

# Brexit – The effects on the construction industry

A speech to The Chartered Institute of Arbitrators (CI Arb) North East Branch

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## Introduction

1. First of all, I would like to thank the CI Arb North East Branch for inviting me to Leeds to speak to you all this evening. I have been very fortunate during my years at the bar to have done a huge amount of work in Leeds, especially in the early days of my career. Despite being based in London, I have always felt a particular connection to Leeds and the Northern Powerhouse more generally, and it gives me great pleasure to be here.
2. One issue which has very much been at the centre of the Brexit debate is the potential impact on food and agricultural policy in the UK. I have recently read an interesting **research paper published by Chatham House in January 2019**<sup>1</sup>, and it is easy to forget how closely intertwined with the EU the UK food system is:
  - 2.1. **Intra-EU trade:** According to the Department for Environmental Food and Rural Affairs, in 2016, 60% of food and drinks exports were to the EU, and 70% of imports were from the EU.
  - 2.2. **Funding:** The EU's Common Agriculture Policy provides £2.3 billion of subsidies per year to the UK.
  - 2.3. **Labour:** According to a House of Common Briefing Paper in 2017, the UK's agricultural industry depends heavily on EU migrant labour, making up 98% of the 75,000 seasonal workers each year and one-third (116,000) of workers employed in the UK food manufacturing sectors in 2016.

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<sup>1</sup> Benton, Froggatt, Wright, Thompson and King, "Food Politics and Policies in Post-Brexit Britain" (Chatham House, January 2019).

- 2.4. **Regulation:** EU legislation and institutions provide a tight framework governing the environmental and safety standards of food produced and consumed in the UK, including food imported from third countries into the UK.
3. I have digressed a little, but the point is this – do these food-related issues sound at all familiar to you? It should, because not only do they have an impact on the very many things which will go into our stomach post-Brexit, those are essentially the very same issues which the UK construction industry will face post-Brexit – I am talking about the post-Brexit challenges to the labour resources, sources of funding, regulatory framework and intra-EU projects in the construction and infrastructure industry.
4. With no agreement on a Brexit deal yet in sight in the Commons, the UK is looming precariously close to a no-deal Brexit. In fact, as we speak this evening, MPs in Westminster are probably considering whether to accept the Prime Minister's deal, to agree on an extension until mid-April, or to drop out of the EU tomorrow into a legal vacuum. The uncertainties cannot be understated, and perhaps the last thing anyone needs is me telling you all what a big political mess this is.
5. But that is not the purpose of this speech. What I would like to do this evening is to take this opportunity to map out the way forward for the construction industry, even if we are faced with a no-deal Brexit. There may be various unknowns in play, but there is also a good deal of things that we do know we can expect, and it would be helpful to demystify those issues.
6. In particular, I would like to talk about the implications of Brexit on **six areas** most relevant to the construction industry, namely:
  - 6.1. **The potential impact on the oil and gas industry.**
  - 6.2. **The availability of EU migrant labour to construction and infrastructure projects in the UK.**
  - 6.3. **The availability of EU funding for construction and infrastructure projects in the UK.**
  - 6.4. **The potential impact on EU legislation governing construction works and construction products in the UK.**
  - 6.5. **The potential impact on public procurement law in the UK.**
  - 6.6. **Managing project risks and Brexit-proofing contracts.**

7. Whilst Brexit no doubt poses challenges for the days and years ahead in these areas, I prefer to see it as an opportunity for rejuvenating the construction industry, if not rejuvenating the country as a whole. The impetus to change and unveil a new chapter in the industry should not be underestimated.

