



## NEC3: THE CONSTRUCTION CONTRACT OF THE FUTURE?

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### Introduction

The first edition of the New Engineering Contract (NEC) was published in March 1993. Rather than building upon existing standard forms the NEC adopted a new simple and direct drafting approach focusing on strong project management principles.

During this time Sir Michael Latham was carrying out his review of procurement in the UK construction industry. In his final report, *Constructing the Team*, he recommended that the NEC should set the national standard in not just the private but also the public sector.<sup>(1)</sup>

Partly as a result of the Latham Report, and some general tidying up of the drafting, the NEC was re-branded as the “Engineering and Construction Contract” and issued as a second edition in November 1995. The publisher was in effect attempting to make it clear that the contract was equally applicable to the wider construction industry, rather than just the engineering sector.

NEC2 was clearly well received by many sectors of the construction and engineering industry. It has its critics, but NEC2 has been used by many of the utility bodies in the UK,

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<sup>(1)</sup> Latham, M. (1994) *Constructing the Team*, HMSO.

in particular the water industry, and has also been adopted for a large number of substantial projects. For example, the contract for the Channel Tunnel Rail Link was based upon NEC2, as was the national procurement project by the National Grid Transco. NEC2 was adopted for use by the English National Health Service for its Procure 21 projects. British Airports Authority has used it for all of its work, most notably adapting it for use for the new £5 billion investment in Terminal 5 at Heathrow.

In June 2005 the third edition (NEC3) was published. The general approach remains the same, although there have been some notable changes to a number of key clauses, which are considered below. NEC3 is already in use, most notably being adopted for use with the contracts for the decommissioning of nuclear power stations and more recently the contract of choice for the construction of the Olympic Games 2012 in London by the Olympic Delivery Authority ("ODA").

NEC3 is also being used to construct the innovative Halley 6 Research Station. That project is being constructed on a moving ice shelf in Antarctica, a project which has been said to be extremely technically challenging because of the extreme conditions being faced by those constructing it.<sup>(2)</sup>

Internationally, NEC has been apparently widely used in South Africa<sup>(3)</sup> and other countries in the transport, energy, process and mining sectors.

ODA is the single body that has been created to ensure the delivery of the venues and infrastructure for the 2012 Games and beyond. In particular, the ODA is responsible for the planning, designing and building of the venues, facilities and accommodation, and developing of the infrastructure to support these. The ODA is also required to look at issues of regeneration and sustainability, and to ensure that the permanent structures created for the 2012 Games are utilised beyond these.

The ODA is responsible for the procurement of the contracts for the infrastructure, construction and transport with the services being let by the London 2012 Organising Committee.

The ODA released its draft Procurement Policy for consultation on 11 July 2006. This policy outlines the ODA's requirement that the 2012 Games are delivered on time and budget, in a way that benefits the community and environment, in keeping with the spirit of London's Olympic Bid.

The ODA has developed "procurement principles" which are: the delivery of the venues and infrastructure and the achievement of the legacy. It is recognised that there must be

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<sup>(2)</sup> Fullalove, S. (2006) NEC Users Group Newsletter, *NEC3 chosen for Halley 6 Ice Station*, 37 December, p.2.

<sup>(3)</sup> Fullalove, S. (2006) NEC Users Group Newsletter, *South Africa sets stage for global NEC use*, 37 December, p.1.

sustainable development, as the 2012 Games will leave a significant footprint on London and the surrounding area.

## NEC: An overview

The NEC is a major attempt to draft a simple and direct standard form contract from first principles without attempting to build upon the standard forms that already exist. The authors of the NEC gathered under the auspices of the ICE, were principally led by Dr Martin Barnes. The specification prepared by him in 1987 set out the aims of those drafting the NEC. The aims were to:

- Achieve a higher degree of clarity when compared to other existing contracts;
- Use simple commonly occurring language and avoid legal jargon;
- Repeat identical phrases if possible;
- Produce core conditions and exclude contracts-specific data to avoid the need to change the core terms;
- Precisely and clearly set out key duties and responsibilities;
- Aim for clarity above fairness; and
- Avoid including details which can be more adequately covered in a technical specification.

In summary, three core principles might be said to be flexibility, simplicity and clarity, and a stimulus for good management. On the basis of these principles the authors drafted core clauses that apply to all NEC contracts. The core clauses were then used as the basis for six main options (each with varying risk allocation and reflecting modern procurement practice). Under NEC3 these six main options remain:

- Option A (priced contract with activity schedule);
- Option B (priced contract with bill of quantities) provides that the contractor will be paid at tender prices. Basically, a lump sum contract approach;
- Option C (target contract with activity schedule);
- Option D (target contract with bill of quantities) provides that the financial risks are shared between the contractor and the employer in agreed proportions;
- Option E (cost-reimbursable contract); and
- Option F (management contract) a cost-reimbursable contract, where the risk is therefore largely taken by the employer. The contractor is paid for his properly incurred costs together with a margin.

One of the most noticeable features of NEC has been its short direct clauses. The simplicity of language is apparently to reduce the instance of disputes. A review by the drafting panel led to the launch, in June 2005, of NEC3.

The foundation of NEC3 and its predecessors are nine core clauses. From those core clauses a user selects the appropriate main option clauses (main options A-F inclusive) to produce the contract appropriate for the chosen procurement pathway. In respect of dispute resolution there are two options.<sup>(4)</sup> There are then 15 secondary option clauses, which are further considered below.<sup>(5)</sup> There are then two further options, one relating to the Housing Grants, Construction and Regeneration Act 1996<sup>(6)</sup> and an option dealing with the Contracts (Rights of Third Parties) Act 1999.<sup>(7)</sup>

There are then a series of additional conditions of contract known as Z clauses. These provide the parties or more usually the employer with the opportunity to insert bespoke terms or amendments to the contract.

Two schedules of cost components are then set out. The second one is a shorter version of the first. The first is for use when Option C, D or E is used, while the shorter schedule is appropriate for Option A, B, C, D or E. The project-specific information (start date, etc.) is contained in the contract data. Part 1 comprises the data provided by the employer, such as the identity of the employer, the project manager, dates, payment intervals and insurance requirements. Part 2 contains the data provided by the contractor such as key contact details, information for the risk register and information in respect of the contractor design.

## The core clauses

The 9 core clauses are:

- General
- The Contractors' main responsibilities
- Time
- Testing and Defects
- Payment
- Compensation events
- Title
- Risks and Insurance
- Termination

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<sup>(4)</sup> Option W1 and W2

<sup>(5)</sup> X1 to X20, but note that Options X8 to X11 and X19 are not used

<sup>(6)</sup> Referred to as Y(UK)2, note that Y(UK)1 has not been used.

