Your Contracts Post-Brexit

Contents

Brexit: An Update

The EU-UK Trade and Cooperation Agreement ('**TCA**') concluded between the EU and the UK at the end of 2020 sets out certain trade arrangements in areas such as goods and services, digital trade, intellectual property, public procurement, aviation and road transport, energy, fisheries, and judicial cooperation. It is underpinned by provisions that seek to ensure a so-called 'level playing field' and respect for fundamental rights.

The TCA was signed on 30 December 2020, was applied provisionally from 1 January 2021 and entered into force on 1 May 2021. While the TCA imposes no direct charges on construction activities or construction products, it did introduce changes that will directly affect those in the UK construction industry who are planning, procuring and delivering construction projects in the UK and EU.

The TCA is a lengthy and complex document and at this point not all of its implications on the construction industry are clear. Post-Brexit complications are inevitable for businesses and you should consider what actions you need to take in order to make your activities run as smoothly as possible post-Brexit.

This note is aimed at businesses in the construction industry doing business with parties that have a connection with, or rely on, UK/EU trade, and we have sought to flag some of the key considerations and outline certain contractual implications for you to consider in light of these and other post-Brexit changes.

Build UK members may benefit from legal advice on the key considerations when planning and prioritising next steps.

1. Supply chain issues

UK businesses in the construction industry had come to rely on the free movement of materials and products between EU Member States without the imposition of tariffs or customs formalities.

The TCA established tariff-free and quota-free trade for (some, but not all) goods, where such goods meet the relevant 'rules of origin'. The rules are complicated but, in essence, goods are not subject to tariffs or quotas, provided that they are:

- traded from the UK to the EU and are of UK origin; or
- traded from the EU to the UK, provided that EU '*rules of origin*' are satisfied in relation to those goods.

Whilst this means that building materials imported from the EU may not attract tariffs, certain customs declarations and other formalities that are now required at UK/EU borders have created additional administrative burdens for those importing goods. In turn, this may cause delays in project delivery. Such delays might result in unexpected costs and liability exposure, as may new VAT rules now that the UK is no longer bound by the EU VAT Directive.

1.1 New border arrangements

To maintain the flow of goods between the UK, the EU and elsewhere, the UK Government has published its Border Operating Model (BOM) policy which introduces new import rules and border controls.

The BOM policy affects all imports into the UK and is separate from the TCA. It seeks to explain how the border now operates and the actions needed by traders and hauliers in order to implement the new rules.

The UK Government stated that '*Traders and hauliers must take the steps outlined in… [BOM]…. which has been updated following the UK-EU trade and cooperation agreement*'.

The BOM policy is still under development, particularly in light of the UK Government's stated focus on the recovery of UK businesses from the COVID-19 pandemic. This can lead to additional obligations and changes for importers of materials into the UK (which may have also impact end-users and others in between in the supply chain). For more information, visit the **GOV.UK website**.

2. Procurement

Those companies involved in public sector work should be aware that the rules on public procurement have now changed as a result of Brexit. For more information, visit the **GOV.UK website**.

Part 1: Contracts – General

Time and programme

1. Auditing existing contracts

Contracting parties are advised to audit existing contracts that are in force to check for exposure to additional delays, costs and penalties that may be incurred post-Brexit. When conducting an audit, they should seek to identify and understand Brexit's effect on existing contractual rights, obligations and remedies, including any consequential impact on compliance, timing, performance and enforcement.

Performance of a contract may become inherently more difficult and, consequently, more time may be required for performance, driving up costs. Previously serviceable contracts could become commercially unattractive or even unprofitable. A party may face claims for breach of contract or termination for default.

Parties should consider the following contract terms:

- **Timing:** What is the commitment to timing of delivery and performance? If delivery is 'late', what are the consequences under the contract?

- **Termination:** Is there a right to terminate the contract (or engagement under it):
    - (i) exercisable by the buyer, where any materials are not supplied (or services not rendered) by the date of delivery/performance or within a specified delivery/performance window; or
    - (ii) exercisable by the supplier where the supplier is unwilling or unable to continue to perform the contract (where performance is not practicable or profitable). The supplier may be exposed to a claim for damages for losses incurred that are caused by the failure to deliver the materials on time or flowing from a termination. This may include the costs of procuring and sourcing replacement materials.

- **Damages:** If the supplier is exposed to a claim for damages, consider the extent of any potential exposure. Does the contract include a provision limiting or excluding liability in certain circumstances?

- **Mitigation:** In any event, the parties should work together to identify and seek to mitigate any losses which may arise, or have arisen, to minimise exposure. For example, it may be sensible for the supplier to notify the other party of any potential delay as soon as (or before) it becomes likely.

A detailed audit should then be conducted on issues which are likely to include the following:

- **References to the EU:** Contracts should be checked for territorial references to the EU, as well as references to EU laws and regulations. Updates should be made according to changes in the law and the context in which the reference is used within the contract.

- **Currency of payments:** See section 5 below.

- **Payment of tariffs in respect of goods:** The TCA allows tariff-free trade for goods that fit within the 'rules of origin' arrangements. Do the goods supplied fall within this definition? If not, are there additional tariffs to consider and who would pick up the costs of these tariffs?

- **Clearance at customs:** Who will manage this process and pay for these costs? Consider what impact the new UK border processes imposed by the BOM policy and the TCA may have on contract service levels and delivery timetables. If you rely on other businesses in your supply chain for the import/export of goods in respect of your UK construction projects, you should seek to ensure that those businesses have prepared for cross-border trading and, where applicable, incorporate relevant operational provisions and warranties into your contracts. Inadequate preparation for the implementation of these changes is unlikely to be excused under a force majeure claim if the delayed delivery of goods causes a knock-on delay to construction work.

