

Brexit

Key issues for Construction

23 October 2020

Background

The UK left the EU on 31 January 2020 (**exit day**). However, this profound change has so far had limited impact on UK law and regulation. Under the agreement on the UK's withdrawal from the EU (the **Withdrawal Agreement**), the UK continues in most respects to be treated as if it were still part of the EU from exit day until 31 December 2020 (the **implementation period**). The Withdrawal Agreement provided a mechanism to extend the implementation period but it has not been used. It therefore appears that the full legal consequences of Brexit will begin to be felt from 1 January 2021.

The Withdrawal Agreement does not regulate future trade between the UK and EU, or any other area of potential future EU-UK cooperation, except to a limited extent in relation to Northern Ireland. It remains unclear if a deal on future UK-EU relations will be agreed by 31 December 2020. In some areas, there is an obvious legal fall-back framework in the absence of a deal (for example, if agreement is not reached on tariff-free trade, World Trade Organisation (WTO) (WTO rules) will apply); in other areas there is not. Whatever happens, those trading between the UK and EU will face significant regulatory changes (for example, in relation to customs). It also seems likely that, if the UK and EU reach a deal in the coming weeks, it may be a fairly "thin" agreement, meaning that negotiations on some aspects of the UK-EU post-Brexit relations may continue well beyond 2020.

For more detailed background, click [here](#).

This note summarises the key changes that affect the construction industry. A more detailed update on Brexit can be found in [Dentons' Brexit brochure](#).

The trade negotiations

At 11pm on 31 December 2020, the UK will leave the single market and the customs union. The UK and the EU have been negotiating the terms of their future relationship since February 2020. The negotiations continue to be complex, political and handled in the tightest of timescales. Their outcome is still hard to predict. The challenges facing the UK and EU in reaching agreement should not be underestimated. Nor should the challenge of implementing any consequent changes in what could be unprecedented – and uncomfortably short – lead-in periods. Remember, new trade agreements are normally phased in over several years.

Regardless of any trade agreement, UK businesses now have weeks to get used to new tariffs and regulatory procedures. Implementing these changes against the backdrop of a global pandemic does not, unfortunately, lighten the workload ahead. It remains to be seen whether any further progress can be made on the trade talks, and, even if agreement is reached, is likely to be more narrow than was hoped for back in February 2020.

Recap: the effect of the UK's exit from the EU on UK law

Retention of EU law in the UK

EU law in force in the UK at the end of the implementation period and absorb it into UK law. Most EU law will then apply in the UK in its new form as domestic UK law ("retained EU law" or EU-based UK law). To ensure this transition process under the 2018 Act is smooth, the government has been issuing secondary legislation to deal with any deficiencies in the retained EU law (such as references to EU structures or cooperation, which will become inapplicable from the end of the implementation period) as well as explanatory memoranda and technical notices to help businesses prepare. This secondary legislation will become operative at the end of the implementation period (by virtue of The European Union (Withdrawal Agreement) Act 2020 (2020 Act)).

Will regulatory changes affect the construction industry?

As with EU law generally, the existing body of EU rules relevant to construction's core business (such as health and safety laws) will be carried over into UK law on exit day. From a practical point of view, the substance of many of those laws will not change at the end of the implementation period – at least not immediately.

Longer term, after the implementation period (regardless of what is agreed), and given the potential for problems arising from future divergence between UK and EU law, the UK government and businesses will need to keep up to date with changes to EU law from 1 January 2021. To support this exercise, records of changes will be kept and monitored by the National Archives in the [EU Exit Web Archive](#) and the [Legislation originating from the EU](#).

Changes to the way we conduct business

However, in addition to industry-specific regulations (like the building regulations), construction businesses are subject to a wide range of regulations relating to general business operations. From employing staff to your business location, from labelling and importing goods to paying tax, new regulations and processes introduced in the UK from 1 January 2021, as well as any changes consequent on the trade negotiations, could affect many aspects of commercial operations.

The effect of no trade deal and potential regulatory divergence

In the event of no trade deal being agreed, the UK's departure from the EU single market and the customs union and the creation of a "hard border" with EU member states will mean that British goods will be checked for compliance with EU regulations and for confirmation that they were created in the UK (the "rules of origin" check) and will be subject to tax, excise duty and/or tariffs. This will create "friction" at the border: without a trade deal, the end of the implementation period will see the end of frictionless UK/EU trade.

