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CAS report on construction disputes in 2022

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Abstract: The purpose of this article is to present the key findings and conclusions of the CAS Report on Construction Disputes in Poland in 2022 with an outlook to 2023. Once again, we asked our Business Partners, acting as various stakeholders of ongoing construction projects, to participate in a survey containing a series of questions on the causes and effects of construction disputes during construction projects in Poland, both in terms of cost and time impact. On the basis of the answers provided, the results have been compiled and presented in detail in this Report.

Keywords: construction disputes, CAS report, risk, war, pandemic

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1. Introduction

In the construction industry, there is a high risk of disputes arising between the parties to a project, and at every stage of the project, from planning and design to execution and acceptance of the works. As CAS, we specialise in helping our customers with this challenging aspect of construction projects.

In order to understand the sources and consequences of disputes, we conducted a survey among our customers and business partners for the fifth time. The survey mainly covered engineers, consultants, lawyers and managing technical staff who operate on both sides of the investment process. The survey included questions on, among other things, the reasons for and methods of resolving disputes and their impact on the implementation of investments. The results of our survey on disputes in the construction sector are directly linked to the impact of the armed conflict in Ukraine on the industry.

2. Main causes of disputes in the construction industry

For another year in a row, our Respondents indicate that the main cause of construction disputes is the increase in the cost of completing contracts. As many as 88% of Respondents reported that this was a problem. Although mandatory remuneration indexation has been introduced in public contracts, Professionals say that this is insufficient to cover real cost increases. That is because the indexation mechanisms in construction contracts are insufficiently regulated or simply do not lead to the expected results.

In second place, the Respondents indicate a lack of or delay in making key decisions, recording an increase on previous years with 51% of the Respondents. During the pandemic, the protracted decision-making process had a major impact on problems in the execution of investments. Now, the impact of the outbreak of war in Ukraine has compounded those difficulties. Above all, there were logistical challenges related to the availability of materials on the market and labour. As last year, the situation made decision-making difficult, but that was not directly due to the actions of the parties involved.

The other main causes of construction disputes identified by the Respondents are errors and/or omissions in the documentation provided by the Contracting Authority ('build' formula), different conditions found on site and incomplete information regarding the design or description of the Contracting Authority's requirements ('design and build' formula), ranking 3-5. The occurrence of force majeure came in sixth place.

Further reasons indicated by our Respondents are shown in Figure 1.

		2019	2020	2021	2022
1.	**Increased costs of delivery**	**(85%)**	**(64%)**	**(80%)**	**88%**
2.	**No decision taking or delays in taking key decisions**	**(63%)**	**(58%)**	**(43%)**	**51%**
3.	Errors and/or omissions in the documentation provided by the Contracting Authority ('build' formula	(29%)	(58%)	(36%)	35%
4.	Different conditions found on site (or problems with access)	(51%)	(62%)	(37%)	25%
5.	Incomplete information regarding the design or description of the Contracting Authority's requirements ('design and build' formula)	(44%)	(44%)	(33%)	24%
6.	Force majeure occurrence	nd.	(24%)	(17%)	22%
7.	Contracting Authority / Contractor / Subcontractor failing to understand or complying with contractual provisions	(20%)	(19%)	(16%)	13%
8.	Incorrectly drafted or incomplete and unjustified claims	(9%)	(8%)	(4%)	11%
9.	Incorrect contract administration	(22%)	(8%)	(12%)	8%
10.	Missing or delayed payments	(20%)	(10%)	(1%)	7%
11.	Changes to applicable laws	nd.	(16%)	(3%)	5%
12.	Adverse weather conditions	(17%)	(17%)	(8%)	1%

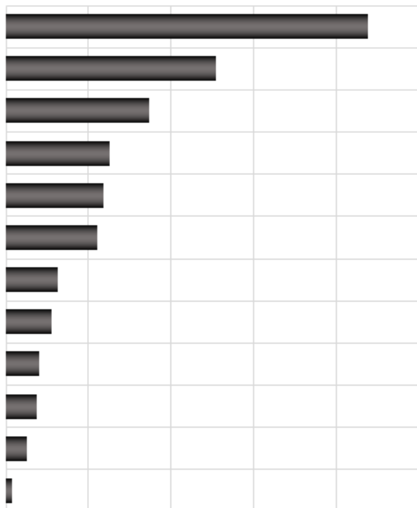

Figure 1 - Main causes of construction disputes

The Respondents also responded to questions on dispute resolution methods, again indicating that the most common method used for this is the 'wait-and-see' approach (66%), while also indicating this method as the least effective (3%). Negotiation is the most effective method in the opinion of the Respondents, which was indicated in 76% of the responses.

