

Briefing Note

CECA Member Briefing:

Brexit: Issues For The Construction Industry In The UK

1. Proofing construction contracts for Brexit

Brexit clause

- 1.1 The expression “Brexit clause” refers to a clause in a contract which triggers a change in the parties’ rights and obligations as a result of an event relating to Brexit occurring. The trigger event might not be Brexit as such, but the occurrence of something which the parties predict might occur as a result of Brexit. For example, changes to tariffs, exchange rates or customs procedures.¹
- 1.2 It is unlikely that parties will be able to anticipate every eventuality that may arise as a consequence of Brexit. Two options for drafting Brexit clauses are²:

Option 1: identify a specific event and provide for a consequence to follow. For example, the specified event could be a currency fluctuation, for which the consequence would be a price adjustment; or

Option 2: identify a trigger following the occurrence of a particular event which permits the affected party to request a negotiation.

Considerations whilst drafting

- 1.3 The following issues should be considered when drafting a Brexit clause, the majority of which are more relevant to **Option 2**³:
 - 1.3.1 **How should Brexit be defined?**
 - 1.3.2 Should there be an end date for the affected party to invoke the Brexit clause?
 - 1.3.3 What are the triggers which permit the party to invoke the clause? This might relate to trade tariffs, currency fluctuations or delays caused by customs checks. Consider whether there are certain events which do not amount to a trigger.
 - 1.3.4 How significant does the impact of the trigger need to be? What evidence does the affected party need to provide of the impact?
 - 1.3.5 Do the parties need to follow a particular procedure throughout the renegotiation? Consider what happens whilst renegotiations are taking place – is the contract continued in full or will obligations be reduced?
 - 1.3.6 Is the contract a public contract and, therefore, are there restrictions to renegotiating the contract? Existing UK procurement legislation includes rules preventing substantial variations (subject to some exceptions) to existing public contracts.

1. [PLC: Brexit: effect on commercial contracts](#)

2. [Lexis Nexis: Construction Law guide to Brexit: Article 50 and withdrawal from the EU \(2017\) 28 4 Cons.Law 14](#)

3. [PLC: Drafting for Brexit: Brexit clauses](#)

- 1.3.7 **Can either party terminate the contract if the renegotiation fails?** Consider how long the termination notice/period will be, whether the right to terminate expires after a certain time and what the consequences of termination are.
- 1.3.8 **Can the clause be invoked on more than one occasion?**
- 1.3.9 **Do you need to express whether references to “the EU” throughout the contract will exclude the UK after Brexit?**
- 1.3.10 **Do you need to express what references to “EU law” throughout the contract will include following Brexit?**

Fluctuation provisions in construction contracts

- 1.4 Following the pound's depreciation since the EU Referendum, one of the strongest cost pressures on the construction industry has been the rising prices of imported materials.⁴ Fluctuation provisions can provide for the contract sum to be adjusted as a consequence of the changes to the price of labour, materials, transport and other costs throughout a construction project.⁵
- 1.5 Where fluctuations clauses are used in a construction contract, the contractor could be entitled to be reimbursed for some or all of any additional costs caused by rising prices. Calculating the increased cost may be achieved by using an index based formula, or by using a published list of market prices for various items.⁶
- 1.6 Unless the parties have agreed to include the relevant fluctuations option, the position under the un-amended JCT contract is that increased materials and labour costs are generally seen as the contractor's risk.⁷
- 1.7 Despite the variety of pricing options available under NEC3, only the rarely used options E (cost-reimbursable) and F (management contract) protect the contractor against increased underlying costs. Option X1 under NEC3, which has tended to be no more popular than the JCT fluctuations provisions, also allows for indexed increases in material costs.⁸

European Union (Withdrawal Agreement) Act 2020

- 1.8 **The European Union (Withdrawal Agreement) Act 2020 (the “WAA”)** received Royal Assent on 23 January 2020. The WAA provides that most EU law will continue to apply to the UK during the transition period (until 31 December 2020) as if it were still an EU member state. This enables, for example, the continued participation of the UK in the EU customs union and single market, the continued application of the four freedoms and the continued ability of UK courts to make references to the CJEU.⁹ The primary objective of the transition period is to provide an opportunity for the UK and the EU to negotiate their future relationship and, understandably, any agreements made between the UK and the EU throughout the transition period should be considered whilst drafting a “Brexit clause”.

