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CHANGED CIRCUMSTANCES AND CONCESSION CONTRACTS: SLOVENIAN LAW IN A COMPARATIVE PERSPECTIVE

In Slovenian law concession contracts are subject to both the public law and private law regime of changed circumstances. The former applies only to certain concession contracts, while others are subject to the general rules of the law of obligations. However, these rules are not adapted to features of concession contracts as they only give the affected party the right to request the rescission of the contract, but not its modification, unless otherwise agreed in the contract. This is not in line with the principle of continuity of public service and the protection of the public interest. In addition, the private law regime is not adapted to the concession award procedure, as it allows only reference to changes in circumstances that occur after the contract is concluded, but not after the binding tender is submitted, meaning that the tenderer bears a disproportionately higher burden of the risk than the grantor.

Key words: *Concession Contracts. – Changed Circumstances. – Public Interest. – Public Services. – Slovenian Law.*

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1. INTRODUCTION

As long-term contracts,¹ concession contracts are more often subject to certain economic or social changes affecting their performance (Clouzot 2010, 937). Business practice has recently faced price increases for many products and services, causing difficulties in fulfilling contractual obligations on the terms agreed in the contract. If these changes have been foreseen in advance (e.g. valorisation clause), they are normally subject to the contractual regime, while respecting the mandatory rules of European law (EU) on permissible changes to the concession contract during its term (Mužina 2022; Brown 2008). The doctrine of *rebus sic stantibus*, on the other hand, refers to circumstances that could not have been foreseen or avoided by the parties at the time of the conclusion of the contract, but which make it substantially more difficult to fulfil the contractual obligations (Kranjc 2022, 621).

Given the special characteristics of concession contracts as administrative contracts (Pirnat 2000, 151–152; Štemberger 2023, 336), administrative doctrine (in particular, foreign) has developed a special changed circumstances regime, the so-called ‘unforeseeable circumstances’, which is a purely administrative law concept (Ahlin 2008, 258; Grilc 2011, 36). It is based on the premise that the object of the concession contract is normally an activity in the public interest, which must be carried out as long as the public interest so dictates. The public interest therefore generally prevails over other contractual interests. This characteristic requires the adaptation of certain fundamental principles of general contract law, designed to protect the private (rather than the public) interest, including the changed circumstances regime.

The special changed circumstances regime can also be found in Slovenian law, but its scope is limited to certain concession contracts only, while the general rules of contract law (Obligations Code, OC)² apply to other concession contracts subsidiarily and *mutatis mutandis*. Since the OC

1 Judgement of the Administrative Court of the Republic of Slovenia, No. III U 69/2019-15 of 11 November 2021. Not applicable to contracts of indefinite duration as this excessively restricts competition. Granting ‘perpetual’ concessions is therefore not allowed. See point 52 of the preamble to Directive 2014/23/EU of the European parliament and of the Council of 26 February 2014 on the award of concession contracts [OJ L 94/1, 28 March 2014, 1–64, hereinafter: Directive 2014/23/EU]. See also decision of the Constitutional Court of the Republic of Slovenia, No. U-I-193/19-14 of 6 May 2021, para. 13.

2 *Official Gazette of the Republic of Slovenia* No. 97/07 with further amendments.

regulates contractual relations of a private law nature, the question arises as to the adequacy of the application of such a legal regime to concession contracts.

This article aims to critically analyse the legal regulation of changed circumstances in relation to concession contracts in Slovenian law and (relying on the comparative law experience) to resolve some of the dilemmas that such a regime creates in practice. To achieve this aim, the established methods of legal science were used, in particular the dogmatic, comparative, axiological, and sociological methods. The dogmatic and axiological methods were used to explore and identify the legal problems of the current legal framework and to formulate possible solutions, also using the comparative law method, both in terms of theoretical and legal framework. The research is closely linked to the question of the effectiveness of the current legal framework, and the sociological method was therefore also used, as it is the basis for distinguishing between norms and their implementation in (judicial) practice. The synthesis of the arguments allowed to formulate the conclusions, confirm or disprove the hypothesis, and possibly offer improvements for *de lege ferenda* regulation.

The article seeks to confirm or disprove the following hypothesis:

H1: The changed circumstances regime, as governed by the Obligations Code, is incompatible with the characteristics of concession contracts.

For a thorough analysis and study of the adequacy of the changed circumstances regime for concession contracts, the following two research questions are also formulated:

Q1: Can the affected party request a modification of the concession contract due to changed circumstances and under what conditions?

Q2: What circumstances are covered by the *rebus sic stantibus* clause from a temporal viewpoint (changes occurring after or even before the conclusion of the contract)?

The novelty of the presented study lies in the fact that no scientific articles dealing with the covered issues have been published so far. Previous discussions have focused mainly on the permissible modifications to the concession contract during its term in general (Mužina 2022; Mužina, Rejc 2017) or the changed circumstances of private law contracts, and, in this context, also on public procurement contracts (Kranjc 2022; Skok Klima, Matas 2022), but not on concession contracts. The article has therefore a cognitive value for both science and practice.

2. CHANGED CIRCUMSTANCES IN COMPARATIVE LAW

2.1. French Law

French law distinguishes between three types of circumstances that can affect the performance of a concession contract: measures taken by the grantor, as the public authority that aggravates the position of the co-contractor (*fait du prince*), unpredictable circumstances (*l'imprévision*), and force majeure (Athanasiadou 2017, 199 ff).

The theory of *fait du prince* applies when the concessionaire's contractual position is worsened by a unilateral modification of the contract in the public interest. This is a so-called administrative risk arising from the power of the grantor to interfere with the contractual relationship. In this case, the co-contractor is entitled to full compensation to completely offset the financial impact of the measures. However, to be entitled to compensation, two conditions must (cumulatively) be met: the measure must be taken by a public law entity that is party to the contract; and the measure must directly and specifically affect the other contracting party (Waline 2016, 503).

However, case law has recognised the right of a co-contractor to compensation even when the public law party to the contract has taken the measure in a different capacity than the contracting party, provided that the measure specifically affects the co-contractor.³ If the measure taken by such an entity does not exclusively affect its co-contractor and is of a general nature, the right to compensation is excluded in principle.⁴ Exceptionally, the counterparty will be entitled to compensation if the (general) measure taken affects an essential element of the contract (e.g. the imposition of a tax on raw materials necessary for the performance of the contract).⁵

If the measure is taken by a public law entity that is not a party to the contract, the counterparty is not entitled to compensation. However, if such a measure has created an imbalance that effectively undermines the economic viability of the contract and makes it almost impossible for the counterparty to fulfil its obligations, the counterparty may be compensated under the terms of the theory of unpredictability.⁶

3 Decision of the Council of State of France, Association le relais culturel d'Aix-en-Provence of 18 January 1985.

4 Decision of the Council of State of France, Société Renoveco of 25 May 1993.

5 Decision of the Council of State of France, Compagnie marseillaise de navigation of 20 May 1904.

6 Decision of the Council of State of France, Ville d'Elbeuf of 15 July 1949.

The theory of unpredictable circumstances was developed in the 1916 *Compagnie générale d'éclairage de Bordeaux* case.⁷ It is based on the recognition that administrative contracts, and in particular concession contracts, are subject to a greater risk of the occurrence of changes that may affect the performance of the contractual obligations since they are generally long-term contracts (Pietrancosta 2016, 2).

