

# NEC Secondary Option X2 Changes in the Law

Presented by  
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## About Us




GVE Commercial Solutions Ltd are a commercial management consultancy providing quantity surveying and programming services. Our consultants specialise in the NEC forms of contract.

Our NEC capability has principally been acquired through practical application and experience within a 'live' project environment, assisting both contractors and subcontractors.


Our specialist NEC services include;

- Commercial and contract management of projects,
- Bespoke training,
- Project health check reviews,
- Contract reviews,
- Programme management,
- Dispute avoidance and/or resolution.

For further information please see our website: [www.gvecs.co.uk](http://www.gvecs.co.uk)  
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**What is the 'law'?**

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**Definition**

'A system of rules, regulations, customs or practices which influences conduct or actions.'

Most laws are formally recognised and are publicly accessible.

Compliance with certain laws may be enforced by a 'controlling authority'.

Laws can generally be sub-divided into the following;

Public Law

This governs the relationship between individuals and the state.

Private Law

This is concerned with the relationship between individuals (which includes organisations).

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## Sources of English Law

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## English Law



## Sources of English Law



**'Primary legislation'** is the term used to describe the main laws passed by the legislative bodies of the UK e.g. Acts of the UK Parliament;

- Housing Grants, Construction & Regeneration Act 1996

**'Secondary or Delegated legislation'** is legislation made by a person or body with the authority given by primary legislation;

- The Scheme for Construction Contracts Regulations

**'Case law'** this is where a precedent is set by a judge on a matter of interpretation or principle, often relating to legislation;

- Eg: NEC Option X7 – Triple Point Technology v PTT Public Co Ltd case

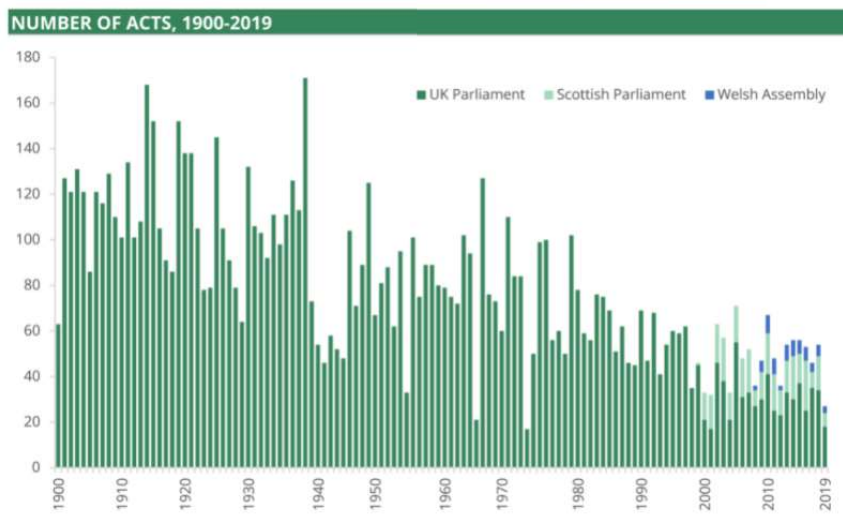
**'General customs'** this is a custom or usage that becomes common over time.

- 'Rights of Way' or 'Right to Roam'

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## Acts of Parliament



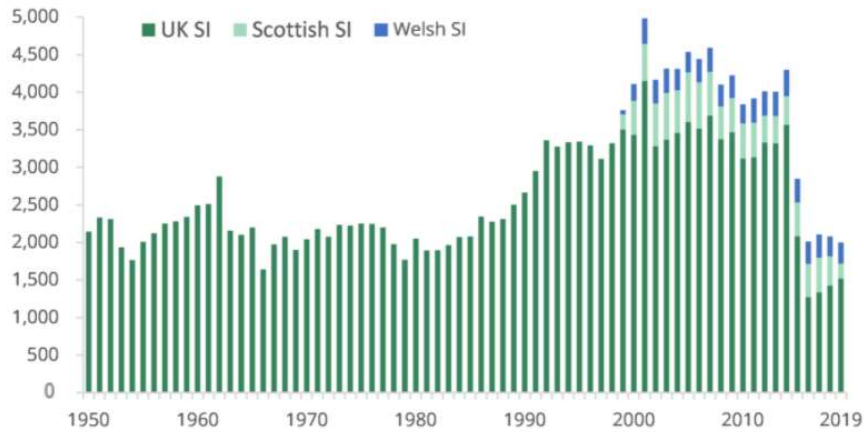
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## Statutory Instruments