<sup>(7)</sup> Referred to as Y(UK)3

The general core clauses deal with definitions, interpretation, ambiguities and general introductory matters. However, they also include an early warning procedure.<sup>(8)</sup>

The second section of core clauses deals with the contractor's main responsibilities, such as design, use of equipment and key personnel working on the project. Subcontracting is also covered.

Time is covered by core clauses 3. A feature of NEC3 is the introduction of key dates that outline periods of time within which the contractor must complete specified works. The specification or condition must be completed so that the deadline or key date can be met. The use of key dates should provide for several contractors to work on one project at the same time, facilitating cooperation and thus progression of the project as a whole. Another aspect is the concept of an access date which may differ significantly from the commencement of the works if for example the contractor is required to prepare significant plans or designs. In addition, access implies more flexibility than other terms such as possession which may be drafted with the view that there will be many contractors on site at once.

Section four deals with testing and defects and establishes a basic regime for the carrying out of tests and inspections, the rectification of defects, the acceptance of them, and then dealing with defects that have not been corrected.

In respect of payment (core clauses 5) the project manager is to assess the amount due at each assessment date. The assessment dates are established in the contract data provided by the employer.<sup>(9)</sup> If the contractor does not include a programme in the contract data then one quarter of the price of the work done at each valuation is retained until the contractor has submitted a first programme.<sup>(10)</sup> The project manager is to certify a payment within one week of each assessment date. A certified payment is then to be made within three weeks of the assessment date or any of the applicable periods set out in the contract data.<sup>(11)</sup> Interest is payable on late payments.

One of the more controversial of the core clauses is core clause 6 dealing with compensation events. A key feature of the NEC contract has always been compensation events. Unlike other standard forms the NEC deals with time and money in respect of each compensation event. If a compensation event occurs then the NEC contemplates that the event will lead to an assessment of time and money rather than a consideration of extension of time to the contract, an assessment of the value of any varied works and then a further assessment in respect of any damages and/or loss and expense.

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<sup>(8)</sup> Clause 16

<sup>(9)</sup> Part 1, 5 payment: "The assessment interval is... Weeks (not more than five)"

<sup>(10)</sup> Core clause 50.3

<sup>(11)</sup> Core clause 51.2

As a concept, the packaging of individual compensation events and the resolution of time and money in respect of each one is highly commendable. However, the use of these provisions in practice has been criticised and the NEC drafting committee has responded with some amendments to the compensation events provisions, which are further considered below.

Core clause 7 relates to the employer's entitlement to plant and materials, together with the removal of equipment and materials within the site.

Risks and insurances are covered by clause 8. The employer's risks are initially set out and the contractor's risks are "the risks which are not carried by the *Employer*".<sup>(12)</sup> An insurance table sets out the types of insurance required, which cover the usual provisions. The contractor is to submit certificates demonstrating that insurance is in place, and if the contractor does not insure then the employer may insure and pass the cost of such insurance to the contractor.<sup>(13)</sup> Similarly, the employer is to provide the contractor with any insurances taken out by the employer, and once again the contractor may if the employer defaults take out those insurances and claim the cost of the insurance from the employer.<sup>(14)</sup>

Finally, termination is dealt with at core clause 9. The reasons and procedure for termination are set out. In summary, either party may terminate in the event of insolvency, as defined in clause 91.1. The contractor may terminate if not paid within 13 weeks of the date of the certificate, while the employer may terminate if the contractor fails to comply with his obligations, does not provide a bond or guarantee, appoints a subcontractor for a substantial piece of work before the project manager has accepted that subcontractor and hindered the employer or others or substantially broken a health and safety regulation.

In the event of suspension of the works either party may terminate if there is a default of the other where the work has not restarted within 13 weeks. Clause 91.7 is similar to some of the *force majeure* clauses encountered. It provides for the employer to terminate if an event stops the contractor from completing the works which neither party could have prevented and which an experienced Contractor at the contract date would have judged as having a small chance of occurring.

## Partnering and project management

According to the proponents of the NEC its great strength is that it adopts a partnering approach whilst also placing great emphasis upon proactive project management. There are perhaps three ways that this is clearly demonstrated in the NEC form. First, the early warning system is drafted to encourage the identification of problems and for the parties to

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<sup>(12)</sup> Clause 80.1 and Clause 81.1

<sup>(13)</sup> Core clause 86.1

<sup>(14)</sup> Core clause 87.3

work together in order to establish an early resolution. The early warning system provides that a contractor will only be compensated on the basis that an early warning had been given based upon the date on which an experienced contractor would have or ought to have recognised the need to give a warning. Contractors are therefore encouraged to play their part in the early warning procedures in order to avoid inadequate cost recovery for those problems which materialise later on.

Second, those risks for which the employer is not expressly responsible under clause 80.1 are risks for which the contractor is liable. Finally, the target cost option most clearly reflects the early warning proactive management approach by affecting the financial bottom line of the parties, in particular the contractor.

Mr Justice Jackson in the case of *Costain Ltd & Others v Bechtel Ltd & Anr*<sup>(15)</sup> in May of 2005, considered the role of the project manager under the NEC contract when it came to assessing and certifying sum due to the contractor.

Costain were part of a consortium of contractors carrying out work in respect of the Channel Tunnel Rail Link. The consortium entered into a contract to carry out the extension and refurbishment of St Pancras Station. The contract provided that:

The Employer, the Contractor and the Project Manager act in the spirit of mutual trust and co-operation and so as not to prevent compliance by any of them with the obligations each is to perform under the Contract.

The contract, though amended, was based upon the NEC Form of Contract. The contract was a target cost contract with a pay and gain mechanism providing for the Costain consortium to be paid actual cost less disallowed cost as defined by the contract. The project manager (RLE) was another consortium. The dominant member was Bechtel Rail Link Engineering. Many of the RLE personnel who worked on the contract were also Bechtel employees. On 6 February 2005, RLE issued payment certificate no. 47. This valued the work carried out as approximately £264 million, but disallowed costs of some £1.4 million. On 8 April 2005, payment certificate no. 48 was issued. The total of disallowed costs had risen to £5.8 million.

