

Legal issues for UK construction businesses

March 2019

Our latest round-up of Dentons' recent articles on topics that affect UK construction businesses.

For further information on the topics below, please contact one of the team listed under "Key Contacts".

Topic	Issue	Key Dates/Issues
Brexit		
Preparing for the UK's exit from the EU	<p>The EU has agreed to extend the two-year notice period under Article 50 and the UK Parliament continues to grapple with how to leave the EU. In the meantime, leaving without a deal remains an option and businesses must crack on with their preparation for a no deal Brexit.</p> <p>Apart from the stagnating effect of Brexit on the economy, businesses' key areas of concern include:</p> <ul style="list-style-type: none"> - the effect of Brexit on trade contracts (see next item); - changes to the immigration system which could affect labour supply (see the immigration section below); - increased costs due to changes to customs procedures and tariffs; - difficulties in obtaining goods on time or at all (at the required price); and - the effect of delays in goods or services being delivered (who will be responsible?). <p>For assistance in preparing for the effects of Brexit or to request our full briefing on "Brexit: issues for construction", get in touch one of the Key Contacts.</p>	<ul style="list-style-type: none"> - Request our analysis of the effects of a no-deal Brexit on construction by emailing one of the Key Contacts or click here. - Guidance on preparing for Brexit can be found on Dentons' Issues and Opportunities Brexit webpage.

<p>The effect of Brexit on your contracts</p>	<p>The High Court's decision in <i>Canary Wharf Limited v. European Medicines Agency</i> [2019] EWHC 335 (Ch) confirmed that Brexit will not frustrate (i.e. bring to a premature end) a lease. In Brexit not enough to frustrate a lease, our Real Estate colleagues summarise the decision.</p> <p>Note that the court has granted leave to appeal this decision.</p> <p>Canary Wharf is the first of many Brexit-related cases expected to be reviewed by the courts. Key clauses likely to be under the spotlight include provisions dealing with interpretation, pricing, payment and financial issues, force majeure, termination, change in law, material adverse change and dispute resolution.</p> <p>If you need support in reviewing the practical and legal effects of Brexit on your business and particularly on your current contracts or those you are negotiating, get in touch with one of the Key Contacts.</p>	<ul style="list-style-type: none"> - Review your current contracts to check what effect Brexit is likely to have on your obligations. - Negotiate future contracts to ensure their provisions are "Brexit-proof".
<p>Construction</p>		
<p>Our review of 2018 ... and a forecast for 2019</p>	<p>In January 2019, we published our UK Construction 2018 review and a look at what lies ahead in 2019, which covers a range of issues including Brexit, payment and contract issues, new contracts, conflict avoidance, alternative dispute resolution and adjudication procedures, and enforcement issues.</p>	<ul style="list-style-type: none"> - See the summaries in the "What lies ahead" boxes at the end of each section in this review.
<p>Project Bank Accounts</p>	<p>Carillion's insolvency in early 2018 placed the industry's payment practices under a glaring spotlight. Setting up Project Bank Accounts (PBAs) to ensure direct payments are made promptly to the supply chain is a key way in which payment can be made fairer.</p> <p>Mark Macaulay and Tracey Summerell consider the use of PBAs in Project Bank Accounts: making payment fair.</p>	<ul style="list-style-type: none"> - The use of PBAs to make the payment process fairer and quicker. - The advantages and disadvantages of PBAs. - A summary of the Public Sector Supply Chains (Project Bank Accounts) Bill 2017-19.

Dispute resolution		
Can/should adjudicators take on a dual role?	In an article first published in Building Magazine on 1 February 2019, Akin Akinbode and Tracey Summerell considered the complications of dual role clauses for adjudicators . In <i>Beach Homes Ltd v. Hazell and Another</i> [2018] EWHC 1847 (TCC), the adjudicator had accepted a reference that he interpreted as jurisdiction to act as both adjudicator and expert.	- Giving adjudicators power to also act as experts requires careful drafting of dispute resolution clauses which must comply with the Construction Act.
Legal professional privilege	In Appeal court upholds privilege , Gurbinder Grewal and Natalia Fludra discuss a recent court of appeal case which clarified the scope of legal professional privilege. This article was first published in Construction Law.	- Court of Appeal decision clarifies the scope of legal professional privilege.
Confidential settlements in the US	Colleagues in Dentons' Washington DC office consider Recent developments which raise questions regarding confidential settlements in the US. Various prominent figures have been in the news recently regarding attempts to conceal salacious allegations made against them by entering into settlements containing confidentiality clauses. Some have suggested that the public's right to information identifying potential misconduct should take precedence over attempts to hide misconduct in exchange for payment.	- Should the public's right to information identifying potential misconduct take precedence over attempts to hide misconduct in exchange for payment (as part of a confidential settlement agreement)?
Employment		
Latest updates	<p>Our UK Employment team has published a variety of articles in the last couple of months that will be of interest to HR teams and business owners/directors alike:</p> <ul style="list-style-type: none"> • UK employment law round-up, Feb 2019 • Age discrimination: hitting the headlines • Leading people – ACAS publishes guidance for effective leadership • EU clarification: worker minimum holiday pay cannot be reduced to reflect short-time working • Looking forward in 2019: gender pay gap reporting, the second wave • UK Employment Law Round-up – January 2019 <p>For further updates, you can sign up to the Employment team's blog here.</p>	<ul style="list-style-type: none"> - Second gender pay gap reporting date approaches (5 April 2019). - New ACAS guidance on age discrimination. - Successful age discrimination claim brought by 88-year-old secretary.

