Impact of a no-deal Brexit on the property industry

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Property analysis: Can the property industry weather a no-deal Brexit? Kate Corke and Laura Conduit, both partners, and Shona Ray Ferguson, knowledge lawyer, all in the property department at Farrer & Co, suggest that, in the short term at least, leaving the EU without a deal is expected to dampen market confidence and the willingness of all parties to take risks.

How would property deals be impacted if the UK left without a deal?

The vast majority of property law is domestic, so, from a legal point of view, property deals will carry on much as they currently do. Even where our domestic legislation originated in the EU, for example much environmental law, the EU (Withdrawal) Act 2018 ensures that this legislation will continue to have effect as it applies on the date that the UK leaves the EU.

However, aside from any legal effects, property deals will be affected by the market conditions caused by a no-deal Brexit and its impact on the positions of individual parties to a deal. For example, for companies that are heavily reliant on importing goods from the EU, a no-deal Brexit might affect the viability of their business due to delays at borders and the trade tariffs which are expected to apply, and, as a result, they may be less likely to invest in property or may want to renegotiate the terms under which they occupy property. Similarly, some property-holding businesses that are reliant on migrant labour (eg, agriculture and construction) could be negatively affected by the end of 'free movement'.

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What are the key risks for property investors?

There will be both risks and opportunities for investors. The risks include a potential drop in property values, as widely predicted by commentators, which could affect an investor's returns if it sells property shortly after Brexit. Investors may therefore wish to hold on to property for longer before selling, and those in the market for a purchase might wait to see what happens. In addition, investment in sectors that are reliant on migrant labour, such as agriculture and construction, might falter due to the end of 'free movement' and the likely financial impact on those areas. Those investing in agricultural land will no doubt be mindful that the Common Agricultural Policy will cease to apply to the UK when it leaves the EU, and although the government has committed to matching the subsidies until 2020, the long-term future is uncertain. On the other hand, a further fall in the value of sterling could lead to an increased demand for UK property from overseas investors. There are also likely to be development opportunities for new distribution facilities to handle customs clearing and support supply chains.

What are the key risks for developers?

As mentioned above, the construction industry is heavily reliant on migrant labour and a no-deal Brexit is likely to make it harder to recruit workers with the required skills. In addition, without a deal, goods being traded with the EU will be subject to tariffs, which could affect the cost of developments and the availability of materials. This would put additional pressure on the construction industry, and we could see more disputes and insolvencies in the near future. Speculative developments are likely to decrease, but developments that have UK government support (eg, residential development) may weather the storm. On the other hand, in a no-deal scenario the EU procurement regime will cease to apply to the UK. Some see this regime as an unnecessary burden, so there could be increased flexibility in the appointment of contractors.

What are the key risks for occupiers?

Many occupiers will be envisaging financial problems as a result of market conditions after a no-deal Brexit, but they may be tied in to long-term leases that do not allow for renegotiation. A relatively recent case in the High Court (see

Canary Wharf (BP4) T1 Ltd and others v European Medicines Agency [2019] EWHC 335 (Ch), [2019] All ER (D) 154 (Feb)) held that a lease was not frustrated (ended) by Brexit, even though the tenant was an EU entity (for further information see News Analysis:High Court finds EU agency's lease not frustrated by Brexit (Canary Wharf (BP4) T1 Ltd v European Medicines Agency)). Other standard clauses in a lease are unlikely to help, so if an occupier needs to exit the lease or renegotiate, they will have to approach the landlord. Many leases allow for assignment or underletting of the lease to another party, usually with the consent of the landlord (not to be unreasonably withheld). Some landlords may be willing to accept a surrender of the lease (potentially at a price), renegotiate the terms of the lease or offer concessions, such as reducing the rent or altering the payment schedule. However, generally landlords have no obligation to do this and do not need to behave reasonably.

How prepared is the industry for a no-deal scenario?

Given that most of the effects of a no-deal Brexit for the property industry will be market-related rather than legal, it is difficult to know how to prepare when the market—and indeed the political situation—is so unpredictable. The degree of preparedness will depend on the sector each individual or business operates in and whether they are sufficiently 'hedged' to bear market fluctuations and changes in circumstances. From a legal point of view, some occupiers have already tried to add clauses to their leases allowing for renegotiation due to Brexit, but these clauses are difficult to draft (for example, how do you define 'Brexit'?) and are unlikely to be agreed by landlords as they can be very wide in scope.

What steps should property lawyers and their clients be taking now?

Given that property-owning or occupying clients can be individuals and businesses in any industry, clients may wish to refer to the information on the Brexit section of the government's website to determine what steps, if any, they need to take in relation to their own concerns.

From a property law perspective, if clients are concerned about the effect of a no-deal Brexit on their business, they may want to negotiate a right to pull out of a transaction in a no-deal scenario—for example, by including a break right in a lease.

Where a client has concerns about their existing agreements, their lawyers could review the documents to establish whether any existing terms can help and whether there is a need for renegotiation. Depending on the circumstances and the nature of the renegotiation required, there will need to be a cost/benefit analysis as to whether it is worth it, given that the effects of a no-deal Brexit are unpredictable. Renegotiating could be a complicated and expensive process and, in some cases, parties may prefer a 'wait and see' approach.

Are there any other points of interest worth adding here?

There will be emerging opportunities in the aftermath of Brexit that savvy investors can take advantage of. No doubt the government (whoever that may comprise) will take steps to put in place a Brexit-busting budget. Some commentators speculate that this may include stamp duty land tax reductions, designed to boost activity in the property market.

Kate Corke has specialist experience advising clients on the financing, sale, acquisition and development of both commercial and residential property. Corke's particular focus is on commercial property finance, an area in which she provides a high level of client service combined with commercial and pragmatic advice to both banks and borrowers.

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