**(1) Oil and gas**

8. I start with the most volatile of the industries – oil and gas. In 2017, **the trade body for the UK oil and gas industry reported** that of those directly employed by the oil and gas industry in the UK, 90% are UK national, 5% are EU workers from countries other than the UK and 5% are non-EU. In particular, of the 5% of EU workers, 70% are skilled, with one in two holding managerial roles. The loss of the EU workforce in the oil and gas industry will have a considerable impact, and there were fears that this would dampen the industry's appetite for new projects.
9. An equally pressing issue is the likely hike in tariffs in the event of a no-deal Brexit. This would mean that the UK reverts to WTO rules, which would double the current tariff costs i.e. around £1.1 billion per annum, assuming the trading pattern remains the same. This may well change if the UK can negotiate improved tariffs with the rest of the world, but that has yet to come to pass.
10. Whilst there is a degree of uncertainty about the precise impact of Brexit on oil and gas, there is a silver lining – large energy companies such as **Equinor, BP, Total SA and Royal Dutch Shell** have in the last year approved long-term projects in the North Sea or around UK coast lines. This is highly encouraging, and goes to show that the impact of Brexit has not been so strong as to disincentivise any further investments in or around the UK.
11. Indeed, given that energy policy (including licensing and taxation of exploration and development of reserves) has always been within the Government's prerogative under the **Petroleum Act 1998**, Brexit is unlikely to have a material impact on regulation of the industry (unlike the wider construction industry, which is subject to significant pieces of EU legislation). Perhaps behind the mist and fog of Brexit, there lies a sunny boulevard where business is as usual for oil and gas.

**(2) EU migrant labour**

12. I have already touched on the issue of EU migrant labour in the oil and gas industry, and this is no doubt just as big an issue for the construction industry, if not more so. Anecdotally, I was on a site visit recently with a few members of chambers, and it is fair to say that all the welders and electricians we saw on our way were from Eastern Europe (also known as EU8 countries)! I cannot begin to imagine how all these EU workers can just vanish overnight from the construction and infrastructure industry.
13. Let's get a few real-life statistics out of the way first. In July 2017, the **House of Lords Economic Affairs Committee published a report entitled "Brexit and the Labour Market"**<sup>2</sup>, observed that EU nationals make up 7% of the UK's total workforce, and for the construction industry specifically, 8.2% of workers within that industry are EU nationals in the year from July 2015 to July 2016.
14. More recently, in August 2018, the Office for National Statistics<sup>3</sup> similarly recorded that:
- 14.1. According to the 2011 Census, of the 208,000 non-UK-born construction workers in England, **26% were EU8-born, 17% were EU15-born (excluding the UK), 9% were EU2-born** and the remaining 48% were from the rest of the world (including EU Other countries). That is, **more than half of the foreign workforce in England comes from the EU.**
- 14.2. On the whole, non-UK nationals accounted for 13% (109,000) of the construction of buildings sub-sector – **8% were EU8 and EU2 nationals, and 2% EU15 and EU (Other) nationals.**
15. There is no shortage of reports about the so-called '*Brexodus*' of EU migrants. Just last month, the **Office of National Statistics' Quarterly Report**<sup>4</sup> observed that EU net migration has fallen to a level last seen in 2009 due mainly to a decrease in EU immigration. More EU8 citizens from the Central and Eastern European countries left the UK than arrived, and immigration to the UK for work has fallen to its lowest level since 2014, due to a fall in EU citizens arriving for work.

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<sup>2</sup> House of Lords Economic Affairs Committee, "[Brexit and the Labour Market](#)" (HL Paper 11, 21 July 2017).

<sup>3</sup> ONS, "[Migrant labour force within the UK's construction industry: August 2018](#)" (23 August 2018).

<sup>4</sup> ONS, "[Migration Statistics Quarterly Report: February 2019](#)" (28 February 2019).