2. Free movement of goods and services (relevant to payment, delays, import barriers and consequences of no deal)

- 2.1 Throughout the transition period, the UK benefits from the common commercial policy and the free movement of goods, the absence of customs duties or customs import or export declarations for goods moving between EU member states, the recognition of standards and approvals, and the terms of the EU's trade agreements with other countries.¹⁰ Considering that a large proportion of construction materials used in the UK are imported from the EU, any loss of tariff-free access to the single market will only increase the cost of resources and the profitability of projects until adequate trade agreements are negotiated and put in place.¹¹

Tariffs

- 2.2 The EU is a customs union, which means that no customs duties are paid on goods moving between EU Member States. In a no-deal scenario, UK-EU trade after the transitional period would be on WTO terms and goods would be subject to customs duties.¹³

4. [Fenwick Elliott: Brexit means...?](#)

5. [Lexis Nexis: Fluctuations in construction contracts](#)

6. [Lexis Nexis: Fluctuations in construction contracts](#)

7. [Lexis Nexis: The legal challenges of Brexit for construction projects \(2017\) 28 6 Cons. Law 18](#)

8. [Lexis Nexis: The legal challenges of Brexit for construction projects \(2017\) 28 6 Cons. Law 18](#)

9. [PLC: European Union \(Withdrawal Agreement\) Act 2020](#)

10. [PLC: Brexit implications for business operations: review and contingency planning](#)

11. [Fenwick Elliott: Brexit means...?](#)

12. [European Commission Trade Helpdesk: EU Customs Union](#)

13. [PLC: Brexit implications for business operations: review and contingency planning](#)

- 2.3 Similarly, UK trade with non-EU countries that currently have a preferential trade agreement with the EU would be on WTO terms, unless the Government rolls over the current agreements.¹⁴
- 2.4 As noted above, the UK will continue to participate in the EU customs union and single market throughout the transitional period. An open consultation on the UK's global tariff was published in February 2020.¹⁵

Customs checks

- 2.5 Currently, goods that have been legally imported can circulate throughout the EU with no further customs checks.¹⁶
- 2.6 If the UK ceases to be part of a customs union with the EU, customs checks will be needed for goods entering and leaving the EU.¹⁷ Depending on the test requirements, a physical examination of goods from port health authorities can cost a trader anywhere between £106 and £600 per container. For goods that enter storage in order for checks to take place, rent can be charged.¹⁸
- 2.7 After exit from the EU, there will be 180,000 traders, from individuals and microbusinesses to large organisations across different industries, who will need to make customs declarations for the first time. Preparing these organisations to use a process they are unaccustomed to is a huge task. They will need to navigate new technology and provide detailed information, as well as potentially requiring new certification from a range of public bodies.¹⁹
- 2.8 Clearly, customs checks will increase the time taken for construction materials imported from the EU to reach project sites, which, as a consequence, could lead to delays.

Services

- 2.9 During the transition period, the UK's trade in services with EU member states is governed by a framework that includes single market rules and common regulatory frameworks, the four freedoms, and the mutual recognition of professional qualifications. The UK's trade in services with non-EU countries is based on the EU's preferential trade agreements and the WTO services schedule that the UK shares with the EU.²⁰
- 2.10 In a no-deal scenario, rights for UK businesses to provide services in the EU will, amongst other things, depend on the national law and national practice of EU member states, with the WTO services schedules setting the baseline for access. Additionally, rights for EU businesses to provide services in the UK will depend on the UK's rules following the transitional period and UK trade with non-EU countries that currently have a preferential trade agreement with the EU would be on WTO terms unless the Government rolls over the current agreements.²¹

Data sharing

- 2.11 Information sharing is the key enabler of modern customs. The UK currently benefits from access to more than 20 EU systems, which do everything from tracking the movements of goods and vehicles, to storing risk profiles for goods and producers from around the world. The UK shares its own data as part of this. Our customs systems, such as CHIEF and CDS, are designed to operate with ready access to these data. A deal could see the UK granted permission to continue to use at least some of the critical systems. No deal, on the other hand, could require the UK to build and integrate new systems, populating them with data from scratch.²²

