

Blogging the B-Word Brexit

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With the planned Brexit Day fast approaching on 29 March, understandably we've seen an increase in queries and requests for advice relating to Brexit. I've also spoken at recent industry events for the Association for Consultancy and Engineering and the Chartered Institution for Highways and Transportation. I thought it would be helpful to "blog" some key themes.

No matter what the Brexit outcome – no deal, a Theresa May deal, Norway Plus (i.e. staying in the Customs Union, an extension of Article 50) - if some senior individuals in the industry, politicians, press, amongst others, are correct, there is a real risk of legal and economic uncertainty looming as well as some significant practical consequences arising from Brexit.

What are the primary risks to consider at this point in time?

What are the risks of laws changing?

For the time being many of the UK's laws, and many aspects of the trading position between the UK and EU, will remain unchanged. This is because, frankly, UK law needs to remain aligned with EU law to facilitate trade or because the UK law in question is not derived from EU law. Further, the [European Union \(Withdrawal\) Act 2018](#) plans on "Brexit day" to convert into UK law "most" of the EU law operative immediately before exit day.

Overtime the UK may look to change the EU-derived legislation where it is not seen fit for purpose or because the UK wishes to do things differently because of say obtaining a competitive advantage. This is going to take time - there's clearly been a backlog of legislation that hasn't yet made it through Parliament because of the political mess which is Brexit (the Aldous Bill regarding retentions is a good example, as commented on [here](#)); this backlog will need to clear and I expect time will tell how the UK does things its own way.

So the risk of a change in law imminently is probably small but it remains a risk. In the medium to long term change is more likely.

This is very relevant to the supply chain in the construction sector, especially those on longer term contracts. Most contracts will require parties to comply with the law or Statutory Requirements and they say very little about changes in law. If you are required to comply with the law in accordance with your agreement, unless specifically mentioned in a variation or change of law provision, the consultant, contractor or supplier, will be taking the risk of the change. If you are required to carry out additional work because the law is changed, this will be at your cost.

Different standard forms provide consultants and contractors with protections but the extent of that protection does vary, depending on the contract and drafting in question. The NEC forms, at Option X2 (only if selected in the Contract Data, which is not always the case) provide that a change in law will be a compensation event. In the 2016 JCT suite, the change in law provisions are drafted so that they provide remedies only if the legislative changes have an actual impact on the design and construction of the works. Bespoke contracts, where

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change in law provisions can be agreed, usually entitle you to additional time and money in the event of an unforeseeable change in law. It is not yet clear how this will actually be applied as Brexit is obviously foreseeable but the specifics are not.

Is your client an EU member state entity?

Another area of risk is if your client is a registered company in Europe (i.e. a Luxembourg developer, where there are distinct tax and accounting advantages for being a registered entity). There are many European registered developers in the UK. If you are not being paid and you need to commence proceedings to obtain payment, life is likely to be more difficult following Brexit.

At present UK judgments are automatically enforced in Europe. This may change after Brexit. The EU has stated earlier this year that the EU rules on recognition and enforcement of judgments will not apply to the UK and post-Brexit each Member State will apply its own national rules on enforcement of foreign judgments.

The UK Government has attempted to address some of this uncertainty through (i) draft legislation which provides that it will continue to enforce judgments from EU Member States where the relevant proceedings were commenced before Brexit: this is the [Civil Jurisdiction and Judgments \(Amendment\) \(EU Exit\) Regulations 2019](#); and (ii) by signing up to the *Hague Convention on Choice of Court Agreements 2005* in its own right in the event of a no deal (as noted [here](#)), but the *Convention* does not address all types of UK court judgements, such as interim injunctions and freezing orders.

This new regime will at the very least make enforcement uncertain, more expensive and time consuming.

What are the risks of uncertainty?

The other, and probably most significant, risk is the non-legal consequences of the Brexit process – the economic and practical impact.