		2019	2020	2021	2022
1.	**'Wait-and-see method**	**(68%)**	**(67%)**	**(65%)**	**66%**
2.	Negotiations between the parties	(39%)	(50%)	(46%)	63%
3.	Common court	(71%)	(45%)	(57%)	35%
4.	Mediation	(3%)	(6%)	(12%)	14%
5.	Arbitration	(3%)	(6%)	(7%)	1%
6.	Conciliation	(0%)	(6%)	(3%)	1%

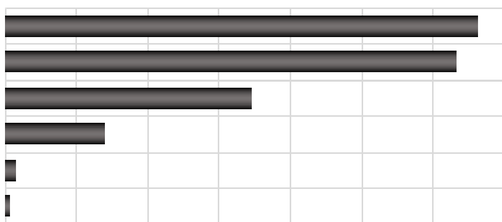

Figure 2 – Most popular methods of dispute resolution

	2019	2020	2021	2022
1. Negotiations between the parties	**(78%)**	**(85%)**	**(78%)**	**76%**
2. Mediation	(29%)	(38%)	(43%)	49%
3. Common court	(36%)	(18%)	(13%)	21%
4. Arbitration	(15%)	(17%)	(22%)	10%
5. Conciliation	(14%)	(10%)	(16%)	8%
6. 'Wait-and-see method	(5%)	(1%)	(1%)	3%

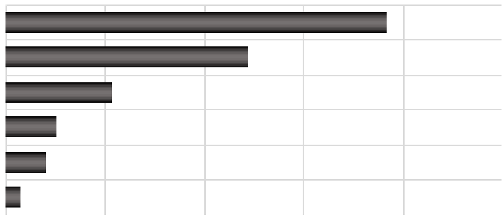

Figure 3 – Most effective methods of dispute resolution

There is no change in the Respondents' belief regarding the distribution of risk between the parties, indicating that it is the interest of the contracting authority that is better protected during the execution of investments. The results of the survey clearly confirm that at least 90 per cent of the Respondents point to the contractor as the party bearing the greater risk. The situation has not changed this year, where up to 92% of the Respondents shared that opinion. This principle is based on the fact that the party that is in control of the finances is more secured. That is understandable, as it is the investors who draft the contracts and, in many cases, the contractors do not have the opportunity to negotiate their terms, especially when operating under the Public Procurement Act, which makes it impossible to introduce provisions that are favourable to the contractor.

3. Impact of the SARS-CoV-2 virus pandemic

This year, due to the end of the critical impact of the effects of the pandemic on ongoing investments, we refrained from asking detailed questions about the consequences of the spread of the SARS-CoV-2 virus and decided only to summarise the period.

In the December 2021 survey, as many as 67% of the Respondents indicated that the SARS-CoV-2 pandemic had a negative impact on their daily work, while 80% of the Professionals indicated a negative impact on their ongoing projects. In previous surveys, we also asked about the future impact of the pandemic on ongoing projects, where up to 74% of the Respondents in December 2021 expected further negative impacts. Based on those responses, this year we examined market attitudes to the continued impact of the pandemic on ongoing projects.

Nearly 70% of the Respondents to the survey said that the pandemic and its effects no longer had the most significant impact on the market (53% had felt the negative effects but their impact was over, and 13% had not felt it at all). Only one in three Respondents are still experiencing the effects of the pandemic.

4. Impact of the war in Ukraine

It is undeniable that the outbreak of the war in Ukraine has had a strong impact on the construction industry in Poland. With the needs of the market in mind, we conducted a survey in the second month of the armed conflict to find out the perceptions of Construction Professionals on its consequences. We published the results of the survey in a report in April 2022. In the next survey, 10 months later, we repeated the same questions to see how changes were evolving according to the Respondents' perceptions.

As a result of the responses collected, it was found that 93% of the Respondents noted the negative impact of the war in Ukraine on the current situation of the construction industry. In contrast, 78% of the Respondents noted that the negative effects of the war will continue or worsen in the near future, a decrease of 19% compared to the April 2022 results. Although experts continue to see the negative effects of the war, the situation seems less pessimistic than at the start of the conflict.