- **Data transfers from the EU to the UK:** At the end of June 2021, after more than a year of talks, the European Union formally recognised the UK's data protection standards as being aligned to those that apply in the EU. Prior to this, certain transitional arrangements were agreed alongside the TSA as an interim solution. Personal data can continue to be transferred freely between Europe and the UK following this agreement by the EU to adopt the so-called 'data adequacy' decisions. The adequacy decisions include a 'sunset clause', which limits the duration of adequacy to four years. If your business transfers personal data (i.e.: information that can be used to identify a living person such as names, delivery details, IP addresses, or HR data) from the EU to the UK, you can find more information regarding this topic by visiting the GOV.UK website.

- **Change control processes:** See section 10 below.

An audit should also be conducted on any template or standard form contracts that you may use on a regular basis when dealing with other parties.

If an existing contract is likely to be extended or renewed, you may wish to consider making amendments to the contract).

2. 'Future proofing' prospective contracts

Parties should focus on 'future proofing' (in so far as possible) contracts that are contemplated or being negotiated (but not yet agreed) in order to identify, allocate and share the risk of unexpected/unanticipated consequences of Brexit (such as delays, cost increases and contractual liability or changes in the interpretation or implementation of the TCA).

The consequences of Brexit may make contracting parties more hesitant to take on risk and therefore reach an agreement that both parties find acceptable. As such, one way to encourage an agreement is to conduct a risk impact assessment exercise (i.e. assess the probability and consequences of certain events and keep this assessment under review). This may assist in maintaining an ongoing dialogue between parties, which in turn may help them to work though risks collaboratively.

Parties may consider cementing this review process in the contract by including an express 'Brexit clause', which would define a post-Brexit event that would trigger a review process and/or certain changes in the parties' respective contractual rights, obligations and remedies.

3. Brexit-related impacts

Any Brexit-specific provision must be clear as to what constitutes a post-Brexit impact and how/when it might be triggered.

Post-Brexit impacts might include:

- the consequences of changes in law;
- the consequences of changes in UK Government policies (for example changes in the BOM

policy);
- the imposition of, or a change to, a duty, tariff or tax imposed on imports;
- labour issues;
- delays at the border;
- transport issues; and/or
- increased costs of compliance/certification.

Parties should consider:

- to what extent would the Brexit-related event need to cause the adverse consequence in order to trigger the provision and how narrowly that adverse consequence should be drafted
- the inclusion of a time period following the triggering event in which a Brexit provision must be invoked by the party claiming relief (failing which, the right to rely on such an event is lost)
- a restriction preventing a party from seeking to rely on the same triggering event to excuse its repeated breaches or delays.

If a post-Brexit event occurs that could (or should) have otherwise been anticipated and/or prepared for by a reasonably prudent person and the risk mitigated against, it may be difficult to establish that a post-Brexit event has occurred and a party is entitled to contractual relief.

Price

4. Pricing clauses

The parties must make clear who will be responsible for any additional costs payable under the contract or incurred in its performance (such as tariffs, import duties, taxes or general increases in procurement costs) post-Brexit.

Both parties will want to ensure that the prices remain favourable to them throughout the duration of the contract. In particular, the supplier may want to include provisions enabling it to pass on any additional charges to the other party, while that party may want to resist any such provisions. If additional charges are passed on under the contract, the other party should consider whether there is a cap or a limit in place for such additional costs. The parties may wish to seek agreement that any additional costs are shared between each of them (not necessarily in equal proportions) and this could be subject to set-off arrangements where permitted under the contract or by specific agreement. Please see 'variations to the contract' section below for commentary about incorporation of changes into a contract.

Any Brexit pricing clauses negotiated into existing contracts should be revisited now that Brexit has occurred.

5. Currency fluctuations

Fluctuations in exchange rates may have a significant impact on the sums due under the contract if such sums are being paid in a different currency. The parties may wish to include a 'currency clause' to protect the parties against material currency fluctuations which may cause performance under the contract to become uneconomic.

The currency clause could provide that, where the supplier's costs of providing the goods and materials fluctuates by more or less than a certain percentage compared to a benchmark that is pre-agreed or calculable by reference to a pre-agreed mechanism:

- the parties will discuss, in good faith (i.e. honestly, fairly and consistently with the justified expectations of the other party), the proportion of the sum that shall be invoiced, as is fair and equitable in the circumstances; or

- the parties will amend the price of the costs payable under the contract to appropriately address the change in the currency.

Where the contract provides for multiple deliveries over a period of time, the parties should consider including a mechanism which would enable the cost to revert to the original price once the exchange rate has stabilised and returned to a specified range or threshold for a certain time period.

Any currency mechanisms negotiated into existing contracts in anticipation of foreign exchange (FX) volatility in the run up to and following Brexit should be revisited.

6. Fluctuations in costs of materials and price adjustments

If the supply and delivery is over a long term, the parties may consider including price adjustment provisions to reflect the fluctuation in the cost of materials and goods, the cost of importing such material and goods, and volatility in currency exchange rates as a result of Brexit.

Future contracts should specify how price adjustments will be dealt with. For example:

- will the contract simply oblige the parties to negotiate in good faith? If so, which party should be responsible for any additional prices or how such additional prices will be borne by the parties?
- will the contract detail a price adjustment mechanism? Such a mechanism should specify exactly how any additional costs should be borne (for example, by way of percentage splits or by reference to a pre-agreed baseline or external objectively measured indices). Implementing such a change is explained in further in the 'variations to the contract' section.

Where existing contracts do not include this information, the parties should consider whether and how the contract can be varied (see section 10).