16. With numbers like that, it is not surprising that the construction industry has been seriously concerned about the future of construction labour resources in the UK post-Brexit. Even without Brexit, Mark Farmer's independent review in 2016<sup>5</sup> already pointed out the labour shortages faced by the construction industry. In the face of Brexit, I suppose the words '*Modernise or die*' have simply taken on an even more urgent tone.
17. There have been talk of a industry-wide lethargy in pursuing new construction projects. In January this year, the **IHS Markit/Chartered Institute of Procurement and Supply's UK construction purchasing managers' index of business activity fell to 50.6** from 52.8 in December 2018, far below the forecasts of City economists, and close to the 50 mark that separates growth from contraction. Construction firms are hiring staff at the slowest pace since July 2016, and Brexit fears have squeezed developer demand ever since the EU referendum, reflecting a "wait-and-see" approach to spending (especially in the commercial building sector)<sup>6</sup>.
18. But the question remains – will EU migrant labour simply disappear overnight, especially in a no-deal situation? Where will the thousands of EU workers already in the UK go, if the Government brings an end to free movement by enacting the Social Security Co-ordination (EU Withdrawal) Bill after a no-deal Brexit?
19. It seems to me that a no-deal Brexit does not necessarily equate to a doomsday scenario, and it is unthinkable that the Government will not implement at least some transitional arrangements. The Government's policy paper<sup>7</sup> on immigration has made it clear that in the event of no deal:
  - 19.1. Resident EU citizens will have until the end of 2020 to apply for EU Settlement Status to protect their status. This provides a safety net for EU construction workers already resident in the UK, as they will have the option of settling in the UK if they wish to. Whether they are now minded to leave the country, of course, is a separate issue, but the bottom line is that resident EU workers will not have to disappear overnight.

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<sup>5</sup> Mark Farmer, "[Modernise or Die](#)" (17 October 2016).

<sup>6</sup> <https://www.theguardian.com/business/2019/feb/04/uk-construction-growth-brexit-pmi-survey>.

<sup>7</sup> <https://www.gov.uk/government/publications/eu-immigration-after-free-movement-ends-if-theres-no-deal/immigration-from-30-march-2019-if-there-is-no-deal>.

- 19.2. Things are slightly more complicated for EU citizens who wish to come to the UK after Brexit. For those who intend to stay longer than 3 months, they will need to apply to the Home Office for leave to remain. There are provisions for the grant of non-extendable temporary leave for 3 years, with permission to work and study. This is a transitional arrangement, and EU workers who wish to stay longer than 3 years will need to apply for further leave under future immigration arrangements. At the moment, it is unclear what those future arrangements will be, and this uncertainty at the end of the temporary arrangement is likely to be unattractive to EU workers thinking of coming to the UK, as well as to employers looking for a long-term workforce.
20. The position, therefore, is this. Employers and contractors in the industry will need to review and revise their recruitment strategies, budgets and timescales, in order to avoid any unwanted disruption to labour supply. Above all, a process will need to be in place to check the immigration status of EU citizens being recruited, and preparations will need to be made to accommodate any further changes to the immigration regime.
21. On a broader level, there needs to be a long-term arrangement to improve access for EU migrant workers to the construction industry, but the problem runs deeper than that – the construction industry has to take concurrent steps to encourage UK workers to join the construction and infrastructure industry, and only a twin-track strategy such as this can ensure the long-term viability of the industry and its workforce.
22. This is precisely what is being proposed by the **Construction Industry Training Board’s (CITB) recent report entitled “Building After Brexit: An Action Plan for Industry”**<sup>8</sup>. The action plan recommends improving access to the industry with more training and apprenticeships, retaining and upskilling the current workforce, and driving digitalisation to modernise the industry.
23. According to the CITB’s policy director, Steve Radley, *“the latest forecast has revealed over 168,000 new jobs will be created over the next five years and with a likely post-Brexit reduction to the availability of foreign workers, the industry must act now to avoid widening the skills gaps”*. In my view, Brexit provides just the impetus the industry needs to work with the Government and modernise – it is a question of seizing this opportunity now.

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<sup>8</sup> CITB, [“Building After Brexit: An Action Plan for Industry”](#) (February 2019).

**(3) EU funding**

24. So that's labour resources. What else is just as important in the world of construction? Cashflow, and in this particular context, funding. Baroness Faulkner, the Chair of the House of Lords EU Financial Affairs Sub-Committee, recently summarised the challenge posed by the loss of EU funding in the following terms:

*'For the last 45 years the UK has relied on the European Investment Bank to invest in all manner of vital infrastructure projects such as Crossrail, London's 'Super Sewer', the expansion of Manchester's tram network and Scotland's Beatrice offshore windfarm.*

*The UK's infrastructure, and the industries that depend on infrastructure spending, will be hurt if the Government does not quickly find a way of plugging the funding gap that will be created if access to the EIB is lost after Brexit.*

