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Review Scientific Paper
UDC: 341.6(497.4)
doi: https://doi.org/10.56461/SPZ_24403KJ
Received: 4. 10. 2024.
Accepted: 13. 1. 2025.

ARBITRABILITY OF CONCESSION DISPUTES IN SLOVENIA

Summary

A fundamental question at the beginning of any arbitration is whether any public policy rules prohibit the dispute to be decided by arbitration. As arbitration became a widely accepted alternative to litigation in national courts, the scope of arbitrable disputes was expanded to allow for a wide range of disputes to be resolved through arbitration. The authority to restrict arbitrability lies with the legislator, which generally does so only in cases where it is warranted by serious public policy concerns. The Slovenian Arbitration Act is a modern act that provides for a wide concept of arbitrability. When the Slovenian legislator unexpectedly tried to restrict the arbitrability of concession disputes by adopting an authentic interpretation of law restricting arbitrability for concession disputes, it created significant uncertainty for the parties who have included an arbitration clause in their concession contracts or who were considering doing so. The Slovenian Constitutional Court confirmed that the authentic interpretation of law cannot be used to give binding interpretations on how to rule in specific cases because it would undermine the core principle of the separation of powers and independence of judges. While it has now been settled that the authentic interpretation should not be applied, it nevertheless remains a skeleton in the legislator's closet since the legislator had not expressly invalidated or retracted the authentic interpretation.

Keywords: arbitrability, concession contracts, authentic interpretation, arbitration.

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ARBITRABILNOST KONCESIONIH SPOROVA U SLOVENIJI

Sažetak

Osnovno pitanje na početku svakog arbitražnog postupka je to da li pravila javne politike onemogućavaju rešavanje spora putem arbitraže. Budući da je arbitraža postala široko prihvaćena alternativa parnicama u nacionalnim sudovima, krug arbitražnih je sporova proširen, što je omogućilo širok dijapazon sporova koji se rešavaju putem arbitraže. Ovlašćenje ograničavanje arbitrabilnosti leži na zakonodavcu, koji obično to čini samo u slučajevima kada je to opravdano razlozima javne politike. Slovenački Zakon o arbitraži predstavlja moderan propis koji predviđa široko definisan koncept arbitrabilnosti. Kada je slovenački zakonodavac, usvajanjem autentičnog tumačenja zakona, neočekivano pokušao da ograniči arbitrabilnost koncesionih sporova, javila se neizvesnost za stranke koje su prethodno u ugovorima o koncesiji ugovarale arbitražne klauzule. Slovenački Ustavni sud potvrdio je da autentično tumačenje zakona ne može da se primenjuje kao obavezujuće u presuđivanju u konkretnim slučajevima, jer bi to potkopalo osnovni princip podele vlasti i sudske nezavisnosti. Premda se stalo na stanovište da autentično tumačenje ne treba primenjivati, ono ipak još uvek postoji, imajući u vidu da ga zakonodavac nije izričito poništio ili povukao.

Ključne reči: arbitrabilnost, ugovori o koncesiji, autentično tumačenje, arbitraža.

1. Introduction

Arbitration has emerged as a widely accepted alternative to traditional court litigation, offering parties a more flexible, efficient, and private means of resolving disputes. Over the years, the scope of arbitrable disputes has expanded significantly, encompassing even complex matters with strong public policy implications. One such area of growing importance is the arbitrability of concession disputes. These disputes, by their very nature, straddle the realms of both private and public law, raising intricate legal and policy questions about whether they should be subject to arbitration or remain within the exclusive domain of national courts.

Concessions, as a key tool for achieving public interest objectives such as the provision of public services and infrastructure, are inherently complex legal arrangements. Given the interplay of public and private law elements in concession

agreements, the regulation of these relationships is stringent. However, such regulation does not necessarily justify an exclusion of arbitration as a dispute resolution mechanism. In fact, arbitration is often well-suited for concession disputes, particularly when international parties are involved, as it offers a perceived neutrality that national courts may lack.