7. Warning notices

Where either party is concerned that the costs incurred and payable under or in the performance of the contract may change, it should notify the other party as soon as possible to enable the parties to negotiate any necessary amendments to the contract.

Going forward, provisions should be inserted into contracts to oblige both parties to use early warning notices to notify the other party if it anticipates that a specific event (defined within the contract) may occur.

Separately, parties may want to include 'Financial Distress' clauses. These oblige a party to inform the other party if a specified event occurs. These events will link directly to the party's financial position and may include profit warnings or public statements about material deterioration or breaching bank covenants. Where such an event occurs, the Financial Distress clause would require the relevant party to provide a notice to the other party within a certain period of time. The parties would be subject to any confidentiality provisions included within the contract.

Materials and goods

8. Sourcing materials post-Brexit

How are the goods being sold?	When does title pass?
Unconditionally under the contract and the goods are in a deliverable state.	As soon as the contract is made.
The seller must do something to the goods to put them into a deliverable state.	Not until the seller has done that particular thing to put the goods into a deliverable state and the buyer has received notice that this has been done.
The goods are being sold in a deliverable state but the seller has to weigh, measure or do some other act in order to determine the price.	Not until the price has been ascertained and the buyer has received notice of the price.
The goods are being delivered subject to the buyer's approval or on a sale or a return basis.	Not until the buyer either signifies its approval/acceptance or if it retains the goods without giving any notice to the seller that it rejects the goods within the specified time frame (i.e., 20 days) or within a reasonable time period if there is no time limit.
The goods to be sold are not yet identified or they are being sold purely by description.	Not until the goods of that particular description are ready for the seller and the parties mutually agree.
The goods in the contract are for a specified quantity and part of a bulk but are not yet identified.	If the buyer under that contract is the only buyer to whom goods are due out of the bulk, title passes at the time when the bulk is reduced to that specified quantity due to the buyer.

In anticipation of continued delays at the UK border, UK buyers may be advised to consider alternative means of sourcing their required materials. A short-term solution to these problems may be for businesses to source their materials from within the UK as far as is possible.

In order to reduce the risk of project delays, buyers who have the means should consider committing to the advance purchase of unique or scarce materials or those for which a longer (or uncertain) lead-time may apply. Any such commitment would necessarily be subject to cashflow considerations and any onward contractual commitments to which the buyer may be bound. Earlier and/or greater exposure on costs could perhaps be mitigated through short-term finance arrangements and/or concession or cost-sharing negotiations with parties elsewhere in the supply chain.

Consider including some flexibility when drafting the specification of the materials. For example, including wording which allows for substitutions, variations or reductions in quantity of certain materials. Whilst drafting a tightly defined specification may be necessary where the materials under the contract are highly specific or unique, allowing flexibility could enable the supplier to provide products from alternative sources without frustrating the contract, therefore mitigating the potential financial losses on both sides, caused by factors beyond the parties' control.

9. Legal Ownership

9.1. Passing of legal title

Legal title of goods and materials being sold will pass from the supplier to the other contracting party and onwards up the supply chain in accordance with the contractual terms. However, in the absence of any specific terms, the legal title will pass in accordance with the default statutory provisions set out in the Sale of Goods Act 1979 (‘SGA’).

9.2. Post-Brexit challenges

In light of post-Brexit delays at the border, a buyer may wish to seek the comfort of knowing that legal title to goods under their contract will not pass to them until such goods have actually been delivered. Post-Brexit, if the goods being shipped to the UK are held at the border indefinitely, buyers may want the ability to source either all or part of the goods from an alternative, more-readily-available, source. If delivery is delayed, but the buyer requires the goods immediately and legal title passes to the buyer under the SGA before the goods reach the customs border, the buyer may be forced to pay for the goods twice – once on its initial purchase and then a second time replacing the goods that they legally own which are being held at customs.

Suppliers are likely to want to retain legal title to the goods for similar reasons. In the event of a severe delay at customs, suppliers may want to have the ability to supply either all or part of their goods to an alternative buyer that is capable of physically receiving the goods more quickly. However, once legal title of the goods passes from the supplier, the supplier would be unable to do this.

It is therefore important to ensure that the contract accurately reflects the intention of both parties, rather than defaulting to the SGA positions, and outlines exactly when legal title to the goods is intended to pass. For example, a provision confirming that legal title will pass to the ordering party once the goods have cleared through UK customs or once they have been delivered to a storage facility.

9.3. Passing of risk

Where the contract is silent on when risk passes, risk passes at the same time that legal title passes. Businesses with existing contracts which have a connection and/or reliance on trade between the UK and the EU should, therefore, review their contractual provisions relating to risk carefully. In particular, businesses should check whether any clauses which were advantageous prior to Brexit are commercially prudent post-Brexit. For example, a contract providing that an EU supplier will continue to bear the cost of delivery up until the goods have arrived in the UK port may no longer be commercially viable for the supplier, given the potential for increases in costs of exporting the goods to the UK. Buyers should 'check the small-print' of any supplier terms of business for contractual provisions which seek to pass the risk to the buyer before the buyer takes possession or otherwise has control of the goods, whether directly or indirectly through a haulier, import agent or other intermediary.

Post-Brexit, use of the International Commercial Terms 2010 (‘Incoterms’), which are standard form pre-defined terms for supply and purchase (and delivery of goods) published by the International Chamber of Commerce, has become more prevalent in supply of goods contracts for UK businesses who may be unaccustomed to trading outside of the EU.

Incoterms are generally incorporated into contracts in order to regulate the timings of when:

- risk relating to the goods will be passed from the supplier; and
- any costs associated with delivering the goods will be re-allocated from the supplier to the buyer. The specific timings of these events will depend on the type of Incoterm incorporated.