Construction businesses – like all other UK businesses – must prepare for these regulatory and procedural changes that will come into effect on 1 January 2021 regardless of whether a trade deal is agreed. Those who do not identify and address potential changes in these areas (on which, more below) risk extra costs, delays, disputes and losing current business and business opportunities.

Example

Here is an example of the effects of no deal within a UK-EU supply chain.

A UK contractor is engaged to work on a UK construction project which relies in part on goods shipped from the EU. The arrival of those goods in the early months of 2021 could be delayed for a number of reasons. The ports, customs authorities and haulage companies might struggle to operate under the new regime of customs checks, export declarations and other formalities that will come into effect and apply to such supply chains for the first time on 1 January 2021.

Even if the contractor's supply chain has mastered the new bureaucracy of UK-EU trade, the arrival of its goods might be delayed by the cumulative impact of others who have not. If the contractor does not receive the goods on site on time, it might not meet its completion date, thereby triggering various rights and obligations under its construction contract with the employer. Parties across its supply chain might seek to exercise one or more of a range of contractual claims from delay to loss and expense, or even force majeure. Disputes, further disruption and extra costs could follow. Add to this, in the event of no EU/UK agreement on, say tariffs, additional costs might be payable because the goods imported from the EU (on which no tariff is payable currently) will be subject to a tariff after 31 December 2020 under the new UK Global Tariff arrangements.

The UK government's preparation for no trade deal by 31 December 2020

Regardless of what is agreed (or not), from 1 January 2021, the UK as a "third country" will assume responsibility for policies and certain functions that for years have been in the EU's domain. The government has been preparing new systems and processes to manage this fundamental shift in governance and to provide resources to British businesses. As well as secondary legislation to facilitate the on-shoring of EU law into the UK, key legislation has been introduced into Parliament to ensure a smooth transition at the end of the implementation period, such as: The European Union (Withdrawal Agreement) Act; the Agriculture Bill; the Environment Bill; various financial services legislation; the Fisheries Bill; Immigration and Social Security Co-ordination (EU Withdrawal) Bill and the Trade Bill. More detail is set out in our bill and the Trade Bill. In summary:

- From 1 January 2021, the devolved administrations will assume new powers to regulate on a number of policy areas. To avoid regulatory divergence and ensure "seamless internal trade" and a level trade playing field between the four UK nations from that point, the government published **The Internal Markets Bill 2019-2020**. The bill fills a gap left by the UK's withdrawal and, while EU legal language is avoided, is based on EU law. It is currently progressing through Parliament.
- **The Trade Bill 2019-2021** aims to establish a new independent UK body, the Trade Remedies Authority, to protect UK firms against unfair trade practices and unforeseen surges in imports. The Trade Bill sets out the necessary measures to empower the UK government to develop the UK trade policy following the UK exit from the EU (see the current draft of the [explanatory notes](#)). The Taxation (Cross-border Trade) Act 2018 establishes a new customs framework for the operation of import tariffs and other export duties. It also provides a trade remedies framework which deals with anti-subsidy measures, anti-dumping and other safeguards.

In recent weeks, the government has ramped up its campaign to urge businesses to prepare, see [Business Secretary urges businesses to prepare for the end of the transition period](#). On 18 October 2020, the government published a warning that [Time is running out to prepare](#) and urged business leaders "to step up preparations for Australia-style arrangements from 1 January 2021". This guidance sets out action needed for all those: importing goods into the UK; exporting goods from the UK; travelling to the EU; living and working in the EU; and staying in the UK if you are an EU citizen. Further guidance can be found [here](#):

- the [government video](#) on what businesses need to do now;
- several useful checklists accessed through [The UK transition: time is running out](#) including: [importing goods into the UK](#), [exporting goods from the UK](#), [travelling to the EU](#), [living and working in the EU](#), and [staying in the UK if you're an EU citizen](#); and
- [UK Government Trade Hub](#) launched to support Scottish businesses.

Businesses can also create a personalised action list via the [government transition website](#) – but seek legal and other professional advice if in doubt about the new procedures and the potential effect on your businesses.

