



No Deal Brexit.

## What does it mean for Federation Members?

### Background and legal context

The situation remains fluid and the guidance from both the UK government and the EU remains uncertain in many of the details, and the devil is very much in the detail. This note tries to give clear pointers on certain issues I know are of key importance to members of the Federation and to ignore the noise that surrounds them. The note does not, though, amount to legal advice and in this, almost more than any other area of their work, members should seek their own advice.

Under the treaties the UK signed up to there are two situations in which a No Deal Brexit might take place.

The first is that the government doesn't conclude a withdrawal agreement by 31 October 2019 and that date is not extended in some way. The second is that we do conclude a withdrawal agreement but that the EU and the UK don't manage to negotiate long-term arrangements by the end of the transition period on 31 December 2020.

The risk of a No Deal Brexit by the 31<sup>st</sup> October seems small. The Benn Act is intended to ensure that it doesn't happen. At the date I am writing this part of this note, 11 October, there are encouraging signs of agreement on the Irish back stop, but we all now know that can change very quickly.

A No Deal Brexit on 31 December 2020 on issues relating to trade with the EU seems much more likely.

The withdrawal agreement that we have been discussing for some three years now is only the first step in the Brexit process under the treaties. When we signed up to these rules I doubt anyone thought negotiating a withdrawal agreement would be so controversial or take very long. A withdrawal agreement puts in place a temporary holding period known as the transition period during which the more difficult negotiations should take place. It is that transition period that expires on 31 December 2020.

Those second set of negotiations that take place during the transition period were always going to be difficult. Our membership of the EU touches many aspects of our daily lives that are not covered in this article and it is reasonable to assume that on most of those the UK and the EU will come to an accommodation. It is unlikely, for example that planes will stop flying, that medicines will not be approved, that the police and security services will no longer co-operate or that UK citizens who have bought house in France will have to come home. It is the trade aspects of Brexit that affect members' business directly and these are likely to be the most difficult to resolve. These trade issues are the subject of this article and it is on these issues that a No Deal Brexit seems more likely.

To secure a long-term future trading agreement along the lines that have been floated so far, all 27 parliaments will have to approve many of the details of that agreement. Given the difficulty that we've had getting the UK Parliament to agree what should be a relatively simple first step, the

chances of all 27 parties reaching an agreement on much more complicated and arguably more wide-ranging measures seems unlikely.

As well as the rules on tariffs and product standards, EU law puts in place many rules intended to make trade between member states more uniform and certain. The consequence is that cross-border trade is often made simpler and therefore cheaper. Until we leave the EU those rules bind the UK just as they bind every other member state and so the same rules apply in every member state.

After we leave the EU, all EU law that applies in the UK on the date we leave (either 31/3/2019 or 31/12/2020) will be converted into UK law wherever possible while we decide what we want to change. The key phrase is *wherever possible*. The relevant UK Act of Parliament aims to smooth the way to provide certainty and stability so that we can diverge from the law of the EU as and when we want to. The UK's ability to adopt some EU rules into our national law depend on the EU co-operating and in a No Deal Brexit, on the evidence so far, it is reasonable to assume they will not. Many of the rules can only apply if they are reciprocally applied in both the EU and the UK. In a No Deal Brexit there will be no such reciprocity so we will adopt most EU rules but will be unable to rely on a small minority.

The detailed position is, as they say, complex and more detail as seen from both sides of the debate can be found at:

<https://www.gov.uk/government/collections/how-to-prepare-if-the-uk-leaves-the-eu-with-no-deal>

[https://ec.europa.eu/info/brexit/brexit-preparedness/preparedness-notice\\_en](https://ec.europa.eu/info/brexit/brexit-preparedness/preparedness-notice_en)

### Importing goods from the EU after a No Deal Brexit

If you buy goods from, say, Italy, at least two bodies of law and two court systems will be involved, the UK courts (England and Wales/Scotland/ Northern Ireland) on the buyer's side and the Italian courts on the seller's side. The question is, which law decides what the buyer and seller have to do to fulfil their part of the bargain?

Under EU rules the position is clear, and all EU countries operate the same 'choice of law' rules. After a No Deal Brexit the position will be much less clear. Over the last few weeks it has become likely that those EU rules will no longer apply to the UK and will instead be replaced with at least 27 different sets of choice of law rules. What laws apply to importing goods from any EU country will be much less clear and more expensive both to determine and to apply.