To apply this theory, the following conditions must be cumulatively met: the circumstances must be truly exceptional and unpredictable (e.g. natural disasters, wars, economic circumstances that could not reasonably have been predicted) at the time the parties entered into the contract; the circumstances make the performance of the contract substantially more difficult or substantially worsen the financial situation of the contracting party; the circumstances are wholly alien to the contracting parties; where they are the result of an administrative measure, the theory of *fait du prince* is applied; and the circumstances are temporary in nature – if the circumstances are permanent, the force majeure theory is applied (Waline 2016, 503–505). Force majeure allows a co-contractor to be released – in part or in full – from its contractual obligations without being sanctioned for non-performance (Brown, Bell 1993, 199–200). It therefore differs from unpredictable circumstances in that the performance of the concession contract is completely impossible and not just more difficult (Ruellan, Hugé 2006, 1597–1602).⁸

Despite the occurrence of unpredictable circumstances, the affected party is obligated to continue to perform the concession contract (principle of continuity of the public service) (Clouzot 2010, 937). The contract is therefore maintained in force and the affected party is entitled to reimbursement of the costs incurred by continuing to perform the contract under unpredictable circumstances (so-called non-contractual costs) (Bucher 2011, 197; Efstratiou 1988, 282 ff). However, the affected party is not entitled to full compensation (as in the case of a *fait du prince*), but only compensation to the extent that it is necessary to enable the public service to operate (on average, it covers 90%–95% of the additional costs incurred by the affected party).⁹ The purpose of this compensation is not to maintain the same position of the contracting party and to eliminate such contractual risks entirely, but rather to ensure the continuity of the public service. The

7 Decision of the Council of State of France, *Compagnie générale d'éclairage de Bordeaux* of 30 March 1916.

8 Decision of the Council of State of France, Pichol of 7 June 1939.

9 Decision of the Council of State of France, *Société Propétrol* of 5 November 1982.

reason for the limitation of the compensation is also that the greater burden on the contractor is not the fault of the grantor as a contracting party, and it is, therefore, logical that it should not bear the entire consequences of circumstances outside the contract (Waline 2016, 505). The amount of the financial compensation is determined by agreement between the parties and, in the event of disagreement, by the court under the rules of non-contractual liability of the administration without fault. The financial compensation is paid only temporarily until the normal economic situation has been restored (Plessix 2016, 1240–1243).

The theory of unpredictability was originally only accepted in public law, but in 2016 it was also introduced in Article 1195 of the Civil Code (*Code Civil*, CC).¹⁰ However, civil law unpredictability differs from public law unpredictability (applicable to administrative contracts) in giving the affected party the right to request the co-contractor to renegotiate the contract while continuing to perform its contractual obligations. If the renegotiation is unsuccessful or is rejected, the parties may agree to terminate the contract at a date and on terms to be determined by them or they may apply to the court by mutual agreement for an adjustment of the contract. If no agreement is reached within a reasonable time, the court may, at the request of one of the parties, modify or terminate the contract on a date and on terms to be determined by the court (Clement 2017, 48).¹¹

2.2. German Law

Under Section 60 of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz*, VwVfG),¹² either contracting party may request an adjustment of the content of the administrative contract (including concession contracts) if, since the conclusion of the contract, the circumstances that were decisive for the determination of the content of the contract have changed so significantly that the contracting party cannot reasonably be expected to adhere to the original contract. The prerequisites for the admissibility of a modification are therefore that there has been a material change in circumstances after the contract was concluded and

10 Code Civil, last updated 21 May 2023, available at: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000032041302 (last visited 1 November 2023).

11 Art. 1195 of the CC.

12 Administrative Procedure Act in the version promulgated on 23 January 2003 (BGBl. I, 102), as last amended by Art. 24, para. 3 of the Act of 25 June 2021 (BGBl. I, 2154).

that the parties could not have taken those circumstances into account when the contract was concluded. Objectively, the circumstances must be of such a nature that, if they had been known at the time the contract was concluded, the parties would not have concluded a contract on the same subject matter. The changes may be factual, such as a change in the price or cost of the services, or legal, such as the adoption of new legislation or a change in case law, as well as a change in administrative practice, in so far as this has a material impact on the performance of the contract, and the (partial) declaration that a law is unconstitutional (Weiß 1999, 78). In addition, the circumstances must be of a substantive nature, i.e. such that the parties cannot be expected to remain in the contract as originally concluded, as this would be contrary to the principle of good faith and proportionality (i.e. unreasonable) (Mahendra 2001, 100–101). A change in circumstances does not automatically lead to an adjustment of the contract but must be agreed between the parties. If no agreement is possible, the affected party may bring an action to enforce the claim. According to the case law, it is an independent claim for adjustment, with the appropriate remedy being an action for performance. If adjustment is not possible or cannot reasonably be expected from the contracting party, the affected party may rescind the contract. Rescission of the contract is therefore the *ultima ratio* (Weiß 1999, 84–90).

Given the general possibility of rescinding the contract, the contracting party is not financially protected in the event of changed circumstances. However, in public contracts, it is usually agreed that the contractor must take out insurance. This insurance obligation achieves the same result in contractual practice as in the French legal system, namely the preservation of financial equilibrium and the continuity of the contract (Athanasidou 2017, 186).

The VwVfG's provision on the adjustment of the administrative contract due to changed circumstances is basically identical to the provision of Section 313 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB),¹³ as both codify the general principle of contract law *rebus sic stantibus*, which is a part of the doctrine of interference with the basis of the transaction (*Wegfall der Geschäftsgrundlage*). In this respect, the German model differs significantly from the French model, which is based on the principle of

13 German Civil Code in the version published on 2 January 2002 (BGBl. I, 42, 2909; 2003 I, 738), as last amended by Art. 2 of the Act of 16 October 2023 (BGBl. 2023 I No. 280).

continuity of the (administrative law) contractual relationship even in the event of unpredictable circumstances (*l'imprévision*) (Gurlit 2000, 556; Kopp and Ramsauer 2015; Fehling 2016).