Funding

- 2.12 Additionally, Brexit will affect the eligibility of UK projects for new EIB loans. The EIB can lend to countries outside the EU within the limits set by the EU treaties and the EIB's statute, however, as expected, the level of EIB lending to third countries is far lower than its lending to EU member states.²³

14. [PLC: Brexit implications for business operations: review and contingency planning](#)

15. [GOV.UK: Open consultation: The UK Global Tariff](#)

16. [European Commission Trade Helpdesk: EU Customs Union](#)

17. [PLC: Brexit: effect on commercial contracts](#)

18. [\(Page 39\) Institute for Government: Implementing Brexit: Customs](#)

19. [\(Page 38\) Institute for Government: Implementing Brexit: Customs](#)

20. [PLC: Brexit implications for business operations: review and contingency planning](#)

21. [PLC: Brexit implications for business operations: review and contingency planning](#)

22. [\(Page 19\) Institute for Government: Implementing Brexit: Customs](#)

23. [PLC: Brexit implications for business operations: review and contingency planning](#)

3. Free movement of workers *(relevant to employment issues and consequences of no deal)*

- 3.1 Free movement of labour has been one of the most valuable assets of EU membership for the UK construction industry. So much that the use of EU labour has managed to paper over the cracks of a sustained lack of skilled UK labour, an ageing workforce and a failure to invest in training and development to encourage the best home-grown talent into construction. This is perhaps the biggest obstacle Brexit creates for the industry.²⁴
- 3.2 There were 2.2 million UK residents working in the construction industry between 2014 and 2016; 47% (1,053,000) worked in the specialised construction activities sub-sector, 37% (832,000) worked in the construction of buildings sub-sector and the remaining 15% (339,000) worked in the civil engineering sub-sector.
- 3.3 Non-UK nationals accounted for 8% (80,000) of all workers in the UK's specialised construction activities sub-sector and 7% (25,000) of all workers in the UK's civil engineering sub-sector.
- 3.4 Non-UK nationals accounted for 13% (109,000) of workers in the UK's construction of buildings sub-sector: 8% were EU8 and EU2 nationals, 3% non-EU nationals and 2% EU15 and EU Other nationals (excluding the UK).
- 3.5 Furthermore, non-UK nationals accounted for 40% (70,000) of the construction of buildings workforce in London; 28% were EU8 and EU2 nationals, 8% were non-EU nationals and the remaining 5% were from the rest of the EU.²⁵
- 3.6 A group of construction industry organisations published a report titled "Building after Brexit: an industry action plan". The report suggests that the UK construction industry will need to fill 168,500 jobs by 2023 and 410,000 by 2030. While it recognises the importance of migrant workers following Brexit, the report concentrates on the domestic workforce. It suggests that the construction industry's workforce needs can be ameliorated by:
 - 3.6.1 Attracting new domestic talent. This includes looking at apprenticeships and "T" level qualifications.
 - 3.6.2 Retaining the current workforce. Suggestions cover everything from improved mental health support to "upskilling" the existing workforce.
 - 3.6.3 Improving productivity. Among other things, this includes reforming infrastructure procurement so that clients and contractors share risks better. The report also suggests following the model of section 106 planning agreements to implement a presumption in favour of off-site production.
- 3.7 The report identifies broad actions for the Government, for construction organisations including the Construction Industry Training Board (CITB) and for the industry as a whole. However, it remains clear that access to migrant workers is critical. According to the report's own figures, successfully implementing its suggestions would increase the domestic workforce by 75,500 by 2030, meaning that foreign workers would still be required for over 80% of new jobs.²⁷
- 3.8 The effect of the WWA on the free movement of workers is:
 - 3.8.1 During the transition period, free movement will effectively continue between the UK and the EU.
 - 3.8.2 EU citizens who have resided in the UK lawfully for five years by 31 December 2020 will be able to apply for "settled status" to stay indefinitely under the EU Settlement Scheme. This means that they will be free to live in the UK, have access to public funds and services and go on to apply for British citizenship.
 - 3.8.3 EU citizens in the UK for fewer than five years by 31 December 2020 will be entitled to apply for "pre-settled status" until they acquire the necessary five years' continuous residence to obtain settled status.²⁸ This will be granted for a period of five years to enable them to reside in the UK until they are eligible for settled status.²⁹

24. [Fenwick Elliott: Brexit means...?](#)

