

Other facilitations for business



Amendments to the Public Procurement Law

As regards contracts executed via the public procurement procedure on the basis of the legislative Act of 29 January 2004 – the Public Procurement Law, the Covid-19 Act provides that the contracting authority may now, working in consultation with the contractor, effectuate certain amendments, e.g. **foregoing the right to claim penalties for failure to perform or improper performance** where the contractor can show, to a reasonable degree of probability, that such failure is a direct consequence of the Covid-19 outbreak. The parties to the contract must promptly notify one another of the impact of the circumstances surrounding the coronavirus epidemic on due performance.

Some questions may arise as regards demonstrating probability that what, nominally, constitutes a breach of the contract was caused by circumstances associated with the coronavirus, and also as regards the very concept of “circumstances associated with the Covid-19 outbreak”. A level-minded, equitable approach to possible modification of the original contract will be called for on the part of the contracting authorities, most of which – obviously enough – will be public sector entities.

Moreover, the Covid-19 Act:

- **Excludes application of the Public Procurement Law** to orders of services or supplies necessary for counteracting the Covid-19 outbreak where there obtains a high probability of uncontrolled spread of the illness and/or where required on public health grounds;
- **Excludes application of the Public Procurement Law** to orders by Bank Gospodarstwa Krajowego Polski Fundusz Rozwoju S.A. and by regional development

funds associated with granting financial support to counteract the negative economic consequences of the Covid-19 outbreak;

- **Excludes criminal liability** for the offence penalised by arts. 296 § 1-4 of the Criminal Code with respect to enforcement of amounts due in connection with improper performance, or failure to perform, a public procurement contract as a result of circumstances associated with the Covid-19 outbreak;
- **Excludes liability of management board members**, supervisory board members, audit committee members, and liquidators vis a vis the company **for harm** occasioned by action, or failure to act, contrary to applicable laws or to the company's articles (as invoked in arts. 293 § 1 and 483 § 1 of the Commercial Companies and Partnerships Code) with respect to enforcement of amounts due in connection with improper performance, or failure to perform, a public procurement contract as a result of circumstances associated with the Covid-19 outbreak.

Modification of the construction laws

The Covid-19 Act introduces considerable facilitations with respect to construction work conducted as part of the anti-epidemic efforts, up to and including **exemption from ordinary application of the construction law to erection, refurbishment, maintenance, and demolition of structures** (as per the legislative Acts of 7 July 1994, 27 March 2003, and 23 July 2003). This translates into a real-terms possibility of accelerating work on **facilities for use in countering the Covid-19 epidemic**. Whenever such work is commenced, however, the competent authorities must be notified forthwith; in this way, the ordinary sequence of events is reversed. All the above is subject to the overarching qualification that any construction, refurbishment, etc. works undertaken in connection with the Covid-19 may not pose a threat to life and limb.

Partial lifting of the ban on Sunday shop opening

While the official state of epidemic risk, or of epidemic, associated with the Covid-19 outbreak persists, and likewise for 30 days after it has been repealed, **unloading, acceptance, and arrangement on display of essential goods may be performed (and entrusted to employees)** also on Sundays (other than high holidays). We would venture, even at this early point, that this is an unsatisfactory half-measure. It applies only to certain categories of goods, and it stops short of actually permitting shops to sell on Sundays. We would argue that, given the potential damage now faced by the economy, the legislature – of course, always with due heed for health and safety – ought to consider abandoning the ban on Sunday trading (a relative novelty in Polish law) to the widest extent possible.

Lease / rental of commercial space and of residential properties, other contracts

In light of the Covid-19 Act, the ban on operation **of shopping malls with retail space in excess of 2,000 m² coincides with a suspension of the mutual obligations of the parties to lease agreements, rental agreements**, and similar contracts pursuant to which retailers use space at the mall. This, as it were, standstill shall remain in force from the day on which such shopping malls were ordered to close until such a time as the ban is lifted, whereupon the lessee will have 3 months to serve on the lessor an unconditional, binding offer for extension of their agreement on the same terms as before – and for the duration of the original agreement increased by the duration of the coronavirus lockdown plus an additional 6 months. If the lessee fails to make such an offer, the lessor ceases to be bound by the above rule concerning suspension of mutual obligations under the lease agreement.

The Covid-19 Act lays down the general rule that, other than in circumstances expressly specified therein, lessors may not effectuate unilateral rent increases or terminate lease agreements until 30 June 2020.

Subject to certain exceptions specified in the Act, the Covid-19 Act entitles lessees to extend their agreements through 30 June 2020 if the original term expires subsequent to coming into force of the Covid-19 Act but prior to 30 June 2020. The lessee may exercise this right by serving a declaration of intent not later than on the last day of the original agreement term.

Subject to certain exceptions, the Covid-19 Act also **restricts the possibility of serving lessees with termination of the lease agreement and of unilateral rent increases**. In other words, lessees / tenants benefit, through operation of the law, from a longer period of notice – provided that the following two prerequisites are met:

- Termination of the residential lease or unilateral increase of the rent was notified to the lessee before the Covid-19 Act came into force;
- The period of notice elapses subsequent to coming into force of the Covid-19 Act, but before 30 June 2020.

Again, the lessee may exercise his right to a longer period of notice by serving a declaration to that effect not later than on the last day of validity of the current lease or rent amount.

The Covid-19 Act also implements a number of specific measures, the most important of which include:

- Longer deadlines for remittance of the fee for transformation of **perpetual usufruct title** in land developed for residential purposes into ownership title for the year 2020 from 31 March 2020 until 30 June 2020;
- Extension of the deadline for execution of the contract for **operation of Employee Capital Plans** by entities with at least 50 employees by 6 months, from 10 April 2020 until 10 October 2020;
- Extension of the deadline for **filing information to the Beneficial Owners Register** by 3 months, from 13 April 2020 until 13 July 2020;
- Statutory solutions concerning **amendment of loan agreements and/or loan repayment schedules with respect to credit facilities extended to micro-enterprises and to small and medium-sized enterprises in accordance with the Banking Law**. The general idea is that any such amendments may not result in deterioration of the financial and business situation of the borrower. All in all, applicable Polish laws already provided ample room for such amendments, although one could, conceivably, argue that they left a bit more to the good will of the lender. Also, the choice of words – about deterioration of the financial and business situation of the borrower – is not a masterstroke of precision and, in fact, may translate into risk for both the bank and its client. Quite apart from that, given that the Covid-19 Act is purportedly directed at the entire market, one would imagine that this regulation should not expressly exclude large enterprises (generally defined as those employing more than 250 people), which are likewise at risk from the unfolding corona crisis.

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