



NEC & Dispute Resolution

Thursday 5 August

08:00am- 09:00am (PET)



Housekeeping

- Please mute your mics and turn off your video
- Remember to keep your microphone on mute when not speaking
- Recording and slides to be distributed after session

Speakers

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NEC4 Consultant



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Society of Construction
Law, Peru



Roberto Hernandez.
Socio en COMAD. Mexico





Agenda

- NEC approach to avoiding, managing and resolving disputes
- NEC 4: Multi tier clauses and Dispute Avoidance
- How Peru and LatAm can organize DAB's disputes

NEC3



NEC4





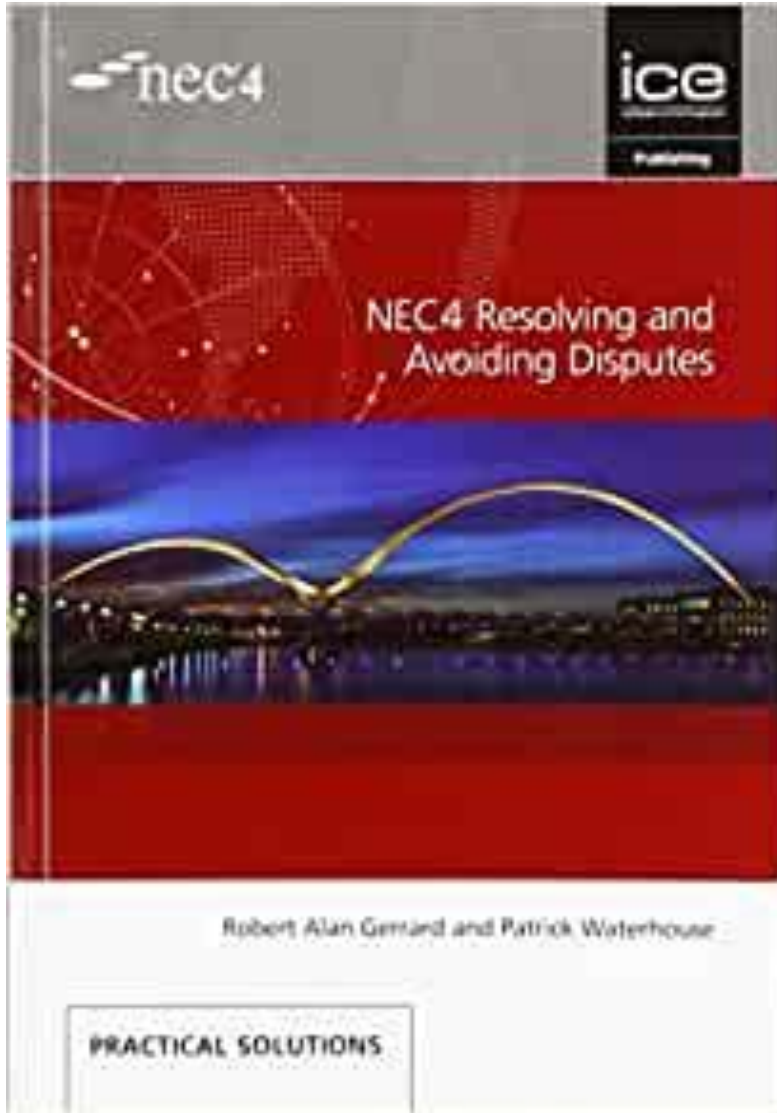
Dispute Avoidance

W1 - Adjudication

W3 – Dispute Avoidance Board

works | services | supply

A good start!



NEC4: Resolving and Avoiding Disputes Robert Alan Gerrard , Patrick Waterhouse

<https://www.neccontract.com/NEC4-Products/NEC4-Books/NEC4-Resolving-and-Avoiding-Disputes>