The urgent need for UK businesses to prepare

The complexity of UK supply chains in the construction industry means that all those involved in construction projects – from clients to contractors and professionals, to suppliers and individual workers – should be reviewing the commercial risks, collaborating with their supply chain, monitoring the ongoing UK/EU trade negotiations, understanding the new trade regimes, training employees and preparing for possible disruption.

Some aspects of UK-EU trade will change after exit day *whether or not the UK reaches a (or several) trade deal(s) with the EU*. If you have not done so already, it therefore makes sense to start reviewing how these changes could affect your business. Businesses which prepare for the possible impacts of "no deal" at the end of the implementation period are more likely to be prepared for the most disruptive outcome of the trade negotiations.

The detailed risk assessment for each business will vary from business to business depending on factors such as the nature and location of the business, where the supply chain operates, the types of projects involved, contracts used and the nationality of employees. Risks include labour shortages due to a reduction in EU staff with access to the UK labour market; border issues due to new regulations and bureaucracy; price increases due to new tariffs; and a range of contractual disputes, for example, arising from claims for project delays.

Key areas for review to minimise future commercial disruption

We have set out below a snapshot of the key areas businesses should be focusing on now to ensure readiness to trade effectively from 1 January 2021. See also the links provided below to our other Brexit flyers. Remember, others in your supply chain may not be as well prepared as you. **It is crucial to both work with and support others in your supply chain to effect the necessary changes – and review your contracts to cover any potential risks in this regard** (on which, more below). Be aware that if delays occur as a result of inadequate preparation for the implementation of these rules, businesses are unlikely to be able to establish, for example, "force majeure" claims if the delayed supply of goods causes delay to construction work.

New customs processes and how to prepare

The new **Border Operating Model (BOM)** (updated 8 October 2020) explains how the GB-EU border will work and the actions that traders, hauliers and passengers need to take to prepare for the new rules. The government is investing in jobs, infrastructure and technology at the border, and is providing grants aimed at growing the customs intermediary sector. Businesses can prepare for the new customs processes by following government guidance including: the BOM; moving goods under the Northern Ireland Protocol: Introduction (7 August 2020); get an EORI number; get someone to deal with customs for you (updated 16 October 2020); HMRC guidance on how to set up an account to defer duty payments when you import goods; apply for grants if your business completes customs declarations (updated 29 July 2020); get UK customs clearance when importing goods from outside the EU: step by step; and Goods Vehicle Movement Service end-to-end guide. This list is not exhaustive: refer to the BOM as your starting point.

Tariffs

- The Department for International Trade (DTI) launched the UK global tariff (UKGT) tool, **Check UK trade tariffs from 1 January 2021**, which sets out the UK import duty rates applicable to goods imported after 1 January 2021 (unless preferential arrangements exist). At the same time, it published its response to the **Public Consultation: the MFN Tariff Policy: The UK Global Tariff** and guidance on the tariffs. The UKGT tool enables businesses to check the tariff that will apply to imported goods from 1 January 2021 as well as the difference between what is payable now and from 1 January 2021.
- In relation to steel imports, the government is conducting a **Transition review of the steel safeguard measures** (30 September 2020) currently applied by the EU to check whether this existing EU trade remedy measure is suitable for the UK market. This measure increases the tariff rate once a specified quota has been exceeded.

Preparing for traffic disruption and new regulations affecting transportation

- The government is proceeding with its proposed legislative amendments for enforcing traffic management plans for outbound heavy commercial vehicles in Kent after 1 January 2021. (See **Enforcing Operation Brock plans in 2021.**)
- Those responsible for cross-border transport and the import of heavy machinery should monitor new regulations to keep up to date with laws relating to, for example, vehicle emissions such as: **New Heavy Duty Vehicles (Carbon Dioxide Emission Performance Standards) (Amendment) (EU Exit) Regulations 2020 (Draft)**.
- Hauliers operating across UK and EU borders should monitor progress on the proposed rules set out in the negotiating document published by the European Commission in March 2020 (updated 15 July and 18 August 2020) (see Title XII).

Establishing freeports

The government is working on plans to establish "freeports" as innovative trade hubs that have different customs rules to the rest of the country. The government's objective is to use them to boost global trade, attract inward investment and increase productivity.