Businesses may therefore seek to vary existing contracts in order to either incorporate or exclude certain Incoterms which may be more favourable to them as a result of Brexit.

An updated set of Incoterms came into effect on 1 January 2020. Provided the wording in the contract is clear, businesses are free to choose whether they incorporate the 2010 or the 2020 version into their contracts. Before signing new contracts, businesses should therefore review both the existing 2010 Incoterms and the updated 2020 Incoterms in order to determine which version best suits their particular circumstances. There are differences between the versions of Incoterms which may result in a more advantageous outcome for one party than the other, depending on the nature of the contract.

In the absence of Incoterms or any other contractual agreement, the default position is that risk will pass from the supplier at the same time that legal title passes. Post-Brexit, this may be a concern for suppliers who wish to retain legal title for the purposes of re-distribution but do not wish to bear the financial risk. Suppliers should therefore draft their contracts carefully to reflect this, or alternatively ensure that the appropriate Incoterm is incorporated into the contract.

Top tips

- To avoid the default statutory provisions, it is important that parties are clear in their contracts as to their intentions of when and where legal title will pass and ensure that this intention is documented in the contract accordingly.

- For existing contracts, businesses should check the relevant terms and conditions to clarify when and where legal title to the goods will pass.

- Also check existing contracts to see whether Incoterms have been incorporated which will determine who will bear the import and export costs and risks post-Brexit.

- For new contracts, review both the 2010 and the 2020 Incoterms to determine which set should be incorporated, depending on the subject matter and nature of the transaction.

Other contractual considerations

10. Variations to the contract

Where the TCA, Government policies and guidance, and other post-Brexit issues have necessitated a variation to the contract (for example, to alter the supplier’s timing and delivery commitments, or to change the pricing structure), the parties should consider how best to achieve this.

Contracts can contain two mechanisms for variation:

- changes to the parties’ obligations; or
- amendments to the contractual provisions themselves.

10.1. Changes to the parties’ obligations

Changes to the parties’ obligations will usually be carried out by ‘change management’ provisions.

A change management clause requires the parties to follow a specific procedure when making changes to the agreement. It aims to prevent informal, and perhaps unintended; variations being made to an agreement. Possible changes to the contract might include:

- provision for the supplier to be provided with an extension to the date of delivery.
- flexibility in the event that costs have increased (for example, by reference to a pre-agreed baseline or external objectively-measured indices), such that those additional costs will be borne either equally by the parties, or that one party will reimburse the other party up to a specified sum (or percentage of the value of the contract);
- a sliding-scale of liquidated damages (or a liquidated damages holiday);

- alteration to termination rights (for example the ability for contracting parties to walk away from a mutually disadvantageous deal);
- increased communication, management oversight and audit rights; and
- a fast-track decision-making process within the change management procedure.

The benefit of relying on the change management procedure is that there is no need to amend the terms of the contract itself.

10.2. Amendments to the contractual provisions

Amendments to the contractual provisions of the contract will generally be made in accordance with the 'Variation clause'. This is a standard clause, which provides that amendments to a contract must be made by written agreement between the parties and signed by a duly authorised representative of each party. In some cases, an additional 'Variation Agreement' may be entered into, which sets out how the original contract's clauses are to be amended.

If the contract does not contain a Variation clause, the parties can vary the agreement orally or in writing. However, it is always best to formalise any variation in writing to avoid disputes as to the agreement's terms down the line.

For an amendment to a contract to be effective, there must be some form of legal consideration. 'Consideration' means that a party promising to do something under a contract (i.e., supplying goods and materials on a certain date) must be doing so in exchange for something given by the party receiving the benefit of that particular act. Usually, contractual consideration will be the price. If only one party receives a benefit (e.g., a reduction in price) and the other party is not required to do anything in return, there may be no consideration. If there is any doubt that there is consideration, the parties should execute the Variation Contract as a deed.

11. Force Majeure

If the parties are unable to agree to a variation to the contract and the contract becomes impossible to perform without such a variation, the supplier may need to look to what is known as a 'force majeure' clause. This clause excuses a party from performing its obligations under a contract if an event occurs that is beyond its reasonable control.

While parties may seek to rely on a force majeure clause, Brexit is unlikely to make performance of the work impossible; instead, performing the contract may become more difficult or more expensive. The party seeking to rely on a force majeure clause would need to prove that there is no alternative way it could have performed its obligations. If delays occur due to insufficient preparation in relation to implementing post-Brexit measures, it is unlikely that a party will be able to establish a force majeure claim if a delay or failure to supply of goods causes delays to project timelines.

For example, if the supplier finds that performing the contract becomes more costly due to changes in import tariffs, the supplier would still be able to provide the goods, it would just be more expensive (and potentially unprofitable) to do so. In this case, the supplier may not be able to rely on the force majeure provision to assist.

It will be in both parties' interest to find a commercial and practical solution to adjustments and work-arounds, and so seeking to rely on a force majeure clause should be considered as a last resort – and only after discussions and negotiations have taken place between the parties.

12. Brexit clauses

Parties should beware of clauses titled 'Brexit' and should not presume that such clauses will protect them post-Brexit.

12.1. 'Specific event' Brexit clauses

'Specific Event' Brexit clauses in a contract (for example, in the event that currency exchange or interest rates fluctuate, or certain restrictions on importing have been introduced) result in a specific consequence for either party (for example, as a result of the specific event, the price will decrease, or a party will have the ability to use a different supplier).

However, the risk with these types of specific clauses is that other events may occur which are beyond the scope of the wording in the clause, rendering the clause subject to challenge (and even meaningless) in relation to the specific event.

