

NEC CONTRACTS IN HONG KONG – THE LEGAL LANDSCAPE AND BEYOND

COLLABORATIVE CONTRACTS and COOPERATING TEAMS

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GAME PLAN for 15 mins:

A. STATE OF PLAY

- State of the Science? *Trends in Contracts – Collaborative, Smart*
- State of the Art? *Integrated Teams - ranging from Functionally/Organisationally Integrated to 'RELATIONALLY' Integrated*

B. MIND the GAP(s) & Address the shortfalls

- Provide Enabling & Empowering Contractual frameworks
- Target longer term common overall value
- Incentivise Teams and Team-members

C. Potential GAME-CHANGERS

- *Relationally Integrated Value Networks - RIVANS*
- *Balancing & Synergising Contractual and Relational Approaches*

D. END GAME? *Best Value Built Assets & Satisfied Stakeholders*

- also extending to 'WHOLE LIFE'

Persisting Performance Shortfalls? Common Root Causes?

Root Causes & potential Remedies:

- of shortfalls in meeting Time, Cost & Expectations targets?
- of avoidable Disputes?

EXAMPLES:

1. **REPORTS** on CONSTRUCTION INDUSTRY REFORMS—1944, ... (UK) + ... +2001 (HK) etc.
 - Proactive Contracts, Re-integrating **segregated/fragmented** teams
2. Kumaraswamy et al. (2017): **Overlooking** important **long-term stakeholders** and **overall common value** - **ADDRESS** by agreeing, then targeting optimal overall life-cycle value of sustainable built assets & related services
3. Jobling & Smith (2018): Insistence on Complete Contracts, despite Inherent Complexities & Uncertainties - so **high risks & infeasible targets**
 - Implies need for **Relational Contracts** - meant to deal with Uncertainties by providing **flexibilities** – handled through **relationship management** ...

Potential remedies: Any Similarities and Synergies with NEC?

Can NEC help in accelerating above collaborative / cooperative trends?

Can emerging Collaborative Contractual frameworks & Cooperative Mindsets help to implement & boost benefits from NEC?

PRESENTLY – Structural/ Organisational Disconnects; Relational Divides; Operational Gaps (or Overlaps-Conflicts); Institutional & Cultural/ Mind-set Barriers/ Blocks

Must address both HARDWARE (Contracts) & SOFTWARE (Relationships) TOGETHER

Example: NEC **Clause 10** – What was behind its change - from NEC 3 to NEC4?

NEC 3:

10.1 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 cooperation.

NEC 4:

10.1 The Parties, the Project Manager and the Supervisor shall act as stated in this contract.

10.2 The Parties, the Project Manager and the Supervisor shall act in a spirit of mutual trust and cooperation.

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25 June 2019

RELATIONAL CONTRACTING

- Reference: NEC Cl. 10: ‘spirit of mutual trust and cooperation’ ? – subjective; can not be exactly defined. BUT NEEDED! *Why?*
Same ISSUE EMERGED with many CONTRACT Types & Scenarios
– High Risk and/or Long Term scenarios with many variables & unknowns
- led to RELATIONAL CONTRACTS:
- Recognise that Contracts can NOT capture all eventualities/ risks, responsibilities, remedies ... in Black & White
- So provide a ‘best possible’ framework for ‘future exchange’ with ‘flexibility’ provisions (trust & cooperation) to address uncertainties and unforeseen events
- **1881 - Lord Blackburn in *Mackay v. Dick***: “I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that **each agrees to do all that is necessary to be done on his part for the carrying out of the thing, though there may be no express words to that effect. What is the part of each must depend on the circumstances**”.
- **In practice? In Construction?** – e.g. Incorporate mechanisms for Joint Problem-solving, Joint Risk Management, Information Exchange - to deal with undocumented eventualities thru. ‘restorational’ /adjustment processes – **success depends on levels of trust and** relationships
- Familiar –**NEC contracts? & in general** - Partnering, Alliancing, Integrated Project Delivery