Regulations affecting goods

- In September 2020, the Ministry of Housing, Communities & Local Government (MHCLG) published guidance providing practical information for placing construction products on the "GB" market (which includes England, Wales and Scotland, but not Northern Ireland) from 31 December 2020. The guidance, **Construction Products Regulation from 1 January 2021**, explains what the legislation will say (but note that the legislation is awaiting Parliamentary approval and is still subject to change). Guidance on goods placed on the Northern Irish market will follow.
- Businesses should prepare for the end of recognition of the CE mark in GB and affix the UK marking using a UK-recognised "approved body" by 1 January 2022. Some CE-marked goods may continue to be available in the UK market until 1 January 2022. "Frequently asked questions" are available in the guidance [here](#).

- To find out if you will need to use the new UK Conformity Assessment (UKCA) marking and how to use it, see the guidance issued by BEIS on [Using the UKCA mark from 1 January 2021](#). Additional guidance on placing these goods on the market can be found here: [placing manufactured goods on the market in Great Britain](#).
- The EU will decide on how UK products will be marketed in Europe after the implementation period ends. The European Commission is consulting on the Construction Products Regulation to improve how the EU construction products market functions. That [consultation](#) closes on 25 December 2020.
- Regulations relating to product safety and specific types of products have also been published. See, for example, the draft [Timber and Timber Products and FLEGT \(Amendment\) \(EU Exit\) Regulations 2020](#); and various regulations relating to the product safety and metrology framework including the draft [Product Safety and Metrology \(Amendment\) \(EU Exit\) Regulations 2020](#) and the [Draft Product Safety and Metrology etc. \(Amendment etc.\) \(UK \(NI\) Indication\) \(EU Exit\) Regulations 2020](#).

Other aspects of running a construction business affected by Brexit with or without a trade deal

Running your company – corporate law

Whether or not a trade deal is agreed, the law relating to the establishment and regulation of companies is not currently under negotiation. The establishment and regulation of companies in the UK has always been primarily a matter for domestic law, albeit subject to some EU minimum harmonisation directives. Some changes will be made under secondary legislation to smooth the process of embedding EU into UK laws. For more detail, see: [Brexit, key issues for corporate law and corporate M&A transactions](#). Companies should also consider whether they need a physical EU presence to continue their particular business in the EU.

Competition policies

Acknowledging that "competition drives down prices, creates a wider choice for consumers and leads to better quality products and services" (Business Secretary, Alok Sharma), the government has asked John Penrose MP to lead a review on how to bolster UK competition policy. (See government [news story](#).) A policy paper, setting out the [Terms of Reference: John Penrose MP report on competition policy](#) was issued on 14 September 2020.

Intellectual Property

The [Intellectual Property \(Amendment etc\) \(EU Exit\) Regulations 2020 \(SI 2020/1050\)](#), alongside its accompanying [explanatory memorandum](#), explain the position in relation to intellectual property (IP) laws (including changes made by five separate IP-related regulations in 2019 (see paragraph 6.3 of the explanatory memorandum) in the event of no trade deal. SI 2020/1050 ensures that the law (after 1 January 2021) properly reflects the UK's obligations in the Withdrawal Agreement, that the laws work effectively at the end of the implementation period and that the UK fully implements the arrangements set out in the Withdrawal Agreement.

Data protection

EU law relating to data protection applies until 31 December 2020: there is no change to the UK's data protection standards during the implementation period. Businesses that already comply with the General Data Protection Regulation (GDPR) will still need to take action if they receive personal data from the EEA. GDPR will be on-shored into UK law at the end of the implementation period and the Information Commissioner will remain the UK's independent supervisory authority on data protection.

In the event of no deal on data protection, the government has issued guidance on [Using personal data in your business or other organisation after the transition period](#) (16 October 2020) which explains what to do regarding data protection and data flows with the EU/EEA from 1 January 2021. You can also check the [Information Commissioner's Office \(ICO\) website](#) for guidance and additional resources. Or, call the ICO helpline on 0303 123 1113.

VAT

HMRC wrote a [letter to VAT-registered traders in Great Britain about leaving the EU – January 2020](#) confirming that the EU rules for VAT, customs and excise will remain applicable and the same until 31 December 2020. Businesses can sign up for help and support emails from HMRC [here](#). A further HMRC letter was sent to traders who trade with the EU on 18 October 2020 to explain how to deal with the new, post-Brexit, customs and tax rules. (Click [here](#) to read the letter.)

