

THE NEC 3RD EDITION

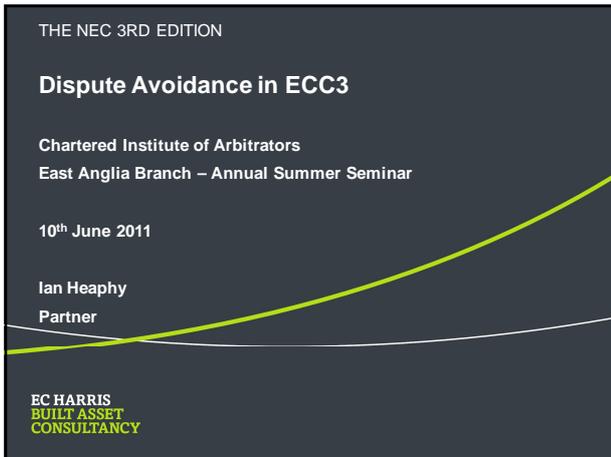
## Dispute Avoidance in ECC3

Chartered Institute of Arbitrators  
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### Agenda

- Introduction
- Benefits of the ECC
- Risk Register
- Early warnings
- Communications
- Programme
- Compensation events
- Dispute resolution
- Behaviour and attitude of the parties
- Summary

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### Introduction

NEC is a brand name for a family of contracts

This presentation focuses on the Engineering and Construction Contract (ECC) 3 edition – June 2005

Similar nature of NEC documents principles will generally be applicable to all NEC contracts

Review the mechanisms within the ECC which attempt to avoid disputes

Effectiveness and issues in their application

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### Benefits of the ECC

#### Flexibility

- Multi disciplinary – use in engineering and building work
- Design responsibility can reside in part or whole with either party
- Choice of pricing options – lump sum, target cost, cost plus
- Modular contract form – core clauses, main options and bolt on secondary options

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### Benefits of the ECC

#### Clarity and Simplicity

- Written in ordinary language, not construction terminology!
- Simple clause structure; avoids legalistic terminology
- Subjective decisions minimised
- Provision of guidance notes and flow charts

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### Benefits of the ECC

#### Provide a stimulus to good management

- The ECC is a management tool as well as a contract
- Requires timely and clear decision making process
- Clear allocation of responsibility
- Encourages collaborative working
- Proactive risk management procedures

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### Benefits of the ECC

**Effective risk management will lead to: -**

- The early identification of potential problems
- Mitigation / elimination of risks / issues
- The Employer being placed in charge of the change control process
- The avoidance of disputes and claims

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### Risk Register

- ECC3 introduced a Risk Register as part of the contract documents
- Development of proactive project management ideals
- Early identification of risk leading to their elimination / mitigation
- Created during the tender process and is a live document updated throughout the life of the project

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### Risk Register

- Sub-clause 11.2(14)
- "The Risk Register is a register of the risks which are listed in the Contract Data and the risk which the *Project Manager* or *Contractor* has notified as an early warning matter. It includes a description of the risk and description of the actions which are to be taken to avoid or reduce the risk"

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### Risk Register

Contract Data is the project specific information  
Contract Data Part 1 completed by the Employer and issued with the tender  
Contract Data Part 2 completed by the Contractor and returned as part of his offer  
Both parts contain the following statement  
– “The following matters will be included in the Risk Register.....”  
The consolidated list then forms the initial Risk Register

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### Risk Register

One of the key functions of any contract is to allocate risk between the Parties  
ECC does this very effectively and the contract provisions clearly allocate all risks  
ECC has a list of Employer’s risks  
– Sub-clause 60.1 compensation events  
– Sub-clause 80.1 Employer’s risks  
All other risks are the Contractor’s

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### Risk Register

Common misconceptions about risk under the ECC  
– Risk is unallocated or that the allocation can be changed by the Risk Register  
– Only risks covered by the contract are those listed in the Risk Register  
– Owner of the risk the person identified in the Risk Register  
– Value of risk allowance is determined by the Risk Register  
Risk Register is in effect for information purposes only  
Should only contain 2 columns  
– Description of the risk  
– Mitigation action

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### Risk Register

- Review allocation of risk
- "Buying or selling" can be very beneficial
- Any risk transfer has to be captured in the Contract
  - Additional Employer's risks in the Contract Data
  - Additional Contractor's risk by amending the contract using a Z clause

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### Risk Register

- Risk Register forms part of the Contract
- Risk Register contains stated mitigation measures
- What happens if the mitigation measure is not carried out?
  - Contractor to undertake trial pits / boreholes
  - Fails to do so and encounters "unforeseen ground conditions"
  - Breach of contract? / Right to a compensation event lost?