*We're calling on the Government to give serious and swift consideration to the creation of a UK infrastructure bank. It also needs to come clean about why it has not claimed any share of the EIB's profits, which for the UK could amount to €7.6 billion.'*

25. In addition to the EIB, the European Fund for Strategic Investment (EFSI) was also established to mobilise €315 billion of infrastructure investment across Europe. The UK was the second largest recipient of funds allocated, but like the EIB, the future of funding from the EFSI is a bit of a *cul-de-sac* (excuse the French phrase), especially in the event of a no-deal Brexit.
26. You will not be surprised to hear that losing access to the EIB is likely to lead to a significant funding gap, especially for large-scale infrastructure projects. The decline in EIB (87%) and EIF (91%) funding since the referendum and the triggering of Article 50 is striking, to say the very least, and it does not take a lot of imagination to see how the industry would contract if there is a dramatic slowdown in new infrastructure projects. This is not a problem that is confined to the construction industry, as the continuous development and renewal of the UK's infrastructure (be it highways, railways or airports) would drive other economic activities nationwide, and a slowdown would have the domino effect of dampening the UK's economic growth.

27. This crucial issue was the subject of a recent report by the EU Financial Affairs Sub-Committee<sup>9</sup>, which noted that the Government has failed to provide a satisfactory explanation of its negotiation position on the return of the UK's capital in the EIB. As a profitable business, there seems to be a plausible case that the UK should receive some share of that profit. A 16.1% share of the EIB's retained earnings would be €7.6 billion, almost 20% of the UK's financial settlement of £35–39 billion. If this translate into a substantial capital investment in new projects, this can really give the construction and infrastructure a timely boost, both financially and in terms of morale.
28. At the same time, the Government's Infrastructure and Projects Authority (IPA) can still issue up to £40 billion of guarantees under the UK Guarantees Scheme to '*nationally significant*' projects, and this will remain open until at least 2026 as the Government has only provided £1.8 billion of guarantees to this date. There are talks of extending this to a wider range of projects, in order to bridge the funding gap left by the loss of access to the EIB.
29. I was particularly delighted to see the report's recommendation that the Government should give serious consideration to the creation of a UK national infrastructure bank, in order to fill the gap left by loss of access to the EIB and support the financing of key UK infrastructure in the long run.
30. Once again, this is an opportunity born out of the challenges we are facing, and if properly taken, there can be a new age of sustainable funding for future infrastructure projects which the country genuinely requires. In particular, a UK national infrastructure bank is likely to:
- 30.1. Gain confidence from private investors and provide policy stability outside the short-term political cycle.
  - 30.2. Attract expertise to the institution, enabling the institution to conduct credible due diligence and give a clear 'stamp of approval' to private investors for infrastructure projects.
  - 30.3. Protect the industry from the vagaries of an economic downturn (or, God forbid, another political upheaval like Brexit).
31. This is yet another promising proposal which has been gathering pace because of the looming shadow of Brexit. Personally, I hope that the Government will make this a priority and take decisive steps in the right direction before it is too late.

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<sup>9</sup> House of Lords EU Financial Affairs Sub-Committee, "[Brexit: the European Investment Bank](#)" (HL Paper 269, 31 January 2019).



