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Brexit – construction market responses

Risks and mitigation measures

June 2018

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Since Article 50 was triggered in March 2017, major players in the construction industry have been closely watching the market to determine what any Brexit related strategy should look like and how that strategy can be translated into contractual provisions.

Our experience in working for some of the largest national and international contractors as well as key developers and investors allows us to monitor developments closely.

In this snapshot, we set out how this is taking shape.

| Contractual Provision | Approaches |
|--|---|
| Change in Law  | <ul style="list-style-type: none"> — We considered the application of the standard form change in law provisions in a Brexit context in our previous law now Brexit and construction contracts: how will your change in law clause respond? — In the past, Clients would seek to amend the standard form provisions so that the Contractor takes some or all of the risk – either for a prescribed period of time or on the basis of what was reasonably foreseeable at an agreed date (e.g. Base Date/ Tender Date/Date of the contract). — The current market position is for parties to accept that Brexit itself does not mean that any changes in law arising as a result are foreseeable. |
| Fluctuation / Indexation  | <ul style="list-style-type: none"> — Change in cost risk is more difficult because historically the Contractor would take the risk. Neither side wants to take the risk in something they cannot control, cannot predict and where they have no idea of the impact. — Subject to the nature and size of the project, a Contractor is likely to meet with fierce resistance to passing this risk back to the Client. We are yet to see an influx in the use of fluctuation provisions under the JCT but in NEC contracts, we are seeing increased use of Option X1. — A more collaborative option would be to include a 'material inefficiencies' clause. If additional resource is required (e.g. as a result of new duties or tariffs on the importation of plant and/or materials from the EU; any restriction on the ability of the Contractor to use staff from the EU) that renders the project financially unfeasible, both parties will agree a share of justified and mitigated additional costs incurred by the Contractor as a direct result of such events. This clause is essentially just an agreement to discuss but if linked into the dispute resolution procedure and/or the termination provisions it could be given more teeth. |
| Tariffs, Taxes, Customs etc.  | <p>Generally the Contractor is expected to take the risk of an increase in the cost of importing goods. In projects where the imported goods are of significant value or delivery of the goods is time critical within the programme, statements acknowledging the potential for increased costs are being included with one or a combination of the following provisions:</p> <ul style="list-style-type: none"> — Obligations requiring both parties to mitigate any additional taxes, duties, tariffs etc. arising as a result of the UK withdrawal; — An agreement to apportion any such additional costs by way of reimbursement to the Contractor up to a maximum aggregate percentage of the value of the relevant imported materials; — Acceptance by the Employer that if there is a delay to the importation of the materials into the UK as a consequence of the UK withdrawal, which in turn delays the Works, it is treated as a Relevant Event. |

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| Extensions of time Loss and Expense  | <p>— Entitlement to time and money arising from changes to statutory requirements is being dealt with by statements acknowledging that the full implications of the UK's withdrawal from the EU are not generally known at the Base Date. This deals with claims where the entitlement is otherwise linked to foreseeability.</p> |
| Force Majeure  | <p>— We are not aware of attempts to argue that 'Brexit' is a force majeure event. A broad definition of force majeure may retain this possibility.</p> |
| Termination at Will  | <p>— We have yet to see this contractual provision being used as a risk mitigation mechanism for Brexit.</p> |
| Condition Precedents to Practical Completion  | <p>— Contractual provisions listing conditions precedent (CPs) to practical completion are now being reviewed with more rigour in the context of any CPs that require compliance with up to date European standards.</p> <p>— In some instances, a change to such standards or an instruction to rectify a discrepancy in the contract documents as to which standard applies might not directly result in a cost implication but the timing could result in the Contractor needing to replace otherwise completed elements of the works in order to meet the revised standard. This is particularly relevant under an NEC4 contract because the Contractor's entitlement to a Compensation Event where this change results from a discrepancy between the Contract Documents has been removed.</p> |
| Key Personnel Clauses  | <p>— A concern around labour and skills shortages could lead to more sensitivity around key personnel clauses where the relevant personnel are EU workers. Long lists of 'Key Personnel' within contracts are becoming less acceptable.</p> |
| Bespoke Brexit clauses  | <p>— We have seen attempts to introduce bespoke Brexit clauses seeking to define potential adverse impact of Brexit and trigger events that entitle the Contractor to:</p> <ul style="list-style-type: none"> • force a renegotiation of the contract (during which time the Contractor's obligation to comply with the relevant obligations is deemed to be a reasonable endeavours obligation only); and • if such renegotiation fails, a right to terminate the contract. <p>To date, given the breadth of drafting and application for these clauses, they have not found favour.</p> |

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

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