

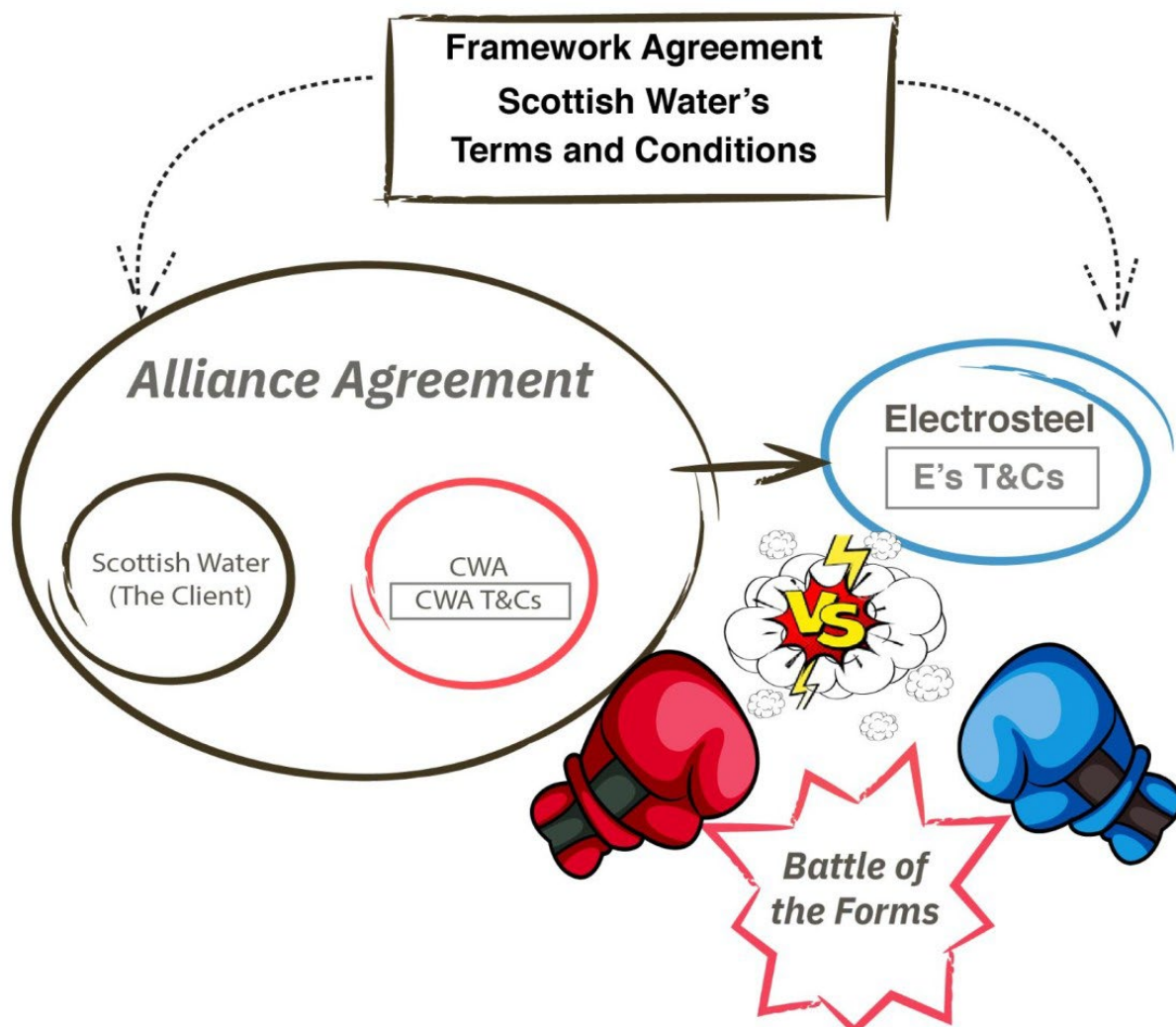
Formation of Construction Contract – Handle with Care (Part II) by Avan Fan

This article is the second part of the captioned topic. In Part I, we reviewed the contractual issues surrounding the incorporation of an Arbitration Clause into a Sub-Contract. In Part II, we now consider the contractual issues related to the “Battle of the Forms” and provide practical recommendations.