**(4) EU legislation**

32. I come now to the third topic – EU legislation relevant to the construction industry. It goes without saying that statutory regimes such as the Housing Grants, Construction and Regeneration Act 1996 (as amended by the Local Democracy Economic Development and Construction Act 2009) are purely domestic and will not be affected. But what of the numerous EU regulations which derive from EU directives?
33. Of particular interest to the construction industry are the CDM Regulations 2007 and 2015, and employment-related regulations such as the Working Time Regulations and Agency Worker Regulations. What will become of these regulations?
34. The answer (at least for the time being) lies in **the EU Withdrawal Act 2018**, sections 2 of which provides that EU-derived domestic legislation as it has effect in UK law immediately before exit day will continue to be part of UK law as the body of '*retained EU law*'<sup>10</sup>. This does not prevent the retained regulations from future amendment or repeal, but that would be a debate to be had at a later date.
35. Given how the CDM Regulations are heavily embedded in the construction industry and various standard form construction and engineering contracts, and given that the UK has been a leader in tightening health and safety regulations, it seems unlikely that the CDM Regulations would be significantly watered down or repealed post-Brexit. The same cannot be said for employment-related regulations.
36. Another area of the construction industry which is heavily regulated by EU legislation is the marketing of construction products. The Construction Products Regulations 2011 (Regulation (EU) No. 305/2011) is an EU regulation directly applicable to the UK, and after Brexit, it will form part of the '*retained EU law*' by virtue of **section 3 of the EU Withdrawal Act 2018**.
37. The Construction Products Regulations prescribe strict requirements on labelling, CE marking and declarations of performance for construction products marketed in the EU. In a no-deal situation, the **Government's policy paper**<sup>11</sup> suggests that the regulatory framework will remain the same for the immediate future. This will enable CE-marked products to continue in circulation in the UK, although previous '*Notified Bodies*' in the UK will become '*approved bodies*' for the purposes of undertaking future conformity assessment activity for UK designated standards.

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<sup>10</sup> <https://www.atkinchambers.com/what-is-retained-eu-law-mathias-cheung-for-lexis-nexis/>.

<sup>11</sup> <https://www.gov.uk/guidance/construction-products-regulation-if-there-is-no-brexit-deal>.

38. The situation is slightly more complicated for UK exporters of construction products to the EU. Post-Brexit, UK bodies will not be in a position to perform conformity assessment tasks pursuant to EU product legislation, and so products exported from the UK must, in practice, be placed on the EU market by a legal entity established in the EU, and UK manufacturers will be required to work with an EU-based importer or distributor. The UK manufacturer will also be treated as a third-country importer, with additional obligations to be complied with. This will continue until the UK is able to reach a permanent trade arrangement with the EU.
39. Whilst there will inevitably be a teething period for the transition to the new import/export arrangements, we can expect that the standards laid down by the Construction Products Regulations will continue to apply. The same can be said for similar regulations such as the Pressure Equipment (Safety) Regulations 2016, which will also form part of *'retained EU law'*.
40. These are challenges which can be overcome if navigated carefully. Perhaps this is less of an opportunity for UK to make sweeping regulatory changes, but more a sobering moment to realise how the EU and the UK made important strides hand-in-hand in the fields of health and safety and product regulation, and that is not something which will or should fade away with Brexit.

#### **(5) Public procurement**

41. The UK's current public procurement regulations are a statutory regime which implements the EU Procurement Directives' rules of fairness and non-discrimination between economic operators, whether from different Member States or otherwise. It is a highly prescriptive regime, which lays down the rules from advertising in the Official Journal of the EU (OJEU) to setting the remedies available to aggrieved economic operators.
42. In the event of a no-deal Brexit (or indeed any form of Brexit which does not keep the UK within the EEA), the UK will no longer be bound to retain the EU-derived public procurement regulations, although the current regulations will continue to form part of *'retained EU law'* by virtue of **section 2 of the EU Withdrawal Act 2018**. On the other hand, UK economic operators cannot expect to enjoy the protection of the EU procurement regime when tendering for EU projects.
43. One of the challenges faced by the UK was its relationship with WTO member states, as it was only a signatory to the WTO Plurilateral Agreement on Government Procurement (GPA) by virtue of its membership in the EU, and the UK ran the risk of losing the right to equal treatment vis-à-vis other WTO member states post-Brexit.

