

Construction Law Update

Brexit and Construction Contracts – How Can You Protect Against Risk?

Whilst no one yet knows whether the UK will agree a Brexit deal with the EU, or what that deal will be if there is one, or how long any transition period might be, it seems safe to say that Brexit is causing and will continue to cause considerable economic uncertainty.

Contractors are likely to be particularly vulnerable to the economic impacts of Brexit. Possible problems that a contractor might face on a post-Brexit project include:

- Increased costs for labour, materials etc. which cannot be recovered from the employer if the contract is fixed-price.
- Delays in importing materials from the EU (e.g. due to customs/border issues).
- Difficulty in obtaining EU workers, causing potential delay and cost issues.
- Changes in the applicable law which the contractor is required to comply with, resulting in a cost/time implication.

Companies entering into construction contracts which are expected to last beyond 29 March 2019 (the date the UK is due to leave the EU) should consider whether Brexit and its consequences might affect their ability to perform the contract, and if so, whether the contract can be amended to minimise risk.

Do the usual construction contract terms provide any relief from Brexit?

In short, no. A typical JCT or NEC contract is unlikely to provide a contractor with much protection from the possible consequences of Brexit. The majority of construction contracts are entered into on a fixed-price basis. This would leave the contractor unable to recover additional cost due to Brexit-related issues. It is likely to be difficult to shoehorn a Brexit-related issue into any of the usual relief events (Relevant Events/Matters or compensation events) entitling the contractor to claim additional time and/or cost. Force majeure provisions are also unlikely to be of assistance

because Brexit was foreseeable. Contractors generally have no right to escape a commercially unattractive contract by terminating for convenience.

A contractor who is concerned about the effect of Brexit on its ability to perform a contract should therefore consider bespoke contractual provisions. However, employers are likely to be equally apprehensive about the risks of Brexit and unwilling to shoulder all the financial burden. Careful consideration must therefore be given as to what specific risks/concerns the contractor most needs the contract to cater for and how they can be addressed in a fair and balanced way. For example, if key materials are being imported from the EU, the contractor's concerns might include customs delays, currency fluctuations and trade tariff costs. Seeking to pass all these risks onto the employer may not be realistic, so the contractor may need to take a view on what risks it absolutely cannot accept.

Claiming for delay and cost

For the contractor, an ideal drafting solution would be a wide-ranging clause which provides that if the contractor encounters any Brexit-related circumstances, the contractor can recover any proven additional cost and/or delay from the employer. However, such a widely drafted clause is unlikely to be palatable to most employers, who will require (at the very least) that risk is shared. Drafting solutions which would spread the risk more evenly between the parties could include:

- A clause which requires causation i.e. it must be proven by the contractor that Brexit was the **direct** or **sole** cause of the additional cost/delay.
- A clause which only allows a claim to be made if the effect on the contractor's performance is **substantial** or **material**.
- A clause which splits the risk between the parties e.g. the contractor may recover 50% of its proven additional cost from the employer and must bear

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the remainder itself, or the liquidated damages for delay are reduced so that the contractor is relieved from some of the financial consequences of delay.

Where the contractor wishes to be able to claim additional cost, an alternative to treating Brexit as a Relevant Event/compensation event type of occurrence would be to agree some form of price fluctuation provision. Although rarely used at present, standard form price fluctuation clauses do exist and incorporating or adapting these may provide the contractor with suitable protection. JCT no longer includes Fluctuations Options B and C in the printed forms, but they do still exist and can be downloaded from the JCT website. NEC contracts also offer a price fluctuation clause in the form of Option X1.

If these standard form clauses do not address the particular cost risk, a bespoke price fluctuation clause could be drafted. This would provide flexibility; the price fluctuation mechanism could be as simple or complex as the parties desire and incorporate whatever price index is considered appropriate.

Claiming for changes in applicable law

The government is widely expected to retain all existing EU laws for a period of time following Brexit before considering which laws to change. Laws relevant to construction are therefore likely to remain as currently drafted for quite some time, but the possibility of changes in law cannot be ruled out entirely and contractors may wish to safeguard against this risk, especially on very lengthy projects.

Many construction contracts already include provisions dealing with changes in the law. JCT contracts require contractors to comply with 'Statutory Requirements' and provide that a change in the Statutory Requirements after the 'Base Date' constitutes a variation. NEC contracts which incorporate Option X2 have a similar effect. Such provisions would offer some protection to contractors against the cost and time implications of having to comply with altered laws post-Brexit.

However, the standard form "change in law" clauses are often amended by employers so that the contractor can only claim for changes in law which were not reasonably foreseeable (or, in some cases, so the contractor cannot claim all). As it is arguable that a change in the law arising as a result of Brexit is reasonably foreseeable, it may be a good idea to amend the contract to state that any change in law arising from Brexit is not reasonably foreseeable so that the contractor is not prevented from bringing a claim.

Summary

Planning for an event as uncertain as Brexit is very difficult and businesses will almost certainly not be able to avoid the economic consequences of Brexit entirely. There are many different ways that construction contracts can be amended to provide the contractor with Brexit protection. However, contractors are likely to find it a real challenge to balance the need to win work against the need to cater for possible financial risks, especially if economic conditions worsen after Brexit and winning new jobs becomes harder.

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