The Costain consortium alleged that at a meeting held on 15 April 2005, one Mr Bassily instructed all Bechtel staff to take a stricter approach to disallowing costs. It also alleged that he instructed the Bechtel staff to disallow legitimate costs when assessing the payment certificates. The Costain consortium were concerned that Bechtel had deliberately adopted a policy of administering the contract unfairly and adversely to them. Accordingly, the consortium issued a claim alleging that Bechtel and Mr Bassily had unlawfully procured breaches of contract by the employer. The claim sought interim injunctions restraining the

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<sup>(15)</sup> [2005] EWHC 1018 (TCC)

RLE consortium from acting in such a way in relation to the assessment of the contractor's claims.

Bechtel argued that they were obliged to look after the employer's best interests and that therefore they did not owe a duty to act impartially in respect of consideration of the payment applications.

Mr Justice Jackson disagreed, holding that it was properly arguable that when assessing sums payable to the contractor, the project manager did owe a duty to act impartially as between employer and contractor.

On the evidence before the court, Mr Justice Jackson found that Mr Bassily had, in fact, been telling Bechtel staff to exercise their functions under the contract in the interests of the employer and not impartially. However, when acting as project manager, it was the RLE consortium's duty to act impartially as between employer and contractor and not to act in the interests of the employer.

The Judge considered the authorities, starting with *Sutcliffe v Thackrah*<sup>(16)</sup> where the House of Lords discussed the role and duties of an architect in that situation. Lord Reid said:

It has often been said, I think rightly, that the architect has two different types of function to perform. In many matters he is bound to act on his client's instructions, whether he agrees with them or not; but in many other matters requiring professional skill he must form and act on his own opinion.

Many matters may arise in the course of the execution of a building contract where a decision has to be made which will affect the amount of money which the contractor gets. Under the R.I.B.A contract many such decisions have to be made by the architect and the parties agree to accept his decisions. For example, he decides whether the contractor should be reimbursed for loss under clause 11 (variation), clause 24 (disturbance) or clause 34 (antiquities), whether he should be allowed extra time (clause 23); or when work ought reasonably to have been completed (clause 22). And, perhaps most important, he has to decide whether work is defective. These decisions will be reflected in the amounts contained in certificates issued by the architect.

The building owner and the contractor make their contract on the understanding that in all such matters the architect will act in a fair and unbiased manner and it must therefore be implicit in the owner's contract with the architect that he shall not only exercise due care and skill but also reach such decisions fairly, holding the balance between his client and the contractor.<sup>(17)</sup>

Mr Justice Jackson noted that these comments had generally been accepted by the construction industry and the legal profession as correctly stating the duties of architects,

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<sup>(16)</sup> (1974) AC 727

<sup>(17)</sup> Page 737



engineers and other certifiers under the conventional forms of construction contract. The issue here concerned the duty of certifiers in general, but the specific duties of the project manager under the present contract. Four reasons were put forward as to why the contract here was different:

The terms of the present contract which regulate the contractor's entitlement are very detailed and very specific. They do not confer upon the project manager a broad discretion, similar to that given to certifiers by conventional construction contracts. Therefore there is no need, and indeed no room, for an implied term of impartiality in the present contract.

The decisions made by the project manager are not determinative. If the contractor is dissatisfied with those decisions, he has recourse to the dispute resolution procedures set out in section 9 of the contract. The existence of these procedures has the effect of excluding any implied term that the project manager would act impartially.

The project manager under contract C105 is not analogous to an architect or other certifier under conventional contracts. The project manager is specifically employed to act in the interests of the employer. In *Royal Brompton Hospital NHS Trust v Hammond (No. 8)* [2002] EWHC 2037 (TCC); 88 Con LR 1 Judge Humphrey LLOYD QC at paragraph 23 described the project manager as 'co-ordinator and guardian of the client's interest'.

The provisions of clauses Z.10 and Z.11 prevent any implied term arising that the project manager will act impartially.<sup>(18)</sup>

This was an application for an Injunction and the Judge agreed that the Costain consortium had raised serious questions to be tried both in relation to whether RLE had acted in breach of its duty to act impartially as between employer and contractor and whether as a consequence the employer was thereby in breach of contract. In addition to this, the Costain consortium had raised a serious question as to whether the RLE consortium had committed the tort of procuring a breach of contract.

However, Mr Justice Jackson was not prepared to exercise the court's discretion at this interim stage and grant the injunction (and it is important to bear in mind that this judgment does not provide a definitive answer on this issue) to correct any failings in the contractual payment procedures. The reason for this was that these could ultimately be compensated for by way of damages. Whilst the claimants had demonstrated that there were potentially serious questions to be tried thus passing the threshold test in *American Cyanamid Co. v Ethicon*,<sup>(19)</sup> the claimants failed to pass the test of the balance of convenience.

This case is of particular interest because of the debate concerning the obligations owed by the project manager to the contractor in respect of the assessment for payments and the employer's obligations to the contractor in the event of any breach of such obligations by

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<sup>(18)</sup> [2005] EWHC 1018 (TCC) Paragraph 40

<sup>(19)</sup> [1975] AC 396 at 409D

the project manager. The form of contract, whilst amended in many significant respects, is based very much on the NEC target cost contract and therefore the issues considered are of great significance to the industry as a whole, particularly given the popularity of this form of contract for major infrastructure projects.

The defendants argued that they were in fact obliged to look after the employer's best interests and that they did not owe a duty to act impartially in respect of consideration of the contractor's payment application. The Judge held that, at the very least, it is properly arguable that when assessing sums payable to the contractor, the project manager did owe a duty to act impartially as between employer or contractor. At paragraph 44 (Mr Justice Jackson stated:

When the project manager comes to exercise his discretion in those residual areas, I do not understand how it can be said that the principles stated in Sutcliffe do not apply. It would be a most unusual basis for any building contract to postulate that every doubt shall be resolved in favour of the employer and every discretion shall be exercised against the contractor.<sup>(20)</sup>

In respect of the second point he stated:

Mr Boswood points out that under clause 92.1 the adjudicator is obliged to act impartially. Therefore, he submits, there does not need to be any similar duty upon the project manager. This submission has surprising consequences. If (a) the project manager assesses sums due partially and in a manner which favours the employer, but (b) the adjudicator assesses those sums impartially and without favouring either party, then this is likely to lead to successive, expensive and time-consuming adjudications. I do not see how that arrangement could make commercial sense.<sup>(21)</sup>

On the third point he concluded:

I do not see how this circumstance detracts from the normal duty which any certifier has on those occasions when the project manager is holding a balance between employer and contractor. In Royal Brompton (upon which defence counsel rely in paragraph 33 of their skeleton argument) the contractual arrangement was very different from that set up in the present case. There were architects and others who would carry out the functions of certification and assessing what was due to the contractor. The role of Project Management International in the Royal Brompton case was far removed from that of RLE in the present case.<sup>(22)</sup>

In respect of the fourth point he decided that clause Z10 was not relevant. He then referred to clause Z11 at paragraph 50 of the judgment:

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<sup>(20)</sup> [2005] EWHC 1018 (TCC) Paragraph 44

<sup>(21)</sup> Paragraph 47

<sup>(22)</sup> Paragraph 48

Clause Z.11.1 provides as follows:

'This contract supersedes any previous (negotiations, statements, whether written or oral), representations, agreements, arrangements or understandings (whether written or oral) between the Employer and the Contractor in relation to the matters dealt within this Contract and constitutes the entire understanding and agreement between the Employer and the Contractor in relation to such matters and (without prejudice to the generality of the foregoing) excludes any warranty, undertaking, condition or term implied by custom.'