HMRC published [Changes to VAT treatment of overseas goods sold to customers from 1 January 2021](#) (20 July 2020) setting out the new VAT regime that will apply to overseas sellers selling goods in the GB marketplace from 1 January 2021. The aim is to improve the effectiveness of VAT collection and to ensure that goods from EU and non-EU countries are treated in the same way and that UK businesses are not disadvantaged by competition from VAT free imports.

Professional qualifications (can architects/engineers etc operate in the EU or vice versa?)

In the event of no deal, the Mutual Recognition of Professional Qualifications Directive (2005/35/EC) (RPQ Directive), which was implemented in UK law by the European Union (Recognition of Professional Qualifications) Regulations 2015 (SI 2015/2059), will no longer apply after the end of the implementation period.

If no UK/EU agreement can be reached on bilateral arrangements relating to professional qualifications before 31 December 2020, a (limited) interim system for recognising professional qualifications will come into place in January 2021. This system would allow those who hold EEA and Swiss qualifications that meet UK standards to seek recognition of their qualifications. (See [The Professional Qualifications and Services \(Amendments and Miscellaneous Provisions\) \(EU Exit\) Regulations 2020 \(SI 2020/1038\)](#) (24 September 2020).) A consultation is under way (The Recognition of Professional Qualifications and Regulation of Professions) to gather evidence on the UK's approach to the recognition of professional qualifications and the regulation of professions.

Other regulations, anti-corruption, bribery

The [Money Laundering and Terrorist Financing \(Amendment\) \(EU Exit\) Regulations 2020 \(2020 No. 991\)](#) will ensure that any deficiencies in the EU money laundering laws will be rectified when those laws are subsumed into UK law from 1 January 2021. UK businesses should expect no reduction in their legal obligations to fight corruption and bribery: in fact, obligations may increase in the longer term.

The environment: the UK vision for a greener future

The government is committed to [Upholding environmental standards from 1 January 2021](#) (13 October 2020) as set out in the 25 Year Environment Plan. [The Environment Bill 2019-2020](#) was published on 30 January 2020 and aims to give continuing effect in UK domestic law to the key general principles of EU environmental law (developed as much in case law as in legislation). The Bill's aims are summarised in the government press release: [Environment Bill sets out vision for a greener future](#). The bill proposes a new regulatory body that could exercise a monitoring and scrutiny role over government that is not dissimilar to that of the European Commission in the environmental field.

Various statutory instruments have been prepared to ensure that EU environment laws can operate effectively in UK law once on-shored from 1 January 2021. For example, the [draft Environment \(Amendment etc.\) \(EU Exit\) \(Amendment\) \(England and Wales\) Regulations 2020](#) enables the Defra Secretary of State and Welsh Ministers in devolved areas to continue to exercise certain powers under the Pollution Prevention and Control Act after 31 December 2020 to regulate activities which are capable of causing environmental pollution in connection with certain EU Directives. (See the government guidance: [The Environment \(Amendment etc.\) \(EU Exit\) \(Amendment\) \(England and Wales\) Regulations 2020](#).)

Health and safety

Businesses' obligations to protect the health and safety of people affected by their work will not change during or after the implementation period. The Health and Safety Executive has prepared guidance to help businesses prepare in the event of no deal, which can be found here: <https://www.hse.gov.uk/brexit/index.htm> and includes guidance on [health and safety made simple: the basics for your business](#). This web page collates information on the changes made to legislation to ensure, for example, that the regulation of chemicals continues if the UK leaves the EU without a deal.

Employment law: effect on people, reward and mobility

Initially, employment laws will remain broadly the same whether there is a deal or no deal. After the implementation period expires, we might, over time, expect changes to EU laws such as those on working time regulations, disability and discrimination. The extent of such changes – and which laws might be affected – is unpredictable. However, the government is unlikely to substantially amend legislation protecting workers' rights – at least not in the short term.

Some minor changes will be made (for example, on existing European Works Council rights). Click here for more detail: [Brexit, Key issues for people, reward and mobility](#).

