Compared to the 1999 First Edition Versions
THE VIEW OF THE ADJUDICATOR
The View of the Adjudicator

1. Identification of the key aspects of the Engineer’s role in the 1999 first editions.

2. Comparison of those aspects with the 2017 versions: What then is different (if anything)?
The View of the Adjudicator on Engineer’s Role – 1999 edn

• Proper administration of the Contract in accordance with the terms and conditions agreed by both parties.

• The issue of timely and clear approvals, consents, certificates, determinations, instructions, opinions or valuations.

• Dispute avoidance and conflict management.

• Determinations: having a clear understanding of the distinction between agent and valuer roles.

• Employer relation management.
ADMINISTERING THE CONTRACT – MAIN DUTIES
A review of the terms of FIDIC 1999 Red Book or 2006 or 2010 MDB Pink Book reveals some 35 plus clauses where the Engineer has the duty to deal with claims of one sort or another on a whole host of matters related to additional payments and/or extension of time.

Considering Sub-Clause 3.5 [Determinations] of the various 1999 FIDIC forms which thrust upon the Engineer the power to “determine” on the issues raised in these 35+ Sub-Clauses, it is easily deducible that the Engineer is a very important person. Also, given the number of Sub-Clause where the Engineer has to determine it can also be understood that this is a very important function.

Through Sub-Clause 3.5 of the Red, Yellow and Pink Books, FIDIC place upon the Engineer considerable responsibility, in the performance of which, the Engineer has the duty to minimize conflict and disputes. This is not a simple task given that the Engineer performs multiple and seemingly conflicting roles under the Contract. In the ambit of administration and management of Contractor’s claims and variations, the Engineer has a primary duty to exercise his professional judgment to reach settlements, within the terms of the Contract, in a manner that minimizes conflicts and disputes.
THE DUAL ROLE OF THE ENGINEER

We know from Sub-Clause 3.1 [Engineer’s Duty and Authority] that when exercising any authority under the Contract the Engineer is deemed to act on behalf of the Employer. Sub-Clause 3.1 requires that in undertaking certain specified actions the Engineer is to seek specific approval from the Employer (the AGENCY role).

Sub-Clause 3.5 requires the Engineer alone determines (the VALUER role), requiring him to act fairly. The Sub-Clause dictates that the Engineer consult with both parties to endeavour to reach agreement and finally, in the absence of agreement, to make a fair determination and if the either party is dissatisfied with the Engineer’s determination it has right to seek redress through the offices of Sub-Clause 20.4.

However, in practice, these roles are routinely confused by Engineers and Employers to the extent that they are misunderstood and/or the Engineer’s exercise of its professional judgment is almost always supplanted or substituted by the Employer’s demands.
The View of the Adjudicator on Engineer’s Role – 1999 edn

CLAIM SETTLEMENT & DISPUTE AVOIDANCE

The role of “determiner” in the 1999 forms demands the exercise of professionalism and of independent thinking. It requires that the Parties be heard by the Engineer, and that he alone finally applies the Contract to the facts and circumstances, in any determination.

A significant effort needs to be made by an Engineer to reach agreement with the parties on the matters to be determined for it is desirable that the they reach agreement (perhaps with which neither is fully satisfied) rather than have an outcome with which they are to comply, imposed where neither may be satisfied at all. In this regard, the Engineer plays a pivotal role in minimizing conflict and disputes.
CLAIM SETTLEMENT & DISPUTE AVOIDANCE

Practically speaking, where and how is avoidance of conflict and disputes achieved by an Engineer?

It is often difficult to find the independence of mind necessary to perform amongst the charged atmosphere of a site and this can compromised the task.