In Slovenia, this issue came to the forefront when the legislator unexpectedly sought to restrict the arbitrability of concession disputes through the Authentic Interpretation of the Services of General Economic Interest Act. This move has introduced significant uncertainty for the parties who had included arbitration clauses in their concession contracts, and for those considering arbitration as a dispute resolution mechanism. At the heart of this debate is a tension between promoting arbitration's benefits – such as expertise, expediency, and neutrality – and safeguarding public policy concerns, particularly in relation to the efficient and transparent use of public resources.

This paper explores the legal landscape surrounding the arbitrability of concession disputes, examining both the domestic legislative framework in Slovenia and comparative approaches from other jurisdictions. It also delves into the ramifications of the Slovenian legislator's actions, in particular the controversial adoption of an authentic interpretation, and how the Slovenian courts, including the Supreme Court and the Constitutional Court, have responded. Ultimately, the paper aims to clarify the current state of the arbitrability of concession disputes in Slovenia and suggest pathways for greater legal certainty in this area.

2. Introduction to Arbitration in Slovenia

The dispute resolution landscape in Slovenia, whether domestic or international, remains largely dominated by litigation and court-annexed mediation. Most domestic parties tend to favour litigation, possibly due to greater familiarity or confidence in it, or a lack of experience with arbitration. However, arbitration is becoming more popular, driven by an increase in foreign investment and Slovenia's growing involvement in international trade. This trend indicates a shift towards arbitral resolution as domestic entities become more integrated into global markets.

In Slovenia, international arbitration cases are predominantly referred to the Ljubljana Arbitration Centre (LAC). Modern arbitration rules, flexibility, the efficient resolution of disputes, and an ambition to be a regional leader (Djinović & Galič, 2017, p. 5) make the Ljubljana Arbitration Centre an attractive place to turn to. It is not uncommon, however, that international disputes involving one or more parties from Slovenia are also referred to chambers outside Slovenia, particularly

the Vienna International Arbitral Centre (VIAC) or the International Chamber of Commerce (ICC).

If the seat of arbitration is in Slovenia, the arbitration proceedings will be governed by the Slovenian Arbitration Act, which is largely based on the UNCITRAL Model Law on International Commercial Arbitration, while also incorporating elements of its 2006 version (Djinović & Galič, 2017, p. 4). In addition to transposing the Model Law into Slovenian legislation with only a few minor deviations, the Slovenian Arbitration Act prescribes specific rules on consumer and employment arbitration disputes (Arts. 44-49, Slovenian Arbitration Act).

The Slovenian Arbitration Act is generally considered a modern law and it has not undergone any revisions since its adoption in 2008 (National Assembly of the Republic of Slovenia, 2024a). There is no pending legislation that would impact the arbitration landscape in Slovenia (National Assembly of the Republic of Slovenia, 2024b), as the consensus appears to be that any new developments in international arbitration practice should be reflected in the rules of the local arbitral institutions rather than in the amendment of the law, reinforcing Slovenia as an arbitration-friendly jurisdiction (Stalna arbitraža pri GZS, 2015, p. 91).

Despite the evolving landscape, arbitration in Slovenia still faces challenges, including the attempt to limit the arbitrability of concession disputes by the Slovenian legislator, strict formal requirements for the validity of arbitration agreements, and a lack of transparency, particularly since the LAC stopped publishing anonymised awards in November 2017. In taking one step at a time, this paper focuses on the first, examining the legal framework that determines which disputes can be arbitrated. Understanding this is key for understanding how arbitration can further develop in Slovenia, and for addressing the ongoing legal and policy challenges.

3. Limits to Arbitrability

Arbitrability is the capacity to settle a dispute by arbitration in respect of which the parties may conclude an arbitration agreement (Ude, 2004, p. 65). Arbitrability involves broader considerations of whether the matter is sensitive in the context of public policy and mandatory rules, making private adjudication not permissible (Gélinas & Bahmany, 2023, pp. 6-7).

The legal doctrine typically distinguishes between subjective arbitrability (*ratione personae*, *i.e.,* a party's ability to be bound by an arbitration agreement), objective arbitrability (*ratione materiae*, *i.e.,* matters that can be settled by arbitration) and jurisdictional arbitrability (*ratione iurisdictionis*, *i.e.,* the (non-)exclusive

jurisdiction of the national courts) (Van Zelst & Masumy, 2024, p. 348; Ude, 2004, p. 73; Djinović & Rižnik, 2018, p. 60; Peralas Viscasillas, 2009, p. 273). This paper focuses on objective and jurisdictional arbitrability as they are relevant in the Slovenian case law landscape.