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### Early Warnings

- Sub-clause 16 - Early warning
- Contractor or Project Manager gives an early warning as soon as either becomes aware of a matter that may (can be Contractor or Employer risk)
  - increase the total of the Prices
  - delay Completion or delay meeting a Key Date or
  - impair the performance of the works in use
  - increase the Contractor's total cost

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### Early Warnings

#### Sub-clause 16 - Early warning

Either the Contractor or the Project Manager may instruct the other to attend a risk reduction meeting. At a risk reduction meeting those who attend co-operate in

- making and considering proposals
- seeking solutions that will bring advantage to all those effected
- deciding upon actions and who will take them

Project Manager records outputs

Risk Register updated

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### General

#### Early Warning – Benefits

- Prevention better than cure
- Proactive rather than reactive
- Early rather than late

The focus is on resolving and mitigating issues rather than seeking to allocate blame and liability

While there is still time to positively influence the course of events

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### Early Warnings

#### Sanctions for the Contractor if not given:

- The compensation event is assessed as if the Contractor had given early warning (Clause 63.5)
- Disallowed cost if cost was incurred because the Contractor did not give an early warning (Clause 11.2 (25) of Option C, D & E)

#### No Employer sanctions

- Employer will lose the opportunity to mitigate the effects of the early warning

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### Early Warnings

Process is not understood or applied correctly  
Considered as part of the compensation event process – they are NOT!  
Failure to raise an early warning will not exclude right to a compensation event  
Notification of an early warning is not notification of compensation event  
Should not be raised for events that have already occurred  
Employer / Project Manager does not raise any  
Issues that affect time, cost, quality not raised & shared if they are not seen as grounds for claim  
Benefits not realised

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### Communication

Period for reply  
Timescale stated in the Contract Data by which all communication has to be responded  
Limited grounds for not providing a response  
Failure to comply is grounds for a compensation event  
Notifications must be made separate to other communications  
Reasons for non-acceptance must be stated  
Flag up and deal with issues in a timely manner

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### Programme

The programme is at the heart of the ECC contract – joint management tool  
There is an extensive and some might consider onerous list of requirements for each programme, however, the level of information required should make it easier to agree the time and cost effects of change  
Float, time risk allowances, statement of how the Contractor plans to do the work identifying principal Equipment / resources etc.  
The programme has to be updated on a regular basis (normally monthly) and submitted for acceptance  
Has to capture all issues that have or will affect progress  
Identify risks to time / potential delaying events  
Develop mitigating strategies  
A revised programme should be supplied for compensation events that have a time effect

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### Programme

- Programmes requirements in the ECC are rarely (if ever) complied with
- Float / time risk allowances are not shown
  - Details of the Contractor's plans and identification of the Equipment / resources required
  - Programmes are not updated / accepted
  - Project Manager lacks the to proactively drive acceptance of the programme
  - Lose ability to identify and mitigate time risk

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### Compensation events

Compensation events bring together in one place the contractual provisions for evaluating the time and cost changes that will occur during construction

Intention that cost and time of changes / variations are assessed and agreed contemporaneously with event arising and preferable before

Final account not required as each change has already been assessed and agreed prior to Completion or shortly thereafter

A compensation event quotation must contain all the effects of the event - time, direct and indirect costs and any disruption

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### Compensation events

The drafters have deliberately broken the link between tendered prices and the evaluation of change

Compensation events are evaluated on the basis of 'Defined Cost'

Rates or lump sums can only be used to assess by mutual agreement

All compensation events potentially attract entitlement to both cost and time the value of either may still be "nil"

19 standard compensation events heads with an additional 7 dependent upon which main and secondary options are chosen

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### Compensation events

#### Time Bar

- 61.3 Contractor notification tests – 8 week time bar
- But only from "awareness" of the event

#### Default Acceptances

- 6.1.4 Default acceptance of Compensation Event if no response from the Project Manager within the correct timescales (1 week + 2 weeks)
- 62.6 Default acceptance of quotation if no response from the Project Manger within the correct timescales (2 weeks + 2 weeks)

#### Project Manager's assessment

- Project Manager can unilaterally determine time and cost effects of a compensation event

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### Compensation events

Enables the parties to successfully manage risk

Gives the Employer greater choice and control over change management

Greater time and cost certainty

Use of Defined Cost reduces grounds for disagreement over the evaluation of change – However, commercial tension still exists between the Parties

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### Compensation events

Successful implementation requires considerable resources and commitment from both parties

Willingness to proactively agree changes

Problems can occur due to

- Parties fail to comply and take a traditional approach
- Deal with direct costs only
- Exclude time / disruptive effects

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Dispute resolution

Dispute Options W1 and W2

A Dispute Resolution option must be chosen

- W1 Dispute Resolution Procedure (used unless the UK, HGCR Act applies) – therefore, for use in HK
- W2 Dispute Resolution Procedure (only to be used where UK, HGCR Act applies)

Adjudication was adopted by the ECC prior to HGCR Act

Simple cost effective dispute resolution

Technical matters determined by an independent expert

Contractually binding – mutual support of the parties

Binding until the end of the project

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Dispute resolution

HGCR Act gave adjudication statutory support

Legal binding and enforceable process

Decisions could only be challenged at arbitration / litigation

Simple dispute resolution process into a mini arbitration

Increasing costs, complexity and legal input

*Has statutory support destroyed adjudication?*

Alternative methods are now being employed

- Dispute adjudication / avoidance boards
- Mediation –

Introducing a simple cost effective dispute resolution process

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Behaviour and Attitude of the Parties

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 co-operation.

Legally enforceable?

His Honour Humphrey Lloyd QC suggest it is (International Construction Law Review, October 2008)

Essential for the benefits of the NEC to be realised

- Application and compliance with procedures
- Early warnings / proactive risk management
- Problem solving
- Sharing on information and issues

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### Summary

ECC has substantial dispute avoidance processes built into the contract  
Set of project management processes as part of the legally binding agreement  
Compliance with the processes will reduce risk and therefore the potential for disputes  
Contract also contains techniques to resolve disputes  
However, in order to realise these benefits all parties must understand the processes  
Apply sufficient resource with the requisite skill set to proactively manage the contract  
**If you cannot comply with 10.1 don't use the ECC!!**

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### Open discussion

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