At the moment I do not see how clause Z.11 impacts upon the present issue. The implied obligation of a certifier to act fairly, if it exists, arises by operation of law not as a consequence of custom.

Nonetheless, the Judge decided that an injunction was not appropriate:

CORBER have satisfied the threshold test in *American Cyanamid*. They have shown that there are serious issues to be tried in their claims against both defendants. Nevertheless, when it comes to the question of balance of convenience, CORBER have failed to show that this is a proper case for the grant of an interim injunction. On the contrary, I am quite satisfied that this is not a proper case for the grant of such an injunction.<sup>(23)</sup>

A definitive answer on this issue would be extremely welcome. If it is held that the project manager does not owe such a duty of impartiality, it is a little difficult to see how this can sit comfortably with the supposed overriding objective of contracts of this nature to attempt to foster collaborative working and avoid confrontation.

## Early warning

The early warning<sup>(24)</sup> procedure provides that:

- The contractor is to give the project manager a warning of relevant matters;
- A relevant matter is anything which could increase the total cost or delay the completion date or impair the performance of the finished work;
- The contractor and project manager are then required to attend an early warning meeting if one or the other party requests it. Others might be invited to that meeting;
- The purpose of the early warning meeting is for those in attendance to cooperate and discuss how the problem can be avoided or reduced. Decisions focus on what action is to be taken next, and to identify who is to take that action.

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<sup>(23)</sup> Paragraph 60

<sup>(24)</sup> Core clause 16

It could be said that this is a partnering-based approach to the resolution of issues before they form entrenched disputes. Co-operation between the parties at an early stage of any issue identified by the contractor or project manager provides an opportunity for the parties to discuss and resolve the matter in the most efficient manner.

This is a departure from the usual approach of the contractor serving formal notices. A Contractor may receive compensation for addressing issues raised by way of the early warning system. On the other hand, if a contractor fails to give an early warning of an event which subsequently arises, and that he was aware of, then any financial compensation awarded to the contractor is assessed as if he had given an early warning. If, therefore, a timely early warning would have provided an opportunity for the employer to identify a more efficient manner of resolving the issue, then the contractor will only be paid for that economic method of dealing with the event.

## Risk register

A risk register has appeared for the first time in this most recent edition of NEC.<sup>(25)</sup> The risk register will initially contain risks identified by the employer and contractor, but the risk register will develop as the project proceeds. It works hand in hand with the early warning process and in conjunction with the proactive project management approach of the contract.

There are three main objectives of the risk register:

- 1 To identify the risks associated with the project;
- 2 To set out how those risks might be managed; and
- 3 To identify the time and cost associated with managing those risks.

It may be possible, precisely and specifically, to identify risks that can be added to the register, or in other instances the risk register may simply contain some generic risks. The process of identification allows the parties to consider how those risks might be managed before turning their attention to the time and cost implications. If Option A or B applies, then the employer will only bear the costs in terms of time and money if a risk is covered by a compensation event. Otherwise, the contractor bears all other risks. The approach is similar for Options C and D (target cost contracts) in that the employer will bear the risk if the event is one listed in clause 80.1. If not, the employer will in any event initially bear the risk, but the risk will then be shared through the risk share mechanism set out in clause 53.

There is, however, the further impact of clause 11.2(25) dealing with disallowed cost. If an element of cost is a disallowed cost, then the risk will be the contractor's in any event.

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<sup>(25)</sup> Core clause 16.3

Finally, the employer bears almost all of the risk under Options E and F (cost-reimbursable contracts). This is unless the risk is covered by the definition in clause 11.2(25) or 11.2(26) again relating to disallowed costs.

Nonetheless, the important aspect of the risk register is not just the early identification, but also the ability to then appraise and re-appraise as well as proactively manage risks before they occur. The overall effect of a well-run risk register is a greater assessment of the overall financial outcome of the project and a greater ability to manage the time for completion of the project.

## Time, programme and key dates

The contractor is to start on site on the first access date and is to complete the work on or before the completion date. The project manager is to certify within one week of completion the date of completion. The contractor must also carry out the work such that any condition stated for a key date is met by that key date.

Key dates are distinct from sectional completion dates. If sectional completion is required then secondary option X5 must be included within the contract. Sectional completion provisions are short, and so the detail of the work to be carried out and completed in any particular section must be carefully identified in the contract data. By comparison the key date is:

.....the date on which work is to meet the Conditions stated. The key date is the *key date* stated in the Contract Data and the Condition is the *condition* stated in the Contract Data unless later changed in accordance with this contract.<sup>(26)</sup>

The distinction between a sectional completion date and a key date, therefore, is that the contractor must simply meet the condition stated in the contract on or before the key date while a certified completion date means that the employer must take over the works not later than two weeks after completion.<sup>(27)</sup>

The Guidance Notes to NEC3<sup>(28)</sup> state that key dates are applicable for projects when two or more contractors are working on the same project, albeit under separate contracts, but with a common employer and most usually the same project manager. If the contractor's work is dependent upon the actions of the other then the use of key dates within a project programme allows the project manager to monitor the completion of a particular activity by a contractor for part of the works. It is said that key dates can be used to precisely programme timescales in order to achieve a particular condition, thus allowing other contractors or indeed the employer to proceed to an overall project programme.

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<sup>(26)</sup> Clause 11.2(9)

<sup>(27)</sup> Clause 35.1

<sup>(28)</sup> Summary of NEC3 Engineering and Construction Contract Guidance Notes, NEC Users Group

In practice there may be some difficulty in defining precisely what it is that must be done in order for a contractor to achieve a key date. There is often some difficulty with adequately and properly defining sections where a particular project is subject to sectional completion. The difficulty can only be compounded by attempting to define the conditions which are something less than the completion of a section, but are readily identifiable.