2.3. Croatian Law

Croatian law also classifies concession contracts as administrative contracts. The latter are governed by the General Administrative Procedure Act (*Zakon o općem upravnom postupku*, GAPA¹⁴) and supplemented by sectoral laws (for example, the Concession Act, *Zakon o koncesijama*, CA),¹⁵ which apply as *lex specialis*. The GAPA regulates, inter alia, the impact of changed circumstances on the performance of an administrative contract. By this Act, a party whose performance of contractual obligations has become substantially more difficult because of circumstances arising after the conclusion of the contract, and which were not foreseeable at the time of its conclusion, may propose to the other party that the contract be modified in accordance with those circumstances. The parties must therefore agree on such a modification.¹⁶ If the public law entity and the party do not agree on the modification of the contract, or if the public law entity or third parties involved in the contract do not agree to such modification, the public law entity may unilaterally rescind the contract.¹⁷ The Croatian regime therefore differs from the German regime in that the right to rescind the contract on the grounds of changed circumstances does not belong to both parties to the contract, but only to the public law entity, reflecting its superior position, which is typical for administrative contracts. In this respect, the Croatian regime is more similar to French law, as the conditions for modifying an administrative contract (due to changed circumstances) are ultimately determined by the public law entity (Aviani, Đerđa 2011, 482). However, unlike French law, Croatian law does not provide the co-contractor with a right to compensation for damages resulting from the modification or termination of the contract due to changing circumstances, which is also one of the main deficiencies of the current regime (Aviani 2013, 358).

14 *Official Gazette of the Republic of Croatia* No. 47/09 with further amendments.

15 *Official Gazette of the Republic of Croatia* No. 69/17 with further amendments.

16 Art. 152 of the GAPA.

17 Art. 153, para. 1 of the GAPA.

Further restrictions on the modification of the concession contract are laid down in the CA, which transposes the restrictions imposed by Directive 2014/23/EU on the modification of the concession contract during its term. According to the CA, modifications of the concession contract due to unforeseeable circumstances are permissible if they do not change the nature and/or object of the concession contract, and in the case of concessions granted by the grantor to carry out an activity not listed in Annex II of the Act (i.e. as an activity performed based on exclusive rights), and the value of the modifications does not exceed 50% of the value of the original concession.¹⁸

The changed circumstances regime for administrative contracts differs from the general regime in contract law (Compulsory Relationships Act, *Zakon o obveznim odnosima*, CRA),¹⁹ under which the affected party may request (through the courts) that the contract be modified or rescinded. A contract will not be rescinded if the other party offers or agrees to an equitable modification of the terms of the contract.²⁰ Either party to the contract (not just the public law entity) can therefore obtain a modification or termination of the contract due to changed circumstances. Due to the special characteristics of administrative contracts, the rules of the CRS on rescission or modification of a contract, as a result of changed circumstances, does not apply to these contracts, but only the specific provisions of the GAPA and the sectoral laws (as *lex specialis*).²¹

2.4. Serbian Law

In Serbian law, concessions are governed by the Law on Public-Private Partnership and Concessions (*Zakon o javno-privatnom partnerstvu i koncesijama*, LPPPC),²² which also contains certain provisions relating to the post-contractual phase. As regards issues not regulated by this Law, the general rules of contract law, i.e. the Law on Obligation Relations (*Zakon o obligacionim odnosima*, LOR),²³ are applied. The LPPPC regulates the changed circumstances within the framework of the modification of the concession contract. It distinguishes between modifying a contract because of a

18 Art. 62, para. 3 of the CA.

19 *Official Gazette of the Republic of Croatia* No. 35/05 with further amendments.

20 Art. 369 of the CRA.

21 For more on this, see Aviani, Đerđa 2011, 481–484.

22 *Official Gazette of the Republic of Serbia* No. 88/2011 with further amendments.

23 *Official Gazette of the Republic of Serbia* No. 29/78 with further amendments.

regulatory change²⁴ and modifying the contract for other reasons.²⁵ The latter reasons are not further defined in the LPPPC, but only limitations on such modification are set out. According to Article 50 of the LPPPC, a concession contract may be modified at the request of the public or private partner, a bank, or another financial institution, but the law does not allow changes to the essential elements of the concession contract, such as its subject matter, duration, and the amount of the concession fee. Such a modification is made in accordance with the provisions of the LPPPC applicable to the procedure for the conclusion of a public contract.²⁶

However, if the public or private partner's position deteriorates as a result of a regulatory change after the conclusion of the contract, the concession contract may be modified, notwithstanding the aforementioned restrictions, to the extent necessary to re-establish the position of the public or private partner at the time the contract was concluded, provided that the duration of the contract may in no case exceed the period referred to in Article 18, para. 2 of the LPPPC. This is a special form of changed circumstances (also known in French law) that must be independent of the contracting parties (so-called stabilisation clause). Otherwise, the regulatory change cannot be considered as unforeseeable.²⁷ The LPPPC further provides that the parties must (also) agree in the public contract on the consequences of an adverse regulatory change on the performance of the contract and on the exclusion of liability of the private partner for non-performance of contractual obligations resulting from force majeure or a regulatory change, while the law does not explicitly mention other changed circumstances. However, it is clear from the statutory provision that these circumstances are defined only explicatively.

If the parties cannot agree on a modification of the contract, as well as in the case of changed circumstances not covered by the LPPPC, the general regime of changed circumstances set out in Article 133 of the LOR is applied.²⁸ The latter gives the affected party the right to request the rescission of the contract, which must be enforced in court.²⁹ However, a contract shall not be rescinded if the other party offers or agrees to an equitable variation of the

24 Art. 53 of the LPPPC.

25 Art. 50 of the LPPPC.

26 Art. 50, para. 6 of the LPPPC.

27 For more on this issue, see section 2.1.

28 For the definition of changed circumstances, see Art. 133, para. 1 of the LOR.

29 Art. 133, para. 1 of the LOR.

terms of the contract, i.e. to adapt them to the changed circumstances.³⁰ A party who has suffered damage as a result of the rescission of the contract due to changed circumstances may claim compensation.³¹

A special regime on changed circumstances, applicable to administrative contracts, is, on the other hand, provided for in the General Administrative Procedure Act (*Zakon o opštem upravnom postupku*, Serbian GAPA³²). It gives the affected party the right to request a modification of the contract on the grounds of circumstances that have arisen after the conclusion of the contract, but which make the performance of the contractual obligations substantially more difficult. The Authority (as a contracting party)³³ will refuse a request to modify a contract if the legal conditions for modifying the contract are not met or if the modification would cause damage to the public interest that would be greater than the damage likely to be suffered by the affected party (Miljić 2017, 528–533), and may also rescind the contract if the parties cannot agree on a change of circumstances. However, according to the authentic interpretation of Article 22, para. 1 of the Serbian GAPA, which states that an administrative contract may be concluded if a specific law so provides (Milenković 2017),³⁴ this condition must be interpreted strictly linguistically, meaning that the special law must expressly define (designate) the contract as an administrative contract. Otherwise, the legal regime of the GAPA does not apply to it, even if the contract establishes, modifies, or terminates a legal relationship in an administrative matter. Since the Law on Public–Private Partnership and Concessions (or any other law) does not define a concession contract as an administrative contract, the changed circumstances regime in Article 23 of the GAPA does not apply to these contracts.

