No deal Brexit and the construction sector – what do you need to know?

In the current political climate and with a no-deal Brexit looming, it is essential that all professionals give careful thought to the implications of a no deal Brexit on their business position.

For the construction industry, it is important that businesses understand how they will be affected and consider, in particular, the extent to which a no deal Brexit might affect ability to perform existing contracts and/or increase costs. There are a number of significant issues to bear in mind:

Business investment

A no deal outcome will leave significant uncertainty as regards the UK’s final position. The likely impact of that uncertainty is a downturn in business confidence and a reluctance to invest, from both foreign investors and UK financial institutions. The construction sector is likely to find it harder to attract investment which, if the risk is not carefully managed, could lead to suspension of current projects and postponement of new project start dates.

Imports and exports

Brexit will bring the inevitable difficulties associated with meeting standards, regulations and other red tape that come from trading as an external partner of the EU. It is impossible to predict exactly what the effect of this will be, but there is every chance of significant delays at border control as paperwork is checked which may, in turn, impact on project completion dates and increase project costs. There is also the issue of tariffs that may be imposed on the import/export of goods to and from the EU. Whilst the government’s proposed no-deal tariff regime will implement a 0% tariff on the vast majority of goods relevant to the construction sector for a period of up to 12 months, there remains concern as to when and what tariffs will be implemented in the longer term.

This uncertainty in cost will need to be managed and included in pricing and contractual terms. This is a very practical and very real risk to the construction sector.

Workers

The potential post Brexit UK immigration policy will have huge implications for the construction sector, which relies heavily on the use of labour from the EU. Any restriction of access for lower skilled workers will have significant consequences for the staffing of big construction projects.

Whilst it will be possible for EU workers already in the UK to apply to stay via means of ‘settled’ or ‘pre-settled’ status, it is likely that many will be deterred by the uncertain UK political and economic climate choose to return to the relative predictability of the EU. There will be options in place to allow for the employment of new EU workers (for example, an EU national could apply for a
Tier 2 Work Visa), but this is unlikely to be helpful to the construction industry. Visa applications will be costly and lengthy, and eligibility criteria (minimum salary requirements, proficient English language skills and adequate savings) mean that it will be difficult for lower paid construction workers to successfully apply.

The impact of a shortage in labour is both obvious and concerning – higher employment costs to attract a limited supply of British workers, the possibility of demand exceeding supply and, consequently, significant project delay and associated cost.

Changes in law – contractual provisions

For the time being it is likely that many of the UK’s laws, and many aspects of the trading position between the UK and the EU will remain unchanged. This is because either 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. It is possible that the UK may change EU derived legislation over time, though this is likely to be medium to long term, rather than short term, change.

This is relevant to those operating on longer term contracts. Most contracts oblige the parties to comply with the law or statutory requirements but say very little about any subsequent changes to the law. If you are required to comply with the law in accordance with your agreement, and in the absence of a specific clause to the contrary, the fall-back position is that the consultant, contractor or supplier will carry the risk of the change. So, if you are required to carry out any additional work because of the change in law, this will be at your own cost.

The protection offered to contractors by standard form contracts varies. The NEC forms, at Option X2, provide that a change in law will be a compensation event. Under JCT, the change of law provisions provide a remedy only where the changes have an actual impact on the design and construction of the works. The contract is usually amended so that the contractor can only claim for damages where changes in law are unforeseeable. It is not clear how such a proviso will be applied in future as whilst Brexit itself is obviously foreseeable, the specifics of any change arguably are not.

It is similarly unlikely that a party will be able to rely on a standard force majeure clause to seek relief from its obligations as, again, it will be difficult to prove the unforeseeability that is required. Likewise, the legal concept of frustration is unlikely to assist. The recent case of Canary Wharf (BP4) T1 Limited and others v European Medicines Agency held that circumstances relation to Brexit, including the tenant being required by the EU to move to Amsterdam, did not amount to frustration of their lease.

It follows that the best way to future proof contracts against Brexit is to include a ‘Brexit clause’, which we consider further below.

Changes in law – disputes

Management of domestic disputes (including pre-action protocols) should not be significantly impacted by a no deal Brexit. However, there are some issues of which industry professionals contracting with EU states should be aware, both in respect of negotiating contractual causes regarding dispute resolution and, also, when a dispute arises.

First, in international/cross border disputes where contracting parties are negotiating on jurisdiction clauses, it may be more difficult for a UK based entity to obtain agreement for the matter in question to be heard in the English courts.
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There may also be difficulties enforcing UK judgments in Europe. The Brussels Regulation will no longer apply, and UK businesses should therefore anticipate a preference for non-UK courts and non-UK law jurisdiction clauses. EU rules on recognition and enforcements of judgments will not apply to the UK and post Brexit each member state will apply its own national rules on enforcement of foreign (UK) judgments. Enforcement will become uncertain, more expensive and time consuming.

It is also worth bearing in mind that the anticipated devaluation of sterling by a no deal Brexit may have an adverse impact on the value of claims being pursued or defended with value assessed in a foreign currency. Provision should be made by those who are in such scenarios by way of sensible internal projections of currency change and impact on the claim value.