12.2. 'Trigger event' Brexit clauses

'Trigger events' can also be used in contracts (for example, the imposition of tariffs, a change in regulatory requirement, one of the party's costs increasing, etc.) Depending on how the clauses have been drafted, these types of trigger events could mean that the affected party may request that the contract is renegotiated. If no deal can be reached, then the contract could also be terminated.

The risk with these types of trigger events is that the party that is not affected by the specific Brexit-related event faces the choice of either accepting the less favourable terms or early termination. The more broadly the trigger event is drafted, the easier it will be for the affected party to argue that such a trigger event has taken place. In contrast, where a trigger event is narrowly drafted, the affected party may struggle to argue that such an event captures what has actually happened.

Potential ways to deal with the parties' obligations pending renegotiation or termination of the contract can include:

- A clause confirming that the parties must continue to perform their obligations in full. In the event that the contract is silent, then, pending renegotiation or termination of the agreement, the parties in the contract would have to continue to perform their obligations as usual (or face termination for breach and a claim for compensation/damages), unless a party is able to rely on a force majeure clause (see section 11) or another similar clause, or rely on frustration of the contract;
- A clause confirming that the parties' obligations are reduced. For example, a clause could be drafted to confirm that the effected party's obligations during the renegotiation and notice period are reduced/fettered; or
- An obligation may be included that requires the party seeking to rely on the clause to prove that there has been an adverse impact as a result of the Brexit event described (for example, an increase in costs or a requirement for the party to obtain a new licence or new regulatory approval).

Please note that it may be difficult for a party to be able to prove that they have suffered an adverse consequence as a direct result of Brexit. For example, it may be difficult to argue that a significant change in exchange rates is a direct consequence of Brexit rather than some other economic factor.

13. Changes to statutory/regulatory requirements

13.1. Importing timber for the UK market

The European Timber Regulation (EUTR) and Forest Law Enforcement Governance and Trade (FLEGT) no longer apply in England, Scotland and Wales. The Timber and Timber Products Placing on the Market Regulations (UKTR) and UK FLEGT Regulations now apply instead, but the requirements remain the same as under EUTR. EUTR specified the following requirements:

- Businesses will need to show that timber imported from the EU and European Economic Area (EEA) has been legally harvested.

- Businesses must do this currently when importing timber from non-EU and EEA countries. In order to show that timber has been legally harvested, companies will need to perform a certain amount of due diligence.

- The due diligence carried out will need to show that: -

    - the risk of the timber being illegally harvested has been assessed;
    - sufficient information has been obtained on the timber – including its species, quantity, the supplier, the country of harvest and how it complies with the relevant laws; and
    - any risk that has been identified has been mitigated, either by obtaining more information or by taking further action in order to confirm whether the timber is legal.

- Where the timber has a Convention on International Trade in Endangered Species import permit, the UK will recognise it as having been legally harvested. Therefore, due diligence will not need to be carried out.

- However, due diligence would still need to be performed in order to confirm that the timber is legally harvested in the following circumstances: -

    - a business is importing from non-EU or EEA countries;
    - a UK producer is placing timber on the market for the first time; or
    - a business is carrying out internal UK trade.

13.2. Import and export of hazardous chemicals into the UK

The Health and Safety Executive (HSE) has established an independent, standalone 'Prior Informed Consent' ('PIC') regime. This is based on the existing EU regime, but with certain amendments in order to allow functions that are currently carried out by the EU to continue post-Brexit. Businesses importing listed chemicals will need to comply with the requirements of the UK PIC. For example, under the new UK PIC regulation, companies that only trade listed chemicals within the EU market and do not export them outside of the EU would have to start notifying these to HSE.

13.3. Changes to importer regulations

UK distributors will need to confirm whether they, or their supplier, will become an importer for legal purposes following Brexit (i.e. when such businesses are bringing goods from the EU, EEA or Switzerland into the UK and intend to place them on the UK market post-Brexit).

In the event that a UK distributor becomes an importer, companies will need to ensure that:

- the goods are labelled with the company's details, including the name and a contact address;
- the correct conformity assessment procedures have been carried out and that any good imported shows the correct conformity markings;
- the manufacturer has drawn up the correct technical documentation and complied with their labelling requirements;
- a copy of the declaration of conformity is maintained for a period of 10 years; and
- no imported goods are placed on the market if there is reason to believe it does not conform with the relevant essential requirements.

13.4. Economic Operator Registration and Identification number ('EORI')

UK businesses trading with the EU will need to have an EORI number in order to continue their trading if moving goods:

- between Great Britain (England, Scotland and Wales) or the Isle of Man and any other country (including the EU);
- between Great Britain and Northern Ireland;
- between Great Britain and the Channel Islands; and
- between Northern Ireland and countries outside the EU.

More information on applying for an EORI number can be found on the GOV.UK website.

13.5. Construction products: the CE/UKCA marking

The TCA does not mirror the mutual recognition of products or standards that were in place when the UK was a Member State of the EU. Pre-Brexit, the EU Construction Products Regulation 305/2011 (the '**CPR**') was in place to harmonise rules for the marketing of construction products within the EU and provide a common technical language for the assessment of the performance of construction products. The CPR included obligations for construction products to carry the 'CE' mark – a mark denoting compliance of such products with EU safety, health and environmental requirements – which allowed those products to be marketed and sold freely throughout the EU.

Now that the UK has exited the European single market, there will be no single 'CE' mark that can be used across the UK and EU. The UK Government has taken steps to fill the gap by introducing new laws dealing with the regulatory regime for products and markings (the Construction Products Materials Regulations 2019 & 2020). The specific marking required will depend on the location of intended use of the relevant product.