Mobility and the labour supply

The end of free movement

From 1 January 2021 free movement ends and a new immigration system will apply for those arriving in the UK: EU nationals and non-EU nationals will be treated equally. Following advice and suggestions from the Migration Advisory Committee (see, for example, [The Migration Advisory Committee report: points-based system and salary thresholds](#)), the minimum salary threshold has been reduced and salaries within a certain band can be traded for qualifications. Additionally, the resident labour market test will no longer be required and, initially, the cap on skilled workers applying to work in the UK will be removed. Full details as to the new application processes and visa categories are expected

imminently. UK businesses will need to adapt and adjust to the end of free movement and should prepare ahead of 1 January 2021.

[The EU Settlement Scheme](#)

UK businesses, which rely on EU labour in the UK or UK employees in the EU, should ensure that all relevant applications have been made to secure their status as needed. For more detail, see [Brexit, Key issues for people, reward and mobility](#).

Procurement

The framework and principles underlying the UK's procurement regime will continue broadly unchanged throughout the implementation period to ensure the public procurement market's continued functioning.

The draft [Public Procurement \(Amendment etc.\) \(EU Exit\) Regulations 2020](#) have been laid before Parliament. It will revoke and replace the Public Procurement (Amendment etc) (EU Exit) (No 2) Regulations 2019 ([SI 2019/623](#)) (which in itself revoked the first SI, the Public Procurement (Amendment etc) (EU Exit) Regulations 2019 ([SI 2019/560](#))). The regulations will amend both primary and subordinate legislation, address deficiencies in retained EU law that arise as a result of the withdrawal of the UK from the EU and remove EU legislation that would be inoperable in the UK (for example, by removing references to Official Journal of the European Union (OJEU)). (See the [draft explanatory note](#) accompanying the regulations.) (The [Defence and Security Public Contracts \(Amendment\) \(EU Exit\) Regulations 2020](#) carry out a similar function in adapting current defence and security regulations after 1 January 2020.) Further detail can be found in the Cabinet Office's published guidance: [Public-sector procurement after a no-deal Brexit](#) (updated 24 April 2020) which provides "information for public authorities, businesses and other organisations on the outcome for public procurement policy from 1 January 2021".

[New Find a Tender service](#)

From 1 January 2021, contracting authorities must publish public procurement notices to a new UK e-notification service, the Find a Tender Service (FTS), for contract opportunities that would (prior to 31 December 2020) have been published on the OJEU or Tenders Electronic Daily (TED).

[Accession to the WTO Government Procurement Agreement](#)

On 7 October 2020, the DTI confirmed that WTO members had agreed to the UK acceding to the WTO Government Procurement Agreement (GPO) from 1 January 2021 (See [Government secures access for British business to £1.3 trillion of global procurement contracts](#)). Rejoining the GPO as an independent member was one of the UK's commitments under the Political Declaration and enables British businesses to continue bidding for public sector contracts globally. Further guidance on what this means for UK businesses was also issued: [Bidding for overseas procurement opportunities: what to expect from 1 January 2021](#).

Issues for those with interests in real estate

The UK's departure from the EU will continue to have commercial rather than legal effects on real estate. The UK's largely domestic property laws are relatively unaffected by either the UK's withdrawal or any trade deal. For comment and more detail, see [Brexit, key issues for Real Estate](#). For more information on the impact of COVID-19 on property, please visit our COVID-19 hub by clicking [here](#).

Are construction contracts Brexit-proof?

[Contract reviews – check for risk](#)

The legislative and regulatory changes highlighted above mean increased risks of disruption for the construction industry – over and above that already being experienced as a result of the COVID-19 pandemic. Such disruption could throw an uncomfortable spotlight on commercial relationships and contractual frameworks in even the most simple of contracts.

For example, project delay caused by insufficient labour on site or materials being stuck at customs might not necessarily lead to an extension of time entitlement. Issues about who bears responsibility for the resulting costs mean disputes are more likely. Whether you are in the middle of a project or about to sign up to a new project, a thorough review of the contractual rights and obligations is essential to minimise potential risks. Provisions relating to "change in law", "material adverse change" and "force majeure" are obvious starting points; other parts of contracts likely to need review include provisions relating to interpretation, pricing and payment and dispute resolution.