This arises out of the uncertainty as to what the Brexit outcome is going to be (especially if the EU and UK do not agree a Withdrawal Agreement (the [Agreement on the withdrawal of the United Kingdom and Northern Ireland](#)

[from the European Union and the European Atomic Energy Community](#))), and also the consequences arising out of Brexit itself.

As noted, many business leaders in our sector have expressed a real concern for construction and infrastructure in the UK. For example:

- In the trade press they have said that there will be a hit to business confidence, clients not making investment decisions, and a significant construction downturn.
- If the free movement of people is abolished and mutual recognition of qualifications removed, many have commented that this is likely to have a real impact on resources in an already depleted sector - the Office of National Statistics figures show that one-third of workers on construction sites in London were from overseas, with 28% coming from the EU.
- A recent study by the Department for Business Skills and Innovation estimated that 64% of construction materials were imported from the EU. After Brexit, importers and exporters may face duties or limits on quantities (particularly if WTO terms are adopted) which could potentially lead to a shortage of construction materials and an increase in costs.

We are all likely to be hit by an economic downturn, if one does happen. What happens if projects do not materialise, are put on hold, or significantly reduced in scope? Further, the risk of delays in receiving materials and additional levies on them will have a direct impact on contractors, resulting in additional costs and potential delays to the programme. And prolongation will also impact consultants too.

The recourse available to contractors and consultants, if any, will depend on the building contract or appointment (as the case may be).

We are advising that consultants, contractors, sub-contractors and suppliers all need to future proof their agreements to deal with these risks.

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Contracts might become loss making or more difficult to perform and it is unlikely that parties will obtain relief from the consequences of these changes in the absence of express provisions. The fact that economic hardship will be suffered is not normally sufficient to claim relief and there is case law to this effect.

Further, it is unlikely that a party will be able to rely on a standard force majeure clause to seek relief from its obligations. Force majeure does not have a precise meaning under English law and it is usually defined as being a circumstance where obligations become impossible to perform as a result of an unforeseen event. Projects are unlikely to become impossible following Brexit and Brexit certainly isn't foreseeable.

Similarly the legal concept of frustration is unlikely to be of assistance - this mechanism allows contracts to be discharged in the event that circumstances change in a manner that make performing the obligations impossible, without the fault of either party. In a recent case (*Canary Wharf (BP4) T1 Limited and others v European Medicines Agency*, as reported on [here](#)) the circumstances relating to Brexit, including the tenant being required by the EU to move to Amsterdam, did not amount to frustration of their lease (valued at £500 million). EMA remain committed to lease despite external circumstances dictating that it moves abroad.

The best way to future proof against Brexit is to include a suitable "Brexit clause" in your contracts. They are being negotiated and certainly included in standard terms and conditions. These include express provisions to cater for the events arising out of Brexit, including specific triggers

for aspects such as inflation, taxes, or general increases in procurement costs. Are you looking at this?

Anything positive?

The risks arising from Brexit produce an opportunity to audit your standard terms and conditions and ensure they are defining the contractual relationship properly. And where appropriate your bespoke terms and contracts generally should mitigate against the risk.

Brexit can be considered an industry disruptor, a catalyst for change and innovation. This will present opportunities.

Innovation in technology is one area to focus on and is likely to be at the forefront of any progress. Technology on our roads might be able to deal with the backlog of lorries at our ports following Brexit, for example. In a toughening market technology might be helpful to streamline the payment, procurement, or even initial contracting and design processes. The key feature will be maximizing efficiency in an effort to keep cash flowing and drive down costs associated with overhead and delays. The industry is already surging forward with BIM, and its potential uses are continuously being explored.

And following Brexit we can expect a significant push to improve general industry practices, specifically around payment. The Civil Service and Parliament will have more time to resolve these issues.

We all might be tired of the B-Word, but we can't ignore it. We must deal with Brexit in whatever form it takes and, where possible, embrace the change.



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