

NEC CONTRACTS IN HONG KONG 2019

The Legal Landscape and Beyond



Handling It Right

Dispute Resolution under NEC

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● **Arbitration and litigation involving international commercial and construction disputes with Hong Kong, Mainland China and Overseas parties and legal issues**

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Overview



Handling it Right

- *Disputes in Collaborative Contracting?*
- *NEC in the context of Hong Kong law*
 - Interpretation of NEC Contract
 - Conditions Precedent & ‘Duty of Good Faith’
 - *Role of Project Manager*
- *NEC Dispute Resolution Options*
- *NEC Adjudication Cases*

NEC in Hong Kong Law

NEC under Hong Kong Law

● Interpretation of NEC Contract

- Ground rules in Hong Kong: *Jumbo King Ltd v. Faithful Property Ltd* (1999) 2 HKCFAR 279 and the rest
- *SSE Generation Ltd v Hochtief Solutions* 2018 SLT 579
[Optional Clause M in NEC2 (excluding contractor's liability for defects in works due to its design so far as with reasonable skill and care to ensure compliance with works information) for design and construction of tunnel of hydroelectric scheme with tunnel collapsed after handed over to client by reason of inadequate support existing such that requirements, *inter alia*, of a design life of 75 years as per works information: ***Whether Contractor liable?***]

NEC under Hong Kong Law

Conditions Precedent & 'Duty of Good Faith'

- Definition of 'dispute' for kick-starting process
- Strict timeframe (e.g. W1.3 & W2.3 of NEC3) for all personnel **BUT** with power of extension
- *Lafarge (Aggregates) Ltd v London Borough of Newham* [2005] EWHC 1337 (Comm) [Decision emailed on 13/8 and sent by post on 13/8; notice to refer sent by letter on 11/11, received on 12/11 (Fri.), but deemed to be served two working days following service: *Whether time to refer to arbitration started counting with email of unsigned adjudicator's decision or signed hard copy? When 'working day' means in relation to service of notice to refer?*]

NEC under Hong Kong Law

Conditions Precedent & ‘Duty of Good Faith’

- *‘Duty to act with spirit of mutual trust and co-operation’*
- *Astor Management AG v Atalaya Mining Plc [2017] BusLR 1634*
*“...A duty to act in good faith, where it exists, is a modest requirement. It does no more than reflect the expectation that a contracting party will **act honestly** towards the other party and will **not conduct itself in a way which is calculated to frustrate the purpose of the contract or which would be regarded as commercially unacceptable by reasonable and honest people.** This is a lesser duty than the positive obligation to use all reasonable endeavours to achieve a specified result ...”*

NEC under Hong Kong Law

● Role of Project Manager

- *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* [2006] BLR 113 [Appointing client itself as project manager: **Whether such appointment allowed?**]
- *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* (2017) 173 ConLR 137 [Appointing client's parent company's employee as project manager in NEC3: **Whether such appointment allowed?**]

*NEC in Dispute
Resolution Options*

NEC Dispute Resolution Options

- **Z-clauses in Hong Kong: Mediation, Adjudication and Arbitration**
- **W1 under NEC4: Senior representatives, Adjudication and Tribunal**
- **W2 (HGCRA) under NEC4: Senior representatives and/or Adjudication and Tribunal**
- **W3 under NEC4: Dispute Avoidance Board and Tribunal**
- **Some Questions & Insights?**

NEC Adjudication Cases

NEC Adjudication Cases

- *SGL Carbon Fibers Ltd v RBG Ltd* 2011 SLT 417
[Adjudicator using own knowledge and experience to introduce new matters not raised in deciding the case:
Whether rules of natural justice to be observed?]
- *SW Global Resourcing Ltd v Morris & Spottiswood Ltd* 2013 GWD 2-60 [Adjudicator decision with internal contradictions: *Whether court to overturn?*]
- *Vinci Construction UK Ltd v Beumer Group UK Ltd* [2017] BLR 547 [Adjudicator decision that sectional completion and delay-damages provisions in design and build sub-contract(as amended by settlement agreement) uncertain and unenforceable: *Whether court to intervene?*]

Thank You!



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