While arbitrability is referenced in the New York Convention[1] and the UNCITRAL Model Law,[2] the scope of arbitrability is not set out at the international level (Mistelis, 2009, p. 3), and it is ultimately determined under each national law (see, e.g., Art. 4, Slovenian Arbitration Act; Article 1030(1), German Code of Civil Procedure; Article 2059, French Code Civil).

As regards objective arbitrability, a dispute is only arbitrable if no public policy rules bar arbitration of its subject matter (Gélinas & Bahmany, 2023, p. 5). Restrictions on arbitrability are often motivated by the concept that submitting certain disputes to non-state-controlled dispute resolution systems undermines sovereignty (Mistelis, 2009, p. 6). These restrictions vary by state, depending on their political, social, and economic priorities and their general attitude towards arbitration (Mistelis, 2009, p. 10). For example, criminal offences are typically non-arbitrable due to their sensitive public policy implications, and are reserved exclusively for the judicial authority of state courts (Mistelis, 2009, p. 4).

In Slovenia, arbitrability is broadly defined, covering claims with economic interest (pecuniary claims) and other claims where parties can validly conclude a settlement (Ude, 2004, p. 67). Consequently, only a limited number of disputes are non-arbitrable, namely disputes that fall under the competence of administrative authorities (e.g. competition law matters governed by the Competition Protection Agency), family law matters (e.g. matrimonial disputes, challenges regarding paternity, and child support), personal status, housing disputes, and decisions with *erga omnes* effect (e.g. the validity of patents, trademarks and other registered intellectual property rights, insolvency, and court register matters) (Ude, 2004, pp. 67-69; Ude & Damjan, 2015, pp. 265-284).

Conversely, consumer disputes and employment disputes, specifically if they are foreseen in the collective bargaining agreement, are arbitrable, with certain specifics[3] on the validity of the arbitration agreement (Ude, 2004, p. 70). Likewise, claims arising from insolvency (e.g. the right to separate satisfaction and right to exclusion), stock exchange disputes, and corporate disputes are arbitrable (Ude, 2004, pp. 70-71; Ude & Damjan, 2015, pp. 265-284).

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

[2] UNCITRAL Model Law on International Commercial Arbitration with amendments, as adopted in 2006.

[3] Art. 45(1) of the Slovenian Arbitration Act: "An arbitration agreement between a company and a consumer can only be concluded in respect of disputes that have already arisen."

As regards jurisdictional arbitrability, states may limit arbitrability by setting the exclusive jurisdiction of courts for specific disputes (Ude, 2004, p. 73). This used to be applicable in Slovenia with the previous iteration of Slovenian Civil Procedure Act of 1977, which explicitly limited arbitrability of matters in the exclusive jurisdiction of courts (Djinović & Rižnik, 2018, p. 67; Ude & Damjan, 2015, p. 279). However, this changed with the adoption of Slovenian Civil Procedure Act in 1999, which did not adopt a similar provision.

4. Arbitrability in the Context of Concession Contracts

Concessions are the state's primary source for the financing of public interest objectives, e.g. the provision of public services, the construction and maintenance of public infrastructure, or the use and management of public goods (Mužina, 2004, p. 39). A concession relationship combines the elements of private and public law (Mužina, 2004, p. 31). The concession is awarded by the grantor, acting in its capacity as a public authority, and the concessionaire accepts the concession with the objective of pursuing its own commercial interests (Mužina, 2004, p. 31).

Given that the concession relationship includes elements of a public law relationship, it is subject to stricter regulation compared to purely private law relationships (Štemberger, 2023, p. 200). This is justified primarily to ensure that public funds invested by the grantor in the performance of the concession contract are utilised efficiently, transparently, and in accordance with public interest (Štemberger, 2023, p. 199).