The UK has now introduced the UK Conformity Assessed mark ('**UKCA'**) which will eventually replace the 'CE' marking for goods sold on the UK market. Although the CE mark is being phased out in the UK, the new rules do not immediately prevent the sale or use of 'CE' marked materials in the UK. Most imported materials that carried a valid CE mark at the moment that the UK left the EU (31 December 2020) may still be used in the UK until 31 January 2022 to allow further time for adjustment to the new rules. However, there are certain exceptions and you should check that any relevant materials do not fall within any of these.

It should be noted that the new UKCA will not be recognised for products exported to the EU so any such products must still carry the 'CE' mark.

The Northern Ireland Protocol introduces the United Kingdom Northern Ireland mark ('**UK(NI)**' mark), which is additional to the CE marking in certain instances.

This new regime is complicated and businesses will need to be consider it carefully. If you are buying, selling and/or otherwise dealing in construction materials in the UK, you ought to be taking the opportunity in 2021 to transition to using materials that carry the new UKCA marking by the start of 2022. If you or your customers, sub-contractors or other counter-parties have EU suppliers, you and they should seek assurances from these suppliers that they are ready for these changes. Third party conformity assessments (carried out by an approved body) will be required in order to continue to use goods and materials within the UK that are imported from the EU.

It is important that you review any contractual terms in place (or contemplated) with EU suppliers which will commence on or after or run beyond 31 January 2022 and, where necessary, draft or update them, in order to: (i) set out a mechanism for dealing with incorrectly marked, faulty and/or otherwise non-compliant products; (ii) make provision to allow time for delivery and consequences for late or non-performance and may include recovery of increased costs; and (iii) otherwise address the fact that the recognition of the CE mark in Great Britain will end on 1 January 2022 and that, after this date, products placed on the market in GB must bear the UK mark.

Please note that the parties to any contract concerning relevant products that is entered into during 2021 but which extends beyond 31 January 2022 would not be entitled to rely on the start date of the contract being before the 31 January 2022 deadline in order to relieve them of any compliance responsibilities.

For further guidance about using the UKCA marking (published by the Department for Business, Energy & Industrial Strategy), visit the GOV.UK website. Further construction-industry specific guidance relating to placing construction products on the 'GB' market (England, Wales and Scotland, but not Northern Ireland), published by the Ministry of Housing, Communities & Local Government, can also be found on the Gov.uk website.

The manufacture and supply of new health and safety work equipment is subject to specific changes. Please refer to the Health and Safety Executive (HSE) website.

Part 2: Standard Form Construction Contracts

Time and programme

14. General considerations

There are a variety of Brexit-related issues, such as delay in the delivery of goods and materials to site and labour shortages which may cause a knock-on delay to the work programme. Which party bears the risk of such delays will depend on the terms of the contract. Where there are no relevant terms that expressly or impliedly cover such delays, the supplying party will in principle bear the risk. If these delays affect the date for completion of the works, it will mean that the supplying party may be liable for liquidated or general damages.

Many businesses are facing increased difficulties exporting and importing goods to and from the UK as a result of Brexit (as well as COVID-19), and, at least in the short to medium term, it appears likely that the cost of EU imports will continue to rise. It is important that contractors and sub-contractors continue to consider the price and time risks arising from Brexit and ensure there is express provision in the contract for both how these risks will be allocated and how Brexit-related delay events will be dealt with.

The industry is also currently experiencing supply shortages of materials. It is unclear how much Brexit has contributed to these shortages, as opposed to COVID-19 and global demand, and it is also unclear how long these shortages will last. It would therefore be sensible for parties throughout the supply chain to identify which party bears the risk of price increase and delays.

15. JCT contracts

The JCT 2016 suite of contracts do not deal with Brexit-related delays specifically and JCT has not published any updates in this regard. Nonetheless there are clauses in the JCT contracts that may apply (depending on the circumstances) and entitle the contractor to an extension of time. For instance, in the unamended JCT Design and Build Contract 2016 (we refer to this contract form throughout for illustration of the key clauses, other contract forms within the suite, including the sub-contracts contain similar provisions), the following are included as events for which the Contractor could obtain an extension of time:

- … after the Base Date a change in the Statutory Requirements which necessitates an alteration or modification to the Works… (Clause 2.15.2.1)
- the exercise after the Base Date by the United Kingdom Government or any Local or Public Authority of any statutory power that is not occasioned by a default of the Contractor or any of the Contractor’s Persons, but which directly affects the execution of the works (Clause 2.26.12)
- delay in receipt of any necessary permission or approval of any statutory body which the contractor has taken all reasonable steps to avoid (Clause 2.26.13)

The last two are Relevant Events under the extension of time provisions. However, none of the Relevant Events deal with matters occasioned by, for example, delays caused at the ports of entry or labour or material shortages. If these and other Brexit-related delays are to be covered by the contract, then specific express provisions relating to the adjustment of the completion date and corresponding amendments to the loss and expense provisions should be included.

16. NEC Contracts

Similarly, NEC contracts do not specifically deal with Brexit-related delays, but there are clauses within the contracts which could be applicable. In the NEC4 ECC (referred to for illustrative purposes, most of the others within the suite have similar provisions, but do review the particular clauses) there are compensation events listed at clause 60 which could cover delays arising out of Brexit, including:

- The Client does not provide something which it is to provide by the date shown on the Accepted Programme (Clause 60.1(3))
- The Project Manager gives an instruction to stop or not start any work or to change a Key Date (Clause 60.1(4))
- The Client or Others: do not work within the times shown on the Accepted Programme… (Clause 60.1(5))
- An event which is a Client's liability stated in these conditions of contract (Clause 60.1(14))
- The Project Manager notifies the Contractor of a correction to an assumption which the Project Manager stated about a compensation event (Clause 60.1(17))

These events arise primarily from a default by the employing party or other contractors, which it is feasible could occur as a result of Brexit.