25. [Office for National Statistics: Migrant labour force within the UK's construction industry: August 2018](#)

26. [Various: Building After Brexit](#)

27. [PLC: Practical Law's Brexit summary: a watching brief](#)

28. [C: Brexit: implications for employment law in the UK](#)

29. [PLC: The EU Settlement Scheme](#)

3.8.4 Irish citizens will not need to apply for settled status in the UK.³⁰

3.9 For practical up to date advice on this topic note the following articles from Samar Shams, Immigration & Global Mobility Partner, Spencer West LLP:

<https://www.spencer-west.com/articles/sponsoring-skilled-workers-and-intra-company-workers>

<https://www.spencer-west.com/articles/businesses-to-check-eea-nationals-right-to-work-or-risk-a-fall-from-grace>

4. Trade agreements following Brexit

4.1 The Government has said that it wants to ensure that cross-border trade with the EU is as frictionless as possible by seeking a new customs arrangement within a free trade agreement.³¹ As noted by the Institute for Government³², a free trade agreement is not the only route to minimising friction. There are other agreements which can reduce checks required at the border. For example, bilateral agreements on customs co-operation. That could mean sharing data and information between authorities, or it could mean recognising that product standards in a certain good are equivalent in each country and so checks at the border can be reduced.

4.2 As at today's date news may be imminent as to whether such an agreement has or can be made before 1 January 2021 and this note will be updated accordingly

4.3 The UK is seeking to reproduce the effects of existing EU agreements for when they no longer apply to the UK. This will ensure continuity of trading arrangements for UK businesses.³³

UK and WTO after Brexit: goods

4.4 After the end of the transition period, the UK will trade with other WTO members as an independent member of the WTO. The UK therefore needs to establish its own WTO goods schedule.

4.5 This schedule will provide the baseline from which the UK will negotiate more preferential trade relationships with other countries, such as free trade agreements. The WTO rules and the WTO schedules will govern the UK's trade with the EU and other countries after Brexit in the absence of any preferential trade agreement or transitional arrangement.

4.6 Although a WTO goods schedule lists a member's agreed maximum tariff levels (bound tariffs) on particular products, the customs duties that a member actually charges on imports (applied tariffs) do not appear in a WTO schedule. The EU's applied tariff, which all member states must apply to goods imported from non-EU countries, is known as the common external tariff. The UK must continue to apply the EU's common external tariff until the end of the transitional period. After that point (and unless the UK has entered into a customs union with the EU under the future UK-EU relationship), the UK can choose to charge lower applied tariffs even if the UK's bound tariffs mirror the EU's WTO tariffs.

4.7 The WTO multilateral agreements on trade in goods set out rules on market access for goods. Market access refers to all the government-imposed conditions under which goods enter a country, and include tariff and non-tariff barriers to trade. The WTO aims to reduce or eliminate these barriers.

4.8 General principles run throughout the General Agreement on Tariffs and Trade (GATT) and other WTO agreements governing trade in goods. These principles provide the foundation of the WTO trading system, and include the following:

4.8.1 **Most Favoured Nation (MFN) principle.** This requires a WTO member to treat all its WTO trading partners equally unless an exception applies;

4.8.2 **National treatment obligation.** This prevents a member from using internal measures (such as taxes and regulations) to discriminate between imported products and domestic products once the imported products have entered the domestic market.

30. [PLC: Brexit: implications for employment law in the UK](#)

31. [HM Government \(2017\): Future Customs Arrangements: A future partnership paper, HM Government](#)

32. [\(Page 17 - 18\) Institute for Government: Implementing Brexit: Customs](#)

33. [GOV.UK: Existing UK trade agreements with non-EU countries](#)

- 4.8.3 **Predictability.** For example, each member must apply tariffs on an MFN basis, and must not charge tariffs higher than the bound rates for any products listed in its goods schedule.
- 4.8.4 **Fair competition.** The rules try to establish what is fair or unfair, and how governments can respond, such as by charging additional import duties to compensate for damage caused by unfair trade.
- 4.9 The Government has said that it aims to replicate the EU's bound tariffs in the UK's WTO goods schedule. If the UK wanted to treat members differently and provide some members with greater market access than others, this would have to be achieved through one of the WTO's exceptions, such as an FTA.³⁴

