

# NEC in Hong Kong webinar: Best use of Z clauses

A discussion on best practice in the drafting of additional clauses

*Robert Gerrard and Peter Clayton*

# Welcome

## Presenters:

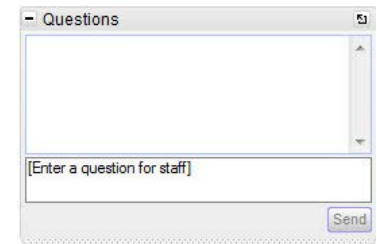


**Peter Clayton**  
Partner at Pinsent Masons

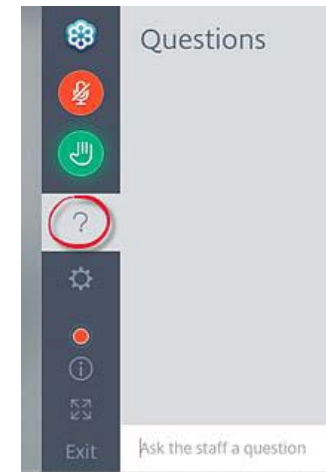


**Robert Gerrard**  
NEC Users' Group  
Secretary and NEC4 drafter

**Send us your questions**



or



# What we will cover



- What are Z clauses?
- Why are they needed?
- What does the Hong Kong Government do about Z clauses?
- Things to consider when drafting Z clauses
- What happens when they go wrong
- Q&A session

# What are Z clauses?

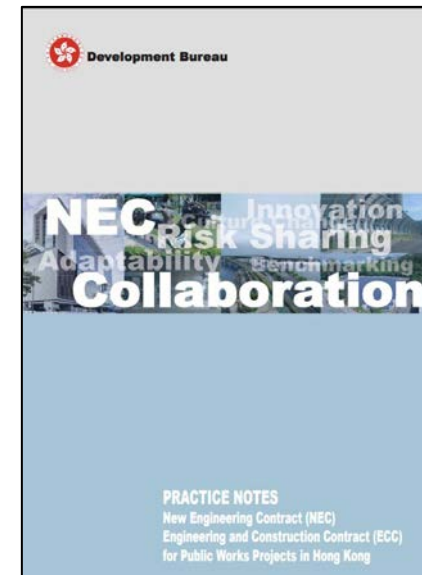
- Z clauses are bespoke “*additional conditions of contract*”
- They apply in addition to, or may amend, the standard NEC core clauses, main Option clauses and chosen secondary Option Z clauses
- Normally prepared and required by the *Employer* (NEC3)/*Client* (NEC4)
- Incorporated through the Contract Data

## Why are they needed?

- Z clauses are an important aspect of the flexibility of NEC
- They allow unique requirements for specific jurisdictions, procurers or projects to be accommodated; eg
  - Tax, employment and health and safety
  - Local dispute resolution practices
  - Bespoke commercial arrangements
  - Modifications to risk balance

## The Hong Kong Government approach to Z clauses?

- The HK Govt. does the following with standard NEC (NEC3 at the moment)
  - Schedule of Amendments to the Core and Optional Conditions
  - Z clauses – *additional conditions of contract*
- Standardised approach to amendments and Z clauses with overarching Practice Note for Works Departments on the use of and preparation of NEC contracts
  - [https://www.devb.gov.hk/en/publications\\_and\\_press\\_releases/publications/standard\\_contract\\_documents/practice\\_notes\\_nec\\_engineering\\_construction\\_contract/index.html](https://www.devb.gov.hk/en/publications_and_press_releases/publications/standard_contract_documents/practice_notes_nec_engineering_construction_contract/index.html)



# The Hong Kong Government approach to Z clauses

- Govt.'s Z clause precedents span 185 pages but not all additional conditions will be used each time
- Largely based on the traditional Special Conditions of Contract and relate to areas such as
  - Hong Kong procurement practice
  - Subcontracting, supply chain, employment, health and safety
  - Competition and bribery
  - Design, Cost Saving, Intellectual Property and PI insurance
  - Environmental
  - Dispute resolution

# Things to consider when drafting Z clauses

- *Why is the clause needed?*
- *Is it necessary, is it helpful, is it fair?*
- *How will it affect other provisions in the contract?*
- *Does it adversely affect benefits and ethos of NEC?*
- *Why is the clause needed?*
- *Is it necessary, is it helpful, is it fair?*
- *How will it affect other provisions in the contract?*
- *Does it adversely affect benefits and ethos of NEC?*
- *Is it drafted in the plain English style of NEC and is it consistent with NEC language?*
- *Is it something which could be addressed in the Works Information (NEC3)/Scope (NEC4)?*





