

Use of NEC in legal jurisdictions other than English law



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Organisations, public and private, across the world are wanting to use NEC contracts for all the good reasons that explain why, for example

- they are specifically endorsed for use by the UK and South African governments
- they have been used successfully in more than 20 countries in the private and public sectors (Figures 1 and 2)
- global organisations, such as Glaxo, are using NEC
- after more than 15 years of use for billions of dollars worth of projects, there is no case law relating to the words of NEC contracts.

This article is intended to highlight some of the few issues that need to be addressed to make NEC contracts suitable for use in jurisdictions other than English law. It was prompted and informed by the excellent paper and lecture given by Humphrey Lloyd on this subject (see issue 45). That paper, which is published in a special issue of the NEC Users' Group newsletter, is recommended to any interested reader. The aim of this article is to give some of the points made in Humphrey Lloyd's paper a wider audience.

The following sets out some of the key points

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In the example above, at the time of the first programme re-issue, it is a cast-iron certainty to both parties that the delay to planned completion is 3 weeks for the two delays, one being denied access to site of 2 weeks and the other being delay in providing critical free-issue materials of 1 week. There is little point to either party in denying now that the completion date will move by 3 weeks. It will be enhancing the visibility and transparency that the programme is trying to bring, hence better to move it now than wait for the commercial teams to agree and implement the detail of the quotation.

Conclusions

NEC3 contracts make it very clear how important the contract programme is in terms of both a management and a commercial tool. The programme has to reflect everything known about the works now, which will also give clarity as to the outcome of any future events as and when they happen.

The assessment of time and cost are fundamentally two components that can be practically separated out – although in the final assessment they

of specific relevance to a potential user under a jurisdiction other than English law. As stated by Humphrey Lloyd, the issues are all peripheral to the core provisions of NEC contracts and, with only minor modifications, they can be used under most jurisdictions.

This article does not constitute legal advice, but is intended to encourage consideration of the use of NEC contracts in new countries and to assist lawyers that may be asked to review the contracts for use in a particular jurisdiction. It should be noted also that any such lawyer is strongly advised to obtain proper training on the use of NEC contracts before attempting to draft additional conditions of contract (option Z). The author's experience is that some lawyers (both in UK and outside the UK) have a habit of proposing unnecessary, unwieldy and/or simply incorrect amendments to a contract they do not really understand.

NEC structure designed for global applicability

NEC contracts were designed to

- use plain English that can be read and understood (and translated if necessary)
- be free of direct reference to provisions of any particular law and so, as far as possible, be able to be used globally.

Core clause 12.2 of the NEC3 Engineering and Construction Contract (ECC) states, 'This contract is governed by the *law of the contract*'. This law is simply stated in the required place in the 'contract data', one of the documents that forms part of the contract.

will be brought together. Time invariably should be relatively easy to agree as it is not directly proportional to any cost assessment. The project manager has to take responsibility for pushing for a quick agreement on the time element to help the project as a whole. The follow-on cost element will be reviewed on its own merits and will 'be what it will be' in accordance with the detail and the timescales of the contract.

The solution proposed in this article should lead to a better understanding to all parties and help the programme acceptance process, with the programme becoming a clearer, more transparent management tool for the whole project team. That team can then get on with building the job – which surely has to be both parties' prime objective. The contract intends for the programme to become the primary management tool for everyone on the project – not a contractual hindrance.

Remember: by agreement, almost anything is possible! ○

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It was recognised that certain modifications and additions may be required to use NEC contracts in specific legal jurisdictions. In the UK – which includes Scots law and Northern Ireland law as well as the laws of England and Wales – there are two 'secondary options', each a 'Y clause' under ECC. They are

- Y(UK)2 – the payment timing provisions of the Housing Grants, Construction and Regeneration Act 1996
- Y(UK)3 – the Contracts (Rights of Third Parties) Act 1999.

In New Zealand, a secondary option (provisionally called Y(NZ)2) is being developed with advice from local lawyers to deal with particular issues under New Zealand law.

A few issues need to be considered

The plain and direct language used by NEC contracts in general reduces reliance on interpretation of words used in the particular jurisdiction. Instead, the natural and necessary focus of any required interpretation will be on the intended meaning of the words themselves in all the key processes within an NEC contract.

Most jurisdictions recognise the principle of *pacta sunt servanda*, meaning 'agreements must be observed' and the words of ECC include (clause 12.4), 'This contract is the entire agreement between the Parties.' In essence the contract sets out the rules governing the actions required of the parties and rights of the parties. Anyone deciding a dispute under the contract will use the words in the contract and only deviate from them if required to do so by the law governing the contract.