Energy		
European renewables	In Another interesting year ahead for European renewables , Adam Brown reviews some of the key messages that emerged from Dentons' fourth annual workshop on investing in European renewables. No two jurisdictions in Europe present the sector with quite the same opportunities or challenges and Adam reviews the markets in Germany, France, Turkey, Poland, Italy, Czech Republic, Slovakia, Spain, Russia, the Ukraine and the UK.	<ul style="list-style-type: none"> - The stability of regulation will be an important factor in realising the sector's potential. - Success increasingly depends on developing new investment approaches.
Investing in renewable energy projects	The 2019 edition of Dentons Guide Investing in renewable energy projects in Europe provides snapshots of the industry across 20 jurisdictions in Europe and Central Asia.	<ul style="list-style-type: none"> - The renewable energy industry is at a crossroads. - A review of the diverse renewable markets.
Ending coal-fired power in Germany	In Germany takes the first steps towards the end of coal-fired power , our German colleagues have considered the conclusions of the Coal Commission's evaluation of a roadmap for the phase-out of coal-fired power production in Germany. These conclusions set the agenda for the next stage of the German energy transition.	<ul style="list-style-type: none"> - Germany's approach to phasing out coal-fired power production.
Environment		
F gas after Brexit	<p>New F gas registration requirements will apply in the event of a no-deal Brexit on 29 March 2019. Our UK Environment team is providing support to clients who are affected by the new system. If you would like to discuss whether you need to take action before Friday 12 April or have any questions relating to the new UK Regulations, our team is providing free email advice for your initial query.</p> <p>Read the full articles here: F gas after Brexit – New registration requirements.</p>	New F gas registration requirements if there is a no-deal Brexit on 29 March 2019.

Immigration		
<p>Preparing for the potential changes to the UK</p>	<p>Labour shortages are a key issue for the industry and are expected to worsen after Brexit. Fewer EU workers, combined with an ageing workforce and fewer young people joining the industry, could result in higher recruitment costs, rising wage bills, increased project costs and project delays, as well as missed government targets (e.g. on housebuilding).</p> <p>Without a deal in place on 29 March 2019, freedom of movement will cease abruptly and new arrivals from the EU will be subject to a visa regime. These issues pose a challenge to the industry's HR teams, but there is action that employers can take to support their current employees and protect their labour supply.</p> <p>Jessica Pattinson produced this guide in 2018: Brexit and Citizens' Rights: Guide for UK-based EU nationals. Jessica is currently advising clients on a broad range of immigration issues, but in particular on the EU Settlement Scheme and what EU nationals and their family members need to do to remain in the UK after Brexit. There is no one-size-fits-all approach and, for some, their circumstances will mean that the process is more complex.</p> <p>You can read Jessica's latest article on the government's white paper setting out proposals for a future immigration system here: Control of our borders: the 2021 vision.</p>	<ul style="list-style-type: none"> - Preparing for potential changes to the UK immigration scheme. - What can employers do now to help their EU national employees? - The government's proposals for a future immigration system.
Planning		
<p>2017 Affordable Housing and Viability Supplementary Planning Guidance (SPG)</p>	<p>In Viability – Speed of Delivery Matters, our planning team reviews the decision in <i>McCarthy and Stone Retirement Lifestyles Ltd v. Greater London Authority</i> [2018] EWHC 1202 (Admin) which had found the Mayor of London's 2017 Affordable Housing and Viability SPG unlawful in one respect: the SPG sought to require all planning applications that do not provide at least 35% affordable housing to be subject to early and late stage viability reviews (the "Viability Tested Route").</p>	<ul style="list-style-type: none"> - Decision-takers may find it harder to rely on policy alone to justify further viability reviews for schemes offering sub-threshold levels of affordable housing.
<p>Local development plan</p>	<p>In Failing to take account of the up to date local development plan, the Court of Session quashed a planning appeal refusal determined by the Scottish Ministers for failing to take account of the up to date local development plan.</p>	<p>The importance of monitoring [Scottish] assumptions made as part of the planning process.</p>

Real Estate

Contract – entire agreement clauses

In Ensuring an entire agreement clause is fit for purpose, our Real Estate team considered *Al-Hasawi v. Nottingham Forest Football Club Ltd* [2018] EWHC 2884 (Ch). This High Court decision confirmed that clear words to exclude misrepresentation claims are needed in an entire agreement clause intended to exclude liability for misrepresentation.

- If you want to exclude liability for misrepresentation, deal with this issue when drafting the entire agreement clause.

KEY CONTACTS



Akin Akinbode

London

D +44 20 7320 3934

akin.akinbode@dentons.com



Gurbinder Grewal

London

D +44 20 7320 3936

gurbinder.grewal@dentons.com



Kirsti Olson

Edinburgh

D +44 131 228 7211

kirsti.olson@dentons.com



Tracey Summerell

Milton Keynes

D +44 20 7320 6523

tracey.summerell@dentons.com



Esther McDermott

London

D +44 20 7320 3938

esther.mcdermott@dentons.com