An example of a key date may be the completion of the contractor's design in respect of a particular section of the works or a design reaching a defined stage. The purpose would be to allow others to then carry on with their design or to commence construction. No doubt with a true commitment to a proactive project management-based approach the use of key dates could be invaluable.

A further important aspect of the core clauses dealing with time is the contractor's programme. The programme might be identified in the contract data and so attached to the contract, or alternatively the contractor may submit a programme to the project manager for acceptance. The contractor's programme must show not only the start date, access dates, key dates and completion dates but also planned completion, the order and timing of operations (both the contractor's and the work of others), together with provisions for float, time risk allowances, health and safety requirements and other procedures set out in the contract.

If the contractor needs access at a particular time and in respect of a particular part of the site then that must also be indicated in the programme together with dates by which acceptances are needed and information from others as well as plant and materials and other "things" that are to be provided by the employer. A statement of how the contractor is to plan and carry out the work must also be included, together with any other specific information required in the works information for that particular project.

The project manager has two weeks to either accept the programme or set out the reasons for rejecting it. There are four default reasons set out in clause 31.3. First, the contractor's plans are not practicable, second the programme does not show the information required by the contract, third, it is not realistic or, finally, it does not comply with the works information. These are the express reasons for not accepting the programme. It seems that a project manager could set out his further reasons for not accepting the programme. Nonetheless the project manager must set out reasons rather than simply reject the programme.

When the contractor submits a revised programme that programme must record the actual progress made in respect of each operation and the effect upon the remaining works. The use of programmes therefore is an active and ongoing management tool. Further, a programme is to be submitted at the completion of the whole works, thus finally updating the programme to the point where it becomes almost a record of the as-built works.

Clause 35.1 provides that the employer will take over the works not later than two weeks after completion. If the contractor completes the work early then the employer might not be obliged to take over the works before the completion date, but only if the employer has set out in the contract date and that he is not willing to do so.

Partial possession is possible if the employer begins to use a part of the works, unless it is simply to suit the contractor's method of working or for a reason stated in the works information. If the employer does take over part of the works then the project manager is to certify the partial taking-over within one week.

The project manager may request the contractors to provide a quotation for accelerating the works in order to achieve completion before the completion date.<sup>(29)</sup> NEC is therefore one of the few contracts that provides express power for the employer, or rather in this instance the project manager on behalf of the employer, to request the contractor's price for accelerating the works. Nonetheless, any acceleration is of course subject to the contractor submitting a quotation that is acceptable, or indeed being in a position to accelerate the works.

## Compensation events

Core clause 60 deals with compensation events. If a compensation event occurs, which is one entitling the contractor to more time and/or money, then these will be dealt with on an individual basis. If the compensation event arises from a request of the project manager or supervisor then the contractor is asked to provide a quotation, which should also include any revisions to the programme. The project manager can request the contractor to revise the price or programme, but only after he has explained his reasons for the request.

NEC3 has adopted a more strict regime for contractors in respect of compensation events. Core clause 61.3 is set out in terms:

The *Contractor* notifies the *Project Manager* of an event which has happened or which he expects to happen as a compensation event if

the *Contractor* believes that the event is a compensation event and

the *Project Manager* has not notified the event to the *Contractor*.

If the *Contractor* does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion Date or a Key Date unless the *Project Manager* should have notified the event to the Contractor but did not.

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<sup>(29)</sup> Core clause 36.1

Clause 61.3 is effectively a bar to any claim should the contractor fail to notify the project manager within eight weeks of becoming aware of the event in question. The old formulation of a two-week period for notification has been replaced with an eight-week period, but with potentially highly onerous consequences for a contractor. This clause must also be read in conjunction with clause 60.1(18), which states that a compensation event includes:

A breach of contract by the *Employer* which is not one of the other compensation events in this contract.

Clause 61.3, therefore, effectively operates as a bar to the contractor in respect of any time and financial consequences of any breach of contract if the contractor fails to notify.

The courts have for many years been hostile to such clauses. In more modern times, there has been an acceptance by the courts that such provisions might well be negotiated in commercial contracts between businessmen.<sup>(30)</sup> The House of Lords case of *Bremer Handelsgesellschaft MBH v Vanden Avenne Izegem PVBA*<sup>(31)</sup> provides authority for the proposition that for a notice to amount to a condition precedent it must set out the time for service and make it clear that failure to serve will result in a loss of rights under the contract. This seems relatively straightforward. However, it may not be possible for an employer to rely upon *Bremer* in circumstances where the employer has caused some delay. So, *Bremer* is a case where a party seeking to rely upon the condition precedent was not itself at fault in any respect whatsoever. An employer may, therefore, be in some difficulty when attempting to rely upon *Bremer* in circumstances where the employer has caused a proportion of the delay.

The courts strictly interpret any clause that appears to be a condition precedent. Not only will the court construe the term against the person seeking to rely upon it, but also the court will require extremely clear words in order for the court to find that any right or remedy has been excluded. However, an alternative way to approaching the drafting of such provisions was highlighted in the case of *City Inn Limited v Shepherd Construction Limited*.<sup>(32)</sup>

The case of *City Inn* was a reclaiming motion by Shepherd Construction Limited from an interlocutor (injunction) of Lord MacFadgen. City Inn Limited was the employer, and Shepherd Construction Limited was the contractor for a hotel at Temple Way, Bristol. The conditions incorporated the JCT Standard Form of Contract Private Edition With Quantities (1980 edition). The architect granted an extension of time of four weeks. An adjudicator then granted a further extension of five weeks.

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<sup>(30)</sup> See for example *Photo Production Limited v Securicor Limited* [1980] AC 827.

<sup>(31)</sup> [1978] 2 Lloyd's Rep 109 HL

<sup>(32)</sup> 20 May 2003, Appeal of the Opinion delivered by the Lord Justice Clerk, Second Division, Inner House, Court of Session, Clerk LJ, Lord Kirkwood, Lord McCluskey.



In this action City Inn Limited argued that both allowances were unjustified and relied upon the mechanics of special condition 13.8. The clause provided:

13.8.1 Where, in the opinion of the Contractor, any instruction, or other item, which, in the opinion of the Contractor, constitutes an instruction issued by the Architect will require an adjustment to the Contract Sum and/or delay the Completion Date the Contractor shall not execute such instruction (subject to clause 13.8.4) unless he shall have first submitted to the Architect, in writing, within 10 working days (or within such other period as may be agreed between the Contractor and the Architect) of receipt of the instruction details of;...