44. Fortunately, on 27 February 2019, the WTO decided to grant the UK independent membership of the GPA. This will enable British companies to bid for government work in the US, the EU, Japan and the like, filling the gap left by the loss of the protection of the EU procurement regimes.
45. The challenge, and also the opportunity, presented by Brexit is the future treatment of the retained public procurement regulations. Is it too hot, too cold, or just right? Would the Government be incentivised to '*cut the red tape*' and relax some of the formal requirements prescribed by the current public procurement regulations?
46. Given that the procurement regime restricts government bodies in the letting of contracts, it may be attractive (at least superficially) for a future government to free itself of some of its constraints (e.g. increase the financial threshold for the application of the regime). However, whether there will be any mileage in such a proposal is debatable, as the current rules are designed to ensure competitiveness and fairness between economic operators, and healthy competition in turn promotes best value for the taxpayer.
47. In fact, many public bodies already voluntarily operate self-imposed best value tendering rules for contracts that fall outside of both the EU procurement regime and the GPA. There may be little immediate incentive for the public procurement regime to undergo a wholesale facelift in the near future, and the construction industry can expect the same regime to carry on for the time being.
48. What would certainly be beneficial, however, is a nationwide conversation about the future model for the letting of Government construction and infrastructure contracts, as well as the future of PFI/PF2 projects. This is a much wider topic which goes well beyond Brexit, and touches on issues such as the collapse of Carillion, the consultation on contractor retention, and the development of more sustainable business models within the construction industry. This would truly be an opportunity worth taking, and is one which promises to have a lasting (and positive) impact on the UK construction and infrastructure industry.

**(6) Managing the risks and Brexit-proofing contracts**

49. I have spoken at length about the various risks and challenges faced by the construction and infrastructure industry in a post-Brexit landscape. As I have tried to highlight over the past 30 minutes or so, there are opportunities to be seized jointly by the industry and the Government, in order to move forward from Brexit and build stronger industries across the UK.

50. That said, it is important not to lose sight of the risks which need to be carefully managed by stakeholders in the construction industry, be they funders, employers or contractors. This will require a combination of pragmatic commercial negotiations and shrewd contract-drafting – something that, even as a lawyer, is often easier said than done, especially in the face of Brexit with its various layers of uncertainty.

51. The importance of having bespoke and express “Brexit” clauses in a contract to guard against the foreseeable contingencies of Brexit is thrown into sharp relief by the recent High Court decision of **Canary Wharf (BP4) T1 Ltd & Others v European Medicines Agency** [2019] EWHC 335 (Ch):

51.1. In that case, the EMA contended that Brexit is a supervening event which has the effect of frustrating the 25-year lease of its headquarters in Canary Wharf, which was agreed in 2011 long before the EU referendum. The EMA also contended that it will lost its legal capacity to perform its obligations under the lease after Brexit. Smith J considered the issues on the assumption of a no-deal Brexit.

51.2. Smith J rejected EMA’s contention that it would lack legal capacity, but in any event, he held at [206] that it would have been a self-imposed frustration, given that the constraints on the location of EMA’s headquarters was imposed not because of Brexit *per se*, but by the EU’s response in changing the EU regulations which dictated where the headquarters had to be:

*‘[...] absent the 2018 Regulation, the EMA would have been obliged to stay in the United Kingdom. On the EMA’s own case, it would have had no competence to move. The EMA’s shift of headquarters is entirely due to the 2018 Regulation. It seems to me that the EMA cannot, on the one hand, say that the Lease is frustrated because its departure from the United Kingdom has been compelled by the 2018 Regulation, itself a reaction to the United Kingdom’s withdrawal from the European Union, and on the other hand say that the terms of the 2018 Regulation (by which I mean how that Regulation was framed and how it could have been framed) are altogether irrelevant for the purposes of frustration.’*

51.3. Further, Smith J held that there was no frustration of a common purpose which went beyond the four corners of the lease. The lease contained alienation provisions allowing EMA to assign/sub-let the premises, and there were unsuccessful attempts to introduce a break clause. This demonstrated that the parties did not share a ‘*common purpose*’ of occupying the premises solely as EMA’s headquarters, and the Court was reluctant to save a party from what has transpired to be a bad bargain:

*‘245. Outside the terms of the Lease, the parties’ purposes were not common, but divergent. The EMA was focussed on bespoke premises, with the greatest flexibility as to term, and the lowest rent. CW was focussed on long-term cash flow, at the highest rate, and was prepared to allow the EMA its say in the building’s configuration, provided that this was not adverse to CW’s interests. There was no common view or expectation between the parties that the risk of the consequences of the EMA abandoning its headquarters should be differently visited according to the reason for the EMA’s departure. I find that it was CW’s purpose that whatever the reason for the EMA’s intended departure, it should be protected: and, from the terms of the Lease, the EMA knew this.’*

52. The **Canary Wharf** case is a timely reminder of how difficult it would be for a party to a construction contract (or any commercial contract) to wriggle out of an unprofitable project on the basis of frustration. The supervening event must have arisen from Brexit itself and not the way the party responded to Brexit, and it would be a tall order to establish a common purpose outside of the express language of the contract.