In practice many members of the association don't think about which law applies until a problem arises and, in doing so, risk finding they have made a deal they may not like. This risk will be greater after Brexit because of the increased cost of working out what the deal requires the importer and the exporter to do will be higher.

Once you have worked out what the rules of the deal are, you and your seller still may not agree on you still may not agree with your seller who is right and who is wrong and someone will have to make a decision. That is usually a court. The question here is which court do you go to, the relevant UK court (English and Welsh, Scottish or Northern Irish) or the foreign one? To put that in lawyer's terms: which jurisdiction applies? At the moment, under EU rules that we use in the UK, the answer is clear and all courts in the EU apply the same rules. After a No Deal Brexit every country will apply its own, often very different, set of rules. Instead of dealing with one system you will have to deal

with 27 different sets of jurisdiction rules. The issue can be dealt with, but it will be more expensive and take longer to resolve than it does at the moment.

In practice many members of the associations don't think about which courts they will use and the risk they take by not thinking about it is limited by the EU rules on jurisdiction. Those rules will no longer apply after we leave the EU (on 31/10/19 or 31/12/2020). If you have a contract that depends on a foreign law you will probably need to employ a foreign lawyer in any event, but the new jurisdiction rules that apply after we leave there is another potentially complex and so expensive and lengthy question you will have to ask that foreign lawyer to advise you on. The issue can be dealt with, but it will be more expensive and take longer to resolve than it does at the moment.

In a post No Deal Brexit sale to or from the EU deciding who pays the tariffs and duties is vital. Incoterms have always been an excellent way of dealing with this without detailed negotiations with your buyer or seller. A new edition of Incoterms will be available next year. If you use terms such as Ex Works or CIF you need to understand the Incoterms and be able to use them properly. The cost of learning how to use Incoterms will be quickly recovered.

Larger value import deals or long-term repeat arrangements with one EU supplier make it practical to negotiate specific terms with that supplier. In the perfect world beloved by lawyers, you would discuss not only price and delivery times but also what law applies and what courts the parties will use. In practice few members of the association do that, but after a No Deal Brexit there will be much greater reason to do so. The cost and uncertainty that results from not doing so will be much higher. If you do negotiate these extra points (as you should) then import deals will take more of your time to negotiate and you may have to engage two sets of lawyers either to guide you as to what you do when you import goods or to draft the contract for you in appropriate circumstances. The issue can be dealt with, but it will be more expensive and take longer to resolve than it does at the moment.

If you are one of the few members that have negotiated contracts that do include a clause agreeing which courts and which law will apply, you need to review those contracts with a lawyer soon after we leave on a No Deal Brexit. The government is proposing to replace the EU rules on these clauses with rules under another treaty (the Lugano Convention, if you are interested) and there are disagreements between the EU and the UK about how those new rules will apply to agreements between the UK and those states that remain in the EU after Brexit. If that date is 31/12/20 then there is a little while to sort this out and the current uncertainties may resolve themselves. If the date is 31/10/19 you will need to grapple with the issue quickly if it is important to your business, but there will be many issues to grapple with, particularly customs requirements, and you will have to decide how important it is to you to know that, for example, English or Dutch rules apply to your import deal with your supplier in the Netherlands.

You will have noticed a pattern emerging here. Being in the EU makes trading with the EU cheaper and more certain in many ways because of a plethora of rules designed to make it simpler and more certain and we will lose many of those rules after a No Deal Brexit. That principle applies across the board to all the topics covered by this note.

**Update 17 October 2019.** In its Queens speech on 14 October the Government said it would put to Parliament a draft statute aimed at reducing the uncertainty in the rules that govern which law applies to a contract and which court the parties should use to solve disputes. It is impossible to predict what form the statute will take after it has been scrutinised by the Commons. It seems

unlikely that the draft bill will become law before this Parliament is dissolved and elections are held, in which case the draft bill will have no effect unless it is adopted and promoted by the next government.

#### Exporting goods to the EU after a No Deal Brexit

The same rules apply to exports as apply to imports. The cost and delay consequences are the same, but many members will find their bargaining power as the seller rather than the buyer is weaker. When you come to negotiate which court you will use you may find you have little choice. That commercial bargaining power is unlikely to change after a No Deal Brexit.