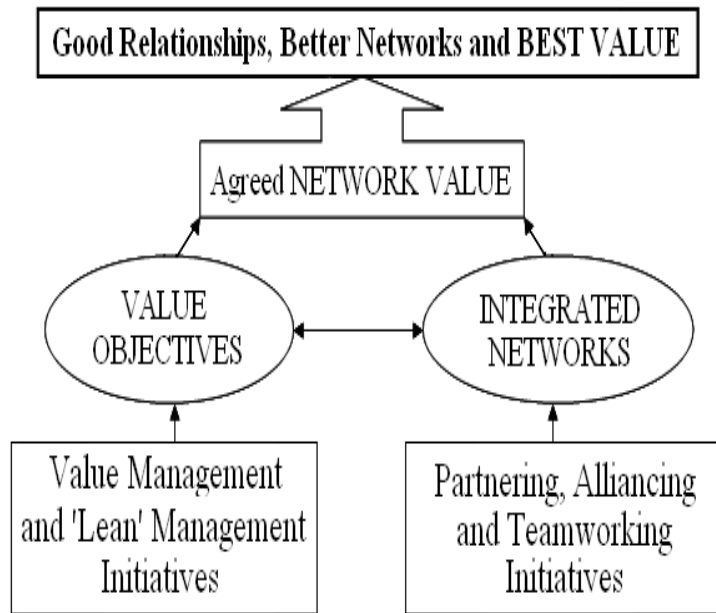
Development of Relational Contracting (RC) & its Applications in Construction *via* Relationship Management, Integrated Teamworking

- **Theory of RC** emerged from Legal Field in 1930's – can compare 'Classical', 'Neo-classical' & 'Relational' Contracts.
- **RC principles** underpin 'business case' for efficient transactions and for developing good **Relationships**
- Excellent **Relationship Management** is essential in construction projects (short-term; multiple stakeholders; critical interfaces; high risks & uncertainties)
- Previously **handicapped by adversarial contracts** in Construction Industry – we had to work at 'arms-length' with virtually '**ZERO-SUM**' **MIND-SETS**
- Now, after Industry Report Recommendations & under New Contract forms - OK to cooperate in Integrated Teams-work together towards **WIN-WIN-WIN** solutions
- Moved from **NON-CONTRACTUAL PARTNERING** to **CONTRACTUAL PARTNERING; ALLIANCING; FRAMEWORK AGREEMENTS, INTEGRATED PROJECT DELIVERY – IPD**
- BUT interlocking joint study (2011) of UK, Singapore and Hong Kong industry perceptions, indicated **performance levels had not risen as far as expected, around 10 years after respective Industry recommendations – mostly due to shortfalls in collaborative contracting & integrated teamworking.**

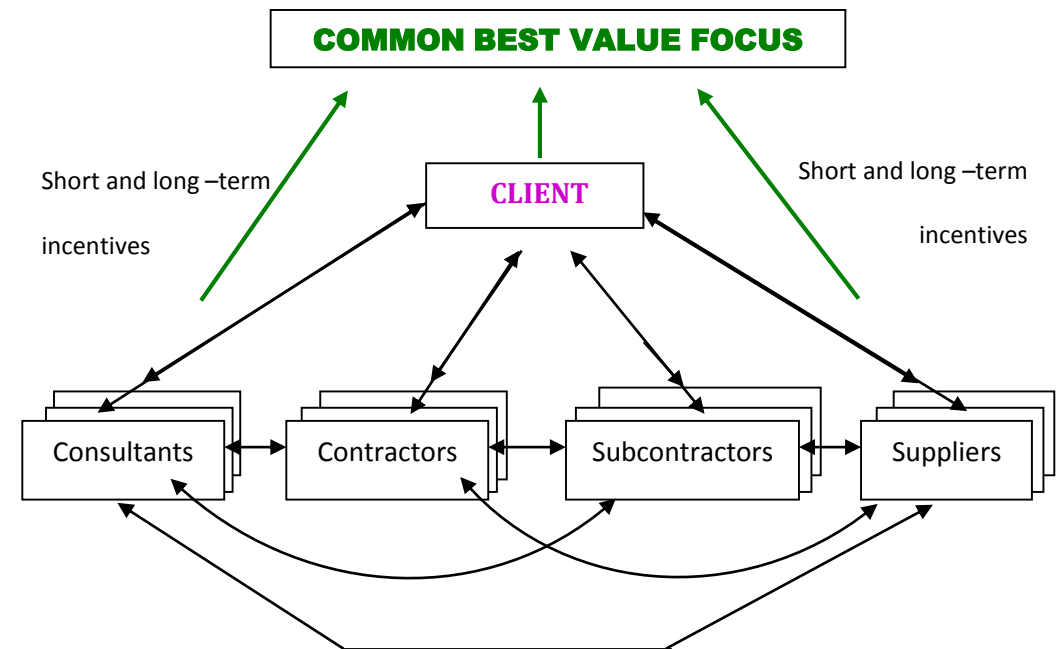
Game-Changer # 1? A 'made in Hong Kong' approach to address **shortfalls** in **Integrated Teamworking** – through **RIVANS**