[Fair allocation \(or reallocation\) of risks and the COVID-19 effect](#)

The UK's exit from the EU (on top of COVID-19 measures) introduces new risks which could shift the balance in both domestic and cross-border contracts. Common construction contract terms might not adequately cover such

disruption or legal changes. Risks need to be identified and allocated fairly – and, in this regard, it would be prudent to take into consideration the latest government and industry COVID-19 guidance such as the [Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency](#) (updated 1 July 2020), the CLC's [Covid-19: Managing Contractual Disputes & Collaboration - Summary Guide](#) and the CLC's operating procedures (version 6), (20 October 2020).

The appropriate allocation of risk is a fundamental priority for those drafting construction contracts – whether domestic or cross-border. Parties should seek to negotiate a fair and appropriate balance by placing the risk (of unforeseen site conditions, delay, the weather etc.) with the party most able to both control and manage it – and to bear the consequences of the risk being realised (for example, via insurance cover).

Current contracts

The approach to "Brexit-proofing" current contracts will vary depending on the project, parties and specific contract terms. Businesses should be reviewing their obligations under existing contracts as part of a broader commercial risk analysis to prepare for no deal at the end of the implementation period. Pay particular attention to who bears the risk under the contract if the project is affected by Brexit-related issues such as new tariffs (leading to price increases), delays due to new customs arrangements and reduced labour supply. Businesses should collaborate with their supply chains to ensure they have done the same – focusing particularly on those supply contracts that cover the import of goods and labour which are critical for the project.

It is in all parties' interests to engage proactively in this risk analysis/contract review process. However, in an industry historically known more for its disputes, collaboration with contractual partners might be easier said than done. (See the government guidance on responsible behaviour above and dispute resolution below.)

New contracts

Parties to new contracts should review contract terms to ensure they have adapted their rights and obligations to cover potential liabilities arising from Brexit-related events. Brexit-related risks should be considered and negotiated to ensure they are manageable. Some parties are trying to include "Brexit clauses" in their contracts – i.e. a right to terminate or renegotiate in certain Brexit-related circumstances – to cover themselves against a wide range of risks. However, to stand any chance of agreement, such clauses must deal with specific, well-defined risks. Widely drafted clauses are likely to be unenforceable.

When negotiating new contracts, rights and obligations affected by Brexit will vary from project to project depending on several factors, including whether the project has a cross-border element (and remember that even domestic projects might be heavily reliant on cross-border supply contracts further down the supply chain). Specific clauses that might require attention include those dealing with: pricing provisions; interpretation provisions; governing law; choice of court; change in law; fluctuations; termination; force majeure and material adverse change; dispute resolution provisions which deal with service of proceedings and enforcement of judgments; intellectual property and data protection.

Attention should also be given to dispute resolution clauses. Those negotiating new contracts with cross-border elements should review their approach to ensure that their dispute resolution choices still offer the most appropriate procedures for the project after the implementation period. The UK as a venue for international dispute resolution will retain its major advantages (such as the strength and independence of its judiciary, certainty and commercial focus of English law, the flexibility of the common law system and respect for a commercial bargain) and English law will retain its appeal as the parties' choice of law. However, no deal could lead to issues in conducting cross-border proceedings and enforcing UK judgments in EU member states.

In some cases, parties entering construction contracts might consider providing for dispute resolution by arbitration on the basis that the enforcement of arbitration awards is covered by the New York Convention which will be unaffected after 1 January 2021. Suggesting arbitration after a dispute has arisen is worth a go, but could be less easy to agree.

Dispute resolution and civil justice co-operation: what happens from 1 January 2021?

Governing law, jurisdiction and enforcement

The Withdrawal Agreement sets out transitional provisions on the matters of applicable law, jurisdiction and enforcement of judgments, and service and taking of evidence. These rules will continue to apply in the UK during the implementation period. If there is no trade agreement, the key areas affected will be choice of law, and jurisdiction and enforcement. For more detail on, for example, the Hague and Lugano Conventions, see [Brexit: civil justice co-operation, what happens from 1 January 2020?](#)

Conducting cross-border dispute resolution

The net effect is that it will take more time and become more expensive to start cross-border proceedings and to enforce judgments after the implementation period ends. Those currently involved in or anticipating cross-border litigation should seek legal advice on whether/how the no trade deal position would affect the way they handle their dispute. As stated above, parties should also undertake a review of the dispute resolution provisions in their contract and, where possible, renegotiate to ensure that the chosen process(es) to resolve any related disputes are/remain appropriate.