2.5. Changed Circumstances in European Contract Law

Changed circumstances are also addressed by key instruments of so-called European private law (Možina 2008), such as the Principles of European Contract Law (PECL) in Article 6:111, Unidroit Principles of International

30 Art. 133, para. 4 of the LOR.

31 Art. 133, para. 5 of the LOR.

32 *Official Gazette of the Republic of Serbia* No. 18/2016 with further amendments.

33 See Art. 22 of the Serbian GAPA.

34 *Official Gazette of the Republic of Serbia* No. 95/2018.

Commercial Contracts 2016 (PICC) in Arts. 6.2.1–6.2.3, Common European Sales Law (CESL) in Article 89, and Draft Common Frame of Reference (DCFR) in Article 1:110.

All these instruments of uniform law lay down the principle of *pacta sunt servanda*, which binds the contracting parties to fulfil their obligations, even if they become more onerous, whether because the cost of performance has increased or because the value of the performance has diminished. Only if the performance of the contract has become substantially more difficult after the conclusion of the contract (and this was not foreseeable at the time the contract was concluded) the changed circumstances (or otherwise named) regime may apply, unless the affected party has (contractually) assumed the risk of changed circumstances. In such cases, the above-mentioned acts impose a duty to renegotiate the contract between the parties, but the affected party remains obligated to fulfil its contractual obligations. If no agreement can be reached, the court may intervene to adapt the contractual relationship to the changed circumstances (taking into account the hypothetical will of the parties) or to terminate it on a date and under conditions it itself determines. However, there is no hierarchy between the modification of a contract and its termination, leaving it to the courts to decide (Drnovšek 2004, 825).

3. CHANGED CIRCUMSTANCES IN SLOVENIAN LAW

3.1. General Regime of Changed Circumstances in Contract Law

The *pacta sunt servanda* principle binds the parties to perform the contract as agreed. However, since circumstances may arise after the conclusion of the contract making it more difficult for one party to fulfil its obligations or making it impossible to achieve the purpose of the contract, the rules of the law of obligations (Obligations Code) give the party whose obligations have been made more difficult – or the party that, because of the changed circumstances, is unable to fulfil the purpose of the contract – the possibility of requesting the rescission of the contract. This applies only if circumstances have changed to such an extent that the contract is manifestly no longer in line with the parties' expectations, and it would generally be unfair to keep it in force as it is.³⁵ Only changes that occur after the conclusion of the contract are relevant. The assessment of the timing of the change is objective, as it is

³⁵ Art. 112, para. 1 of the OC.

relevant when the events occurred, but not when the parties became aware of the change. However, it is not possible to request the rescission of a contract if the party referring to the changed circumstances should have considered such circumstances when the contract was concluded, could have avoided them, or could have averted the consequences thereof. In addition, the party requesting the rescission of the contract may not refer to changed circumstances that arose after the deadline stipulated for the performance of such party's obligations.³⁶ The parties may also contractually waive any reference to specific changed circumstances in advance, unless this is in violation of the principle of conscientiousness and fairness.³⁷

A party must bring an action in court to rescind the contract due to changed circumstances and cannot rescind the contract by a unilateral declaration of will.³⁸ A party also cannot assert the changed circumstances only by objecting in the litigation.³⁹ However, a contract will not be rescinded if the other party offers or agrees to have the relevant contract conditions justly amended,⁴⁰ but the law does not impose an obligation to (re-)negotiate the content of the contract (Možina 2020, 142). According to case law, the party invoking the changed circumstances has therefore only the right to request the rescission of the (entire) contract and not its modification, while the possibility to offer or agree to an equitable modification of the relevant contractual terms is only given to the counterparty who wants to keep the contract in force. The affected party may therefore propose to the other party that the contract be modified but may not request (enforce) that the contract be modified without the other party's consent.⁴¹ Nevertheless,

36 Art. 112, paras. 2–3 of the OC.

37 Art. 115 of the OC.

38 See the following judgements of the Higher Court in Ljubljana: No. I Cpg 803/2013 of 7 January 2015; No. I Cpg 599/2011 of 18 January 2012; No. II Cp 152/2009 of 6 May 2009; and judgement and decision of the Higher Court in Ljubljana, No. I Cpg 468/2018 of 5 December 2018. See also the following decisions of the Supreme Court of the Republic of Slovenia: No. II Ips 735/2007 of 11 December 2008; No. II Ips 1034/2007 of 11 December 2008; No. II Ips 94/2008 of 26 May 2011; No. III Ips 140/2015 of 19 May 2017; and No. III Ips 36/2012 of 25 September 2012.

39 Judgement of the Higher Court in Ljubljana, No. I Cp 1105/2017 of 4 October 2017. See also judgement of the Supreme Court of the Republic of Slovenia, No. III Ips 17/2012 of 12 September 2012.

40 Art. 112, para. 4 of the OC.

41 Decision of the Higher Court in Ljubljana, No. I Cp 1487/2010 of 8 September 2010; judgement of the Higher Court in Ljubljana, No. Cpg 775/96 of 16 April 1998; judgement of the Higher Court in Ljubljana, No. II Cp 1820/2014 of 18 May 2015; judgement and decision of the Higher Court in Koper, No. Cp 568/93 of 8

claims for the modification of a contract are quite common in case law, likely due to the title of Chapter IV of the OC, which refers to ‘rescission or modification of the contract due to changed circumstances’, but also to the provisions of the General Conditions of Sale of Goods⁴² which provide for such a claim. However, relying on a linguistic interpretation of the first paragraph of Article 112, which refers only to the rescission of the contract, the case law rejects such claims (Drnovšek 2016).