The stricter regulation of concession relations, however, does not justify the exclusion of the possibility of arbitration for concession disputes (provided that the relationship is *iure gestionis*) (Štemberger, 2023, p. 352). Arbitration is well-suited for concession disputes due to several factors, primarily the high level of expertise of the arbitral tribunal and the expediency of arbitral decisions (Štemberger, 2023, p. 350). The concessionaire is obliged to carry out the activities in a continuous and uninterrupted manner, meaning that a protracted dispute could impose a significant burden on both the grantor and the concessionaire (Lahne, 2014, pp. 37-38). Arbitration in concession disputes will be even more appropriate in cases where the concessionaire is a foreign party, as arbitration gives the concessionaire a greater sense of neutrality, compared to proceedings before domestic courts in the grantor's home country (Štemberger, 2023, p. 350).

In analogous relationships to concession contracts, namely concession partnerships, the Slovenian legislator has expressly provided the option for settlement by arbitration maintaining that parties should have autonomy regarding the question

of jurisdiction, and that for *iure gestionis* relationships, settlement by arbitration may even be more advisable (Government of the Republic of Slovenia, 2006).

In light of the aforementioned, it is difficult to justify non-arbitrability of concession disputes arising from *iure gestionis* concession relationships.

5. Arbitrability of Concession Disputes in Other Jurisdictions

It is important to consider how other jurisdictions approach the non-arbitrability of concession disputes. The jurisdictions that the Slovenian legislator relied on for comparison purposes when adopting the Slovenian Arbitration Act[4] and certain public procurement legislation (e.g. Government of the Republic of Slovenia, 2008), namely Austria and Germany, do not exhibit a distinct aversion to the arbitrability of concession disputes (Heider & Fremuth-Wolf, 2016, p. 27; Gélinas & Bahmany, 2023, Chapter 4).

In Bulgaria, the legislator has introduced limitations on arbitrability to protect public interests (Dozhdev, 2020, pp. 309-311). Initially, Article 154(2) of the Bulgarian Concession Act required that disputes related to concession contracts be decided by the courts, which can lead to ambiguities (Baykushev & Zahariev, 2019, p. 123). The law was later amended to clarify that disputes without cross-border interests must be decided by the courts, while disputes with cross-border interests[5] could be resolved by arbitration (Baykushev & Zahariev, 2019, p. 123).

This distinction seems unjustified by public policy arguments or enhanced control over the allocation of public resources, as non-arbitrability would logically apply more to cross-border interests and not vice versa (Baykushev & Zahariev, 2019, p. 124). Instead, the motive appears to have been granting contractors assurance that their potential disputes with the state would be resolved by an independent tribunal, outside the influence of the Bulgarian state (Baykushev & Zahariev, 2019, pp. 124-125).

Another perspective can be found in Russia, with a traditional background of a wide scope of non-arbitrability, particularly for disputes involving public interest (Samoylov, 2016). According to Article 17 of the Russian Federal Law on Concession Agreements, disputes arising out of concession contracts may be settled by arbitration tribunals of the Russian Federation (Samoylov, 2016).

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[4] Official Gazette of the Republic of Slovenia, no. 45/08, as amended.

[5] According to Article 11(1) of the Bulgarian Concession Act, these are construction works concessions and service concessions value of which is higher than the value determined in regulation of the European Commission adopted pursuant to Article 9 of the Directive 2014/23/EU.

In *Nevskaya v St. Petersburg*, Nevskaya Concession Company Ltd., as the concessionaire, and the Government of St. Petersburg, as the grantor, concluded a concession contract for the construction of the Orlovsky tunnel (Russian Court of Cassation, case no. A56-9227/2015, 2016). The concession contract contained an arbitration clause providing for an *ad hoc* arbitration under the UNCITRAL Arbitration Rules, with the place of arbitration set in Moscow, and the ICC as the appointing authority (Boulatov, 2020, p. 788). When a dispute arose, it was resolved by an arbitration award (Boulatov, 2020, p. 788). However, during the enforcement, the grantor argued that the arbitral proceedings did not meet the narrow definition of "Russian arbitration tribunals" (Boulatov, 2020, p. 788). The Arbitrazh Court of St Petersburg ruled that the arbitral tribunal did not qualify as a Russian arbitration tribunal since ICC was agreed as the appointing authority (Russian Court of Cassation, case no. A56-9227/2015, 2016). Consequently, the arbitration agreement was deemed null and void, and enforcement of the award was denied (Russian Court of Cassation, case no. A56-9227/2015, 2016).