Data Protection

Having only just come to terms with the changes implemented as a result of the introduction of the EU General Data Protection Regulation (“EU GDPR”) in 2018, the industry will unfortunately once again need to revisit the issue of data protection as a no deal Brexit looms.

The government has already put in place law to replace the EU GDPR with a new ‘UK GDPR’, which is largely identical. This means that for many businesses operating solely in the UK, there is unlikely to be any practical change. All that will be required is a minor update to existing templates to reflect the change to the UK GDPR.

For those transferring and storing data outside of the UK, however, the position is more complex. In the event of a no deal Brexit the UK will become a ‘third country’ for the purposes of data protection. UK organisations will be subject to strict data transfer rules, set out in the EU GDPR. As and when the UK can show the EU that it is a safe place for data processing it may be given ‘adequacy’ status and will no longer be treated as third country, meaning that data can flow unrestricted. Unfortunately, however, the process of obtaining ‘adequacy’ is likely to be long and drawn out, meaning that restrictions on data transfer will certainly apply when the UK finally leaves the EU. Here’s a summary of what you need to know:

- Transfers from the UK should be unproblematic on the basis that the UK has recognised adequate levels of data protection in (1) all the EU countries and (2) all the countries recognised by the EU as adequate. Businesses will therefore be able to continue transferring data to those countries without problems.

- Transfer of data from the EU to the UK will be trickier. The UK’s status as a ‘third country’ means that companies based in the EU will not be able to lawfully transfer personal data unless certain safeguards are put in place. There are a few limited exceptions to this, but these are likely to apply only rarely. The easiest way to ensure legal transfer of data will be to enter into standard contractual clauses (“SCCs”) with the EU sender of the data. SSCs are signed by both the sender and receiver of the data and include contractual obligations which protect personal data when it leaves the EU. Businesses who are likely to want a continued flow of data from the EU following Brexit should consider inclusion of these SSCs and take advice if required.

- If UK businesses are receiving data from non EU countries that have been awarded ‘adequacy’ status by the EU, that country will probably have its own legal restrictions on the transfer of data to countries outside the EU (after a no deal Brexit, this will include the UK). The UK
government is working with these countries to make specific arrangements for data transfer to the UK but again, this could be a lengthy process.

- Any UK based business offering goods or services to individuals in the EU will need to consider the appointment of a European Representative. The representative will be an individual company or organisation established in the EU and must be able to represent the business regarding its obligations under the EU GDPR. This representative should be accessible to supervisory authorities and information about the data representative should be included in the organisation’s privacy notice. The representative will be based in the EU state to and from which the majority of the data is transferred.

- Are you involved in the running of UK businesses carrying out cross border processing within the EEA (i.e. do you have an office, branch or establishment in the UK where your processing is likely to affect individuals in one or more of the EU states and/or do you have branches/related business in one or more EU states?) If so, post Brexit the business will no longer be able to benefit from the EU GDPR One-Stop-Shop provisions. Currently a single supervisory authority acts as lead on behalf of other EU supervisory authorities, regardless of the amount of EU countries involved. This means only one fine in case of any breach of data protection rules. Post Brexit these One-Stop-Shop provisions will no longer apply, meaning that there is scope for businesses with a significant EU presence to be investigated and thus fined by more than one supervisory authority. This could obviously be a significant risk to your businesses and you may which to consider what resources are available to deal with enquiries from various supervisory authorities e.g. cyber liability insurance.

In summary, data protection post a non-deal Brexit is a complex issue, and is highly particular to the manner in which data is transferred by a particular organisation. If you have any concerns, the complexities and ambiguities of this issue mean it would be pertinent to seek legal advice.

**What can be done?**

The uncertainties associated with a no deal Brexit should rightly be of concern to the construction industry. There is, however, no reason for panic – whilst it certainly warrants careful thought and consideration, there are ways and means of ‘future-proofing’ against the potential negative implications of a no deal Brexit.

First, there are some straightforward measures that can be put in place:

- Give thought now, in advance of Brexit, to where your future workforce will come from.
- Consider making provision at this stage for the risk of increased wages further down the line.
- Think about stockpiling materials where you can, before a potential increase in costs.
- Consider the use of more UK produced goods and materials to mitigate against increased costs.
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- Open dialogue and work flexibly and effectively with your supply chain.
- Price future contracts with risks and costings in mind.
- Be aware of the changes in data protection law and seek further advice if you are concerned as to how the changes will affect you.

However, more important still is to revisit your standard contract terms and conditions and, if possible, avoid a totally fixed contract. Create mechanisms that allow to adaptations to the contract and encourage continued dialogue between the parties. If you have not already done so, consider and take advice as regards the addition of a ‘Brexit Clause’, now a common inclusion in construction contracts. This will enable you to agree certain triggers (such as inflation, taxes or general increases in procurement costs) which allow for renegotiation and/or termination of the contract.

Finally, try and see the positives in the uncertainties that lie ahead. This is a great opportunity to revisit possibly dated standard terms and conditions and fine tune bespoke terms and conditions to mitigate against future risks. We may all be fed up of hearing about Brexit, but we can’t avoid it – it’s now time to tackle it head on and embrace the change.

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