Core principles



Flexibility



Stimulus to good management



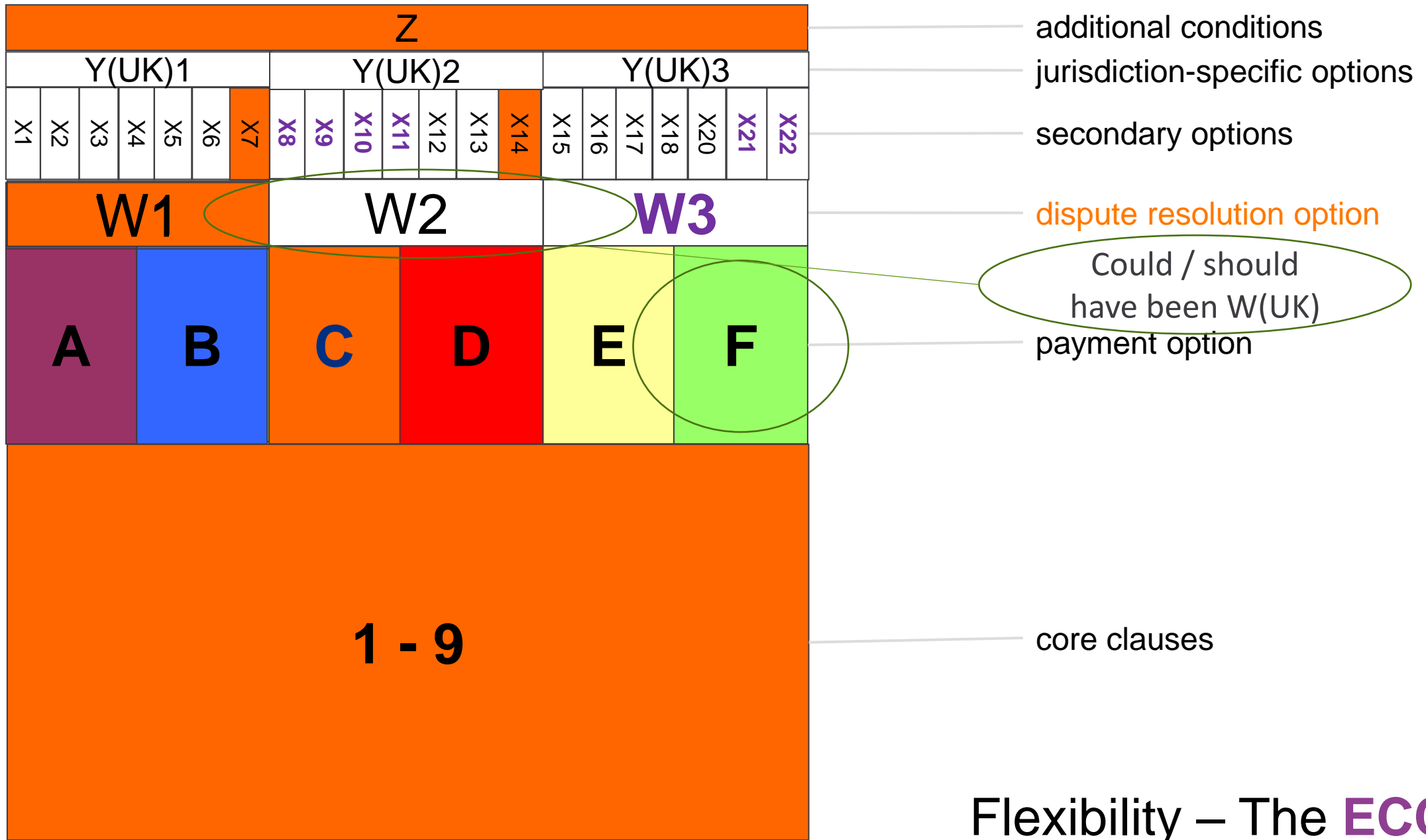
Clarity and simplicity

works | services | supply

The truth will out

- **NEC demands good documentation**
 - **NEC demands active management**
-
- culture, training and systems are vital





Flexibility – The **ECC4**

Secondary Options

X1

Price adjustment for inflation

X2

Changes in the law

X3

Multiple currencies

X4

Parent company guarantee (EEC4 Ultimate Holding Co Guarantee)

X5

Sectional completion

X6

Bonus for early completion

X7

Delay damages

X12

(multi-party) partnering (EEC4 Multiparty collaboration)

X13

Performance bond

X14

Advanced payment to the *Contractor*

X8

Undertakings to the *Client* and Others

X9

Transfer of rights

X10

Information modelling

X11

Termination by the *Client*

New to ECC4

Secondary options – yet more!

X15

Limitation of the *Contractor's* liability for his design to reasonable skill & care

(ECC4: 'The *Contractor's* design')

X16

Retention

X17

Low performance damages

X18

Limitation of liability

X20

Key Performance Indicators

X21

Whole Life Cost

X22

Early Contractor Involvement (only with C and E)