In a subsequent decision by the Federal Commercial Court of the Moscow District,[6] it was ruled that a dispute arising from a concession agreement is a dispute between private parties and does not affect public interests (Dozhdev, 2020, pp. 309-311).

Finally, attention should be given to Chinese legislation, where concession contracts can be classified as administrative contracts, and thus, non-arbitrable (Yifei, 2018, pp. 222-223).[7] In *Banwan Highway Company v Bazhong Government*, the Beijing Second Intermediate People's Court addressed whether a concession contract was an administrative contract or a civil and commercial contract (Yifei, 2018, pp. 222-223). The court held that since the concession contract contained provisions indicating that the parties entered the contract on an equal basis, the contract was of a commercial nature, and thus that the arbitration clause was valid (Yifei, 2018, pp. 222-223).

In comparison, the non-arbitrability of concession disputes appears largely unjustified from a public policy standpoint, and is rarely encountered without a clear, consistent rationale or unified approach across jurisdictions.

6. Arbitrability of Concession Disputes in Slovenia

Article 40 of the Services of General Economic Interest Act states that:

"If a dispute arises between a grantor and a concessionaire during the execution of a concession contract, the regular court shall decide on the dispute."[8]

[6] Federal Commercial Court of the Moscow District, case no. A40-93716/2017, dated 3 May 2018.

[7] According to Article 3(2) of the Chinese Arbitration Law, administrative agreements are not arbitrable. See: Yifei, 2018, pp. 222-223.

[8] Author's translation.

The wording only relates to court jurisdiction in matters concerning concession contracts but is not expressly concerned with the arbitrability of concession disputes.

On 13 July 2011, the Slovenian legislator[9] adopted the Authentic Interpretation of Article 40 of the Services of General Economic Interest Act, which states that: "Article 40 of the Services of General Economic Interest Act is to be interpreted so that the dispute resolution between a grantor and a concessionaire in connection with the execution of a concession contract fall under the exclusive jurisdiction of the courts." (Authentic Interpretation of Services of General Economic Interest Act).[10]

The Slovenian legislator chose one of the possible interpretations of Article 40 of the Services of General Economic Interest Act by using the authentic interpretation of an existing law. While several circumstances led the Slovenian legislator to settle on this interpretation, which will be explored in this paper, it is widely accepted in both legal doctrine and judicature that the Authentic Interpretation of the Services of General Economic Interest Act is both misguided and inherently inappropriate.

6.1. Authentic Interpretation

The authentic interpretation of the law is a mandatory source of law to be followed by the legislator and other public authorities, with the purpose of ascertaining the true meaning or purpose or to clarify an ambiguous statutory provision (Zagorc, 2012, pp. 273-274). It has remained in force in Slovenia as authoritative interpretation primarily for historic reasons (Slovenian Constitutional Court, case no. U-I-462/18-45, 2021, para. 26; Zagorc, 2012, p. 273).

An authentic interpretation enters into force on the date of its adoption, but is applicable from the date of entry into force of the underlying provision of law (Nerad, 2011). This means that the authentic interpretation has retroactive effect (*ex tunc*),[11] except for adjudicated cases that are already final and binding (Galič, 2011, p. 11).

Problems arise when an authentic interpretation of a law does not merely clarify the law but instead changes, amends or supplements it. In such cases, the constitutionality of the procedure for adopting what is effectively an amendment to an existing law comes into question (Nerad, 2011). The Slovenian Constitutional

[9] I.e., the National Assembly of the Republic of Slovenia.

[10] Translation by the author.

[11] Slovenian Constitutional Court, case no. U-I-192/16, decision dated 7 February 2018, para. 14; Slovenian Constitutional Court, case no. U-I-51/06, decision dated 15 June 2006; Slovenian Constitutional Court, case no. I-I-103/11, decision dated 8 December 2011; see also Pavčnik, 2011, pp. 207-208.

Court has often addressed the distinction between interpreting an existing law and introducing a new meaning or supplement through authentic interpretation, frequently annulling the latter.[12]

More importantly for the purposes of this paper, the constitutional validity of authentic interpretation is also in question, as the legislator, by interpreting the law, assumes powers that inherently belong to the courts and the judicial branch under the principle of separation of powers (Nerad, 2011).