The contractor was then required to submit details of its initial estimate, requirements in respect of additional resources and the length of any extension of time. Clause 13.8.5 then stated:

If the Contractor fails to comply with any one or more of the provisions of clause 13.8.1, where the Architect has not dispensed with such compliance under clause 13.8.4, the Contractor shall not be entitled to any extension of time under clause 25.3.

City Inn Limited argued that as the contractor failed to comply with clause 13.8.1 they were not entitled to any extension of time. Shepherd claimed that clause 13.8.5 was a penalty clause and was therefore unenforceable. They also argued that the clause only applied if on receipt of an instruction the contractor actually formed the opinion that there would be an adjustment to the contract sum and delay to the completion date.

The Appeal Court held that the Lord Ordinary had accepted that the contractor could avoid liability for liquidated damages for culpable delay by simply complying with clause 13.8.1. The £30,000 worth of liquidated damages was payable by the contractor because of the delay to the completion date pursuant to clause 23, not as a result of a breach of clause 13.

Lord Justice Clerk delivering the opinion of the Court, held that the contractor was impliedly obliged to have applied his mind to the question and form a view as to the likely consequences of an Architect's Instruction. It was not sufficient for the contractor quite simply not to bother to think about the position. The clause was not a penalty because the contractor had the option, if he wished to avoid liability for the delay, of applying his mind to the clause and then providing the employer with the details required by clause 13.8.1. As the contractor had failed to comply with the clause he had deprived the employer of the opportunity to address the matter, if the employer considered that the cost and/or the delay potentially caused by the instruction were not acceptable.

One important distinction between the drafting of the provision in *City Inn* and the NEC3 is that the contractor in *City Inn* did not have to carry out an instruction unless he had submitted certain details to the architect. The NEC3 is a bar to the bringing of a claim simply for a failure to notify the project manager about a compensation event. A specific

instruction might not have been given. The contractor might not be prompted to respond to a specific instruction.

The contractor must of course be “aware of the event” in order to notify the project manager under clause 61.3. There will no doubt be arguments about when a contractor became aware or should have become aware of a particular event, and also the extent of the knowledge in respect of any particular event. Ground conditions offer a good example. Initially, when a contractor encounters ground conditions that are problematic, he may continue to work in the hope that he will overcome the difficulties without any delay or additional costs. As the work progresses the contractor’s experience of dealing with the actual ground conditions may change such that the contractor reaches a point where he should notify the project manager. The question arises as to whether the contractor should have notified the project manager at the date of the initial discovery, rather than at the date when the contractor believed that the ground conditions were unsuitable.

The answer must be that the contractor should give notice when he encounters ground conditions which an experienced contractor would have considered at the contract date to have had only a minimal chance of occurring and so it would have been unreasonable to have allowed for them in the contract price having regard to all of the information that the contractor is to have taken into account in accordance with clause 60.2.<sup>(33)</sup>

A further question arises in respect of clause 61.3, and that is: who precisely needs to be “aware”? Is it the person on site working for the contractor, the contractor’s agents or employees or is it the senior management within the limited company organisation of the contractor? Case law suggests that it is the senior management of the company and not merely servants and agents.<sup>(34)</sup>

The starting point is the general argument that all corporations and authorities have a legal identity and act through the individuals that run, are employed by or are agents of that organisation. A corporation or authority is a legal person, and is therefore regarded by law as a legal entity quite distinct from the person or persons who may, from time to time, be the members of that corporation.

The position is simplified for a person dealing with a company registered under the Companies Act 1985. A party to a transaction with a company is not generally bound to enquire as to whether it is permitted by the company’s memorandum or as to a limitation on the powers of the board of directors to bind the company. However, if the contract is to be completed as a deed, then the contract must be signed by either two directors or a director and the company secretary.

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<sup>(33)</sup> Clause 60.2 deals with physical conditions.

<sup>(34)</sup> *HL Bolton Engineering Co. Limited v TG Graham & Sons Limited* [1956] 3 ALL ER 624, in particular the judgment of Denning LJ.

Generally, directors and the company secretary have, therefore, authority to bind the company. If a person represents that he has authority, which he does not possess, but in any event induces another to enter into a contract that is void for want of authority, then that person will be able to sue for breach of want of authority. However, these propositions relate to the formation of contracts rather than the conduct of the contract and in particular the identification of who within the company needs to have the knowledge required in order to make a decision as to whether a notice should be served. While then an agent of a company can bind a company, that agent must still act within the scope of their authority when taking actions under a contract.

So who then within the company must be “aware” for the purposes of clause 6.3? The concept of identifying the “directing mind” within a company as the key to ascertaining who within a company has the necessary quality to be “aware” is helpful when answering this question. It was established by Denning LJ in *HL Bolton Engineering Co. Ltd v TG Graham & Sons Ltd*:

Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company.<sup>(35)</sup>

According to Denning LJ, the intention therefore of the company is to be derived from the directors and the managers, rather than those that might be carrying out the work. The company’s intention will, therefore, depend upon the nature of the matter that is being considered, the position of the director or manager, and other relevant facts of the particular case. This principle has been affirmed in subsequent cases, in particular by Lord Reid in *KR v Royal & Sun Alliance Plc* where he stated:

Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation, he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn.<sup>(36)</sup>

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<sup>(35)</sup> [1956] 3 All ER 624, page 630.  
<sup>(36)</sup> [2006] EWCA Civ 1454.

Lord Reid confirms the approach of Denning LJ, but notes that it may be possible for the directors or senior managers to delegate, in this instance, fundamental decision-making processes required during the course of the running of a construction contract. In the absence of such delegation, it is arguable that those who must be “aware” are the directors and managers who constitute the “directing mind” of the company.

The prevention principle may also apply in respect of any employer’s claim for liquidated damages. If the contractor does not make a claim, then the project manager cannot extend the completion date under NEC3, and so an employer will be entitled to liquidated damages. However, those liquidated damages could be in respect of a period where the employer had caused delay. The employer can only recover losses for delay in completion for which the employer is not liable.

It may be that some will argue that time has been set “at large”. If an employer is unable to give an extension of time (on the basis that the contractor did not give a clause 61.3 notice) that would otherwise be due, then the contractor is relieved of the obligation to complete the works by the specified date. Arguably, where a delaying event has been caused by the employer and there is ordinarily an obligation on the employer to give an extension of time so as to alleviate the contractor from liquidated damages, but the employer is unable to do so, then time will become at large.<sup>(37)</sup> It must be remembered that the purpose of the extension of time provisions is quite simply to allow the employer the benefit of the liquidated damages provisions where not only the contractor is in delay, but also where the employer has not caused any of that delay.