New to ECC4

Y (UK) 1

Project bank account

Y (UK) 2

The Housing Grants, Construction and Regeneration Act 1996

Y (UK) 3

The Contracts (Rights of Third Parties) Act 1999

Z

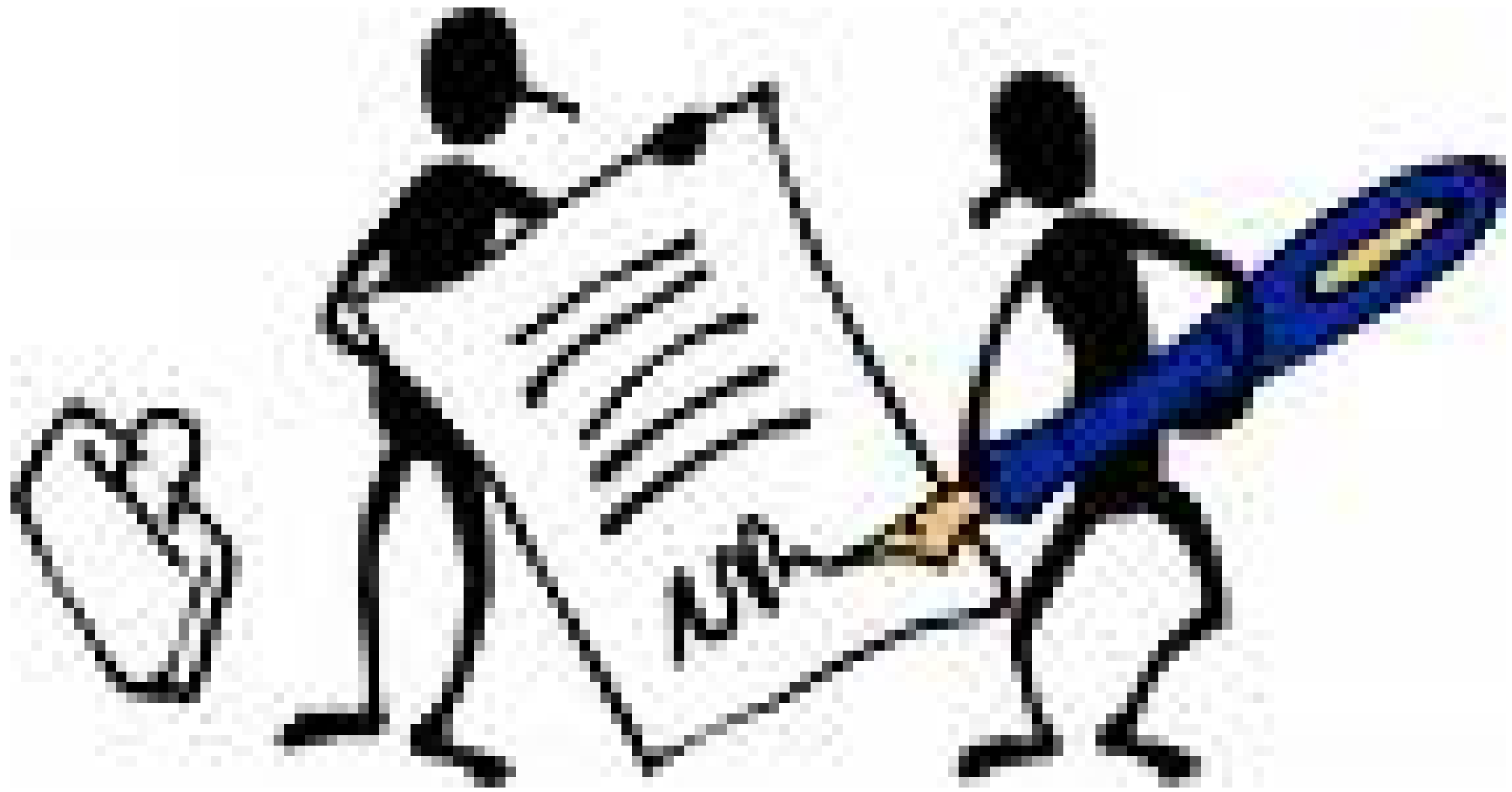
additional conditions of contract



- Scope
- What does it say?
 - 20.1 'The *Contractor* Provides the Works in accordance with the Scope
 - > 70 references from the conditions
 - 55.1 (option A or C) 'Information in the Activity Schedule is not Scope or Site Information
 - 60.1 'The following are compensation events.
 - (1) The *Project Manager* gives an instruction **changing the Scope**
 - 63.10 *Contractor* gets benefit of ambiguities

If it's not 'in the Scope'
then the *Contractor* does
not have to do it.

Simple !



Managing the contract

1 General

3 Time

5 Payment

7 Title, 8 Risks
and insurance

2 Contractor's
main
responsibilities

4 testing and
Defects

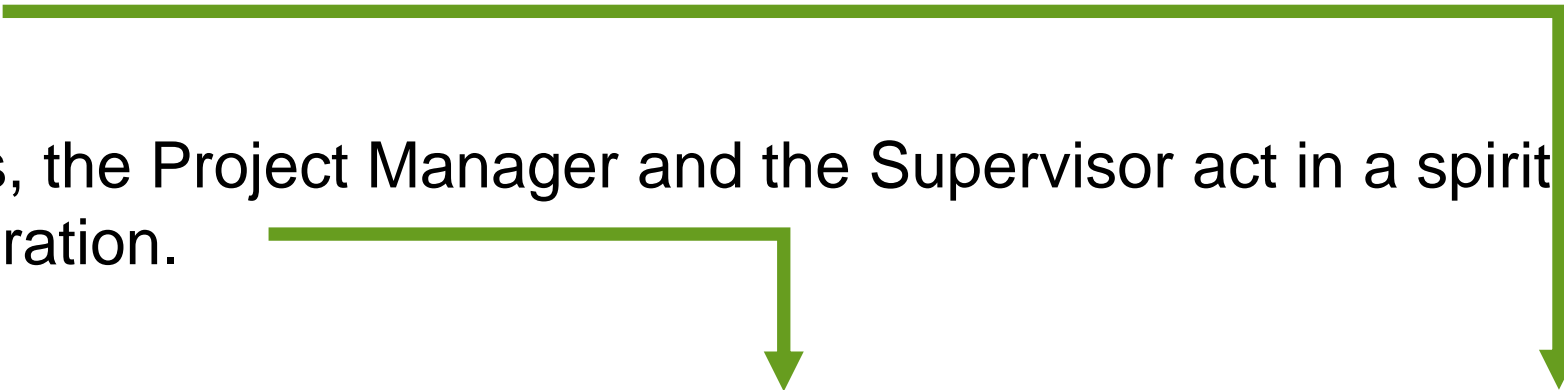
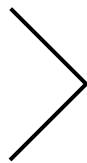
6
Compensation
events

W Dispute
resolution and
9 termination



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 act in a spirit of mutual trust and co-operation.





- early warning
- Simple but vital part of ECC – reciprocal obligations to both notify and solve
- *Contractor* and *PM* **notify** an early warning... aware of a matter which could
 - increase the total of the Prices
 - delay Completion,
 - delay meeting a Key Date or
 - impair the performance of the *works* in use



- early warning
- *PM* enters early warning matters in **Early Warning Register**
 - NEC4 makes explicit that *PM* starts this off
- **early warning meetings**
 - NEC4 has a meeting no less frequent than as stated in Contract Data
- **_TALTEO!**

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- Programme
- “I’ve been a client in this industry for 20 years. I’ve never accepted a programme yet and I have no intention of doing so.”

programme < > compensation events

- 63.5: 'A delay to the Completion Date is assessed as the length of time that, due to the compensation event, planned Completion is later than planned Completion as shown on the Accepted Programme current at the dividing date.
- 63.5 The assessment takes into account
 - any delay caused by the compensation event already in the Accepted Programme and
 - events which have happened between the date of the Accepted Programme and the dividing date.
- 62.2 'Quotations for compensation events comprise proposed changes to the Prices and any delay to the Completion Date and Key Dates assessed by the *Contractor*..... If the programme for remaining work is altered by the compensation event, the *Contractor* includes the alterations to the Accepted Programme in his quotation.'

1

Start with Accepted Programme
current at the 'dividing date'
(63.5)

2

Update to the dividing date (63.5)
show remaining work (62.2)

3

Show effect of compensation
event (63.5)

4

Any delay to planned Completion?
Completion Date is delayed by
same period (63.5)

<https://www.neccontract.com/About-NEC/News-Media/NEC-issues-NEC4-Practice-Note>

Managing the contract

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W Dispute
resolution and 9
termination

- ECC compensation events
- Where are they?