However, in some jurisdictions it is not only permissible but normal to consider pre-contract negotiations and documents such as NEC guidance notes. In such cases clause 12.4 may not be effective. Humphrey Lloyd goes on to note that under certain international arbitration rules, arbitrators may – and in some cases are required to – take into account 'relevant trade usages'. It may be appropriate to clarify that the guidance notes may be used to guide interpretation.

ECC has a named project manager as its key contract administrator. The project manager is engaged by and acts on behalf of the employer. However, he or she is required to 'act as stated in the contract' (clause 10.1), including when assessing and certifying amounts for payment and assessing the effect of compensation events. The contract sets down well-defined rules for each of these actions.

In some jurisdictions, particularly outside common-law countries, the concept of an agent of the employer being able to assess amounts impartially and according to the rules of the contract may be difficult.

Dispute resolution

ECC provides for adjudication as the first stage in the resolution of disputes, followed by the

'tribunal', which may be set (in the contract data) to be either arbitration or the courts. One of two options must be chosen

- W2 – which is specifically designed to be used when the UK Housing Grants, Construction and Regeneration Act applies
- W1 – which is designed to be used when the Act does not apply.

The words in option W1 will normally be appropriate outside the UK but must be reviewed for compatibility with any legal requirements relating to the dispute resolution process under any other jurisdiction.

Adjudicator

Humphrey Lloyd notes that an adjudicator should be competent to put himself or herself in the position of the parties being expected to operate the contract. Especially (but not exclusively) in a country where NEC contracts are relatively new, it may be difficult to find a single individual with experience and understanding of

- technical aspects of the project
- local law
- NEC contracts.

However, it should be possible to make it explicit (if necessary) that the single named adjudicator can have access to advice from a person competent to advise on issues specific to NEC contracts. The Institution of Civil Engineers for example maintains a list of adjudicators that includes suitably qualified individuals.

Plain language is used in the vast majority of contract provisions and this is likely to be read (and interpreted) as drafted. However, certain provisions, that are relatively infrequently used, use terms that may not have a clear meaning under jurisdictions other than English law. These provisions include

- clause 80.1 – 'claims' (as part of 'claims, proceedings, compensation and costs payable')
- clause 84 – insurance (terminology and requirements should be reviewed against the requirements in the local jurisdiction)
- clause 91.1 – a number of terms relating to 'bankruptcy', 'receivership', 'liquidation' and 'administration'
- X18 – limitation of liability: especially terms such as 'tort' and 'delict' in clause X18.4.

Cultural issues

NEC contracts, like any others, work best where there is a desire on the part of the people involved to work collaboratively for the sake of the project. NEC contracts are different from

ABOVE Figure 1. The £160 million conversion of Durban Pier 1 in South Africa from a multi-purpose terminal to a state-of-the-art container terminal for Transnet was completed on time and to budget using NEC in 2007. Procurement advisor and project manager was HMG joint venture of Hatch, Mott MacDonald and Goba.

RIGHT Figure 2. The new 'Earth' golf course at in Dubai, UAE is part of a 375 ha leisure and residential development Jumeirah Golf Estates. The clubhouse, tennis academy, ancillary buildings and villas were procured using NEC. Procurement advisor and project manager was Mott MacDonald.

other forms in that they are designed to support and encourage collaborative behaviours.

One key way they do that is by requiring users to follow the contract processes and to use them to manage the project. This requires that those involved actually use the contract. Some would see this as 'getting contractual' and 'quoting clauses at each other'.

In the UK the term 'contractual' has come to be interpreted as 'adversarial'. This sometimes contributes to significant resistance to doing what it says in the contract that has been signed. This is despite the words in the first line of ECC (clause 10.1), 'The Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in the contract'.

Use of the contract anywhere in the world, including the UK, requires the issue to be addressed, not least by training. The importance of the issue will be heavily influenced by the culture – personal, organisational and national – regarding the inclination to use the contract.

As an example, the author was involved in discussions relating to potential long-term use of the contract in China, and indeed its translation into Mandarin Chinese. While the culture in China is generally collaborative, it appears that using and

quoting a construction contract is the exception rather than the rule.

Conclusion

Any party using NEC contracts outside the UK would benefit from a review of the particular contract in the context of the local law by a competent construction lawyer, covering at least the points raised in this article. 'Competence' would need to include some training in NEC.

Starting with the secondary option for New Zealand, the NEC panel will endeavour to help facilitate, collate and ultimately publish and share appropriate minor modifications to NEC contracts for use in jurisdictions other than English Law.

However, it is important to note that all the points raised in this article do not relate to the core provisions of NEC contracts. Additionally, the tight structure of the contracts and their drafting mean that any minor modifications considered necessary will be able to be made clearly and simply in one place only, which is in the 'additional conditions of contract' (option Z). ○

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