Case law, on the other hand, recognises claims for the modification of a contract if the adaptation of the contract to the changed circumstances has been agreed in the contract, since the changed circumstances clause⁴³ is dispositive in nature and, as such, subject to the freedom of the contracting parties to regulate it. In such cases, the operative part of a judgement has the character of a reformation (novation) of the contract.⁴⁴ However, even in this case, the modification of the contract must be asserted by (counter-)action and not only by objection in the litigation.⁴⁵

Part of the theory points out that such a regulation is inconsistent with the principle of *favor negotii*, according to which a contract should be preserved as far as possible. Even the hypothetical intention of the parties, particularly in the case of continuing contracts, may point in the direction of contract adaptation rather than rescission. According to this position, the modification of a contract in the current regime should be allowed by referring to the basic objective of the institution, other fundamental principles (e.g. the principle of good faith and fair dealing, the principle of preservation of the contract), and certain other cases where the OC allows for the equitable modification of contracts (Možina 2020).

If a court rescinds a contract due to changed circumstances, at the request of the other party it will instruct the party that requested the rescission to reimburse the other party for an appropriate part of the damage incurred on the grounds of the rescission of the contract.⁴⁶ According to the theoretical view, damages cover only the negative contractual interest, not

September 1993; and judgement of the Higher Court in Celje, No. Cpg 58/2015 of 3 June 2015. See also judgement of the Supreme Court of the Republic of Slovenia, No. II Ips 163/2012 of 17 January 2013.

42 *Official Gazette of the Republic of Slovenia* No. 15-179/1954.

43 Art. 112 of the OC.

44 Judgement of the Supreme Court of the Republic of Slovenia, No. II Ips 153/2011 of 15 September 2011.

45 Judgement of the Higher Court of Ljubljana, No. II Cp 3000/2011 of 29 February 2011.

46 Art. 112, para. 5 of the OC.

the lost profits (Možina 2006, 372). Otherwise, the effects of the termination of the contract would be nullified, as the liability for damages would be the same as in the case of a breach of contract for non-performance (Juhart 2020, 473).

3.2. Special Changed Circumstances Regime for Concession Contracts

3.2.1. Concession Contracts Covered by Directive 2014/23/EU

Directive 2014/23/EU deals with changed ('unforeseeable') circumstances in the context of the modification of a concession contract during its term. If circumstances that cannot have been foreseen by the diligent contracting authority or contracting entity arise after the conclusion of the contract, the contract may be modified without a new concession award proceeding. However, such modification may not change the general nature of the concession and in the case of concessions awarded by contracting authority (to pursue an activity other than those referred to in Annex II to Directive 2014/23/EU), the change may not exceed 50% of the value of the original concession.⁴⁷ These rules have been transposed into the Certain Concession Contract Act (CCCA)⁴⁸ and apply to concessions that correspond to services concessions or works concessions within the meaning of Article 2, paras. 2–3 of the CCCA,⁴⁹ on the further condition that the concessions threshold value is equal to or higher than the threshold value referred to in Article 8, para. 1 of the Directive 2014/23/EU, and that there are no legal exceptions to the application of the Act (Štemberger 2022, 48–52).

However, such a modification of the contract may only be made by agreement of the parties and not by unilateral decision of a co-contractor. If the parties have not reached an agreement on the modification of the

⁴⁷ Art. 43 of the Directive 2014/23/EU.

⁴⁸ *Official Gazette of the Republic of Slovenia* No. 9/19 with further amendments.

⁴⁹ The CCCA defines concession as a written contract for pecuniary interest by which one or more grantors entrust the execution of works ('concession of works') or the provision or management of services ('concession of services') to one or more economic operators, where the remuneration consists solely of the right to use the works or services which are the subject of the contract, or this right together with a payment, and the operational risk in the performance of the concession is transferred to the concessionaire.

concession contract due to unforeseeable circumstances, the concessionaire may request the rescission of the contract by analogy with the application of the rules of the OC on changed circumstances (Kranjc 2022, 621).

The CCCA does not therefore introduce a new institution but only sets (stricter) conditions under which the parties can invoke unforeseeable circumstances and modify the contract without a new concession award proceeding. The reason for the restrictions on modifying the contract during its term is to ensure that the procedure is competitive and that all tenderers are treated equally. If the grantor and the concessionaire were to be able to modify the contract without restriction after the concession award procedure has been completed, the whole purpose of the procedure would be defeated (Mužina 2022). This means that the concept of ‘unforeseeable’ circumstances has the same meaning as the concept of ‘changed circumstances’ in general contract law.

3.2.2. Regulation in Sectoral Laws

The special changed circumstances regime in relation to concession contracts (under the erroneous name of ‘force majeure’) can be found in Article 50 of the Services of General Economic Interest Act (SGEIA),⁵⁰ which regulates the duties and rights of the concessionaire. In contract law *force majeure* means the impossibility of performance, whereas in the case of circumstances under Article 50 of the SGEIA, the performance of the contract is still possible, but in circumstances that no longer correspond to the expectations of the contracting parties. The theory therefore argues that Article 50 of the SGEIA must be interpreted in the context of unforeseeable circumstances (*l'imprévision*), which is a purely administrative law concept (Ahlin 2008, 258; Pirnat 2003, 1613).

According to this Article, the concessionaire must perform the concession economic public service within its objective possibilities – even in the event of unforeseeable circumstances caused by force majeure – but cannot request the rescission of the contract or its modification. In this respect, part of the theory strictly defends the view that the concessionaire has practically no possibility to rescind the contract, while others take the position that this legal requirement is not absolute, as it is linked to the (non-)existence of its objective possibilities. This means that all internal and subjective circumstances of the concessionaire’s operation are excluded, but not what is external and beyond the concessionaire’s sphere of control. The

50 *Official Gazette of the Republic of Slovenia* No. 32/93 with further amendments.

term 'objective possibilities' therefore represents a legal standard whose content and impact on the concessionaire's obligation to act in unpredictable circumstances must be determined on a case-by-case basis. If the objective situation is such that the concessionaire's operation is not possible, the concessionaire has the right to request the rescission of the contract under the rules of the OC, but there is no illegality in its act or omission and therefore no breach of contract and consequently no liability for damages. This brings the regime closer to French law, where, in the event of the existence of certain unforeseeable circumstances, the concessionaire may request a court decision to rescind the contract. French case law emphasises that the unforeseeable (or changed) circumstances regime can only be applied in the case of temporary circumstances. If these circumstances lead to a permanent financial imbalance, the concession contract must be rescinded since the fundamental condition for the public service concession, i.e. the possibility of making a profit, is no longer present (Mužina 2004, 617).