60.1 (1-19)

Option B and D

Certain X clauses –
eg X2

Z clauses

ECC4 – additional
CES in Contract Data



Compensation events – process

- Clear process
- Time and cost for all
- Same process for all
- Defined maximum timescales
- **Forecast** from the **dividing date**
- Needs both ‘sides’ to want to get them sorted
- **Various detailed improvements in NEC4**





Compensation events – ECC4 improvements

- Entry in Contract Data for additional CEs
- New CE when quotation for proposed CE not accepted
- Clearer split between notify (61.1) and instruct quotation (61.2)
- Separate and clearer clause (65) for proposed instructions
- ‘dividing date’ (defined in 63.1, used also in 63.5)
- Programme at dividing date (63.5) and update to dividing date
- Rates and lump sums option for pricing in core (63.2)
- *options A and B*
 - Defined Cost now includes amounts paid to Subcontractors
 - *value engineering percentage*
 - No exclusion of costs of preparing CE quotation in options
 - Option to agree new People Rates



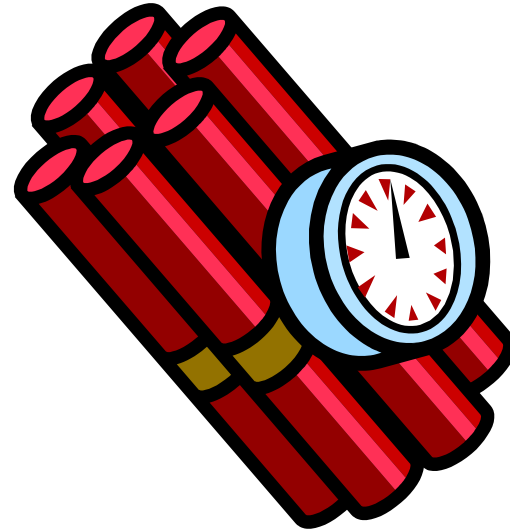
Dispute Avoidance

W1 - Adjudication

W3 – Dispute Avoidance Board



Option W - Resolving and Avoiding Disputes



The NEC is a collection of processes to avoid disputes.

Do not go here!



disagreement

The CE process is a **dispute avoidance** procedure'

dispute

Disputes W1

Many *Clients* set up 'dispute resolution ladders'

Senior Representatives

One or two each side in Contract Data

adjudication - private

tribunal

No mention of **mediation** – but often a sensible option

(stated in Contract Data part one as either)

litigation - public

or

arbitration - private and confidential

Either Party

Senior Representatives

W1.1

W1.1(1) A disputeis **referred** to the *Senior Representatives* in accordance with the Dispute Reference Table. (Some time limits)

W1.1(.2)**notifies** the *Senior Representatives*, the other Party and the *Project Manager* of the nature of the dispute....

submit to the other their **statement of case** ...Each statement of case is limited to no more than ten sides of A4 paper together with supporting evidence.

W1.1(4) No evidence of the statement of case or discussions is disclosed, used or referred to in any subsequent proceedings before the *Adjudicator* or the tribunal.

< 1 week

< 3 weeks

Not 100% clear when this period starts – logically the receipt of the second statement of case

W1.1(3) ...attend as many meetings and use any procedure they consider necessary

W1.1(3) produce a **list of the issues agreed and issues not agreed.**

W1.1(3) *Project Manager* and the *Contractor* put into effect the issues agreed.



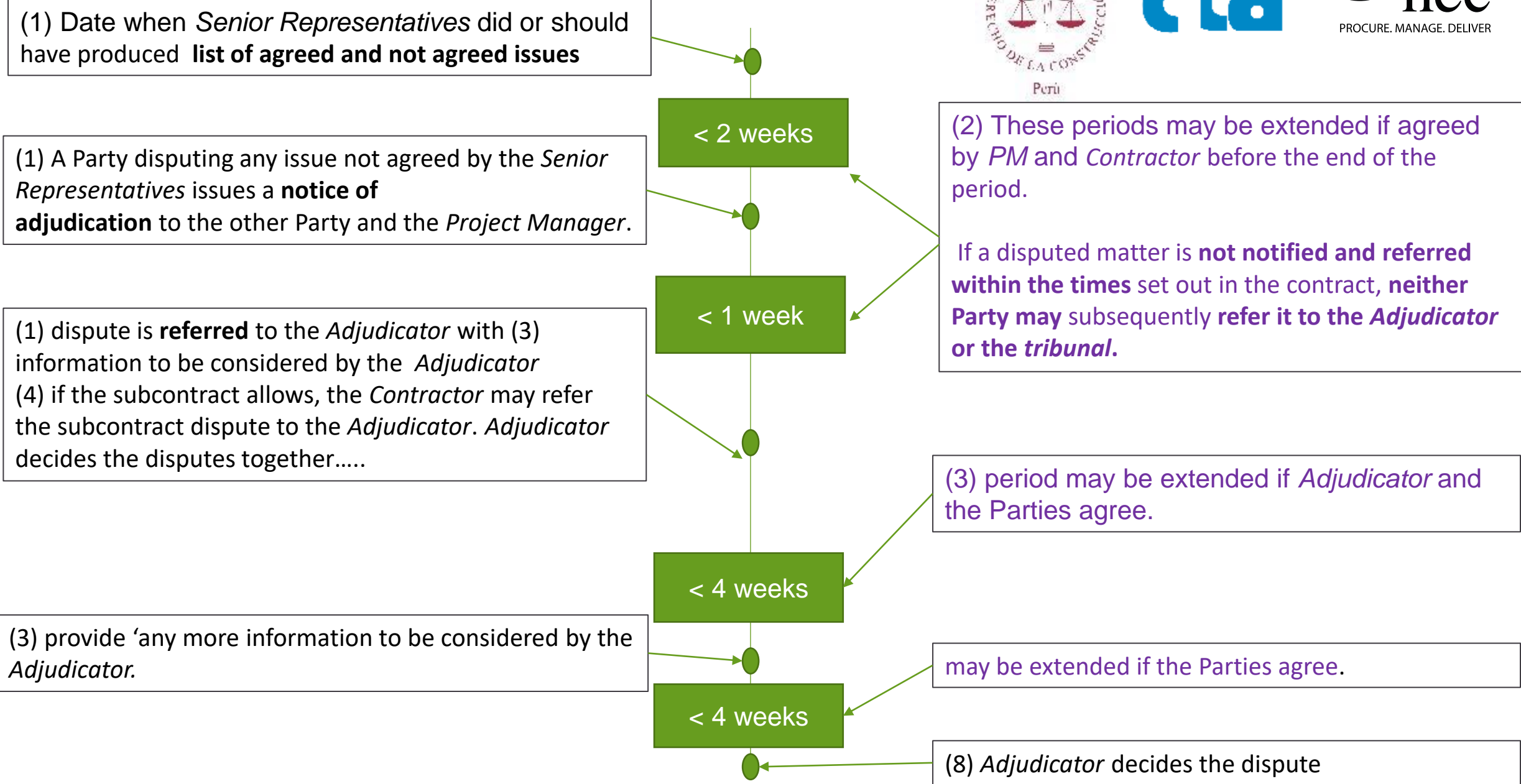
- (1) The Parties appoint the *Adjudicator* under the **NEC Dispute Resolution Service Contract**
- (2) *Adjudicator* acts impartially.....
- (3) Process to appoint or replace *Adjudicator* if they resign or are unable to act.
- (4) Replacement *Adjudicator* powers
- (5) *Adjudicator* is not liable to the Parties for any action or failure to take action in an adjudication unless the action or failure to take action was in **bad faith**.