53. The position of a contractor will be even more difficult when it comes to arguments of frustration, given that labour shortages and cost/currency fluctuations would render performance more difficult, but not impossible. Moreover, insofar as the construction contract was made around or after the EU referendum, it cannot be said (unlike in **Canary Wharf**) that the effects of Brexit were not reasonably foreseeable.

54. One thing is for certain – as Smith J puts it in **Canary Wharf** at [15], ‘*matters are in a state of flux and it is impossible to say – and certainly not for a judge to speculate – what will be the position on 29 March 2019*’, and I do not venture to speculate what might happen after Brexit. Whether we get an extension or not, employers and contractors alike will need to give careful thought to the post-Brexit risks for any given project.

55. For instance, the risks of labour or materials shortages and cost fluctuations are likely to affect projects one way or another, but particularly long-term contracts. This will need to be managed by express fluctuation costs, inclusion of Brexit-related relevant events for the grant of extensions of time, or more simply, by pricing appropriately for the time/cost risks in a post-Brexit climate. A failure to do so contractually will mean that the parties can only resort to common law principles such as frustration, and that is unlikely to be an entirely happy affair.

### **Concluding remarks – charting the way forward**

56. Having considered six areas of the construction industry which are most likely to be affected by Brexit, I come back to the theme which I began with about an hour ago – the unique opportunities which arise from the challenges posed by Brexit.

57. I started with a brief digression to Brexit and food policy, and I may as well end on it as well. The Chatham House report on Brexit and food policy concluded that *‘a carefully managed Brexit could also offer a historic opportunity to reassess and reformulate legislation, policies, practices and institutional arrangements that take better account of the needs of different actors [...] in the UK and abroad’*.

58. Most interestingly, the Chatham House report recommends what it called *‘a comprehensive, cross-government approach to fostering a post-Brexit food system founded on clear, coherent goals across trades’*, and there is a particular emphasis on *‘taking advantage of technological change’* and *‘a stronger but coordinated role for the devolved administration in defining the strategic direction and oversight of British food and farming’*.

59. That is a lot of food for thought (excuse the pun), and not just in the context of farming and food policy. I believe that those concepts are equally applicable to the construction and infrastructure industry, which has long suffered from stagnation in terms of reform and modernisation. A push for a modernised domestic workforce, making efficient use of technology such as BIM and digital tablets for record-keeping, can help the industry overcome the challenges of Brexit whilst building a sustainable model.

60. Moreover, on a governmental level, there has been a lot of talk about cutting red tape – this is not just a slogan to be chanted when quizzed on the benefits of Brexit, but a call to arms to MPs and the Government to take the initiative and identify a clear and coherent business case for reducing unnecessary regulation and bureaucracy, and making the UK a better environment for domestic and foreign property investment, a better market for contractors to compete and tender for construction and infrastructure projects.

61. I am particularly captivated by the mention in the Chatham House report of a cross-government approach and stronger coordination with devolved administration. My view is that the very occurrence of Brexit was a result of a fundamental disconnect between the capital (and particularly Whitehall) and the rest of the country, and there will be more “Brexit” or similar problems until we start bridging that chasm.
62. Brexit, therefore, is a timely (if rather extreme) reminder to us all that the Government has to actively to rebuild the links between London and the rest of the country, so as to solve the most deeply rooted issues in our society. It may well be that this can only be done by moving the Civil Service out of London and spreading it across the country, and if so, that will be an invaluable lesson learned.
63. As such, the outlook for the construction and infrastructure industry is not so much an “unknown” as an opportunity – an opportunity for the Government to seize the moment and work with the industry across the country to overcome the various challenges ahead. On that relatively optimistic note, I should probably stop and let all of you check what is the latest word from Westminster!