The performance of the concession contract in unforeseeable circumstances entitles the concessionaire to financial equilibrium ('compensation' within the meaning of the SGEIA⁵¹). This includes compensation for the costs incurred in the performance of the concessionary public service in such circumstances, or the right to compensation for the special effort or difficulty required to fulfil the contractual obligations (reimbursement of additional costs), reminiscent of the doctrine of *l'imprévision*. The right to compensation for the performance of a concession contract in unforeseeable circumstances is a form of state liability for damages without wrongful conduct (other compensation schemes).⁵²

The theory suggests that the third paragraph of Article 71 of the Public-Private Partnership Act (PPPA),⁵³ could be also considered as a kind of changed circumstance (within the meaning of Article 112 of the OC). This Article refers to other measures by the authorities, which prevent the concessionaire from carrying out the relationship, as a reason for the extension of the relationship. Such a modification of the contract (i.e. an extension of its duration to enable the concessionaire to fulfil the purpose of the contract), rather than its rescission, is undoubtedly an expression of the principle of *favori negotii*. However, the PPPA does not comprehensively regulate it (Ahlin 2008, 269).

51 Art. 50, para. 2 of the SGEIA.

52 For more on the forms of state liability for damages, see Možina 2003.

53 *Official Gazette of the Republic of Slovenia* No. 127/06. The PPPA regulates the procedure for establishing concessional public-private partnerships (works concessions and services concessions) and applies subsidiarily in relation to other (sectoral) laws.

A specific regulation of changed circumstances can also be found in Article 47h of the Social Assistance Act (SAA),⁵⁴ which regulates concessions for the provision of public services in the field of social welfare. The latter establishes the concessionaire's obligation to perform the public service subject to the concession and to comply with the obligations under the concession contract, regardless of the changed circumstances. In the event of changed circumstances that make it significantly more difficult for the concessionaire to fulfil its obligations to such an extent that, despite the special nature of the concession contract, it would be unfair to shift the contractual risks solely to the concessionaire, it has the right to request the grantor to modify the contract (unless the concessionaire has taken the circumstances into account at the time of conclusion of the contract, or if it would have been able to avoid or overcome them).

As the scope of the above Acts is limited, the general changed circumstances regime applies to other concession contracts, unless otherwise agreed in the contract.

4. COMPATIBILITY OF THE GENERAL REGIME OF CHANGED CIRCUMSTANCES WITH CONCESSION CONTRACTS

Contract rescission on the grounds of changed circumstances is not in accordance with the specific characteristics of concession contracts, which are based on the principle of the pursuit of the public interest and the continuous performance of the public service (also recognised in EU law). The latter obligation also derives from the PPPA, which stipulates that the concession (public service) must be carried out continuously and uninterrupted, and from the specific nature of public service activities, which involve the provision of basic necessities of life (e.g. drinking water supply, garbage collection). In principle, this obligation falls primarily on the private partner, but Article 18, para. 3 of the PPPA emphasises that the public partner is not relieved of its responsibility for the continuous, uninterrupted, and equitable performance of the project by the transfer of the concession to the private partner; the parties' relations with third parties are therefore not affected by a different agreement between the parties. Liability in connection with the performance of an activity of general interest is also provided for in Article 163 of the OC, according to which a person who performs a public utility or other similar activity of general interest is liable for damages if, without good

⁵⁴ *Official Gazette of the Republic of Slovenia* No. 3/07 with further amendments.

reason, it ceases to perform or irregularly performs its services. The general regime of changed circumstances⁵⁵ is therefore conceptually inconsistent with these obligations since the rescission of the concession contract leads to the fact that a service that had been performed in the public interest is no longer being carried out *vis-à-vis* the users or recipients of the public service or goods. It should be noted that public law does provide for certain mechanisms aimed at the continuous provision of public service, such as the designation of a temporary successor to the concession,⁵⁶ the temporary award of a concession without a public call for tenders,⁵⁷ the provision of the concession under the existing concessionaire until the award of a new concession.⁵⁸ However, these mechanisms are not linked to the occurrence of changed circumstances, but rather to the revocation of the concession. They therefore do not resolve the dilemma of the (continued) performance of the concession contract after its rescission.

Moreover, the rescission of a concession contract is not always in the public interest, as it leads to the interruption of the performance of projects that have already started and to a repetition of the procedure for the selection of the co-contractor and the conclusion of the contract. The procedure for concluding a new concession contract usually takes a significant amount of time, which means that the project will not be implemented in the interim period between the expiry of the first concession contract and the conclusion of the new contract. This results in increased costs for the public sector and delays in the implementation of the public interest project. The general changed circumstances regime is also not applicable to certain events that are otherwise considered as changed circumstances in private law contracts, since they do not fall within the sphere of one or other of the parties (e.g. changes in regulations, actions by public authorities). In the case of administrative contracts (and concession contracts), the theory of *fait du prince* must be applied to these actions (Pirnat 2003, 1613). In addition, the rescission of the contract is not the aim of the institution *per se*, but rather the equitable distribution of the benefits and losses associated with the change of circumstances and the relief of the debtor's liability for non-performance. Equitable distribution restores the contractual fairness

55 Art. 112 of the OC.

56 Art. 44.i, para. 2 of the Health Services Act (*Official Gazette of the Republic of Slovenia* No. 23/05 with further amendments).

57 Art. 68 of the Veterinary Practice Act (*Official Gazette of the Republic of Slovenia* No. 33/01 with further amendments).

58 Art. 47.m of the SAA.

that has been destroyed by the change of circumstances (Finkenauer 2019). This is also required by the fundamental principle of contract law – *favor negotii*, which also applies to concession contracts.

The rules of the law of obligations, according to which the affected party may rely only on changed circumstances that have arisen since the conclusion of the contract, are not adapted to the specificities of the concession award procedure. These contracts feature generally longer periods between the tendering phase and the contract conclusion phase, in particular, due to the legal remedies available to unsuccessful tenderers. Since the tender is binding and cannot be modified in the process of concluding the concession contract, the application of the provisions of the law of obligations leads to the conclusion that any changes in circumstances during the period of the tendering phase and the conclusion of the concession contract are borne by the tenderer (concessionaire). In addition, a feature of concession contracts is that the parties do not negotiate the content of the contract, but the tenderer must accept the contractual content as defined by the grantor (adhesion contract) (Schilling 1996, 190–191). This means that it cannot reach a different agreement on the point in time from which changes in circumstances can be invoked (e.g. from the moment of the submission of the binding tender onwards). Therefore, the tenderer (future concessionaire) bears a disproportionately higher burden of the risk of changed circumstances than the grantor, although it cannot be held responsible for any delays in the process of selecting the most successful tender. Such regulation is inconsistent with the principle of conscientiousness and fairness⁵⁹ and the principle of equal value of performance.⁶⁰

Based on the above, it is possible to conclude that the general regime of changed circumstances in the Obligations Code is not adapted to the characteristics of concession contracts. The initial hypothesis must therefore be confirmed, and some changes must be accepted *de lege ferenda*.