W1.2

Either Party

works | services | supply

Adjudicator





- Very recent case law on notifications for Adjudication
- Transport for Greater Manchester v Kier Construction Ltd [2021] EWHC 804 (TCC)
- Comments from Patrick Waterhouse
- <https://www.linkedin.com/pulse/nec-communications-provisions-come-under-scrutiny-patrick-waterhouse/?trackingId=CRnwRk%2BHTSqr6P1lumespA%3D%3D>
- Summary:
 - DWISIT_C
 - 13.1, 13.2, 13.7



- (5) The *Adjudicator* may
 - **review and revise any action or inaction** of the *Project Manager* or *Supervisor* related to the dispute and alter a matter which has been treated as accepted or correct,
 - **take the initiative** in ascertaining the facts and the law related to the dispute,
 - **instruct a Party to provide further information** related to the dispute within a stated time and
 - **instruct a Party to take any other action** which is considered necessary for the *Adjudicator* to reach a decision and to do so within a stated time.

W1.3



- (9) Unless and until the *Adjudicator* has informed the Parties of the decision, the Parties, the *Project Manager* and the *Supervisor* proceed as if the matter disputed was not disputed.
- (10) The *Adjudicator's* decision is **binding** on the Parties unless and **until revised by the *tribunal*** and is enforceable as a matter of contractual obligation between the Parties and not as an arbitral award.
- The *Adjudicator's* decision is **final and binding** if neither Party has notified the other within the times required by the contract that it is dissatisfied with a decision of the *Adjudicator* and intends to refer the matter to the *tribunal*.