6.2. Reasons for the Adoption of the Authentic Interpretation

The purpose of the Authentic Interpretation of the Services of General Economic Interest Act was to clarify the non-arbitrability of disputes arising from concession contracts (Note General Editor Slovenia, 2019, pp. i-ii; Galič, 2011, p. 11). In the discussion leading to its adoption, the sponsor[13] of the authentic interpretation, the parliament's working group,[14] and the Slovenian legislator (together referred to as the drafters of the authentic interpretation) concluded that arbitration offers a lower level of legal certainty for public entities for the following reasons: (i) arbitrators are chosen privately; (ii) there is no appellate procedure; (iii) corruption is more prevalent, whereas resolving disputes before regular courts offers an additional judicial overview of public spending; and (iv) arbitration offers a less diligent evidentiary procedure.[15]

Although the drafters of the authentic interpretation acknowledged that the prevailing legal doctrine supported the interpretation of Article 40 of the Services of General Economic Interest Act considering concession disputes arbitrable (Bogovič,

[12] Slovenian Constitutional Court, case no. U-I-51/06 decision dated 15 June 2006; Slovenian Constitutional Court, case no. U-I-64/08, decision dated 6 November 2008; Slovenian Constitutional Court, case no. U-I-103/11, decision dated 8 December 2011.

[13] The sponsor of the authentic interpretation consisted of three members of the Slovenian People's Party, Mr. Bogovič, Mr. Žerjav and Mr. Kres (see: Bogovič, Žerjav & Kres, 2011).

[14] The Committee on Environment and Spatial Planning of the National Assembly of the Republic of Slovenia acted as the working group for the Authentic Interpretation of the Services of General Economic Interest Act during its 31st session on 23 June 2011 (see: the Committee on Environment and Spatial Planning, 2011).

[15] There were also further uninformed opinions, such as (i) the claim that the LAC influences the legal doctrine due to its vested interest in ensuring arbitrability, allowing it to adjudicate such disputes; (ii) the belief that anyone, not necessarily a judge, can serve as an arbitrator, raising concerns about whether the arbitrator would possess the necessary expertise for the procedure; and (iii) the concern that the list of arbitrators might include individuals who were involved in signing the concession contract (see: National Assembly of the Republic of Slovenia, 2011; Bogovič, Žerjav & Kres, 2011; Plauštajner, 2011, p. 16).

Žerjav & Kres, 2011), they disregarded this perspective, and even misquoted the sole legal opinion that they relied on and cited[16] (Government of the Republic of Slovenia, 2011). Furthermore, the drafters of the authentic interpretation ignored the opinion of the Government of the Republic of Slovenia, which explained that during the drafting of Article 40 of the Services of General Economic Interest Act, two options were considered: either (i) disputes could be decided by administrative courts; or (ii) disputes could be decided by regular courts; with the latter option ultimately chosen (Government of the Republic of Slovenia, 2011). This choice indicated that exclusive jurisdiction (and by extension non-arbitrability) was not a consideration in the drafting of Article 40 of the Services of General Economic Interest Act.

However, the discussion by the drafters of the authentic interpretation also exposed their true motives for pursuing the authentic interpretation. Their decisions were driven by negative experiences with arbitration, particularly stemming from a case involving the Municipality of Laško when the dispute was resolved against the municipality and in favour of the concessionaire (National Council of the Republic of Slovenia, 2011; Galič, 2011, p. 11; Plauštajner, 2011, p. 16).

On 19 October 2001, the Municipality of Laško and two concessionaires signed a concession contract for the construction of a sewage system with treatment facilities, and for the operation of a public wastewater disposal and treatment utility service (Committee on Environment and Spatial Planning, 2011; Ljubljana Higher Court, case no. I Cpg 1748/2014, decision dated 11 March 2015). The concessionaires connected the town in question to the sewage treatment plant, but did not complete the sewage system (Ljubljana Higher Court, case no. I Cpg 1748/2014, decision dated 11 March 2015). Nevertheless, the concessionaires charged the Municipality of Laško for the entire project under the concession contract (Ljubljana Higher Court, case no. I Cpg 1748/2014, decision dated 11 March 2015). The contract included a dispute resolution clause for disputes to be settled by arbitration (Ljubljana Higher Court, case no. I Cpg 1748/2014, decision dated 11 March 2015). The dispute was decided by an arbitral tribunal under the auspices of the LAC in favour of the concessionaires (Committee on Environment and Spatial Planning, 2011). This decision appears to have swayed the Slovenian legislator to adopt the authentic interpretation despite the