In addition,

Clause 60.1(19) refers to 'an event which:

- stops the Contractor completing the whole of the works; or
- stops the Contractor completing the whole of the works by the date for planned Completion shown on the Accepted Programme.'

Clause 60.1(21) refers to 'compensation events stated in the Contract Data….'. This enables the parties to cater expressly for specific matters which they can identify may affect the progress of the works. Such clauses could therefore be so worded as to cover Brexit-related events.

Also, at clause X2.1 of the secondary option clauses in the NEC4 ECC, there is provision to include a change in the law of the country in which the site is located if it occurs after the contract date as a compensation event. The drafting of this optional clause is wide, so it is likely to cover Brexit-related delays for sites in the UK. Though it should be noted when selecting this clause that it allows for prices to be reduced in the event that the change of law causes such a reduction. The parties may take the view that such a reduction is unlikely.

A key clause in NEC contracts *is 'The Parties, the Project Manager and the Supervisor act in a spirit of mutual trust and co-operation'* (Clause 10.2 in NEC4 ECC), so in the spirit of the contract, parties should be discussing the risk of Brexit-related delays, if they haven't been already and working to mitigate likely effects. Brexit-related delays should be logged on the early warning register, early warning meetings held to discuss any issues foreseen and the programme should be kept up to date.

Top tips

- For existing contracts, where a Brexit-related delay is suffered, check the precise terms to see who bears the risk of the delay. Standard clauses in JCT contracts are often amended by way of a schedule of amendments and in NEC contracts the parties should review the selected secondary option clauses and any additional Z clauses. In particular the definitions of the Relevant Events (compensation events in the NEC or equivalent in other contracts) should be reviewed to see whether such delays entitle the contractor party to additional time having regard to the particular Brexit circumstances, including whether they fall into the clauses above. Follow the notification procedures in the contract carefully and promptly and take reasonable steps to mitigate the delay. In particular, for NEC contracts be aware that a claim for additional time or money may be time barred (under clause 61.3) in the event that it is not notified within 8 weeks of occurring (or 7 weeks for NEC sub-contracts).

- For future contracts, it is vital to discuss the issue of timing, programming and the ongoing effects of Brexit at the outset to avoid difficulties down the line. Review the terms and consider whether the particular Brexit-related events that pose a risk of delay will be covered by the existing clauses. If not, propose amendments. Consider widening the scope of events which allow additional time (and loss and expense – see paragraph 21 below) (Relevant Events under JCT contracts, compensation events under NEC contracts), the application of a liquidated damages (Delay Damages in NEC contracts), a liquidated damages holiday or reduced liquidated damages for specific Brexit-related events. This could be done by adding a Brexit Related Event definition, tailored to the particular risks to be covered, which could include changes in law, introduction of tariffs and taxes, delays to imports and staff shortages. A general definition which simply refers to any delay caused by Brexit is unlikely to work legally because it gives rise to uncertainty of whether Brexit alone has caused the delay. The employing party may request clauses excluding extensions of time (compensation events or equivalent) for Brexit delays, which contractor parties should either resist or take account of that risk in the price.

Price

17. JCT general

In JCT contracts where fluctuations options (see JCT fluctuations) are not incorporated, the Contract Sum is fixed, with scope for the supplying party to be paid additional sums in accordance with the contract where, for example, there is a variation/change or where it is entitled to loss and expense.

18. JCT variation/change

Clause 2.15.2.1 (see Time and Programme – JCT Contracts) in the JCT Design and Build Contract 2016 may constitute a Change. Otherwise, to qualify as a 'Change' in the unamended JCT Design and Build Contract 2016 (others in the JCT suite of documents have similar provisions) there must be a change/variation to the Employers Requirements which necessitate an alteration or modification to the design (in design forms), quantity or quality of the Works (apart from for rectification) or the imposition of certain restrictions or obligations by the Employer. It is conceivable that this could arise as a result of Brexit due to for example reduced availability of materials, but it would not cover the supplying party, where it has had to pay a higher price for materials due to price increases/tariffs and/or higher staffing costs. Therefore on current contracts, plan ahead where possible and/or discuss with the Employer to see whether the price increases can be mitigated by using alternative supplies or materials.

19. JCT loss and expense

As well as additional time for specified Relevant Events as referred to in paragraph 18.2 above, there may be an entitlement to loss and expense if the event in question also constitutes a Relevant Matter. The list of Relevant Events is longer than the list of Relevant Matters so it is not every Relevant Event delay that gives rise to an entitlement to loss and expense. The majority of the circumstances allowing for loss and expense arise out of a default by the Employer or interruptions to progress on site due to the Employer, so would cover a limited number of circumstances. However, it is possible that a Brexit related event could entitle a supplying party to loss and expense.

20. JCT fluctuation provisions

JCT has a set of optional fluctuation provisions which are designed to deal with fluctuations (usually upward for the prices of labour and materials). These operate from a base date (usually the date of the tender or contract) and enable price increases to be measured from that base date. If there have been price increases within the parameters agreed by the parties then the contract sum will be adjusted accordingly. Whilst these have not been drafted specifically for Brexit, they can in principle be used to capture some price increases.

