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NEC Contracts – The Saviour of Alternative Dispute Resolution?

Like many construction professionals of a certain generation, I have a raft of experience working on NEC contracts. My own view, based on those experiences, is that NEC3 and NEC4 contracts in their standard form are excellent. After 15 years of operating NEC3 and now NEC4, have we as a construction sector embraced some of the NEC principles set out to avoid disputes?

It has been interesting to contrast the evolution of the NEC contract with the experiences gained in my own career, having developed from being a contractors' QS to now specialising as a quantum expert. One of NEC3's key differentiators: the '*spirit of mutual trust and co-operation*' ought to have assisted to revolutionise Alternative Dispute Resolution and perhaps the behaviours of construction teams across the globe.

Some experiences I have encompassed:

- Contract drafting and interpretation;
- The 'maverick' project manager; and
- The contractor who cannot forecast (time or money).

Contract Drafting & Interpretation
HKA's CRUX Insight[1] research determines that in overall causation factors by type '***contract requirements were poorly drafted'*** ranks #2 in the list of key causations of construction disputes. This happens in standard NEC clauses but there are a generation of lawyers, quantity surveyors, planners and contract specialists that have been working with NEC contracts since their inception. Therefore, why have the basics not sunk in yet? Where are we going wrong? More importantly, how can we fix it?

In Atkins Ltd v Secretary of State for Transport[2] 1 February 2013, Mr Justice Akenhead expressed his concern about the lack of consideration by the courts of the NEC form, noting the following about NEC3 Conditions, construction, and engineering industries:
"They are highly regarded in the sense that they are perceived by many as providing material support to assist the parties in avoiding disputes and ultimately in resolving any which do arise. There are some other people in the industry whom criticise these Conditions for some loose language, which is mostly in the present tense, which can give rise to confusion as to whether and to what extent actual and liabilities actually arise. Very few cases involving material disputes as to the interpretation of the NEC3 Conditions have made their way through to reported court decisions."

With precedent setting case law remaining scarce, it is difficult to test some of the differing interpretations of some standard and commonly amended clauses. A particular favourite of mine is the deletion of NEC3 Clause 10.1 in one contract:
"The Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in this contract and in a spirit of mutual trust and co-operation".

[1] https://www.hka.com/crux-insight-claims-and-dispute-causation/
[2] Atkins Ltd v Secretary of State for Transport[2] [2013] EWHC 139 (TCC)

Take that deletion as you will. Different interpretations of contracts can of course be created by moving away from standard clauses, or in the case of NEC, the dreaded "Z Clauses". Overzealous Z clauses can be the catalyst for ambiguity, which is almost certainly a factor in disputes if the ambiguity has not been caught early[3]. I fully appreciate that the Z clause can essentially be an employer's or drafter's catalogue of mitigation of previous issues, but that does not mean that moving away from the standard clause is the solution.

Think about the QS with 50 subcontractors under their remit. It can quite easily be the case that each subcontractor notifies 10 Compensation Events per week[4] equating to 10 x 50 = 500[5]. Of those 500 CEs, potentially half require to be notified upstream to the employer. That is a colossal amount of correspondence. This situation can easily be exacerbated by complex contract drafting, resulting in situations, that I have personally experienced, where contracts have effectively become unmanageable.

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The 'Maverick' Project Manager

So, when the contractors QS has submitted a lot of CEs, the project manager (and their team) are under a fair bit of pressure to respond[6]. What if they don't [respond]? Will the contractor adjudicate? I don't think so. Those that want to stay in favour of the employer wouldn't dream of it.

Cue the 'maverick'. We have all met the PM who has zero regard for the contract, notwithstanding those who know the contractor is highly unlikely to dispute anything formally. The maverick does not accept programmes[7]. In terms of CEs, the forecasted impact (of time and cost) will be rejected; the maverick will 'wait and see' what happens.

Remind the maverick of Clause 10.1 as outlined above, but will it do any good?

In the case of Walford v Miles [8], Lord Ackner commented that to negotiate in good faith was too uncertain to be enforceable:
"The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations."