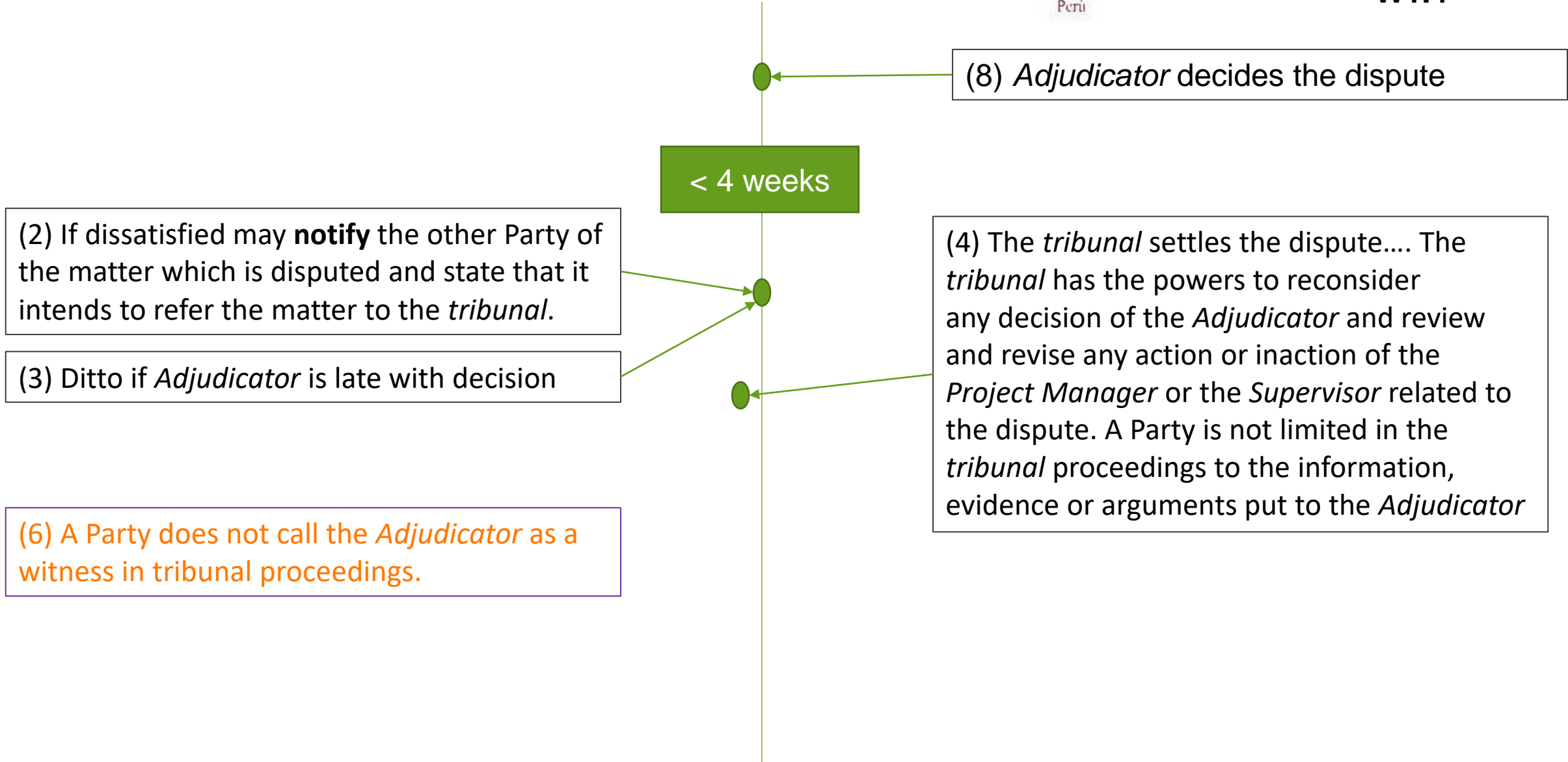
W1.3

Either Party

tribunal



W1.4





Dispute Avoidance

W1 - Adjudication

W3 – Dispute Avoidance Board



- (1) One or three members as Contract Data
- (1) *Client* nominates one member
- If three members then:
 - *Client* nominates one member in Contract Data
 - *Contractor* nominates one member in Contract Data
 - (1) The third member jointly chosen by the Parties
- (4) If cannot agree then one Party can get the *Dispute Avoidance Board nominating body* to act.

W3 Dispute Avoidance Board



Either Party

W3.1(6) Agenda for the Site visit proposed by Parties and decided by the DAB

W3.2(4) The Parties make available to the DAB

- copies of the contract,
- progress reports and
- any other material they consider relevant to any **difference** which they wish the DAB to consider in advance of the visit to the Site.

W3.2 (3) notify **potential dispute** to the other Party and the *Project Manager*.

W3.2 (3) notify potential dispute to DAB

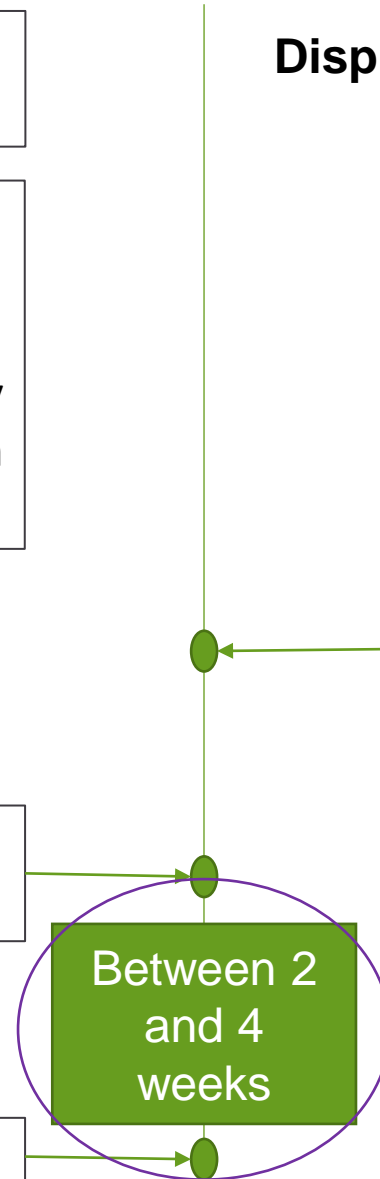
Dispute Avoidance Board W3

W3.1(1) Formation of DAB

W3.1(5)....visits the Site at the intervals stated in the Contract Data from the *starting date* until the *defects date*to inspect the progress of the works and become aware of any potential disputes

W3.2(1) The DAB assists the Parties in resolving potential disputes before they become disputes.

Cooling off period and time limit.





Either Party

W3.3 (2) may **notify** the other Party of the matter which it disputes and state that it intends to refer it to the **tribunal**.

W3.3 (2) The dispute is not referred to the tribunal unless this notification is given within four weeks of the provision of the Dispute Avoidance Board's **recommendation**.

W3.2 (6) A Party does not call a member of the DAB as a witness in *tribunal* proceedings.

< 4 weeks

(5) DAB^{enti}

- **visits** the Site and inspects the works,
- reviews all **potential disputes** and helps the Parties to settle them without the need for the dispute to be formally referred,
- **prepares a note** of their visit and
- unless the Parties have resolved the potential dispute by the end of the Site visit, **provide a recommendation** for resolving it.

Dispute Avoidance Board W3



Dispute Avoidance

W1 - Adjudication

W3 – Dispute Avoidance Board



Entorno en Colaboración para la Solución de Disputas en el Contrato NEC 4

1. Herramientas colaborativas y Mecanismo Escalonado en la Solución de Disputas
2. Opción W1 y W3 en NEC 4
3. Cuadro Comparativo de NEC 4 y NEC 3 op. F (Proyectos de RCC)
4. Opción W 4 (Peru)



Herramientas Colaborativas y Solución de Controversias en el Contrato NEC 4

Los contratos con herramientas colaborativas son capaces de alienar incentivos comunes:

- Enfoque principal: prevenir conflictos. Cuando ocurren: resolverlos con eficiencia
- Solución de controversia considerando vínculos más estrechos entre las partes y el proyecto (información), con mutua confianza
- Mantenimiento más eficiente de vínculo entre las partes



Herramientas Colaborativas y Solución de Controversias en el Contrato NEC 4

❖ Mecanismo Escalonado de Resolución de Conflictos en NEC 4



El inicio otorga la posibilidad que las partes lleguen a un acuerdo sin necesidad de recurrir a un tercero (W 1)