Relationally Integrated Value Networks (RIVANS) - 'double-barreled' approach to galvanise **teambuilding** by intense focus on **common objectives - value proposition**

Supply Chains re-conceptualised as '**Value Networks**' - truly/ **RELATIONALLY integrated teams**



Mutually Reinforcing SYNERGIES in:
pursuing RELATIONAL INTEGRATION &
BEST VALUE



Basic Structure of a Relationally Integrated Value Network

RIVANS Workshops I & II

Workshop I - 01 Dec 2007 – “Enhancing Performance and Overall Value through RIVANS”

Workshop II - 31 May 2008 - Boosting value by building RIVANS



Centre for Infrastructure & Construction Industry Development



RIVANS WORKSHOP

ENHANCING PERFORMANCE & OVERALL VALUE THROUGH RELATIONALLY INTEGRATED VALUE NETWORKS (RIVANS)
01 December 2007



Extending RIVANS approach to 'Whole Life' of Built Assets

Workshop on **RIVANS for TAM** – Total Asset Management – Nov. 2012



Another Game-Changer?

SYNERGISING Contractual and Relational Approaches – Right Balance?

- Experience & Studies show - Moves to new ORGANISATIONAL arrangements must be complemented by far better OPERATIONAL arrangements - in this case, based on FAR BETTER RELATIONSHIPS
 - in turn needing Radical Shifts in MIND-SETS & INDUSTRY CULTURE

- **CAVEATS:**

1. Collaborative Contractual and Close Teamworking arrangements

-should Not be Abused & slide into Collusion and Worse!

