

# Track Changes

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## BOSNIA AND HERZEGOVINA: IMPACT OF COVID-19 ON CONSTRUCTION CONTRACTS

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*[https://www.wolftheiss.com/covid\\_19/](https://www.wolftheiss.com/covid_19/)*

The state of natural or other disaster in Bosnia and Herzegovina (**BiH**), declared on 17 March 2020 and caused by the COVID-19 pandemic, combined with the various imposed governmental measures for combating the spread of virus, will certainly affect construction contracts in BiH for which construction works have already commenced and those that will commence in the future.

Measures that are currently in force in BiH do not restrict or prohibit construction work or construction sites. However, since construction contracts entail (in addition to the construction work itself) the delivery of materials, the installation and commissioning of various types of equipment, as well as the services of foreign experts and the workforce, it is inevitable that the realization of the construction contracts will be affected due to the closure of borders and limitation of transportation.

Once the deadlock in construction occurs, the question remains: which party ultimately bears the responsibility for it (in terms of damages/contractual penalty, transfer of risk, etc.), and whether an extension of time may be requested. Some of these issues are regulated by BiH laws and are briefly explained below. As construction contracts may include the application of FIDIC conditions or other rules, specific issues that may arise due to the outbreak should also be evaluated keeping in mind such specific rules as well.

### COVID-19: IS IT FORCE MAJEURE OR NOT?

Force Majeure is not expressly defined under the applicable laws in BiH. However, under the established case law, a Force Majeure event is every unforeseeable event that may not be objectively avoided or overcome and that is not attributable to the contracting parties. Accordingly, it may be argued that the COVID-19 pandemic may fall under the said description of a Force Majeure event, since as such, it was unforeseeable, and its

occurrence could not be avoided or overcome. However, in terms of the contractual obligations, a Force Majeure event is also seen as an event preventing one party or the parties from temporarily or permanently performing its/their contractual obligations (one or more).

Thus, in order to consider relying on the Force Majeure basis, it is necessary to assess the circumstances of each particular case and to check whether the necessary criteria are met. The occurrence of a Force Majeure event in accordance with the applicable law in BiH would not automatically release the parties from performing their obligations during the Force Majeure. If such a provision is not expressly included in the construction contract, the parties may refer to the provisions of the applicable Law on Obligations which regulate the occurrence of a Force Majeure event and its connection with the exclusion of contractual liability for damages and the inability to fulfil obligations.

### COMPLETION OR INTERMEDIATE DEADLINE EXCEEDED – WHAT ARE POSSIBLE CONSEQUENCES?

If the deadline is exceeded due to the Force Majeure event, the party in the delay is generally not liable for the damages nor the contractual penalties. The party is obliged to pay the contractual penalties and damages only if the delay can be attributable to a party's fault. The applicable laws in BiH do not specifically regulate situations when contractors are entitled to an extension of time within the construction contracts, thus leaving this matter to be regulated by the parties.

The contractor may also consider referring to the hardship provisions and claim that performance of its contractual obligations is excessively difficult, or the purpose of the contract cannot be achieved due to the COVID-19 pandemic and related governmental measures. Based on such an impediment, the contractor may, if such a possibility is not explicitly excluded by the construction contract, request the termination of the contract due to the material adverse change/hardship circumstances. The party which received the request for termination may avoid termination if it accepts that the relevant terms and conditions of the contract are fairly amended.

However, considering that the governmental measures and COVID-19 pandemic would not be of a permanent nature and that the parties generally would be able to continue with performance of their obligations following the cessation of the measures imposed, it would be reasonable to consider amending the contract rather than terminate it.

### THE PARTIES TO THE CONSTRUCTION CONTRACT WANT TO "FREEZE" THE CONSTRUCTION CONTRACT

Parties to the construction contract are generally free to regulate their contractual relations, therefore the temporary suspension (freeze) of the parties' rights and obligations arising from the construction contract would be feasible. However, it would be necessary to amend the construction contract accordingly as well as to notify the authorities on the suspension of the works. Furthermore, considering all circumstances of the current situation

caused by COVID-19, it would be generally advisable for the parties (if they intend to continue their business relationship) to consider suspending performance of their contractual obligations during the outbreak by which they will avoid possible litigation or arbitration proceedings arising out of the construction contracts.

#### IS THE INVESTOR ALLOWED TO PROHIBIT THE EXECUTION OF THE WORKS?

One of the main employer's obligation arising from the construction contract is to provide to the contractor and its staff access to the construction site. Exceptionally, the employer or the competent construction inspection are entitled to close the construction site and to ban execution of work due to statutory reasons such as non-compliance with the design documentation, using inappropriate material and non-qualified staff, execution of the works contrary to the construction permit etc.

Therefore, the employer's prohibition to execute works by closing the construction site without justified reason would be considered a breach of the construction contract, unless the contract does not expressly stipulate such a right of the employer. Nevertheless, employers in BiH may at any time cancel - unilaterally terminate the construction contract, for no specific reason. In such event, the contractor would be entitled to compensation for executed works until the date of termination.

Since health and safety is the greatest priority at the moment, in order to prevent and minimize the COVID-19 outbreak on construction sites and among workers, contractors should ensure a safe environment, as much as possible, which includes measures on the reorganization of work (such as avoiding groups of workers together), providing sanitizing methods and face masks, fumigating the site and workers' camps as well as providing medical support and medical staff at the site.

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