Respondents' anticipation of the risk of not completing the project is slightly more optimistic compared to the responses given a year earlier, i.e. 42% of the Respondents now answered in the negative, i.e. they thought the risk was low. In 2022 the percentage stood at 38%. Although some improvement can be seen with regard to the negative effects of the war, it is still too early to speak of a significant change in the situation and a calming down of the industry.

Our Respondents identified the main areas of project execution / projects that were negatively affected by the outbreak of war:

	April 2022	end of 2022
1. Availability and deliveries of materials	**93%**	**79%**
2. In-house labour	**27%**	**13%**
3. Availability and deliveries of equipment	37%	4%
4. Other	10%	3%
5. Implementation of contractual procedures	28%	2%
6. Management / engineering staff	10%	0%

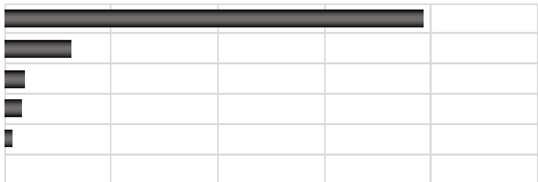

Figure 4 – Main areas adversely affected by the war

For a more accurate analysis, the question structure was changed this year so that the Respondents could select only one answer, allowing the most affected areas to be identified. The results from the previous survey, which allowed multiple choice, are also presented to show the trend of responses.

The results of the survey show that as many as 79% of Professionals cited the problem of availability and supply of materials as the main factor negatively affecting construction projects. This means that disrupted or broken supply chains cause disruption to construction and erection works.

The second area of focus for the Respondents was in-house labour (13%). This was followed by equipment availability and delivery (4%), other problems (3%) and implementation of contractual procedures (2%). A comparison with the previous survey conducted in April 2022 shows that the above areas scored higher (compared to the current one) but were identified as secondary ones. The final sixth place went to the area of engineering staff, which was not indicated by any respondent.

Our Respondents also answered the question on the dimension of the temporal impact of the war on the execution of construction projects.

	April 2022	end of 2022
1. No impact	10%	12%
2. 0 – 0.5 months	0%	4%
3. 0.5 – 1 month	13%	b.d.
4. 1 – 3 months	40%	39%
5. 3 – 6 months	25%	29%
6. Over 6 months	12%	16%

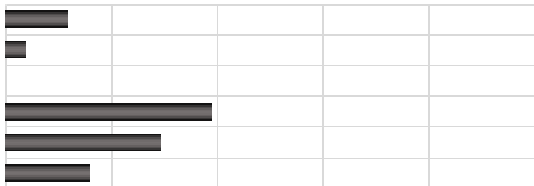

Figure 5 – Anticipated dimension of the time impact of the war on the execution of investments (estimated delay)

The majority of Professionals believe that the impact of the war will cause delays to projects. Only 12% of the Respondents did not perceive such an impact. Compared to the previous survey, there was a slight change. In April 2022, only 10 per cent of the Respondents thought that the war would not affect the timing of the project.

84% of the Respondents believe that the execution of projects will be delayed by at least one month, while 45% of the Respondents indicate that the delay will be at least three months. 16% of Professionals estimate the impact of the war in Ukraine on project delays to be six months or more.

The Respondents responded unanimously to the question regarding confirmation of an increase in the cost of delivering projects(s), with as many as 86% of the Respondents answering indicating a significant increase. Also, 86% of Professionals anticipate an increase in project costs of up to 30%.

5. Summary

In our survey on construction disputes in Poland in 2022, our respondents confirmed the prevalence and diversity of the causes of disputes, indicating that the most common cause of disputes is the increase in the cost of investment execution. The Respondents indicated that negotiation was the most effective method of dispute resolution, while the 'wait-and-see' approach was the most popular but least effective. Those involved in construction disputes are becoming more confident in the opportunities arising from negotiation and are increasingly opting for this method of dispute resolution.

The war in Ukraine has had a negative impact on the construction industry in Poland, as confirmed by almost all of the industry professionals surveyed. The vast majority of Professionals noted that the negative effects of the war would continue or worsen in the near future. A survey conducted 10 months later, which compares results from the previous survey in April 2022, showed a slight improvement in the construction industry. The Respondents continue to point to the lack of availability and supply of materials as the main factor holding up the contractual execution of construction projects. A vast majority of the Respondents expect construction projects to be delayed by at least one month. Despite some signs of improvement, the situation in the construction industry is still uncertain and experts continue to see the negative effects of the war on the construction market in Poland.

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