

By John Redmond



The NEC documents are used widely in the UK construction industry. However they do also get used internationally. John Redmond examines how they are used and why the rules of the game might be very different to when they are used in the UK.

The New Engineering Contract (NEC) may have been born in the UK, but from the start it was intended that it should be used internationally. It avoids the use of phrases familiar to the UK construction industry, such as practical completion, loss and expense, extension of time and retention. It uses simple language with short sentences and the present tense. These heretical departures from tradition are intended to make the contracts easier to understand for those whose first language is not English and who are not steeped in the traditions of JCT and ICE.

The contract has had limited success outside the UK. The [NEC website boasts that the contract is used in 16 countries](#) worldwide from Antarctica to Zimbabwe, but drilling down into that statistic reveals that in many of those countries the use has been by the British Foreign and Commonwealth Office for the construction of embassies and the like.

One country where the use of the NEC has been significant is South Africa. [Eskom](#), the South African electricity company, was one of the first users of NEC anywhere. Several other major corporations use it regularly as do South African Government and municipal authorities.

In practice, the NEC generates very strong feelings. If the Employer (through the Project Manager) and the Contractor both play the game according to the rules, the experience can be very positive. The contract provides a comprehensive system for the management of the project

and has many success stories. But you do need to understand the rules, and you do need to have a big enough team.

Too often either the Project Manager or the Contractor, or both, are very experienced. They have been building projects like the current one for umpteen years and know exactly what they are doing. They don't need to look at the contract – that's for lawyers. The Project Manager knows exactly what Contractors are about and how they try all sorts of tricks to extract more cash. The Contractor also knows exactly how Project Managers always try to protect the Employer from paying any more and they know how to get round them.

If the parties are a little more sophisticated than that and have at least read the contract, they will often underestimate the amount of management that will be required to deal with all the requirements for programming, notices, quotations for and assessment of compensation events and the like. They assume that the team that ran the last project on ICE or JCT will be able to cope, and anyway there isn't any more in the budget to pay for extra planners.

These problems are familiar to regular users in the UK. They are just as familiar to users in South Africa. But once you step outside the UK there is another trap waiting for you which can come as something of a surprise.

The NEC's standard dispute clause is Option W1. Users of NEC in the UK will probably never have read that clause. Unless their business is one of the very limited exceptions to the 1996 construction legislation, they will only ever come across Option W2

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The difference is that in the UK a construction contract must give both parties the right to take a dispute to adjudication at any time, even several years after the end of the work. That is contrary to the principles of the NEC, which requires all problems to be sorted out in double-quick time so that the project can proceed without worrying about festering disputes.

When the NEC is used elsewhere, it can revert to its essential principles as set out in Option W1

. There is a strict timetable for taking a dispute to adjudication and on to arbitration or court.

If the Contractor is upset about an action of the Project Manager or the Supervisor (perhaps a low assessment of a compensation event), it must notify the dispute to the Employer and to the Project Manager within four weeks of becoming aware of the action. The Contractor can refer the dispute to the Adjudicator in not less than 2 weeks and not more than 4 weeks after notifying. If the Contractor fails to notify and refer the dispute in accordance with this timetable, the dispute cannot be referred at all (unless of course there is agreement for an extension). What is more, the dispute cannot be taken either to arbitration or court. The action of the Project Manager therefore becomes final and unimpeachable.

The timetable works in the same way for the Employer. If a quotation for a compensation event is treated as having been accepted (perhaps because the Project Manager did not respond to notices), the Employer has to take action within similar time limits.

It is not unusual for the strict timetable of the NEC for notices, quotations, assessments and such to be relaxed in practice. Both sides want to avoid confrontation and so difficult conversations are left until “the final account” (although of course there is no such thing in NEC). The Project Manager may have given an assessment of a compensation event which the Contractor thinks is far too low, but the Contractor thinks he can claw something back in the discussion about another aspect and so doesn’t challenge it. Some months later the discussions are not going well so he decides to push the button and take it to adjudication. Under Option W2 in the UK he can. But elsewhere the Employer will point to Option W1 and say that he is too late.

Then some really interesting arguments break out. The Contractor says that he agreed (perhaps only by implication) with the Project Manager that the time limits would be relaxed. Lawyers start using words like “estoppel” and “waiver”. Then they apply the local national laws to the situation - particularly if there is a relevant Civil Code as there would be in most European countries. The outcome is uncertain and the costs substantial.

The NEC purist will say that the strict timetable is the right approach. But if you would prefer to keep some flexibility in the system, you may wish to include Option W2 in your contract even if it isn’t subject to UK statutory adjudication.

But even then there are potential problems. The diligent Contractor does everything by the

book, and refers his dispute to adjudication within the time limits. The Adjudicator thinks he is right and makes his decision that the Contractor is entitled to an additional payment. The Employer promptly gives notice that he wishes to take the matter to arbitration and says that he has no intention of paying in the meantime.

In the UK there is no doubt that the decision of the Adjudicator must be implemented straight away, even if the dispute is being taken to arbitration or court. Pay now, arbitrate later. Things are unlikely to be that simple outside the UK. The decision of the Adjudicator will constitute a contractual debt, which will be enforceable by court action or arbitration, but the court or arbitrator may decide that the whole dispute should be considered before enforcing. The adjudication process may therefore have been a waste of time. Depending where you are doing business, it may be possible to sort this out by more amendments to the contract but of course it will be too late when the dispute arises.

Two lessons for those who are thinking of using the NEC internationally:

1. Take local legal advice about how the contract will be interpreted and enforced and consider requiring amendments to NEC.
2. Keep to the strict timetable of the contract.

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