-Checks & Balances needed e.g. in Hong Kong: COMPETITION ORDINANCE

1st case: Bid-rigging. 1st Market Study by HKCC: Bid-manipulation in Renovations

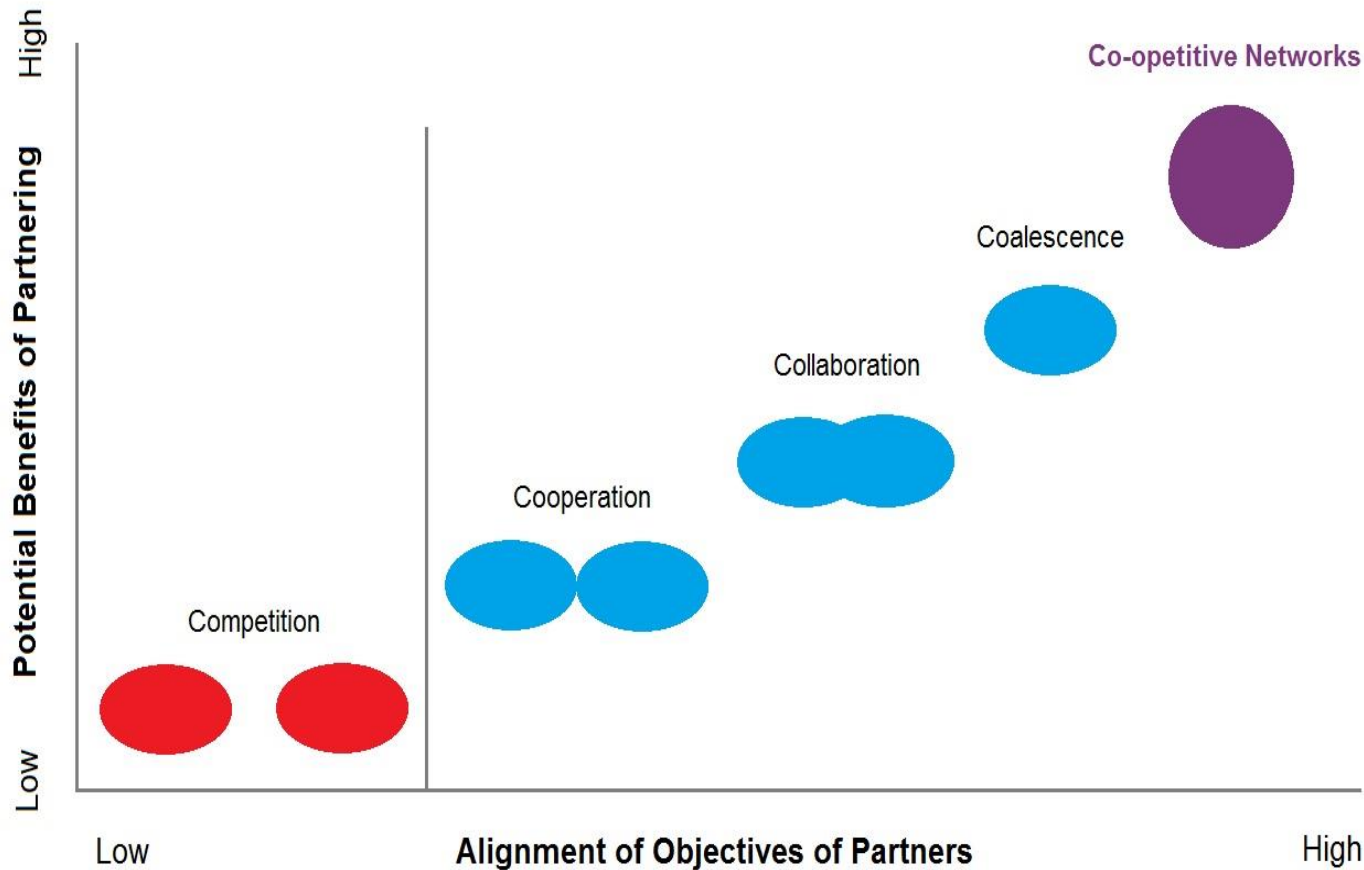
2. Even if not corrupt, couldn't Partners get too 'close', cosy & 'comfortable' after some time and then less demanding & **less efficient?**

SOLUTION? Retain Competitive Edge through CO-OPETITION ...

CO-OPERATION + COMPETITION = CO-OPETITION

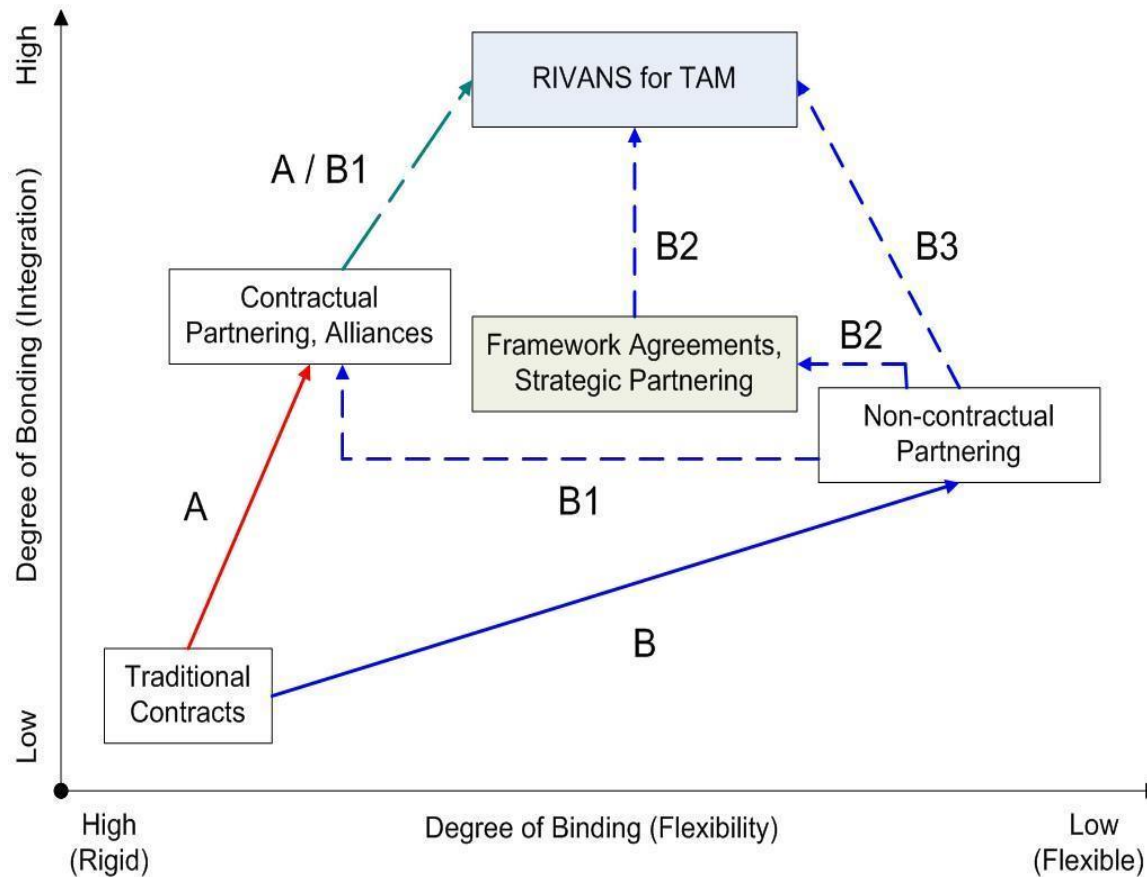
How? Co-operate to be more competitive together –

