

Contract drafting and Brexit: considerations for local authorities

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As Brexit Day inches closer there are many things for local authorities to consider. One of which is whether contracts already in place or currently being negotiated will still be accurate or support council business after Brexit. Many contracts will not be affected materially by Brexit but if not already doing so local authorities should identify any areas of material risk as well as asking whether there are more mundane amendments that need to be made.

The results of such an exercise may include the identification of categories of existing contracts that require renegotiation (and an assessment of what is possible legally/commercially on that front) and the amendment of contract templates.

Potential high risk arrangements for local authorities include contracts for social care services that rely heavily on employees/agency staff likely to be from the EU rather than UK citizens, for example, home care services. Additionally, contracts for services that use personal data where the data is processed outside of the UK.

Some of the basic issues that such a review should take into account are set out in the following paragraphs.

1. Legislative change

The potential for material legislative change in the UK needs to be recognised. Local authorities should consider carefully who will bear the cost of legislative changes that impact on the delivery of the contract. Commonly, the allocation of risk in relation to such changes is covered off in the change control provisions of an agreement and any associated pricing principles. These provisions will need to be given careful consideration going forward.

2. Defining the EU

UK law governed contracts now need to be drafted in a way that recognises that directly applicable EU legislation may cease to apply and certain domestic legislation derived from EU law may be repealed. If we have a transition period, the legal landscape in the short run remains the same. However, if there is a no-deal scenario or the contracts are longer term they will need to be future-proofed insofar as possible to recognise the potential for this kind of change. Such future-proofing may be addressed in contractual interpretation provisions, as well as in clauses and definitions where specific reference to EU legislation is made. Current contracts will need to be kept under review and change notes agreed where provisions reflecting specific EU legislation become obsolete.

In particular this will have an impact on data protection clauses where under the GDPR data can be processed anywhere in the EEA. The UK will no longer be a member of the EEA so may have to get particular approvals or assurances about data coming from or going to the EEA (see our more detailed article on data processing).

3. Termination/force majeure

In relation to future transactions, it may be appropriate to include an express termination provision linked to specific impacts of Brexit. Specific termination triggers may also be included in relation to the impact of legislative change or changes in the commercial profile of the agreement e.g. due to cost of performance.

Of course, the procurement savvy among you will know that contracts awarded under the Public Contracts Regulations 2015 contain termination provisions as set out in Regulation 73. Some of these refer either directly or indirectly to EU institutions and legislation. This will need to be amended to ensure that only domestic legislation and judiciaries are referenced.

Where appropriate, force majeure clauses may be drafted to expressly recognise that issues connected with Brexit may or may not constitute a force majeure event and allow relief from obligations under the contract or termination. The commonly held view is that without specific drafting Brexit will not be a force majeure event because it has been foreseen and could be managed.

The termination and force majeure provisions of existing long term contracts are likely to come under significant scrutiny in the coming months and years, as their performance or commercial rationale is challenged by Brexit, and parties seek to renegotiate or terminate.

Another option is to include an 'adverse impact' clause, defining circumstances that impact adversely on one or both parties e.g. cost of service provision increasing or legislative changes making contractual adherence impossible. In these cases, this can be linked to the adverse impact being caused directly (or indirectly although that creates uncertainty) by Brexit and set out how the parties should manage the continuation of the contract. This could be seen as an agreement to agree so careful drafting will be required.

4. Dispute resolution

To the extent that a local authority contract contains cross-border elements or the supplier is based in another EU member state it may be preferable to agree to arbitration of disputes relating to their commercial contracts rather than UK courts pending confirmation of how the new arrangements between the UK and EU will work. This is unlikely to impact on the majority of local authority contracts.

If you would like to discuss how we can assist you in reviewing your contracts, including how to prioritise the most risky contracts, and advising on appropriate amendments please contact [Anja Beriro](mailto:anja.beriro@brownejacobson.com).

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