

BREXIT AND CONSTRUCTION CONTRACTS

A view of the market

- ▶ What are the key risks arising from a hard/no deal Brexit?
- ▶ How are contractors seeking to manage risk?
- ▶ How are employers responding?

Main areas of Brexit related risk

Brexit creates any number of potential risks for the construction industry, with imported goods and materials and the labour force giving rise to key areas of risk. Risks include:

- ▶ increased costs of goods and materials – whether through the introduction of or changes to import duties/tariffs, exchange rate fluctuations, increased transport charges or otherwise;
- ▶ costs of double handling and off-site storage if goods are brought into the UK early and stock-piled off site;
- ▶ changes in law;
- ▶ non-availability of workers, and other potential increases in costs relating to workers;
- ▶ delays in importing and/or transporting materials into the UK including delays arising from customs checks (although it seems from new GOV.UK Guidance issued on 4/2/19 that this risk will be mitigated by the introduction of Transitional Simplified Procedures which will allow transportation of goods into the UK without the need for a full customs declaration at the border for the first 12 months after Brexit);
- ▶ loss of or changes to or new requirements for licences or consents required by the contractor to carry out the Works;
- ▶ increases in ancillary costs, such as fuels, utilities and the disposal of waste from the site; and
- ▶ difficulties in enforcing judgments overseas.

Without express drafting who bears the risk of increased cost/delays under JCT contracts?

This section is drafted on the basis that the contract has no specific Brexit related amendments or fluctuations provisions.

Under the standard **JCT Contracts** the contractor bears the risk of cost increases (including of goods and materials, labour, transport, duties, taxes and other costs), currency fluctuations and delays resulting from problems in obtaining goods and materials and labour issues. The prevailing view in the market is that the standard Relevant Events and Relevant Matters are not wide enough to include events resulting from the consequences of Brexit and accordingly that the risk of Brexit related costs and delays will lie with the contractor. However, there will be arguments from contractors that a hard/no deal Brexit constitutes a Relevant Event either on the basis of force majeure and/or on the basis of the exercise of a statutory power which directly affects the execution of the Works. Depending on the drafting of the relevant provisions, the prevailing view in market is that it is unlikely that Brexit will constitute force majeure, unless specifically provided for in the definition of Force Majeure or the relevant provisions of the contract and especially in contracts entered into after the Brexit referendum – but it remains to be seen how these arguments will play out and there are some dissenting views. We have yet to see a development of the argument on statutory powers.

In terms of change in Statutory Requirements, clause 2.15.2.1 of the JCT D&B form provides that "If after the Base Date there is a change in the Statutory Requirements which necessitates an alteration or modification to the Works, such alteration or modification shall be treated as a Change". The requirement for the change in Statutory Requirements to necessitate an alteration or modification to the Works means that general changes arising from the UK leaving the EU (eg changes in the position on import duties) will not constitute Changes under the Contract.

Enforceability of judgments overseas

This is a point to consider if a counterparty has substantial assets overseas against which the employer may need to take enforcement proceedings.

Leaving the EU in a 'no deal' scenario will bring an end to the current regime under the Brussels I Regulations and the UK will accede to the 2005 Hague Choice of Court Convention (**Convention**). Where the parties have an exclusive choice of court agreement this will be applied between the UK and EU/EEA states and other states which are party to the Convention. The Convention provides only for the recognition and enforcement of judgments where the parties have concluded an exclusive choice of court agreement.

Note that the JCT jurisdiction provision (Article 9) gives jurisdiction to the English Courts. Under Article 3b) of the Hague Convention this form of wording is deemed to provide for exclusive jurisdiction (even though it does not use the term "exclusive").

For projects involving a European (or indeed other non-domestic) contractor it would be wise to consider whether international arbitration (with a seat in London or other appropriate domestic location) offers a more certain position in relation to enforcement by reason of the favourable provisions of the New York Convention on the enforcement of arbitral awards and whether this outweighs the advantages of litigation as a dispute resolution procedure. Traditionally, litigation has been the preferred means of dispute resolution for domestic projects primarily for reasons of cost, difficulties with joinder of third parties which arise in an arbitration and access to the specialist TCC jurisdiction. These issues now need to be weighed against enforcement considerations. Consideration should also be given to whether local advice as to enforcement should be obtained.

Where the counterparty is not a domestic entity it is also important to ensure that the contract contains provisions providing for service on a process agent in England/Scotland (as applicable), as it will be more difficult to serve proceedings in foreign jurisdictions.

On a practical level, it will be more difficult to take evidence from a witness overseas post Brexit, but this is not something that it is possible to legislate for at contract stage.

What amendments are contractors currently seeking to mitigate Brexit related risks?

To date we have seen Brexit related amendments put forward by a small but increasing number of contractors. These amendments have adopted a number of different approaches, but there seem to be two main ones.

The first is a wide approach intended to protect the contractor from all increased costs and delays by giving him an extension of time, an entitlement to loss and expense and entitling him to claim for fluctuations. Not surprisingly we are not aware of this approach having been accepted by any employer clients to date.

The second approach relates only to changes in duties etc imposed on imports of goods and materials for the works and delays in importing such goods and materials. We have seen a variety of approaches here, some including risk sharing with the employer and an overall cap on the employer's liability for additional duties, and some which grant the contractor an extension of time, but no loss and expense. Some employers seem to be willing to consider a degree of risk sharing with the contractor in relation to one or both of these risks, subject to a capped exposure, but this is not universal. Some employers have refused to accept the contractor's proposed amendments and they have been withdrawn.

To date we have not seen wording put forward by an employer to confirm that the risk of cost increases and delays arising from Brexit lie with the contractor.

It goes without saying that it is hard to predict where the market will go on these issues, particularly without any certainty as to whether there will be a deal with the EU and what this will look like. Currently there is no consistent position with the outcome being determined on a scheme by scheme basis, depending on the nature of the risks arising on that scheme, the parties' views on them and their respective bargaining positions. In the meantime, contractors will need to assess the degree of risk involved in a scheme and how best to manage or seek to share that risk. Employers should check tender returns carefully for Brexit related assumptions (for example that there will be no adverse impact arising from Brexit) or requirements for Changes relating to Brexit to avoid unwelcome negotiations later on.

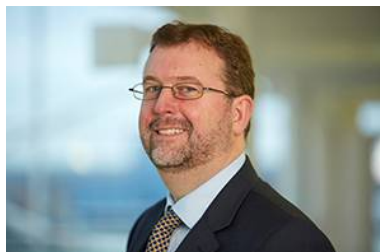
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