The JCT suite of contracts allow the parties to agree their own fluctuation provisions and cater for standard forms of fluctuation which can be incorporated through the relevant contract particulars. The Design and Build Sub-Contract 2016, the three forms of Standard Building Contract and the Standard Subcontract, the Intermediate Named Sub-Contract, the Construction Management Trade Contract and the Management Works Contract allow for three sets of fluctuation provisions in a similar manner to the Design and Build Contract 2016. Other JCT forms such as the Intermediate Building Contract 2016 and the Minor Works Building Contract 2016 only include one set of fluctuation provisions (option A – see further below), but there is the option to incorporate a bespoke form. The JCT Design and Build 2016 sets out fluctuation provisions at clauses 4.2, 4.12, 4.13 and at schedule 7, where 3 types of fluctuation are provided for as follows:

- **Option A:** contribution, levy and tax fluctuations (included in the back of the JCT contract at Schedule 7)

  Under this option, the Contract Sum is based on the contributions, levies and taxes that the Contractor is liable to pay as an employer and the duty and tax on goods and materials as detailed in the schedule. Therefore, the price is only varied if these are decreased/increased or a tax is introduced or repealed. There is no allowance for a rise in pay rates or the price of goods and materials.

- **Option B:** labour and materials cost and tax (available on the JCT website)

  Under the option, the Contract Sum is based on the following in respect of workers:

  1. the rules and decisions of the Construction Industry Council or other wage fixing body;
  2. any incentive scheme and/or productivity agreement under the Working Rule Agreement of the Construction Industry Joint Council or provisions on them contained in the rules or decisions of some other wage-fixing body; and
  3. the terms of the Building and Civil Engineering Annual and Public Holidays Agreements; in addition to the contribution, levies and tax fluctuations specified under option A.

  For materials, the Contract Sum is based on market prices of goods and materials and any duty or tax payable on them. Therefore, under this option if prices, wages or taxes increase or decrease by reference to the indices set, then so will the Contract Sum.

- **Option C:** formula adjustment (available on the JCT website) Under this option, the Contract Sum is based on a formula issued by the JCT, which divides the work into different categories. Then the works are valued by reference to separate indices for each category set at the Base Month (the month before tender returns), so if they increase or decrease from the Base Month figures so will the contract sum. Some categories of the Contract Sum remain fixed, which could include overhead costs, insurance premiums and the cost of items supplied directly by the Contractor and these are defined in the Contract Particulars by reference to a 'Non-Adjustable Element' expressed as a percentage.

For A and B parties also need to specify the 'percentage addition' in the Contract Particulars, which is a percentage of the increase or decrease of the relevant item, which is added or subtracted from the Contract Sum in addition to the increase or decrease. Bear in mind that in some unamended JCT building contracts (SBC, D&B and MW) no fluctuations are payable where the Contractor is in default in completing the Works.

The JCT fluctuations provisions use industry agreed indices and measures. Therefore, if using fluctuations, it could be advisable to use something tried and tested in this uncertain and challenging post Brexit climate.

21. NEC general

The compensation events (see Timing and Programme – NEC), could also entitle a supplying party to additional sums. There are also options within the ECC (and the ECS, TSC, TSS, PSS and PSC) which allow for different pricing options, which could apply to costs and/or time increases due to Brexit.

22. NEC pricing options

In NEC4 ECC there are six pricing options:

- **Under Options A (Priced contract with Activity Schedule) and B (Priced contract with bill of quantities)**, there is a lump sum for the works and the supplying party carries the cost risk, save for compensation events allowing for more time or money, or risks allocated under the terms of the contract.

- **Options C (Target Contract with Activity Schedule) and D (Target contract with bill of quantities)** are contracts where parties agree a target price for the works and respective shares of savings (where the works come in under budget) or overrun (where the target price is exceeded).

- **Under Options A, B, C and D** there is the option for parties to incorporate secondary option clause X1 which allows for price adjustment due to inflation.

- **With Options E (cost reimbursable contract) and F (management contract)** the parties agree levels of overheads and profits and the Client pays the agreed overheads and profits, plus the actual cost of the works, so in effect the Client carries the risk on costs (though under Option F risk allocation can be varied by the options chosen in the sub-contract).

Therefore, incorporating secondary option clause X1 under Options A to D, to cater for inflation or using Options C to F, which allow for price fluctuations could provide protection to the supplying party against price increases arising out of Brexit.

Top tips

- On contracts which have been entered into, if costs have increased, consider the variation/change, loss and expense and fluctuation provisions under the contract (or equivalent, for example compensation events and pricing options for NEC) to see whether the contract sum could be increased and/or a claim could be made.

- For any contract not yet finalised, review the variation/change and loss and expense sections of the contract or equivalent and consider whether they could be amended using a schedule of amendments or equivalent (Z clauses for NEC) to allocate the Brexit risks between the parties.

- Discuss the use of the standard form fluctuation provisions under the JCT or a bespoke form. If the parties agree their own mechanism to take into account fluctuating prices, ensure that the provisions are readily understandable and address the parties' concerns – it is also a good idea to do a worked example to ensure that the calculations work in practice.

- For NEC contracts, consider the incorporation of the inflation option clause and/or one of the pricing options that caters for allocation of risk of price increases between the parties.

23. General drafting points

- Ensure that you review the contracts that you are negotiating (including all of the contract documents) to see whether any reference to Brexit is buried in them. Some contracts will contain clauses excluding or limiting liability for Brexit-related delays or cost increases. These should either be resisted or the risk priced accordingly in the contract.

- The phrase 'Brexit Clause' comes up frequently, but in practice there are no such standard clauses and one size does not fit all.

- Termination, frustration and force majeure clauses are unlikely to apply to Brexit delay or cost increase events in themselves (unless specific Brexit-related drafting has been included), but given the current uncertainty about the long- term effects of Brexit and its ramifications on the construction industry, these are worth reviewing in the event of issues arising.

For further guidance see termination, frustration and force majeure.