Compromiso e incentivo de las partes de resolver directamente la controversia



Herramientas Colaborativas novedosas del Contrato NEC 4

- ❑ Se adiciona un evento compensable como la cl. 60.1 (20): se reconocen los daños del contratista originado por elaborar una cotización que no se utilizó (ordenada por el PM)
- ❑ La “cláusula abierta” (de buena fe) para adicionar eventos compensables según el 60.1 (21): se pueden incluir en el documento ‘Datos del Contrato – *Contract Data* ’’ (*Ficha 1 del Contrato*)
- ❑ Cl. 61.3: Contratista no notifica un evento compensable dentro de 8 semanas de haber conocido su ocurrencia: el precio del contrato o la fecha de culminación no cambiarán. Excepción: si el evento se deriva de una instrucción del PM o por el Supervisor



Herramientas Colaborativa novedosas del Contrato NEC 4

- ❑ Confianza Mutua y Permanente a fin de resolver las controversias de acuerdo a:
 - W1: Representantes de alto rango / Adjudication / Tribunal Arbitral
 - W2: Aplicable solo en UK (Housing Grants, Construction and Regeneration Act 1996)
 - W3: Panel Preventivo de Controversias / Tribunal Arbitral



Herramientas Colaborativa en el Contrato NEC 4

La filosofía NEC4:

- Considera un vínculo más inmediato entre las partes (W1 / W3) y el intercambio de información de modo efectivo (*Building Information Modelling* - BIM)
- Se **filtran** aquellas controversias cuya resolución sí podría solucionarse directamente por las partes sin necesidad de un *Adjudicator* (en el caso de los Senior Representatives del W1)
- ❖ ¿Qué incentivos o contra incentivos debemos considerar en Latinoamérica?



Beneficios de las Cláusulas Escalonadas del Contrato NEC 4

W1 y W3:

- Provee a las partes una oportunidad de resolver sus disputas de un modo menos oneroso.
- Brinda un espacio de diálogo más inmediato entre éstas, con matices más cercanos a las gestión comercial y técnica entre las partes
- ❖ El Trabajo en colaboración propone un entorno que evita la culpabilidad como acto instintivo de actuación: busca como primera opción lograr los objetivos del proyecto



Solución de Controversias en Contrato NEC 4

Cláusula W1

- **W 1.1** Negociación entre los Representantes de Alto Rango (*Senior Representatives*)
 - ✓ Con suficiente autoridad técnica y de gestión en la industria
 - ✓ Importante: suficientemente alejados a la ejecución de la obra, pero cercanos a los objetivos más importantes (evitar prejuizgamientos)
 - ✓ Resuelven en 3 semanas
- Se produce una lista de acuerdos y otra de desacuerdos

Solución de Controversias en Contrato NEC 4

Cláusula W1

- **W1.2 Dispute Adjudication Board (DAB):** conoce la lista de desacuerdos sobre los cuales se pronunciará

- W 1.3 Se inicia un proceso que dura 11 semanas donde:
 - ✓ 2 semanas para la notificación de adjudicación de la lista de desacuerdos (SR)
 - ✓ 1 semana: para la notificación al DAB
 - ✓ 4 semanas para el envío de toda la información referida a la disputa (DB). Las partes pueden acordar extender el plazo.
 - ✓ El DAB resuelve en 4 Semanas a partir del último día en que termino de recibir la información

- ✓ Total: 11 semanas (77 días calendario).



Solución de Controversias en Contrato NEC 4

Cláusula W3

- **W 3.1 *Dispute Avoidance Board*** : 3 miembros definidos en el Contract Data (Ficha del Contrato)
 - ✓ Sistema preventivo de solución de controversias
 - ✓ El panel realiza visitas continuas al sitio de obra, de acuerdo a lo señalado en la Ficha del Contrato como también a requerimiento de las partes
 - ✓ La agenda es propuesta por las partes y definida por el Panel

- **W 3.2 Funciones principales del Panel Preventivo**
 - ✓ Asisten y guían a las partes para que éstas resuelvan el conflicto
 - ✓ Punto principal: analizar diferencias potenciales de cualquier naturaleza vinculadas al contrato
 - ✓ Emite una recomendación a fin de resolver el **conflicto potencial**: **Recomendación**



Solución de Controversias en Contrato NEC 4

- **W3: El poder de la “Recomendación” del Panel Preventivo**
 - ¿llega a ser de obligatorio cumplimiento en caso las partes no acudan al tribunal arbitral?



Solución de Controversias en Contrato NEC 4

Cláusula W3

- **W 3.3** Si una de las partes no esta conforme: notifica a la otra su interés de acudir al tribunal arbitral dentro de las 4 semanas de emitido y notificada la recomendación
 - ✓ El tribunal revisa la recomendación del Panel, ratificándolo o enmendándolo.
 - ✓ Puede revisar y emitir pronunciamiento sobre acciones o inacciones del PM o del Supervisor vinculadas a la controversia
 - ✓ La parte recurrente no se limitará a la información, evidencias o argumentos que conoció el Panel Preventivo. Puede extenderse a cualquier otra información sin límite.

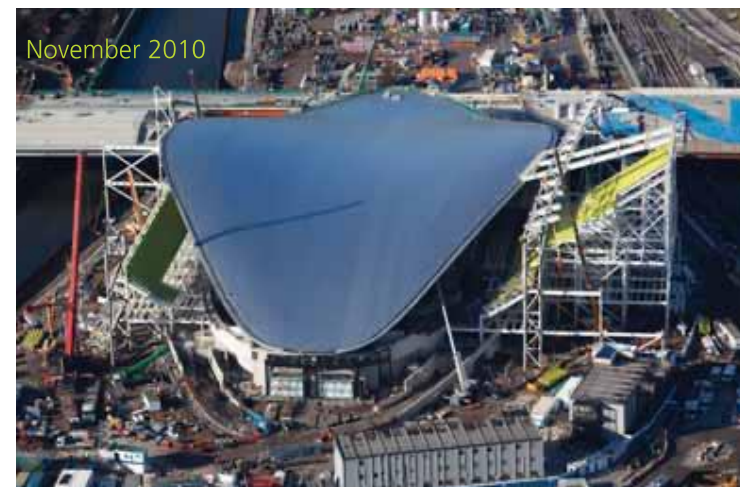
Predecesor del W3

➤ *Independent Dispute Avoidance Panel* (“IDAP”) London Olympic Games 2012

1. Una de las principales claves: Sistema gestionado por Olympic Delivery Authority (ODA).
2. Se gestionó aproximadamente 800 contratos de construcción
3. Como mecanismo escalonado:
 - a) IDAP
 - b) Dispute Adjudication Board
 - c) Technology and Construction Court (TCC)
4. Número sumamente bajo llegó al DAB y ninguna controversia llegó al TCC
5. Valor aproximado US\$ 890 M.