#### Employing agents in the UK

Most people in the industry are aware that the regulations that give commercial agents certain protections, including the right to a payment when their agency is terminated, came to us from the EU. Similar laws have applied in France and Germany for a long time. It is fair to say the EU rules protecting agents have not been popular amongst members of the Federation.

These rules *will* apply immediately after a No Deal Brexit, or indeed any Brexit. They have been adopted into UK national law and so you can rely on the measures you already have in place to protect you from their effects.

The government of the day may of course decide to change these rules after we have left the EU, which they cannot do now. Some commentators believe the current government will want to change them as they have been seen by some as a restraint on free trade. My personal view is that they are unlikely to change any time soon. If the current government survives it will have other priorities and the rules do have supporters in the business community which will make them politically more difficult to change than other, more high-profile measures.

#### Employing agents in the EU

If you employ agents who are resident or based in Remain EU states it has always been sensible to assume they have the protection of the laws of that country and a No Deal Brexit makes it even more prudent to take that view.

The rules on the choice of law set out above might give you some opportunities to avoid these extra costs but they are likely to be complex and so expensive. They will differ from case to case and from country to country and should only be considered if the amounts at stake are large.

If you have long term agency agreements in place (even if you have nothing in writing) you should review those arrangements following the check list for long term contract reviews below.

#### Distribution agreements with businesses based in the 27

Distribution agreements will not be affected by a No Deal Brexit, except of course that the new customs, tax and tariff arrangements will apply to any goods that cross borders.

### Trade Secrets

New, uniform rules were introduced by the EU in 2018 to help businesses protect their trade secrets across all 28 states. When (If?) we leave on a No Deal Brexit those rules will continue to apply to trade secrets in the UK.

### Sales to Consumers

Most members of the Federation are aware that customers who are consumers have many more protections than customers who are businesses. Most members also know that many of these additional rights have their origins in EU law but despite this the rights will not change when we leave the EU. Most of these protections were adopted into UK national law in an all-encompassing Act in 2015. The EU rules were enthusiastically embraced by our Parliament and so it is reasonable to assume they will not be changed anytime soon by a government of any political persuasion.

The position on sales to consumers in the EU, particularly over the internet, is complex and always has been. It will become even more complex after a No Deal Brexit making it even more necessary for members of the Federation to take legal advice from lawyers in the countries where they sell direct to consumers.

### Debt Collection in EU

It is always nice to be paid for goods you've sent to the EU and over the last 40 years open credit terms have become the norm in sales to EU customers. The ease of collecting debts across EU borders has helped that trend. Clear rules have helped members of the Federation collect debts and helped to keep premiums low for those who insure their debts. The rules will change on a No Deal Brexit.

Under the current rules it is usually better to collect *undefended* debts through the debtor's home courts but *defended* claims for repayment are better run in your home courts. Defended claims require much more thought and work by the creditor. EU rules mean that a judgment obtained in the UK courts can almost automatically be enforced in another EU state. The rules on serving court papers (which you need to do to start the court process) and gathering evidence also make it easier to deal with any disputes with your EU customer in the UK courts. These EU rules will not survive a No Deal Brexit (or perhaps any other sort of Brexit) which will tip the scales against using the UK courts to sue EU debtors here.

Every case will have to be considered individually (which in itself imposes a cost) and where you decide you need to use other courts the process will be even less comfortable, more remote, usually more expensive and often more unpredictable.

The loss of other EU measures seems unlikely to have much impact. For example, my impression is that the European Payment Order and the European Small Claims Procedure have not been very widely used and so their loss should have little impact. The EU mediation regime doesn't differ much from the domestic rules on mediation so little will change there.

### Contract reviews

You should review all your long-term, high value contracts with EU businesses or individuals, whatever type of Brexit we are heading for. Some contracts have a specific Brexit clause but if yours doesn't then it is unlikely that Brexit will give you a reason to bring the contract to an end if you want to. You might want to keep your commitments short while the political, economic and legal consequences of Brexit become clear. Currency fluctuation clauses have become crucial, if almost impossible to negotiate. Specification clauses or schedules must be read carefully to ensure they comply with the post No Deal regime.

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14/10/19

Updated on 17<sup>th</sup> October 2019