[16] The drafters of the authentic interpretation relied on Dr. Konrad Plauštajner's quote "In view of the purpose and content of the Services of General Economic Interest Act, it could be argued that the provision of Article 40 of the Services of General Economic Interest Act is of mandatory nature," and that Dr. Plauštajner went on to write that such disputes should be decided by courts. However, this was a misquote because Dr. Plauštajner clarified that it is not in the public interest that disputes arising from concession contracts be decided only by regular courts, especially because of the complexities of such disputes, as they would carry on forever (see Plauštajner, 2003, p. 1619; Plauštajner, 2011, pp. 16-18).

prevailing opinion of the legal doctrine, a well-reasoned opinion of the Government of Slovenia against it, and even the opinion of the Legislative and Legal Service[17] (National Assembly of the Republic of Slovenia, 2011).

6.3. Development of the Question of the Arbitrability of Concession Disputes in Slovenian Case Law

Interestingly, the very arbitration award that persuaded the legislator to adopt the authentic interpretation later kickstarted the court saga, in which the Supreme Court confirmed that the courts were not bound by the legislator's interpretation of the law, thus rendering the authentic interpretation inapplicable.

The question of the arbitrability of concession disputes in Slovenia first arose before the Celje District Court (Celje Disctrict Court, case no. Pg 321/2008, decision dated 22 January 2009), where the court dismissed a claim and annulled an enforcement order against the Municipality of Laško following the municipality's objection based on the arbitration clause (LAC, case no. SA 5.6-X/2014, decision on jurisdiction dated 12 August 2014). In response, the claimants initiated arbitration under the auspices of the LAC (LAC, case no. SA 5.6-X/2014, decision on jurisdiction dated 12 August 2014*)*. The arbitral tribunal issued a decision on jurisdiction (LAC, case no. SA 5.6.-2/2009, decision dated 25 March 2010), finding that it has jurisdiction to decide in the matter, despite objections emanating from Article 40 of the Services of General Economic Interest Act (LAC, case no. SA 5.6-X/2014, decision on jurisdiction dated 12 August 2014), and subsequently issued an award (LAC, case no. SA 5.6.-2/2009, decision dated 11 March 2011).

Following arbitration, the Slovenian legislator, siding with the Municipality of Laško, adopted the Authentic Interpretation of the Services of General Economic Interest Act. The Municipality of Laško, however, did not voluntarily fulfill its obligations under the award, prompting the claimants to seek enforcement, which was granted. The Municipality of Laško appealed this decision.

The case reached the Slovenian Supreme Court twice. In the first instance, the question was whether both the parties had received a fair hearing.[18]

[17] The Legislative and Legal Service, a body that assists the Slovenian legislator in drafting and amending legislative acts, argued that the Authentic Interpretation of the Services of General Economic Interest Act was unnecessary. It maintained that the provision in question was clear, and that its content, as proposed in the authentic interpretation, could be adequately determined through linguistic and teleological interpretation (see: Legislative and Legal Service, 2011).

[18] The court of first instance served the respondent the claimant's written pleading (i.e., chronologically the second submission in the proceedings) together with its final decision in the matter. Consequently, the respondent did not have the opportunity to respond to the written pleading, and thus did not have the opportunity to be heard on the substantive submissions of the

In the second appeal, the key issue was the applicability of Article 40 of the Services of General Economic Interest Act (Slovenian Supreme Court, case no. Cpg 2/2014, decision dated 17 June 2014). The Slovenian Supreme Court ruled that the authentic interpretation, by its nature, is only an interpretative act of the Slovenian legislator, not a law, and therefore not binding on the courts, which are bound only by the constitution and laws (Slovenian Supreme Court, case no. Cpg 2/2014, decision dated 17 June 2014; Galič, 2011, p. 11). The Slovenian Supreme Court further affirmed that Article 40 of the Services of General Economic Interest Act did not exclude the possibility of arbitration for concession disputes because even at its inception, the provision in question did not indicate exclusive jurisdiction for regular courts, nor did it expressly exclude arbitration.[19] Additionally, the Slovenian Supreme Court rejected the argument that the award violated public policy (Slovenian Supreme Court, case no. Cpg 2/2014, decision dated 17 June 2014).