Olympic Stadium March 2011
Photo courtesy of London 2012



London 2012 Aquatics Centre
Photo courtesy of London 2012



Solución de Controversias en Contrato NEC 4 Para el Perú

OPCIÓN W4 (Peru)

- W 4.1 Representantes de Alto Rango
- W 4.2. Panel Preventivo y de Resolución de Disputas (DAAB)
- W 4.3. Tribunal Arbitral



Solución de Controversias en Contrato NEC 4 Para el Perú

OPCIÓN W4.2 Panel Preventivo y de Resolución de Disputas (DAAB)

- Preventivo. Opiniones.
- Resolución (vinculante). Mayor Análisis.

Plazos diferenciados dependiendo del monto.



Comparativo: NEC 4 (W1) v NEC 3 (Proyectos RCC)

	NEC 4 (W1)	NEC 3 (modelo ARCC)
Surgimiento de la Controversia, plazo de solución previa al Panel de Expertos (DAB)	<i>Senior Representatives</i> (Representantes de alto rango): 3 semanas	partes acuden al DAB conforme al Reglamento de la CCI (en cualquier momento)
Cantidad de miembros	Es integrado por 1 adjudicator (texto original). Podría adaptarse a 3 miembros	Integrada por 3 miembros DAB, según el Reglamento de la CCI



Comparativo: NEC 4 (W1) v NEC 3 (Proyectos RCC)

	NEC 4 (W1)	NEC 3 (modelo ARCC)
Tiempo máximo para constitución	Las partes nombran al Adjudicador/DAB el día de inicio 'starting date' (<i>Ficha del Contrato o Contract Data</i>)	4 semanas desde la fecha de inicio del Proyecto
Tiempo máximo para Resolver Controversias	<p>2 semanas para la notificación de adjudicación de la lista de desacuerdos (SR)</p> <p>1 semana: para la notificación al DB</p> <p>4 semanas para el envío de toda la información referida a la disputa (DB). Las partes pueden acordar extender el plazo.</p> <p>Resuelve en 4 Semanas a partir del último día en que termino de recibir la información</p> <p>Total: 11 semanas (77 días calendario).</p>	90 días a partir de la fecha de presentación de la Exposición de la Demanda (Art. 19.2 y 22 Reglamento CCI)



Comparativo: NEC 4 (W1) v NEC 3 (Proyectos RCC)

	NEC 4 (W1)	NEC 3 (modelo ARCC)
Obligatoriedad de las Decisiones	<p>1. Las decisiones del Adjudicador son vinculantes, hasta que sea revisado por un tribunal arbitral</p> <p>2. Definitiva y vinculante: si en el transcurso de 4 semanas desde la decisión del adjudicador la parte insatisfecha no notifica su interés en acudir al tribunal.</p>	<p>1. Las decisiones del DAB son vinculantes y se ejecutan de modo inmediato y hasta que sea cuestionado por el tribunal</p> <p>2. Definitiva y vinculante: si en el transcurso de 30 días desde la decisión del DAB la parte insatisfecha no notifica su interés en acudir al tribunal.</p>



The experience of Dispute Boards in Lima 2019

- Some thoughts:
 - New form of contract for dispute boards (previous FIDIC).- What was the reaction?
 - Collaboration in Latin America: completely new.
 - Public Works culture vs. NEC: how parties dealt with it (and how the DAB dealt with it)
 - Rules of ICC on Dispute Boards- very useful.
 - Informal consultation vis a vs adjudication vis a vis public officers liability.
 - The DAB in a collaborative scheme: how does it help or not?
 - Meeting targets and completing Projects: that is what is all about.



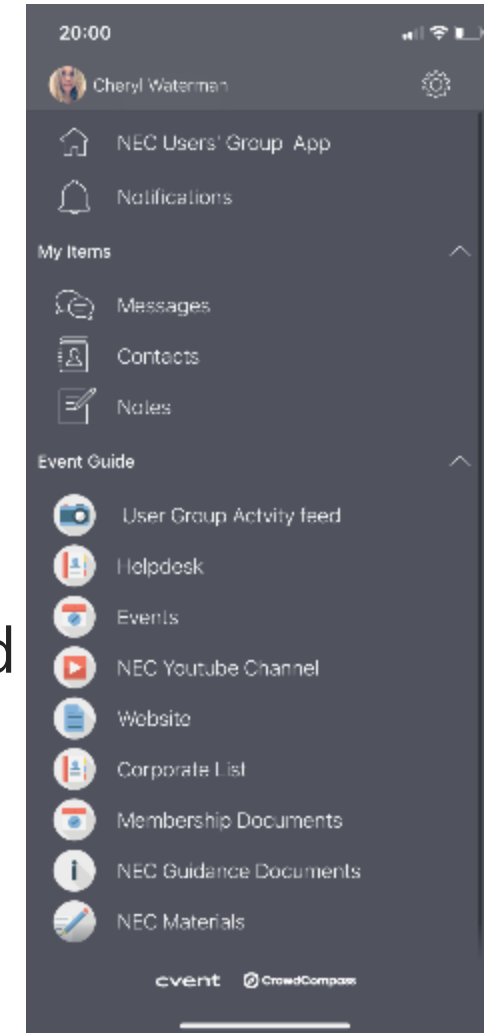
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