# What happens when Z clauses go wrong?

- Ambiguities and discrepancies
- Destruction of NEC ethos
- Unnecessarily lengthy contract terms
- Unfair risk allocation
- Higher tender prices
- Disputes



# What happens when Z clauses go wrong?

## Examples:

- Negative cash flow on target contracts; *“The Price for Work Done to Date is the total Defined Cost which the Project Manager ~~forecasts will have been paid by the Contractor before the next~~ assesses the Contractor has paid before the assessment date plus the Fee”*
- Control of sub-contracting on target contracts
  - Requirements for minimum tenders
  - Requirements to (generally) select lowest price

# What happens when Z clauses go wrong?

## Examples:

- *Contractor's* cost saving design
  - Standard NEC target contracts address sharing of cost savings in one paragraph with the aim of incentivising cost saving proposals
  - HK Govt. additional conditions are 12 pages with numerous provisions primarily focused on making *Contractor* liable for all possible adverse consequences of cost saving proposal
- Generally Govt. additional conditions use traditional language and do not adopt NEC drafting approach

# What happens when Z clauses go wrong?

## Examples:

- Amendment to Schedule of Cost Components, “...*the cost of the Contractor’s management and supervisory staff are treated as included in the Fee...*”
  - So the *Contractor* is only paid for site staff through Fee on other costs – primarily subcontractor costs
  - Suppose a compensation event causes critical delay
    - If there are significantly increased subcontractor costs the *Contractor* makes a recovery for site staff (possibly over recovers)
    - If there are no increased subcontractor costs the *Contractor* makes no recovery

## How could HK Z clauses be improved?

- Reduce the quantity
  - Refine to NEC language
  - See what can be included in Works Information (NEC3)/Scope (NEC4)
  - See what is unnecessary
  - See what is now covered by new provisions in NEC4
- Place greater trust in the *Project Manager and Contractor*
  - Greater freedom to procure appropriately
  - Greater reliance on incentivisation not risk transfer



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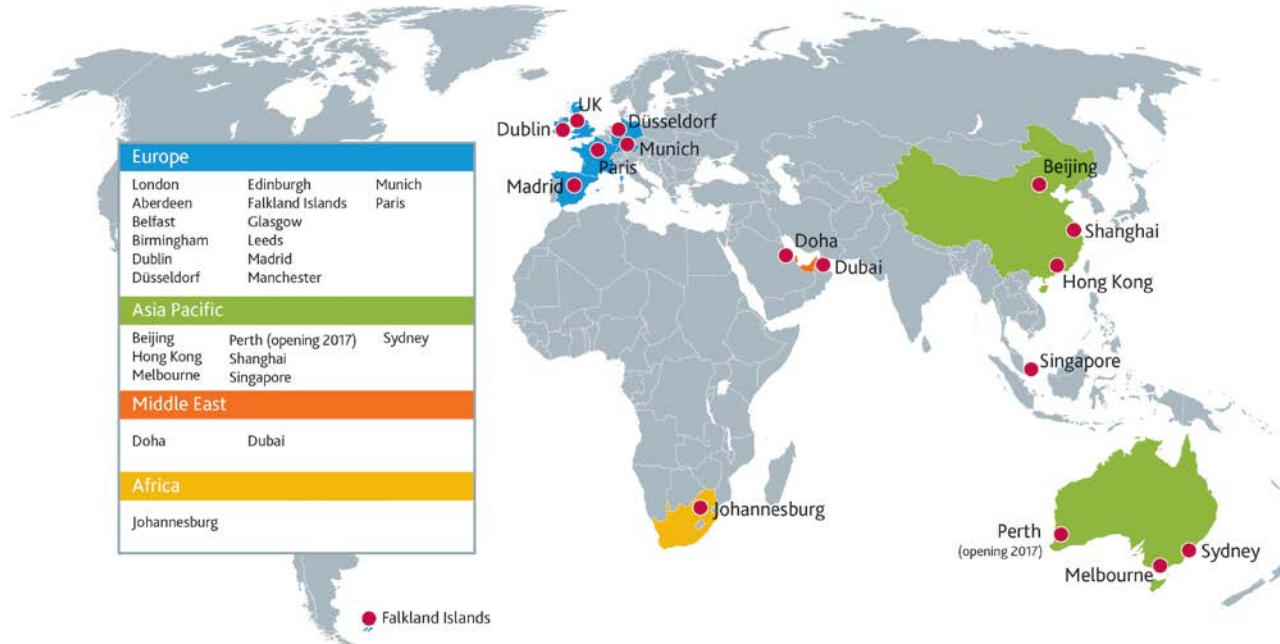
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