5. PROPOSALS DE LEGE FERENDA

Such an inadequate legal framework opens the door to the application of contractual provisions that are the result of the agreement of the contracting parties or their intention at the time of the conclusion of the contract and the power of the individual contracting party, mainly the grantor, which *de*

59 Art. 5 of the OC.

60 Art. 8 of the OC.

facto unilaterally determines the content of the contract (the concessionaire can only agree or not agree to it – a so-called adhesion contract). As changed circumstances are not always adequately addressed in contractual practice, and not properly distinguished from force majeure and unilateral measures taken by the grantor in the public interest, the specific changed circumstances regime should be adopted at least for concession contracts, if not for all (especially long-term) contracts in general.⁶¹

If the expectations of the contracting parties can still be achieved despite the changed circumstances, albeit through an adaptation of the contract, the affected party should be able to claim a modification of the (concession) contract. Only if such a modification is not possible or permissible (due to the limitations imposed by Directive 2014/23/EU) should the affected party have the option of seeking rescission of the contract. The Slovenian legislator should therefore follow the example of German law, rather than French law where the concessionaire is obligated (without the possibility of requesting a modification of the contract) to continue to fulfil its contractual obligations despite unforeseeable circumstances. Such a regime is not only more in line with the principle of *favor negotii*, but also more fairly balances the public interest (the principle of continuity of the public service) and the interests of the concessionaire as a party to the contract. Moreover, such a regime is already established in contractual practice⁶² and certain specific laws (SAA), which indicates that the legislator has identified the inappropriateness of treating concession contracts under the general rules of contract law due to their specific (administrative) legal nature. Furthermore, the principle of renegotiation of contractual terms is also established in contemporary (unified) models of European contract law, indicating that the purpose of the institution of changed circumstances is not (only) to relieve the debtor from liability for non-performance of the contract (which is – or at least seems to be – the purpose of the regulation in Slovenian general contract law) but to pursue the principle of *favor negotii* and to restore the contractual balance (Kessedjian 2005, 422–423).

In this respect, it is not sufficient to merely change the case law in favour of recognising a claim for a contract modification on the basis of the existing statutory regime in general contract law (with a broader interpretation of the provisions of Article 112 ff. *intra legem*), but the changed circumstances regime for administrative contracts (and therefore also for concession contracts)

⁶¹ For more on this, see Možina 2020.

⁶² See, for example, JN006113/2022, JN000133/2020, JN004976/2021 and JN005255/2020 on Public procurement portal, available at: <https://www.enarocanje.si> (last visited 1 November 2023).

should also be regulated at the legislative level. This approach (which provides for a separate legal regime for administrative contracts) is also widely accepted in comparative law (including French, Croatian, German, and Serbian law) and ensures legal certainty and predictability of the law, although sometimes such a regime does not differ substantially from the general regime of contract law (e.g. the regime of changed circumstances in German law).

However, this does not mean that the general regime of changed circumstances cannot be applied to concession contracts at all. The provisions of Article 112 on the ‘concept of changed circumstances’ – i.e. the application of the criteria for the qualification of changed circumstances (but not its consequences), the ‘duty to inform the other party of the intention to assert the entitlements arising from the changed circumstances’,⁶³ the provisions on ‘circumstances relevant for the decision of the court’⁶⁴ and the ‘waiver of reference to certain changed circumstances’⁶⁵ – can also be applied to concession contracts *mutatis mutandis*. Regarding the latter provision, it should be noted that such a waiver should not be extensively accepted given the specific legal nature of concession contracts, where there is a distinctly unequal position of the contracting parties, which may give rise to doubts as to whether such an agreement is in accordance with the principle of conscientiousness and fairness (Mužina 2004, 618).

Due to the specific (long) procedure for concluding concession contracts, which includes an open call for tenders, the submission of binding tenders, the selection procedure, and the conclusion of a contract with the selected tenderer, the tenderer (concessionaire) should be able to claim changes in the circumstances that occurred (after) the submission of the binding tender, and not only after the conclusion of the contract. A different view could lead to a disruption of the contractual equilibrium that existed at the time of the submission of the binding offer and, due to changed circumstances after that moment, (might) no longer exist at the time of the conclusion of the contract.

6. CONCLUSION

Concession contracts are – because of their specific legal nature – often subject to a different legal regime than private law contracts, including the changed circumstances regime. In these contracts, unlike private law

63 Art. 113 of the OC.

64 Art. 114 of the OC.

65 Art. 115 of the OC.

contracts, the public interest is the primary consideration, and usually outweighs the interests of the co-contractor. To protect the public interest, French law has developed the doctrine of 'unforeseeability', according to which the concessionaire is obligated to fulfil its contractual obligations despite the occurrence of unforeseeable circumstances but is entitled to reimbursement of the costs incurred. In German and Croatian law, on the other hand, the occurrence of changed circumstances can lead to a change in the contract, thereby protecting the principle of continuity of the contract and preserving financial equilibrium.

Although Slovenian law on concession contracts (and administrative contracts) is largely influenced by French law, the consequences of the occurrence of changed circumstances for concession contracts are not regulated comprehensively in Slovenian legislation, but only in certain sectoral regulations. Other contracts are subject to the general rules of civil law, which give the affected party the right to request the rescission of the contract on the grounds of changed circumstances, and to the contractual agreement between the parties. A similar regime is also known in Serbian law. However, this is not adapted to the specific characteristics of concession contracts as administrative contracts (protection of public interest, continuous performance of the public service, and special concession award procedure), as also confirmed by contractual practice. Therefore, the changed circumstances regime for these contracts should be regulated separately and differently, following the example of German law.

REFERENCES

- [1] Ahlin, Janez. 2/2008. Uporaba pravil obligacijskega prava za razmerja iz koncesijske pogodbe: koncesijska pogodba na meji med javnim in zasebnim. *Lex localis* 6: 247–269.
- [2] Athanasiadou, Natasa. 2017. *Der Verwaltungsvertrag im EU-Recht: Beiträge zum Verwaltungsrecht*. Tübingen: Mohr Sierbeck.
- [3] Aviani, Damir. 2/2013. Posebnosti upravnog ugovora i njihove sudske kontrole u hrvatskom pravu. *Zbornik radova Pravnog fakulteta u Splitu* 50: 351–370.
- [4] Aviani, Damir, Dario Đerđa. 3/2011. Aktualna pitanja pravnog uređenja upravnih ugovora u hrvatskom pravu. *Zbornik radova Pravnog fakulteta u Splitu* 48: 475–486.