- hence compete better 'against' other networks
- create a bigger pie, and divide it equitably



EXTENDING THE 'PARTNERING CONTINUUM'

Thompson and Sanders, 1998 visualised progression from traditional 'competition' (adversarial contracts & attitudes) through cooperation, then collaboration to 'coalescence' - 'working as one' e.g. as in an Alliance and/or Integrated Team. Kumaraswamy (2012) proposed extending this to 'Co-opetitive Networks'



**Roadmap of Collaborative Contracting approaches -based on Wong et al., 2014
– developed after RIVANS for TAM study**

TAKE-AWAYS? - Potential GAME-CHANGERS in:
Developing together, Balancing & Synergising
Collaborative Contracts & Cooperative Working Arrangements

Proactive and Appropriate CONTRACTS - *necessary but not sufficient*

Contracts can only 'enable'. Parties & other **Stakeholders** must be 'empowered'

& Mind-sets must change for truly **Cooperative WORKING ARRANGEMENTS**
that increase efficiencies and boost common value

...Including in the long-term – for Whole Life, cradle to cradle Value of the Built Assets

Many examples + Lessons Learned - of the GOOD, BAD & the SUB-OPTIMAL

Significant International TRENDS are noted towards:

PARTNERING – *from Non-Contractual to Contractual*

– between Clients & Contractors, incldg. Consultants & Sub-contractors

ALLIANCING (Virtual Project Companies) e.g. UK, Australia

INTEGRATED PROJECT DELIVERY (IPD) e.g. USA

FRAMEWORK AGREEMENTS - for longer term *ex-ante* relationships

What else??

*Examples of Potential **GAME-CHANGERS** - but 'handle with care' **

Innovative / Collaborative Contracts & Cooperative working arrangements

Collaborative Contract forms & Working formats? Available, Need development e.g.

NEC Suite with various Options – Target Cost, Early Contractor Involvement, Alliancing

AIA (US) Contract Docs. for Integrated Project Delivery

Alliancing Code of Practice (UK)

Framework Alliance Contract (FAC-1, ACA, UK)

- combines workflow of a framework *with* relationships, values and processes of an alliance
- multi-party over-arching agreement between any number of framework alliance members
- FAC-1 is designed for use with any underlying contract form e.g. NEC3, ICC, JCT, FIDIC forms

** CAVEATS:*

Will not work - IF most mind-sets & industry culture is not receptive to change

Will go wrong - IF some abuse trust for short-term gains OR become complacent & inefficient

NEED - Checks & Balances; Monitoring (with relevant KPIs) & Control

END GAME?

SMART & SUSTAINABLE BEST-VALUE BUILT ASSETS & SATISFIED STAKEHOLDERS