




Brexit Snapshot




May 2017

Risks and mitigation measures for contractors – Countdown to 2019 (and beyond)

By triggering Article 50 in March 2017, the UK Government set Brexit's wheels in motion.

We are monitoring developments closely: in this snapshot, we set out the key risks presenting themselves to contractors and suggest ways to mitigate such risks within contractual arrangements.

Risks	Key Contractual Provisions and Mitigation Measures
Labour Supply Restrictions on the free movement of EU citizens. A skills shortage will impact on price as well as the ability to deliver projects on time. 	Entitlement to Extension of Time / Loss and Expense Restrictions on free movement are unlikely to constitute an event of 'force majeure'. It is also common for Employers to exclude 'shortage of labour' as a basis of entitlement. Mitigation Measures <ul style="list-style-type: none"> — Consider using fluctuation provisions to absorb increased costs. — Amend clauses providing EoT/L&E entitlement arising from the exercise of statutory powers to include the exercise of such powers to restrict labour, goods and/or materials. — Include provision for the risk of significant increases in labour costs either to sit with the Employer or for these costs to be shared.
Change of Law The 'Great Repeal Bill' or other legislation may result in changes of law coming into effect. 	Change of Law / Statutory Requirements JCT and FIDIC contracts place the risk of changes in law with the Employer. NEC (absent Option X2) places the risk on the Contractor. However, it is common for Employers to exclude the Contractor's entitlement to relief where the change ought to have been reasonably foreseeable. Mitigation Measures <ul style="list-style-type: none"> — If passing the risk to the Employer is not an option, consider a risk share. For example, the Contractor could accept the risk of changes in law save for those directly due to increases in import duties and restrictions on labour. — Where an Employer does seek to exclude relief if a change ought to have been reasonably foreseeable, consider limiting this exclusion by carving out its application in relation to Brexit.
Tariffs and Currency Exchange Potential for introduction of tariffs/ barriers on goods and increased impact of currency fluctuations. 	Contract Sum Does the price include or exclude taxes, duties or other similar levies? What if there is a delay in the delivery of goods/materials due to access barriers being imposed? Mitigation Measures <ul style="list-style-type: none"> — Consider using fluctuation provisions. — Specify whether the price includes or excludes taxes, duties and/or other levies currently in existence or that may be levied in the future. — Provide for relief where there is delay in delivery due to barriers to access being imposed.

<p>Termination</p> <p>It is possible that issues arising as a result of Brexit may make contracts no longer economically viable.</p> 	<p>Force Majeure event? Changes in a party's economic circumstances generally do not qualify as force majeure events. Remedies such as frustration of the contract have very limited application.</p> <p>Exercise of Statutory Powers? It is not clear whether parties could invoke this provision in the JCT contract in light of Brexit to allow termination.</p> <p>Mitigation Measures</p> <ul style="list-style-type: none"> — If force majeure is defined in the contract, it might include Brexit as a basis for the Employer to terminate. If so, what is the relevant notice period? What recompense are you entitled to (e.g. demobilisation costs)? — Consider adding a ground of termination where the exercise of statutory powers restricts labour, goods and/or materials or more expressly to refer to Brexit. Note that the Employer is likely to require that this is a mutual right of termination! — If there is a termination for convenience provision, check the entitlement to recompense if this is activated.
<p>Enforcement of Judgments</p> <p>The current provision for reciprocal arrangements in other EU member states may not continue.</p> <p>This may impact upon the ability to enforce a judgment in other EU member states.</p> 	<p>Governing Law / Exclusive Jurisdiction</p> <p>This may be relevant to enforcement against a parent company or bondsman in another member state or where specialist European sub-contractors/suppliers are used.</p> <p>Mitigation Measures</p> <ul style="list-style-type: none"> — Seek a legal opinion, before contracting with a subcontractor in Europe or where their parent company/bondsman is domiciled in Europe, that specifically deals with the ability of the Contractor to enforce a judgment. — Check the governing law provision carefully to ensure that the parties have certainty as to what law will apply to contractual and non-contractual obligations and what courts will have jurisdiction. Consider the location of the assets.
<p>Funding</p> <p>For contracts funded by European Investment Bank or other European funding initiatives, long term funding arrangements may be uncertain.</p> 	<p>Termination for Convenience Provisions</p> <p>Is the Employer able to terminate for convenience?</p> <p>Mitigation Measures</p> <ul style="list-style-type: none"> — Consider requiring a UK guarantor or payment bond from the Employer. — Where this is not practical, ensure that there is a mechanism to recover for work completed or costs incurred where funding is withdrawn part way through a project. — Ensure that any sub-contracts will terminate upon termination of the main contract.

For more information or to discuss any concerns you may have, please email or telephone your usual CMS Construction contact.

The information contained in this snapshot is intended for general purposes and guidance only and does not purport to constitute legal or professional advice.