- [5] Brown, Adrian. 2008. When Do Changes to an Existing Public Contract Amount to the Award of a New Contract for the Purposes of the EU Procurement Rules? Guidance at Last in Presstext Nachrichtenagentur GmbH (Case C-454/06). *Public Procurement Law Review* 6: NA253–NA267.
- [6] Bucher, Charles-Édouard. 2011. *L'inexécution du contrat de droit privé et du contrat administratif*. Paris: Dalloz.
- [7] Clement, Ariane. 2017. L'imprévision en droit français des contrats – une révolution de façade. *Le Bulletin de Cheuvreux Notaires* 5: 48.
- [8] Clouzot, Ludivine. 2010. La théorie de l'imprévision en droit des contrats administratifs: une improbable désuétude. *Revue française de droit administratif* 5: 937.
- [9] Comba, Mario. 4/2013. Contract Execution in Europe: Different Legal Models with a Common Core. *European Procurement & Public Private Partnership Law Review* 8: 302–308.
- [10] Drnovšek, Gregor. 5/2004. Hardship po načelih mednarodnih gospodarskih pogodb. *Podjetje in delo* 5: 815–827.
- [11] Drnovšek, Klemen. 8/2016. Institut spremenjenih okoliščin v novejši sodni praksi. *Podjetje in delo* 8: 1486–1503.
- [12] Efstratiou, Pavlos-Michail. 1988. *Die Bestandskraft des öffentlich-rechtlichen Vertrags: Eine vergleichende Untersuchung zum griechischen, französischen und insbesondere deutschen Verwaltungsvertragsrecht*. Berlin: Duncker & Humblot.
- [13] Finkenauer, Thomas. 2019. *Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB, 8. Auflage, Band 3, Schuldrecht Allgemeiner: Teil II, §§ 311–432*. München: C. H. Beck.
- [14] Grilc, Peter. 2011. Gospodarska/finančna kriza kot spremenjena okoliščina. *Pravni letopis*: 33–46, 378–379.
- [15] Gurlit, Elke. 2000. *Verwaltungsvertrag und Gesetz*. Tübingen: Mohr Siebeck.
- [16] Juhart, Miha, Vrenčur, Renato, Plavšak, Nina (ed). 2020. *Obligacije, splošni del: komentar splošnega dela Obligacijskega zakonika*. Ljubljana: Litteralis.
- [17] Kessedjian, Catherine. 3/2005. Competing Approaches to Force Majeure and Hardship. *International Review of Law and Economics* 25: 415–433

- [18] Kopp, Ferdinand, Ramsauer, Ulrich. 2015. *VwVfG: Kommentar, 16. Aufl.* München: C. H. Beck.
- [19] Kranjc, Vesna. 5/2022. Gradbena pogodba s fiksno ceno in spremenjene okoliščine. *Podjetje in delo* 48: 621.
- [20] Weiß, Paula Macedo. 1999. *Pacta sunt servanda im Verwaltungsvertrag.* Frankfurt am Main, Berlin, Bern, Bruxelles, New York, Wien: Europäische Hochschulschriften, Peter Lang.
- [21] Milenković, Dejan. 3/2017. Upravni ugovori u zakonima o opštem upravnom postuku zemalja zapadnog Balkana. *Strani pravni život* 61: 67–80.
- [22] Miljić, Dražen S. 2/2017. Upravni ugovori prema Zakonu o opštem upravnom postupku. *Zbornik radova Pravnog fakulteta Novi Sad* 52: 521.
- [23] Možina, Damjan. 1/2013. Odškodninska odgovornost države. *Pravni letopis*: 141–165, 316–317.
- [24] Možina, Damjan. 1/2020. Breach of Contract and Remedies in the Yugoslav Obligations Act: 40 Years Later. *Zeitschrift für europäisches Privatrecht* 28: 134–167.
- [25] Možina, Damjan. 2008. Evropsko pogodbeno pravo, škatle za orodje in modri gumbi. *Pravni letopis*: 377–399.
- [26] Možina, Damjan. 2006. *Kršitev pogodbe.* Ljubljana: GV Založba.
- [27] Možina, Damjan. 2020. Plačilo najemnine v času, ko najemnik poslovnih prostorov zaradi epidemije ne more uporabljati. *TFL Glasnik*. <https://tax-fin-lex.si/Dokument/Podrobnosti?rootEntityId=39e78e82-ba24-4a59-b55e-a64d85371bee> (last visited 28 August 2023).
- [28] Mužina, Aleksij, Žiga Rejc. 16–17/2017. Pravilo de minimis o spremembah pogodb o izvedbi javnega naročila in koncesijskih pogodb. *Podjetje in delo* 36: 17–19.
- [29] Mužina, Aleksij. 2004. *Koncesije – Pravna ureditev koncesijskih razmerij v Sloveniji in EU.* Ljubljana: Založniška hiša Primath.
- [30] Mužina, Aleksij. 3/2022. The Problem of the Admissibility of Modifications to Public Procurement (and Concession Contracts). *Lex localis* 20: 685–714.
- [31] Brown, Lionel Neville, John Bell. 1993. *French Administrative Law.* Oxford: Clarendon Press.

- [32] Pietrancosta, Alain. 2016. Introduction of the hardship doctrine ('théorie de l'imprévision') into French contract law: A mere revolution on the books. *RTDF* 1: 1–8.
- [33] Pirnat, Pirnat. 2/2000. Pravni problemi upravne pogodbe. *Javna uprava* 36: 143–162.
- [34] Pirnat, Rajko. 6–7/2003. Koncesijska pogodba. *Podjetje in delo*: 1607–1618.
- [35] Plessix, Benoît. 2016. *Droit administratif général*. New York: LexisNexis.
- [36] Ruellan, Aymeric, Albane Hugé. 2006. Le partage des risques et la portée matérielle des théories de la force majeure, du fait du prince et de l'imprévision. *AJDA* 29: 1597–1602.
- [37] Schilling, Theodor. 1996. Der "unfreiwillige" Vertrag mit der öffentlichen Hand. *VerwArch* 78: 191–211.
- [38] Singh, Mahendra Pal. 2001. *German Administrative Law in Common Law Perspective*. Berlin: Springer.
- [39] Skok Klima, Vesna, Matas, Sašo. 1–2/2002. Sprememba pogodb o izvedbi javnega naročila gradnje zaradi sprememb cen. *Javna uprava* 58: 81–89, 97–98.
- [40] Štemberger, Katja. 1/2022. Legal dilemmas in the field of granting concessions in Slovenian law and some solutions in comparative law. *Hrvatska i komparativna javna uprava: časopis za teoriju i praksu javne uprave* 22: 37–66.
- [41] Štemberger, Katja. 1/2023. Legal Protection of Concession Contracts – at the Interface between Public and Private Law and European and National Law. *Studia Iuridica Lublinensia* 32: 335–355.
- [42] Waline, Jean. 2016. *Droit administratif*. Paris: Dalloz.

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