The English legal principle of prevention means that an employer cannot benefit from its breach. If, therefore, there is concurrency of delay and the employer refuses to award an extension of time (thus alleviating the contractual liquidated damages), then the contractor may be released from those liquidated damages in any event.

It might be said that the true cause of this loss was in fact the contractor’s failure to issue a notice complying with clause 61.3. However, judgments, such as they are, are divided. The case of *Gaymark Investments Pty Limited v Walter Construction Group*<sup>(38)</sup> is a decision of the court of the Northern Territory of Australia. That decision follows the English case of *Peak v McKinney* holding that liquidated damages were irrecoverable as the completion date could not be identified as time had become “at large”. The alternative drafting approach of *City Inn* suggests a different conclusion, but further case law on that approach is likely before the *City Inn* approach can be relied upon. The key distinction is whether it is the employer’s acts or omissions under the contract or breaches of contract that are the events that lead to the loss, or whether, regardless of any acts, omission or breaches of the

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<sup>(37)</sup> See *Peak Construction (Liverpool) v McKinney Foundations* (1971) 69 LGR 1 CA; 1 BLR.

<sup>(38)</sup> (2000) 16 BCL 449.

employer, the breach could instead be said to be the *secondary* breach by the contractor in failing to issue the notice.

Finally, the contractor may be able to rely upon the equitable principles of waiver and/or estoppel.<sup>(39)</sup> It may be that the contractor does not serve a formal notice because, by words or conduct, the employer or indeed the project manager represents that they will not rely upon the strict eight-week notice period. The contractor would also need to show that they relied upon that representation and that it would now be inequitable to allow the employer to act inconsistently with the representation made by the employer or project manager. In addition, this approach could be further supported by core clause 10.1 which requires the parties to act "in a spirit of mutual trust and co-operation". It would be somewhat ironic if a contractor did not submit contractual notices in the spirit of "mutual trust and co-operation" but the employer at some much later date relied on the strict terms of clause 61.3.

## Secondary option clauses

The secondary option clauses are:-

- X1 Price adjustment for inflation.
- X2 Changes in the law.
- X3 Multiple currencies.
- X4 Parent company guarantee.
- X5 Sectional completion.
- X6 Bonus for early completion.
- X7 Delay damages.
- X12 Partnering.
- X13 Performance bond.
- X14 Advanced payment to the *Contractor*.
- X15 Limitation of the *Contractor's* liability for his design to reasonable skill and care.
- X16 Retention.
- X17 Low performance damages.
- X18 Limitation of liability.
- X20 Key Performance Indicators.

These 15 secondary option clauses are relatively short. They simply provide for some instances which are commonly encountered and therefore may be required in the contract. X1 dealing with price adjustment for inflation is only to be used with Options A, B, C and D, but in any event in the UK is unlikely to be necessary given the persistent low inflation for more than 15 years. However, the clause may prove to be widely used in many other parts

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<sup>(39)</sup> See *Hughes v Metropolitan Railway* (1877) 2 AC 439.

of the world. X2, changes in the law, provides a further compensation event if there was a change in the law, and X3 provides for multiple currencies. Once again these two secondary options are more likely to be used internationally.

If a parent company guarantee is required then X4 can be used. If sectional completion is required then X5 is appropriate. An incentive for early completion is dealt with at X6, and the most frequently encountered liquidated damages is covered by option X7.

The more lengthy option X12 deals with partnering. Unsurprisingly it requires the parties to work together in a "spirit of mutual trust and co-operation".<sup>(40)</sup> The partners are to give an early warning to the others when a partner becomes aware of a matter that could affect the achievement of any other partner's objectives. It would be interesting to test the ramifications of an allegation for failing to follow this procedure as clause X12.2(6) states that the option does not create a legal partnership between the partners, but does not go as far as stating that the partnering option is to have no legal effect unlike a non-binding partnering charter.

Option X12 provides for incentives that are based upon key performance indicators ("KPIs"). A partner can therefore achieve a financial incentive by reaching its target or improving upon its target.

Similarly, if a performance bond is required then option X13 is selected. In respect of payment, X14 provides for an advance payment, while X16 provides for retention.

Where a contractor is designing and constructing the works, X15 provides that the contractor's liability for design is reduced to one of reasonable skill and care. The extent to which clauses of this nature work in practice remains to be seen given that the focus of the drafting is on a reduction of the design liability to one of skill and care without considering that a contractor's overall liability where designing and building is under English law on a fitness for purpose. Further provisions limiting the contractor's liability are covered at option X18.

KPIs may be introduced by the use of option X20. Option X12 relating to partnering does not need to be used in conjunction with X20. Indeed, the contract does not anticipate that X20 and X12 will be used together. The KPIs introduced at option X20 are therefore simply to introduce an incentive schedule into an NEC3 contract where the partnering option has not been selected.

## Z clauses

Additional conditions can be inserted into the NEC through the use of option Z. These clauses are often referred to as "Z clauses". They are clauses inserted by the parties

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<sup>(40)</sup> Option X12.3(1)

either, to address matters that are not expressly addressed within the contract, or to amend the standard clauses of contract. In traditional forms of contract, e.g. JCT, ICE, etc, the equivalent of Z clauses would be those clauses inserted as “special conditions” or those inserted through a “schedule of amendments”.

When considering the use of Z clauses it is important not to lose sight of the defining characteristics of the NEC. The NEC is inherently flexible: the combined use of core and optional clauses provides for a variety of approaches to risk allocation and consequently the NEC can be adapted for any number of circumstances. Further, the NEC is intended as a stimulus to good management: rather than prescribing an outcome for every eventuality it advocates early collaboration between the parties using an early warning system so that there is a proactive approach to problems as the works progress.

Notwithstanding the above, some would suggest that the lack of detail contained in the NEC can lead to ambiguity and that clarity in respect of certain matters should be set out at the outset, rather than as particular events occur. Accordingly, Z clauses may typically address the following:

1. The provision of collateral warranties. Notwithstanding the Contracts (Rights of Third Parties) Act 1999 the construction industry still relies heavily on collateral warranties. It is often the case that funders, tenants and the like will insist on an employer procuring collateral warranties from its contractor. An employer will therefore be forced to include such provision within the contract;
2. Copyright. Where a contractor has design responsibility it is important to include a provision addressing matters relating to copyright. Without such clarity the employer’s rights, if any, to use the design would be uncertain.
3. Prohibited materials. Again, where a contractor has design responsibility a provision requiring the contractor to refrain from using prohibited materials in design and construction may be necessary so as to prevent the use of unsuitable materials; and
4. Assignment. A provision prohibiting the contractor from assigning the contract may be necessary so that the employer has certainty in respect of who is actually carrying out the works.