### STATUTORY INSTRUMENTS, 1950-2019



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## Secondary Option X2

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## NEC Suite



Secondary option X2 can be found in the following NEC forms of contract;

- Engineering and Construction Contract (ECC),
- Engineering and Construction Subcontract (ECS),
- Professional Services Contract (PSC),
- Professional Services Subcontract (PSS),
- Term Service Contract (TSC),
- Term Service Subcontract (TSS),
- Facilities Management Contract (FMC),
- Facilities Management Subcontract (FMS),
- Supply Contract (SC),
- Alliance Contract (ALC).

The DBO form considers 'changes in the law' as a compensation event.

## X2 – Contract Procedure



All of the applicable NEC forms provide for the following;

*'A change in the law... is a compensation event... after the Contract Date'.*

**Note:** there is no definition of what a 'law' actually is.

Any change in the law is a compensation event.

The only stated qualification is that a change must occur 'after the Contract Date'.

The change 'is a compensation event' also leads to further questions as to how the matter is dealt with under the contract.





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**X2 – law**

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**X2 – law**

Although 'law' is not a defined term, the various NEC user guides contain the following information;

*'For the purposes of this clause, law would include a national or state statute, ordinance, decree, regulation (including building or safety regulations) and a by-law of a local or other duly constituted authority or other delegated legislation.'*

**Note:** the above text does not include 'case law', although it is accepted that the list is not comprehensive.

The NEC user guides further state that the change in the law must have an effect on Defined Cost to be a compensation event, although this 'restriction' is not expressly stated in the X2 wording.

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**X2 – compensation event**

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**X2 – compensation event**

A change in the law is stated to be a 'compensation event', but how is this administered under the contract?

Core clause 6 contains both a list of events that are compensation events and an associated compensation event procedure.

Are the secondary option compensation events administered in accordance with the procedure under core clause 6?

For NEC3 an 'optional' notification provision was included for the;

- Project Manager - ECC,
- Contractor - ECS,
- Service Manager - TSC,
- Supply Manager - SC,
- Either Party - PSC,

This 'optional' provision differs from the procedure at sub-clause 61.

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## X2 – compensation event



This 'optional' notification procedure under NEC3 appears to be included for the following reason;

*'... the clause is reciprocal in the sense that the (Employer) gains the benefit of a change in the law which reduces costs.'*

Furthermore, all of the X2 clauses include the wording;

*'If the effect of a compensation event ... is to reduce the total Defined Cost, the Prices are reduced.'*

This aligns with the corresponding requirement at sub-clause 63;

*'If the effect of a compensation event is to reduce the total Defined Cost, the Prices are not reduced except as stated in this contract.'*

Does this 'optional' notification provision affect the 'time bar' principle under sub-clause 61.3?



## X2 – Contract Date

## X2 – Contract Date



Contract Date is a defined term;

*'The Contract Date is the date when the contract came into existence.'*

How do you know when 'the contract' came into existence?

- Offer,
- Acceptance,
- Consideration,
- Performance.

**See:**

- RTS Flexible Systems Ltd v Molkerei Alois Muller GMBH & Co (2010) UKSC 14 & 38,
- Balfour Beatty v Van Elle Ltd. (2021) EWHC 794 (TCC).

**Note:** that a change in the law is only a compensation event after the Contract Date.



## X2 - location

## Location



The ECC, ECS, ALC, TSC, TSS, FMC and FMS forms state;

*' ... the country in which the Site (Affected Property) is located ... '*

**Note:** the definition of Working (Service) Areas includes the Site (Affected Property), but could also include other areas.

For the PSC and PSS forms, instead of a location the term *'law of the project'* is identified in Contract Data Part 1.

For the SC form, the term *'law of the country'* is identified in Contract Data Part 1.



## Issues to consider

## Be Aware That ....



The 'law of the contract' is stated in Contract Data Part 1, but different laws could apply to secondary option X2.

A change in the law is not a compensation event if it occurs before the Contract Date.

Confirm and agree the procedural requirements for a 'change in law' compensation event and ensure these are being complied with.

Consider sources where you can obtain information in relation to a change in the law, including; [www.legislation.gov.uk](http://www.legislation.gov.uk) for the UK.

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