The Ministry of Justice has published guidance for legal professionals on cross-border civil and commercial legal cases: [Cross-border civil and commercial legal cases: guidance for legal professionals from 1 January 2021](#).

Consequential amendments to the Civil Procedure Rules

Changes to the Civil Procedure Rules (CPR) will be necessary including the rules relating to service of proceedings and enforcement of judgments in different jurisdictions. These changes are set out in the [107th Update – Practice Direction amendments](#) and will come into force after the implementation period alongside the [Civil Procedure Rules 1998 \(Amendment\) \(EU Exit\) Regulations 2019 \(SI 2019/521\)](#) (which will enable EU law retained in the UK to operate efficiently).

Cross-border mediation

The conduct of cross-border mediations involving an EU party, currently regulated by the Cross-Border Mediation (EU Directive) Regulations 2011 (SI 2011/1133) will be repealed on 31 December 2020 by the [Cross-Border Mediation \(EU Directive\) \(EU Exit\) Regulations 2019 \(SI 2019/469\)](#). The Mediation Directive (which SI 2011/1133 implemented in the UK) operates reciprocally as between participating EU member states. That reciprocity will be lost when the UK ceases to be an EU member state. Mediations currently within the scope of the Mediation Directive (because, say, one of the parties is a UK domicile) will no longer be recognised for the purposes of the Mediation Directive. The UK government cannot legislate for reciprocity and, besides, implementing regulation of this sort would also mean more favourable rules would apply to mediations involving UK and EU parties than would apply where both parties in mediation are UK domiciled or habitually resident.

In July, a [fact sheet](#) relating to the Private International Law (Implementation of Agreements) Bill 2019-21 indicated that the government is considering whether or not the UK should join the 2019 Singapore Mediation Convention. [The Singapore Convention](#) establishes a framework for enforcing international settlement agreements resulting from mediation.

Industry guidance to help construction businesses prepare

In August 2020, the Construction Leadership Council (CLC) launched a Brexit Working Group dedicated to helping the construction industry "get ready and be prepared to maintain business continuity at the end of the transition period". (See the [press release](#).) The working group will focus on four key areas: the movement of people (preparing for new immigration rules, accessing alternative labour supply and reciprocal arrangements on skills and qualifications in new trade deals); the movement of goods and materials (preparing for a new customs regime, guidance on WTO rules and alternative sourcing opportunities); standards and alignment (including guidance on the Construction Products Regulation 2011 ((EU) 305/2011), EU notified bodies, CE marking, UK designated standards and UKCA marking); and data adequacy (business awareness of the potential impact and mitigating actions on data flow). Further CLC guidance, which should be read alongside the guidance on COVID-19, such as the [Site Operating Procedures](#) (Version 6), includes:

- [Building Winter Resilience](#) (with a focus on building supply chain resilience) (14 October 2020)
- [Road to Recovery – CLC Covid-19 Recovery Plan update](#) – "a strategy to drive the recovery of the construction and built environment sectors, and through them the wider UK economy, following the COVID-19 pandemic and economic downturn".
- See also the [Taking Stock – Progress on the Industry Recovery Plan](#) (15 October 2020) which provides "evidence of an industry that is thinking collaboratively and strategically about their role in the COVID-19 recovery".
- [Signposting the way towards a smarter future for construction](#) (15 October 2020) which launches a free digital resource to support construction firms working towards adopting smarter, more modern methods of construction. The resource will help firms "navigate their way through the vast range of expertise and support available, from training and knowledge sharing to R&D facilities to networking".

How can Dentons help?

Dentons can provide a range of services to help your business mitigate risks and prepare for the changes ahead, including a Brexit risk assessment, commercial and construction contracts review, strategic planning tools (for example, bespoke training and strategy reviews), collaboration with trade associations to safeguard commercial interests as the negotiations progress, and employment law and immigration guidance to manage employees and future labour supplies proactively. You can find more details in our briefing [After Brexit: Navigating a new world](#). These services are provided by our team of specialist construction lawyers and colleagues in other practice areas who, together, can guide you through the issues related to the UK's departure from the EU, whether or not there is a trade deal. Get in touch for more information.

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