UK and WTO after Brexit: services

- 4.10 During the transition period, the UK will continue to be treated as an EU member state at the WTO. The UK's trade in services with EU member states is governed by a framework that includes single market rules, the four freedoms (the free movement of people, goods, services and capital) and the mutual recognition of professional qualifications and regulatory frameworks. The UK's trade in services with non-EU countries is based on the EU's preferential trade agreements and the WTO services schedule that the UK shares with the EU.
- 4.11 After the end of the transition period, the UK will trade with other WTO members as an independent member of the WTO, setting its own trade policy. The UK therefore needs to establish its own WTO services schedule, and its own list of Most Favoured Nation (MFN) exemptions.³⁵
- 4.12 A WTO member must record in its services schedule the specific commitments it has negotiated and agreed with the other WTO members. For each sector or sub-sector in which commitments are undertaken, the schedule must specify any of the following:
 - 4.12.1 Terms, limitations and conditions on the market access requirements under any of the modes of supply;
 - 4.12.2 Conditions and qualifications on the national treatment requirements under any of the modes of supply; and
 - 4.12.3 Undertakings for additional commitments relating to measures affecting trade in services, such as undertakings based on qualifications, technical standards or licencing matters.³⁶

34. [PLC: Brexit: WTO and international trade in goods](#)

35. [PLC: Brexit: WTO and international trade in services](#)

36. [PLC: Brexit: WTO and international trade in services](#)

Appendix A: Brexit clause examples

PLC: Long form trigger, renegotiation and termination clause³⁷

1. **Right to renegotiate or terminate.** If [at any time after [Brexit OR [DATE OR EVENT]]] a Brexit Trigger Event occurs which has [or is likely to have] an Adverse Impact on a party, the impacted party may:
 - 1.1 require the other party to negotiate an amendment to this agreement to alleviate the Adverse Impact, in accordance with clause 5; and
 - 1.2 if renegotiation fails, terminate this agreement in accordance with clause 6.
2. **Brexit.** The UK ceasing to be a member state of the European Union [on 31 January 2020] [and ceasing to be subject to the transition or implementation arrangements provided for by Part 4 of the withdrawal agreement between the UK and the European Union negotiated under Article 50(2) of the Treaty of the European Union which sets out the arrangements for the UK's withdrawal from the European Union (as such arrangements are extended from time to time) [provided that the UK includes [England] [Scotland], [Wales] [Northern Ireland] at such date]].
3. **Brexit Trigger Events.** A Brexit Trigger Event means any of the following events [if [directly]][solely] caused by Brexit [or any discussions, proposals, negotiations or any other steps taken by the UK government or a body in any other jurisdiction in anticipation of or related to preparation for Brexit]]:
 - 3.1 **Change in Law:** a change in the Law or a new requirement to comply with any existing Law or existing Law ceasing to apply to a party. For these purposes, Law means any legal provision a party must comply with including any law, statute, subordinate legislation within the meaning of section 21(1) of the Interpretation Act 1978, enforceable EU right within the meaning of section 2 of the European Communities Act 1972 (as saved and modified by the European Union (Withdrawal) Act 2018), bye-law, regulation, order, mandatory guidance or code of practice, judgment of a court of law, or requirement of any regulatory body, whether in the UK or elsewhere;
 - 3.2 **Trade tariff:** in any jurisdiction, the imposition of, or a change to, a duty, tax or levy imposed on imports or exports of [DEFINED TERM FOR PRODUCTS SUPPLIED] or any raw materials or components used by the Supplier to manufacture the [DEFINED TERM FOR PRODUCTS SUPPLIED] or any products into which the [DEFINED TERM FOR PRODUCTS SUPPLIED] are to be incorporated or in conjunction with which the [DEFINED TERM FOR PRODUCTS SUPPLIED] are to be commercially exploited [provided that such a change or imposition is not applied equally in respect of the whole of the EU for so long as the UK remains a member of the EU];
 - 3.3 **Licence or consent:** in any jurisdiction, the loss of, a change to or the imposition of a new requirement for any licence or consent required by a party to perform the agreement or to commercially exploit the [DEFINED TERM FOR PRODUCTS OR SERVICES SUPPLIED] including [DETAILS OF ANY LICENCES, FOR EXAMPLE EXPORT LICENCES];
 - 3.4 **Currency Fluctuation:** a change of more than [NUMBER]% to the rate of exchange of sterling against [CURRENCY], since the price for the [DEFINED TERM FOR PRODUCTS OR SERVICES] was last agreed. The rate of exchange for these purposes shall be the [daily spot exchange rate published by the Bank of England];
 - 3.5 **Other change:** [a OR an unforeseeable (at the Effective Date)] change to the business or economic environment in which a party operates which is not caused by 3.1 to 3.3 above or by any fluctuation in currency exchange rates.

