The COVID-19 pandemic and the legal situation of the construction industry

I. Projects with special priority under the Coronavirus Act

Simplified rules of development of special investments related to the COVID-19 pandemic

On 8 March 2020, the Act on Special Measures Related to Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and Resulting Crisis Situations (known as the "Coronavirus Act") entered into force. **The Act waives the application of provisions of the Building Law, the Act on Spatial Planning and Development, and the Act on the Protection of Monuments. This exclusion applies to:**

- **designing, construction, reconstruction, renovation, maintenance, demolition, and**
- **change of use**

of building objects in connection with counteracting COVID-19. The Coronavirus Act does not provide for an analogous waiver of the relevant provisions of the Act on Environmental Impact Assessments, meaning that some projects to which the exemption applies may still be required to obtain an environmental permit.

At the time of this Alert's publication, a bill to amend the Coronavirus Act is available on the website of the Sejm, which proposes the following:

- Any actions covered by the exemption must be notified to the relevant authority;
- The relevant authority must establish requirements regarding the necessary safety measures in the case of works which pose a threat to human life or health;
- Compensation shall be paid to the owner or perpetual usufructuary for any damage caused to their real property by construction works performed under the Coronavirus Act.

The rationale behind these changes is to prevent the application of the exemption for purposes other than counteracting COVID-19. It seems that the adoption of these amendments would address at least some of the concerns raised about the safety of projects implemented under the Coronavirus Act.

Binding instructions issued to business operators

Under the Coronavirus Act, the Prime Minister may issue instructions to business operators, including companies from construction industry, in connection with counteracting COVID-19. The provisions of the Coronavirus Act do not specify a catalogue of such instructions, therefore they may include any actions related to combating or preventing disease. Such instructions may be issued orally, by telephone, or via means of electronic communication, must be acted upon immediately and do not require justification. **Instructions are carried out on the basis of an agreement concluded between the business operator and the head of relevant voivodship, and are financed from the state budget.** Some questions may arise about the provision stating that **preparations to carry out the tasks specified in such an agreement** (such as planning works) **shall be financed by the business operator themselves**. However, the bill amending the Coronavirus Act proposes that this controversial solution be abandoned. Given the dynamic nature of the current situation, it is necessary to keep one's finger on the pulse and follow the latest developments in the legal environment. The introduction of further stringent measures and amendments to the Coronavirus Act is highly probable, especially in the context of the proposed 'Anti-Crisis Shield' law.

WKB experts are at your disposal
Contact person: Anna Wyrzykowska, anna.wyrzykowska@wkb.pl

Ii. Other investments not covered by the Coronavirus Act

Status of proceedings for the issuance of administrative decisions, in particular building permits, zoning decisions,, environmental permits and occupancy permits

The issuance of permits required in the investment process takes place within statutory time limits and should be done without undue delay. There are no laws providing for the suspension of the proceedings in case of extraordinary situations such as the COVID-19 pandemic. **However, the time limit for the issuance of a particular permit does not include any delays caused by reasons independent of the relevant authority**. At the time of this Alert's publication, no notices explicitly limiting the operation of public authorities have been issued. However, it cannot be ruled out that because of the threat posed by the spread of the SARS-CoV-2 virus, or because of high levels of absence, the operation of public authorities may be limited, which may impact time limits for obtaining required permits and, as a result, project schedules.

We would like to note that permits in the building process are issued on the basis of a written procedure, which does not require the physical presence of those involved or the relevant authority. Therefore, unless public authorities are ordered to temporarily shut down their operations, the procedures should progress as normal, except for procedures for the issue of an occupancy permit, which requires prior inspection by the relevant supervisory authority. For obvious reasons, such activities may be currently postponed.

What about existing construction?

Firstly, a thorough analysis of the contractual provisions is required in order to determine:

- Whether the contract defines force majeure and what does that definition include?
- What are the rights of the parties in cases of force majeure?

If the contract does not contain a definition of force majeure, or the force majeure clauses are very vague, it is helpful to refer to the general criteria developed in both case law and legal theory. It is generally accepted that the cumulative satisfaction of the following criteria enables an event to be classified as force majeure:

- the event must be external,
- it was impossible to foresee, and
- its effects could not be prevented.

In the case of existing construction contracts, unless the parties have made certain contractual modifications, the current epidemiological situation may be deemed force majeure. Such a classification may not be possible in respect of contracts concluded when the threat became foreseeable.

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Contact person: Anna Wyrzykowska, anna.wyrzykowska@wkb.pl

Consequences of force majeure

Depending on the provisions of the contract, the occurrence of force majeure may exclude or limit the liability of the affected party, waive the obligation to pay liquidated damages for delays, extend completion period, or even imply the possibility of discontinuing the legal relationship.

If a construction contract does not contain any provisions regarding force majeure, it is possible to invoke general rules on liability, according to which **the relevant party shall not be held liable if their non-performance or improper performance of an obligation is due to circumstances for which that party is not responsible, such as the COVID-19 pandemic**. The burden of proof – i.e. demonstrating that the failure to properly perform an obligation results from force majeure – rests with the party which failed to fulfil its obligation, and, in the majority of cases, this will be the contractor.

Furthermore, in accordance with Article 495 of the Civil Code, **the obligation may also expire, where its performance has become impossible as a result of circumstances for which the debtor is not responsible**. In such case, **the investor is not entitled to demand performance of the contract from the contractor, and the contractor is not entitled to receive their remuneration**. If the performance by one of the parties has become impossible only in part, that party loses its rights to the appropriate part of the mutual performance – such as the remuneration due for the non-completed part of works. In such a situation, the investor may renounce the contract if partial performance would have no significance for it.

Investor's right to renounce the contract

As regards special regulation applicable to construction contracts worth mentioning is Article 635 of the Polish Civil Code, according to which, **if the party who accepted the order (i.e. the contractor) is in delay with the commencement or completion of its work to the extent that it is unlikely that they will be able to complete it within the agreed timeframe, the client (i.e. the investor) may renounce the contract without setting any additional period of time and before the original completion time expires**. This provision uses the term delay, which, by definition, is non-culpable. Therefore, the right of an investor to terminate a contract may apply **even to a contractor's delay which was caused by reasons independent of the contractor**.

Failure to reach an agreement

Where the parties to the contract are unable to agree on the necessary modifications of their original arrangements as a result of the current epidemic, each of them may resort to the "fundamental change of circumstances" clause expressed in Article 3571 of the Civil Code, which states that where, **for reasons of a fundamental change of circumstances, performance would involve excessive difficulties or would expose one of the parties to a gross loss, which the parties did not foresee at the time of the contract's conclusion, the court may, having considered the interests of both parties and in accordance with the principles of social conduct, indicate how the performance should be delivered, specify the amount of consideration, or even rule that the contract should be terminated**. In its judgement of 8 March 2018 in case II CSK 303/17, the Supreme Court explicitly stated that an epidemic may be considered as a fundamental change of circumstances. Where the court decides to terminate the relevant contract, it may, if need be, make a determination about the parties' settlement of amounts owed, in accordance with the principles referred to above. It should be borne in mind, however, that the above provision gives the court the right to order a change in the contract, rather than the parties. Given that the courts have currently been limited to handling only urgent cases, it seems much more effective for the parties themselves to renegotiate the terms of any contract being performed where possible; this is also the direction towards which current practice appears to be heading, as the effects of the pandemic affect both parties to any contract.

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