The central idea of the Engineer, who is not based on site full time, is key to this. The off-site Engineer is better placed to take an objective view on claims, potential conflicts and key contractual matters in a contemporaneous manner. Such a governance structure is seen to contribute to dispute avoidance and to conflict or problem identification. In that scenario, the Engineer has the opportunity to minimize conflicts and disputes between the Parties.
CLAIM SETTLEMENT & DISPUTE AVOIDANCE

Also through a routine series of site visits, reviews and monitoring of key correspondence, reports and documentation from site, and through regular discussions with his Resident Engineer of the relevant issues, the Engineer is (from a distance) capable of playing a proactive role in the identification and resolution of potential areas of conflict and avoidance of disputes.

Whilst management at distance is never satisfactory there is the opportunity to motivate site personnel to take action in respect of the issues identified. Routine monitoring on a proactive basis permits early intervention strategies to be developed and applied before issues develop into major disputes. Thereafter, when conflicts and disputes do develop the Engineer is well placed to step in and deal with them meaningfully from an well-informed and objective perspective. So as can be seen the role of the Engineer in dispute avoidance is primordial.
EMPLOYER RELATIONS

Ultimately it is the Employer leadership strategies that condition outcomes. However, to ensure a proper administration of the Contract, it is vital for the Engineer to exercise its role affirmatively with professionalism, sensitivity and responsibility and to keep the Employer in the knowledge of its dual roles and its involvement productive and result oriented. That role was somewhat eroded under the 1999 Edn. when compared to the 4th Edn. where the Engineer was “Almighty”.

The View of the Adjudicator on Engineer’s Role – 1999 edn
The View of the Adjudicator on Engineer’s Role – 1999 edn

SOURCES
Conditions of Contract.
The 1999 Guide to FIDIC.
Books.
Publications.
ICC Bulletins.
Jurisprudence.
The View of the Adjudicator on Engineer’s Role – 2017 edn

- Proper administration of the Contract in accordance with the terms and conditions agreed by both parties: **Stronger timetabling component**.

- The issue of timely and clear approvals, disapproval's, no-objections, permissions, checks, examinations, inspections, tests, notices, proposals, reviews, replies, requests, consents, certificates, determinations, instructions, opinions or valuations. ➔ **We note that the requirements became more explicit**.

  - Determinations – acting as a neutrally and not be deemed to act for the Employer; Valuer role.

  - Encourage discussion, commence consultations promptly, record consultations [S.C. 3.7.1]. Dispute avoidance and conflict management role.

  - Issue a ’fair’ determination ... in detail ... [S.C. 3.7.2]; Valuer role.
The imposition of a **42 day deadline** for the delivery of a determination ... which may be extend ...if *proposed by the Engineer* and agreed by both Parties [S.C. 3.7.3]: **Dispute avoidance role.**

The failure to respond/oppose a claim, renders it accepted ... except at the discretion of a DAAB/arbitrator [S.C.1.1.2.9]. **Valuer/Dispute avoidance role ... with peril!!**

Payment in the **next Certificate** [S.C.3.7.3]: **Valuer role.**

Employer relations. Still highly important but **power of the Engineer is much stronger** with the **distinction** between Agent and Valuer roles **spelt out strongly**
The View of the Adjudicator on Engineer’s Role – 2017 edn

Conclusive Remarks on the changed role of the Engineer under the 2017 edition (Red Book).

• The role of the Engineer is **much empowered**.
• The mystery and confusion surrounding the 1999 Edn obtaining Employer approval under S.C. 3.1 and determining under S.C. 3.5 [now S.C. 3.7] is addressed (the unspoken rule of the exercise of independent professional judgment is now spoken). He is to act ‘neutrally’.
• His dispute **avoidance role** in determinations **is now explicit and more onerous, and demanding rigour**.
• The **timescale** for determinations is **tighter**, and demands effort.
• S.C.3.5 [now S.C 3.7] is no longer an option: it is **mandatory** for any disagreement or dispute. An S.C. 3.7 determination is now a condition precedent before referral to a DB (in lieu of arbitration). There is a linearity with FIDIC 4th edition and the Engineer’s Decision has been restored without doubt. The requirement is now **explicit**.
Thank You!