Battle of the Forms

Under common law, the traditional “mirror image” rule surrounding offer and acceptance requires that an acceptance must match the offer for a contract to be formed, whereas in disputes concerning the “Battle of the Forms”, the “last shot” rule applies. However, it is common for parties involved in a project to commence performance—such as initiating work or delivering materials—without a clear agreement on which terms govern the project, often resulting in disputes.

Battle of the forms disputes can lead to unexpected outcomes, in particular, where the parties have failed to agree as to which set of terms governs their relationship. A recent case of *Caledonia Water Alliance v Electrosteel Casting* [2024] CSOH87, dealt with this issue. This was a battle as to which of the respective parties’ own standard terms and conditions (T&Cs) applied. Surprisingly, the court undertook an objective consideration of what had been communicated between the parties by words and action and determined that the overarching NEC3 Framework Contract applied.



CWA stands for Caledonia Water Alliance

The Facts

In June 2015, Scottish Water (the Client) entered into an Alliance Agreement with the Caledonia Water Alliance, a joint venture, for the design and installation of water pipes for a project known as the South Edinburgh Resilience Scheme (“SERS”). This Agreement was based on the NEC3 Option C (Target Contract) terms. The Agreement obliged CWA, subject to certain conditions, to obtain items of plant, material and services from suppliers with whom Scottish Water had agreed contracts under an overarching framework (i.e., NEC3 Contracts).

In February 2016, Electrosteel (a pipework subcontractor) entered into a framework agreement with Scottish Water, the purpose of which was to allow Scottish Water or those working for it such as CWA to order plant and materials from them on the basis of pre-agreed terms and prices set out in the Framework Agreement. The Framework Agreement included a copy of Scottish Water’s Terms and Conditions of Contract for the Purchase of Goods and Services under a Framework Agreement (the “SWT&Cs”) which were expressly intended to govern all orders issued under the Framework Agreement.

Between June 2018 and May 2022, CWA placed sixty (60) orders with Electrosteel for ductile iron pipes for the SERS project. Each order was made via a purchase order from CWA followed by an order confirmation from Electrosteel. Both the purchase orders and the order confirmations contained standard wording seeking to incorporate each party’s standard terms and conditions. A dispute arose over whether either of these terms and conditions applied in preference to the SWT&Cs required by the Framework Agreement.

The Scottish Court’s Decision

Based on the following key points, the Scottish Court determined that the SWT&Cs applied to the contracts:

a) Awareness of framework terms:

Both parties (i.e., CWA and Electrosteel) demonstrated a clear understanding that their contractual relationship was to be governed by the NEC3 Framework Agreement, which included the SWT&Cs. This mutual awareness was further evidenced by a “Supplier Guide” prepared by Electrosteel which explicitly confirmed that the Framework Agreement had been awarded without any amendments or deviations from the SWT&Cs.

This reinforced the mutual expectation that the SWT&Cs would comprehensively regulate the contractual obligations and commercial arrangements between the parties.

b) Objective consideration of party communications:

The Court adopted an objective approach in evaluating the communications and conduct of the parties throughout the course of their dealings. This assessment encompassed the initial establishment of the commercial relationship, the exchange of purchase orders and corresponding order confirmations, and the consistent reference to the SERS project and Scottish Water.

Although each party's documentation made reference to their respective standard terms and conditions, there was no substantive evidence to suggest an intention by either party to depart from the agreed SWT&Cs under the Framework Agreement.