but a Brexit Trigger Event does not mean:

[DETAILS]
4. **Adverse Impact.** An Adverse Impact means any one of the following:
 - 4.1 a [substantial] adverse impact on a party's ability to perform the agreement in accordance with its terms and the Law;

³⁷ [PLC: Drafting for Brexit: Brexit clauses](#)

- 4.2 an increase in the costs incurred by a party in performing the agreement of at least [NUMBER]% since the price for the [DEFINED TERM FOR PRODUCTS OR SERVICES] was last agreed;
- 4.3 the price of the [DEFINED TERM FOR PRODUCTS OR SERVICES] under this agreement is at least [NUMBER]% lower than the market value for similar products or services (an impact on the Supplier);
- 4.4 the price of the [DEFINED TERM FOR PRODUCTS OR SERVICES] under this agreement exceeds the market value for similar products or services by at least [NUMBER]% (an impact on the Customer);
- 4.5 a [substantial] adverse impact on the Customer's ability to sell or commercially exploit the [DEFINED TERM FOR PRODUCTS OR SERVICES] (an impact on the Customer).
5. **Renegotiation.** The impacted party may initiate a negotiation under clause 1.1 by a notice (**Brexit Notice**) giving [reasonable] details of the relevant Brexit Trigger Event and Adverse Impact. Either party may, at any time, serve a new Brexit Notice, [but a party cannot serve more than one Brexit Notice for the same impact]. On delivery of a Brexit Notice:
 - 5.1 the parties shall meet within [7] days of the date of the Brexit Notice and as reasonably necessary thereafter to discuss in good faith amendments to this agreement;
 - 5.2 the affected party shall promptly comply with all reasonable requests made by the other party for additional information and documents relating to the Adverse Impact suffered and the Brexit Trigger Event relied on, always provided that information so disclosed shall be a party's confidential information for the purposes of clause [NUMBER] (Confidentiality); and
 - 5.3 any amendments to this agreement shall be recorded [in accordance with clause [NUMBER] (Variation) OR in writing, signed by the parties].
6. **Termination.** If the parties fail to agree a variation in accordance with clause 5 within [PERIOD] of the date of the Brexit Notice, [the party serving the Brexit Notice OR either party] may, [without affecting any other right or remedy available to it], terminate this agreement by giving the other party not less than [PERIOD] and not more than [PERIOD] written notice. [A party may not give notice to terminate under this clause more than [PERIOD] from the date of the relevant Brexit Notice]. On termination under this clause, clause [NUMBER] (Consequences of termination) shall apply.
7. **Performance after a Brexit Notice.** After delivery of a Brexit Notice, until this agreement is varied under clause 5 or terminated, the parties shall, unless prohibited by law, continue to comply with the terms of this agreement, [save that the party that served the Brexit Notice need only use reasonable endeavours to comply with its obligations insofar as they are affected by the relevant Adverse Impact].
8. **Overlap with other clauses.** Where a party suffers an Adverse Impact as a result of a Brexit Trigger Event, the provisions of this clause shall apply and take precedence over any conflicting express provisions of this agreement.