Contrary to Lord Ackner's view, in Cable & Wireless Plc v IBM United Kingdom Limited [2002], (where the contract was a global framework agreement), it was found that the requirement to negotiate disputes in good faith and subsequently to use Alternative Dispute Resolution to

[3] See NEC3 Clause 17.1 Ambiguity and Inconsistencies
[4] Notifying Compensation Events (NEC3) Clause 61.1 from an instruction or Cl 61.3 for an event which has (or is expected to happen)
[5] Quantum Expert Illustration.
[6] Instruct the Contractor to submit quotations- NEC3 Clause 61.2
[7] See NEC3 Clause 31 The Programme
[8] Walford v Miles [1992]1 All ER 453

resolve a dispute brought adequate certainty, as it would allow the steps taken to comply by the parties to be catalogued. Had such steps not been taken and duly recorded, but rather, there had simply been a requirement to "attempt in good faith to resolve the dispute or claim" then this would not have been enforceable.

Given that a “good faith” obligation will be enforced if specifically clear, it still remains uncertain under Scots or English law as to what the consequences of failing to adhere to such clauses actually are? Further to the increased international use of NEC3 and NEC4, it will be interesting to see if more international contracts such as FIDIC or LOGIC will follow the NEC’s lead in adopting ‘good faith’ style wording, or whether the mavericks will continue to be allowed to do what they want.

The Contractor who cannot Forecast (Time or Money)
The contractor has two key areas in which they need to produce a forecast: (i) Clause 31.2 requires the submission of a programme for acceptance and (ii) Clause 62.2 quotations for compensation events.

In both instances, when the PM is a ‘maverick’, the contractor faces an uphill battle. Without an accepted programme, it is difficult to determine or agree the starting point on which to base the delay calculation.

It is commonplace that the contractor does not forecast those impacts of a Compensation Event correctly. For example, I have witnessed the following scenario multiple times: contractor’s CE001 = 10 days delay forecast[9]. CE002 = 5 days delay forecast. CE003 = 20 days delay forecast. The contractor seeks (10+5+20) 35 days and the costs associated. In some cases that is wrong. The contractor should be altering the accepted programme to outline what the impacts of the event are. That means assessing the impacts of CE001, CE002 and CE003 in parallel with one another, not in series, meaning that the total delay is less than the sum of 35 days. In terms of cost, the contractor forecasting the defined cost needs to calculate both the work done to date and defined cost of the work yet to be completed.

In my experience, when there are submissions which show an unnatural delay, and/or additional cost position, the relationship between the parties becomes more fraught. The crystal ball becomes clouded, the ability to accept a forecast is diminished. The number of Compensation Events requiring close-out becomes a challenge. Sometimes this position leads to disputes.

Conclusion
In conclusion, I think that NEC3 has done a lot for construction and has had an impact on reducing those disputes which go on to litigation, but there are perhaps still lessons that need to be learned and more widely adopted. One consequence is the exponential growth of adjudication over the period of NEC3’s existence. However, perhaps adjudication should not be so readily adopted as an alternative to good contract administration practice, well conducted negotiation, or just basic communication.

Even prior to Covid-19, it had been a concern of mine that the training and mentoring of our young QS, Planners and Project Managers is not quite where it should be. Whilst I can not predict where the

[9] Delay to the end date for completion

construction industry may end up postCovid-19, margins are likely to still be low. We need to make sure our professionals are well trained. Key people at least should have demonstrable experience.

In future improvements I would like to see NEC5 make it easier for the contractor to forecast time and cost; make the principles more specific. I would also like to see the opportunity for the 'maverick' [Project Manager] to diminish from projects. The NEC4 puts some emphasis on the PM's deemed acceptance for not accepting or rejecting within a period of time, but there is still some wriggle room, as the PM can provide reasons for rejecting without having to substantiate their rationale. In terms of the dispute provisions, the DAB in NEC4 is a great start in my opinion. A DAB member in quantum, one on delay, one engineering and one on contractual matters would be the perfect way to resolve disputes without an overly formal process.

So, is NEC the saviour of ADR? In one respect, I think it has been the saviour, in terms of creating an industry of adjudication. We possibly need to revisit the Latham Report[10]. In chapter 9.5 Latham comments: "If the NEC becomes normal construction contract documentation, its procedures for adjudication will be followed, though they may require some amendments."

In light of the growth of adjudication, maybe this is the right time to implement change, perhaps relating not just to NEC, but also other standard forms across the board, together with a revision of the Construction Act. Perhaps a look at a multi-tiered approach such as using mediation, conciliation, expert determination, and arbitration or litigation depending on the nature and scale of the dispute is the way to go.

If you require any further information, please contact Andrew Drennan at andrewdrennan@hka.com.

[10] Constructing the team, Sir Michael Latham, 1994