The Court further acknowledged that the routine inclusion of standard terms within contractual documentation is a common and accepted practice within the industry, and such inclusion alone did not constitute an intention to supersede or override the governing Framework Agreement.

c) Party actions under the Framework Agreement:

Electrosteel's invoices consistently referenced a dedicated account number that had been specifically established for transactions conducted under the Scottish Water Framework Agreement. This administrative measure demonstrated alignment with the contractual framework and further reinforced the parties' adherence to its terms.

In addition, Electrosteel made rebate payments to Scottish Water in accordance with the obligations set out under the Framework Agreement, further evidencing its implementation and recognition as the governing contractual instrument for the transactions in question.

d) Common purpose:

The Court also noted that its interpretation was supported by the parties' joint purpose to participate in Scottish Water's framework arrangement. This purpose supported the application of the SWT&Cs as intended by the Framework Agreement.

The Court further observed that its interpretation was consistent with the shared commercial objective of both parties to participate in Scottish Water's framework arrangement. This mutual purpose provided contextual support for the application of the Standard Terms and Conditions (SWT&Cs) as set out in the NEC3 Framework Agreement. The parties' alignment with the overarching framework reinforced the conclusion that the SWT&Cs were intended to govern their contractual relationship.

Recommendations for Good Practices

1. In the case of the "Battle of the Forms", the 'last shot' rules usually apply, except where the communications between the parties by words and actions suggest other things.
2. Clear Communication: This applies to both the issue of the "Battle of the Forms" and "Back-to-Back" provisions. All terms should be clearly communicated and acknowledged. With the advancement of technology, it is easy to provide the soft copy of the main contract and any other related documents.
3. Clear words should be used if the sub-contract or sub-sub-contract is intended to adopt the same dispute resolution mechanism as the main contract.

PROJECT NEWS

Shui On – Cycle Links JV have been awarded a **HK\$1.03 billion** contract for the design and construction of a Fire Station cum Ambulance Depot with departmental quarters and facilities at Anderson Road Quarry Site, Sai Kung by Architectural Services Department. The project will provide a

fire station-cum-ambulance depot, and provide 132 departmental quarters (DQ) and other fire services facilities. The scope of the Project includes – i) construction of FSAD with a 5-bay appliance room; ii) re-provisioning of the CEPD store; iii) re-provisioning of the office of FSITF; iv) provision of outdoor parking spaces for FSD operational vehicles and outdoor parking spaces for DQ ; and v)provision of 132 DQ units and related facilities. The Contract was awarded in June 2025 and construction is scheduled for completion in 2028.

China State - Best Build Joint Venture have been awarded a **HK\$2.05 billion** contract for the Hung Shui Kiu effluent Polishing Plant Phase 1 - Civil works by Drainage Services Department. The project comprises construction of the civil works for sewage and sludge treatment facilities and the associated utilities and roadworks of the proposed Hung Shui Kiu Effluent Polishing Plant; construction of an administration building, a maintenance workshop building and a utility bridge; and other related Works. The Contract was awarded in June 2025 and the project is expected to take around 64 months to complete.

STAFF NEWS

We are pleased to announce that we now have even more NEC ECC Accredited PMs in the team, with [Peter Ingram](#), [Avan Fan](#), [Cr Rahul PUN](#), [CMgr, NECReg](#) all gaining their accreditations in the last few months. This has further strengthened our experience and capabilities to deliver NEC services from both the contractual and programming perspectives to our Clients. Congratulations to all.

COMPANY NEWS

The Contracts Group Limited are pleased to announce a strategic partnership with Digital Beehive, a trusted provider of digital solutions for NEC Contracts® administration. This collaboration merges decades of advisory expertise with cutting-edge cloud-based technology to offer a seamless and integrated approach to NEC3 and NEC4 contract implementation across Asia.

The partnership aims to promote best practices, transparency, and proactive contract management by delivering local training, digital solutions, and knowledge-sharing initiatives. With the combined strengths of both organisations, clients will benefit from practical support tailored to regional project conditions—aiming at improving collaboration and risk management to achieve better project outcomes.