PLC: Short form trigger, renegotiation and termination clause³⁸

1. **Right to renegotiate or terminate.** If a Brexit Trigger Event occurs, [either party OR the impacted party] may:
 - 1.1. require the other party to negotiate in good faith an amendment to this agreement to alleviate the Brexit Trigger Event; and
 - 1.2. if no such amendment is made to this agreement within 30 days, terminate this agreement by giving the other party not less than [PERIOD] and not more than [PERIOD] written notice. On termination under this clause, clause [NUMBER] (Consequences of termination) shall apply.
2. **Brexit Trigger Event** means any of the following events [whenever occurring] [occurring at any time after the UK ceases to be subject to the transition or implementation arrangements provided for by Part 4 of the withdrawal agreement between the UK and the European Union negotiated under Article 50(2) of the Treaty of the European Union which sets out the arrangements for the UK's withdrawal from the European Union (as such arrangements are extended from time to time) [provided that the UK includes [England] [Scotland], [Wales] [Northern Ireland] at such date]] [occurring at any time after DATE OR EVENT]:
 - 2.1. a [substantial] adverse impact on a party's ability to perform the agreement in accordance with its terms and the law;
 - 2.2. an increase in the costs incurred by a party in performing the agreement of at least [NUMBER]% since the price for the [DEFINED TERM FOR PRODUCTS OR SERVICES] was last agreed;
 - 2.3. the price of the [DEFINED TERM FOR PRODUCTS OR SERVICES] under this agreement is at least [NUMBER]% lower than the market value for similar products or services (an impact on the Supplier);
 - 2.4. the price of the [DEFINED TERM FOR PRODUCTS OR SERVICES] under this agreement exceeds the market value for similar products or services by at least [NUMBER]% (an impact on the Customer).

Example clause provided by Simon Tolson³⁹

“**Brexit**” means that during the Term of this Agreement pursuant to Article 50 of the Treaty of Lisbon the UK leaves the European Union.

“In the event of Brexit, if either Party considers that the consequences of Brexit materially increase the costs of it performing its obligations under this Agreement and/or reduces its income under this Agreement and/or otherwise adversely affects the benefit it derives from this Agreement, such Party may give notice to the other of the same, and shall promptly supply such details and evidence of such consequences as may reasonably be required by the other Party). Within fourteen (14) days of the other Party receiving such notice, the Parties shall discuss in good faith and agree whether any amendments are required to this Agreement as a result of Brexit, such that the provisions of this Agreement maintain the same overall balance of obligations, benefits, liabilities and risk between the Parties as applied at the date of this Agreement. The Parties agree that the imposition of tariffs and other trade barriers relating to the subject matter of this Agreement and not in existence at the date of the Agreement shall be considered a change in the overall balance.”

The following are some categories of potential triggers for a Brexit clause:

A specific change in the law or the imposition by government of specific costs (Example: “A change in the laws applicable to [relevant activity] such that [Party A] is no longer entitled by law to sell [product or service] in the member states of the European Union.”)

A divergence between the rules applicable in the UK and those applicable in the EU (Example: “The laws applicable to [relevant activity] in the United Kingdom ceasing to be [substantially similar] to those applicable to [that activity] in the European Union”)

A loss of “passporting” benefits currently available under EU rules (Example: “A change in the laws applicable to [relevant industry] such that [Party A] is no longer entitled by law to sell [product or service] in the member states of the European Union.”)

Tariffs or other specific costs being imposed:

“Tariffs being imposed upon the sale, licensing or other transfer of [specified goods or services] from the United Kingdom to a member state of the European Union.”).

Appendix B: Useful Sources

1. PLC: Brexit: effect on commercial contracts
2. Lexis Nexis: Construction Law guide to Brexit: Article 50 and withdrawal from the EU (2017) 28 4 Cons.L aw 14
3. PLC: Drafting for Brexit: Brexit clauses
4. Fenwick Elliott: Brexit means...?
5. Lexis Nexis: Fluctuations in construction contracts
6. Lexis Nexis: The legal challenges of Brexit for construction projects (2017) 28 6 Cons. Law 18
7. PLC: European Union (Withdrawal Agreement) Act 2020
8. PLC: Brexit implications for business operations: review and contingency planning
9. European Commission Trade Helpdesk: EU Customs Union
10. GOV.UK: Open consultation: The UK Global Tariff
11. Institute for Government: Implementing Brexit: Customs
12. Office for National Statistics: Migrant labour force within the UK's construction industry: August 2018
13. Various: Building After Brexit
14. PLC: Practical Law's Brexit summary: a watching brief
15. PLC: Brexit: implications for employment law in the UK
16. PLC: The EU Settlement Scheme
17. HM Government (2017): Future Customs Arrangements: A future partnership paper, HM Government
18. GOV.UK: Existing UK trade agreements with non-EU countries
19. PLC: Brexit: WTO and international trade in goods
20. PLC: Brexit: WTO and international trade in services