The above are only a few examples of the types of issues that are commonly addressed in Z clauses. What should be remembered is that Z clauses are not intended to substantially rewrite the standard clauses of contract. Indeed, improper use of Z clauses can be problematic.

No doubt it is quite easy for parties to simply “cut and paste” provisions contained in some “special conditions” or a “schedule of amendments” into Z clauses. The problem is that in doing this the parties can quite easily fall back into old habits, thereby defeating the

benefits of using the NEC. Put simply, wholesale amendments to the standard form through the use of Z clauses should normally be resisted.

## Dispute resolution

The principal dispute resolution procedure in NEC3 is adjudication. The parties have an option. Option W1 applies unless the United Kingdom Housing Grants, Construction & Regeneration Act 1996 (“HGCRA”) applies. If the HGCRA applies then option W2 is the appropriate dispute resolution procedure.

This is a significant departure from NEC2. The adjudication procedure in NEC2 imposed minimum time periods that a Referring Party had to comply with before they could issue a referral to adjudication. Section 108(3) of the HGCRA required a construction contract to provide that either party could “at any time” refer a dispute to adjudication. NEC2 therefore fettered the ability of either party to refer a dispute at any time and so did not comply with the HGCRA. As a result either party could ignore the adjudication provisions in NEC2 and refer any dispute at any time under the HGCRA and in accordance with the adjudication procedure set out in the Scheme for Construction Contracts<sup>(41)</sup> rather than the adjudication procedures set out in the NEC2.

NEC2 has dealt with this problem by providing an HGCRA-compliant procedure at W2, while maintaining the original NEC2 adjudication procedure at option W1.

W1 identifies which party may refer a dispute and identifies when it may be referred to an adjudicator. In brief:

- 1 A dispute about an action of the project manager or supervisor may be referred by the contractor between two and four weeks after the contractor’s notification of the dispute to the employer and project manager. The notification must be made not more than four weeks after the contractor became aware of the action. In similar circumstances the contractor may also refer a dispute about the project manager or supervisor not having taken a particular course of action.
- 2 The employer may refer a dispute about a quotation for a compensation event which has been treated as having been accepted. Once again the employer may refer the dispute to an adjudicator between two and four weeks after the project manager’s notification of the dispute to the employer and the contractor. That notification must be made not more than four weeks after the quotation was treated as accepted.

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<sup>(41)</sup> The Scheme for Construction Contracts (England and Wales) Regulations 1998 No. 649



- 3 Further, either party may refer a dispute about any other matter between two and four weeks after the notification of the dispute to the other party and the project manager.

This procedure is the default procedure that can be used by either party where the HGCR does not apply. It is not identified by selecting an option in the contract data. The problem with this approach is that if the contract is used in another country where a legislator of adjudication or adjudication-backed payment provision is provided for then there is a high chance that option W1 will not comply with the local legislation, and so once again the dispute resolution procedures may be entirely replaced by a local legislation.

A truly international form may have provided for a third option, when options W1 and W2 are inappropriate, thus placing the onus on the employer to insert a dispute resolution procedure that complies with the law of the place where the contract is being carried out. Local branches of the NEC users group around the world might then be able to develop short W option clauses for particular jurisdictions in order to assist in the wider international use of NEC3.

The party referring the dispute to the adjudicator must include "information" with the referral. This is no doubt the supporting documentations and explanation of the matter or matters in dispute. Any further information is to be provided within four weeks of the referral.<sup>(42)</sup> The adjudicator is to decide the dispute, with reasons, within 4 weeks of the end of the period from receipt of the information. The period may be extended by agreement between the parties. The minimum period therefore for an adjudication is 8 weeks.

The decision is binding unless or until revised by a "tribunal". More importantly, the decision becomes final and binding unless one of the parties notifies the other that he is dissatisfied with the dispute and intends to refer it to the tribunal.<sup>(43)</sup>

If the tribunal were referred to in W1 is to be an arbitral tribunal then the contract date should state the applicable arbitration procedure and the place where the arbitration is to be held as well as the procedure for the appointment of the arbitrator.

## Conclusion

The NEC3 is clearly a departure from the traditional approach to construction contract drafting. The use of simple short direct core clauses provides the basis for a range of construction contracts covering different procurement pathways. Secondary option clauses allow an employer to select particular terms which suit a particular employer's requirements or indeed a particular project.

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<sup>(42)</sup> Option W1.3(3).

<sup>(43)</sup> W14(3)

The proactive project management focus must be welcomed. Construction projects, regardless of their size, are complex and require careful planning. NEC3 builds upon that concept, attempting to engage the contractor in the process by the use of a simple early warning system with adverse valuation principles should the contractor fail to warn, as well as the optional partnering procedures. Nonetheless, in practice the success of a project is dependent upon the forward thinking, planning and reasonableness of the individuals that manage, coordinate and carry out the work. The NEC3 attempts to do what only a contract can do, and that is to capture a framework for the parties to follow, but at the same time identify who bears which risk in the event that a particular problem materialises.

Mechanisms for resolving disputes during the course of the project or very soon after a project's conclusion are becoming more frequent. NEC3 goes further than simply addressing disputes by way of adjudication, but attempts to introduce a time bar for any compensation events that are not notified by the contractor to the project manager within eight weeks of becoming aware of the event. The clause attempts to give the employer some certainty in respect of the out turn cost of the project by requiring the contractor to give an early notice and thus alert the employer's team to additional costs. This approach is similar to the international FIDIC contracts, and also to contracts that have been amended by more sophisticated employers.

Contractors are having difficulty adjusting to this new regime. Many feel that a warning notice relating to claims leads to a breakdown in the relationship between the individuals working on the project thus making the project more difficult to complete. However, an absence of an appropriate notice might well mean that a contractor is unable to bring a claim at some later date. It will be interesting to see how this mechanism is used by the industry in practice. It will also be interesting to see how the courts interpret such a clause, but given that many disputes will be resolved in adjudication and then finally most likely arbitration, it may be some time before the courts comment on these provisions.

Overall, NEC3 is a contract that is now being adopted by some sectors of the construction industry within the UK, and internationally. It adopts a drafting philosophy that many argue supports modern good practice. If the use of NEC3 continues to develop across further sectors of the industry and internationally, then there is no doubt that it will be the construction contract of the future.

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