The saga with the Municipality of Laško continued before the Ljubljana District Court and the Ljubljana Higher Court, where the municipality sought to set aside the award. Both courts upheld the arbitration award, reaffirming that concession disputes are arbitrable in Slovenia (Ljubljana Higher Court, case no. I Cpg 1748/2014, decision dated 11 March 2015). The Ljubljana Higher Court also reviewed and confirmed the procedure and concluded that due process was respected, and the arbitral tribunal conducted an adequate evidentiary procedure (Ljubljana Higher Court, case no. I Cpg 1748/2014, decision dated 11 March 2015), addressing even the unsubstantiated concerns of the drafters of the Authentic Interpretation of the Services of General Economic Interest Act.

In each case, the courts emphasised that whilst the Authentic Interpretation of the Services of General Economic Interest Act exists, the courts are not bound by it, thus clearly establishing that concession disputes are arbitrable in Slovenia.

In a subsequent arbitration case under the auspices of the LAC concerning a dispute arising from a concession contract for payment for wastewater treatment services, the arbitral tribunal confirmed its jurisdiction stating that Article 40 of the Services of General Economic Interest Act did not impede the jurisdiction of arbitral tribunals, despite the Authentic interpretation of the Services of General Economic Interest Act (LAC, case no. SA 5.6-X/2014, decision dated 12 August 2014).

claimant. In such circumstances, the Slovenian Supreme Court granted the respondent's appeal, annulled the decision, and referred the case back to the court of first instance. See Slovenian Supreme Court, case no. Cpg 2/2012, decision dated 17 July 2012.

[19] With only the latter being determining due to the provision of the Slovenian Civil Procedure Act (*Official Gazette of the Republic of Slovenia*, no. 26/99, as amended), which did not adopt the same provisions of the Slovenian Civil Procedure Act of 1977, *Official Gazette of the Socialist Federal Republic of Yugoslavia*, no. 4/77, as amended, differentiating arbitrability of disputes with an international element and those without it, limiting arbitrability to subject-matters without exclusive jurisdiction of courts. See: Slovenian Supreme Court, case no. Cpg 2/2014, decision dated 17 June 2014; Galič, 2011, p. 12.

6.4. Recent Decision of the Slovenian Constitutional Court on Authentic Interpretations and its Effect on the Arbitrability of Concession Disputes

A significant constitutional development regarding the applicability of the authentic interpretation occurred in 2021. Historically, the Slovenian Constitutional Court had held that an authentic interpretation, regardless of its later adoption, is an integral part of regulations from the time it comes into force (Slovenian Constitutional Court, case no. U-I-361/96, decision dated 21 October 1999). This approach was applied mainly in cases involving authentic interpretations by local municipalities (Slovenian Constitutional Court, case no. U-I-201/02, decision dated 17 December 2003), and had been affirmed for authentic interpretations by the Slovenian legislator as well (Slovenian Constitutional Court, case no. U-I-361/96, decision dated 21 October 1999; Slovenian Constitutional Court, case no. U-I-192/16, decision dated 7 February 2018).

The matter before the Slovenian Constitutional Court concerned the constitutionality of certain provisions of the Criminal Procedure Act,[20] where the judges reviewed the reasoning in the above decision by the Slovenian Supreme Court (Slovenian Constitutional Court, case no. U-I-462/18-45, decision dated 3 June 2021, para. 24).

The Slovenian Constitutional Court noted that the Slovenian Supreme Court had not adhered to previous constitutional judicial review but nevertheless reaffirmed the conclusion that the courts were bound only by the constitution and the laws (Slovenian Constitutional Court, case no. U-I-462/18-45, decision dated 3 June 2021, para. 33). Any further authoritative involvement of the Slovenian legislator in specific cases would violate the principle of the independence of judges and the principle of separation of powers (Slovenian Constitutional Court, case no. U-I-462/18-45, decision dated 3 June 2021, paras. 34-39).

The result of the judgment was that the Slovenian Constitutional Court annulled the provisions of the Rules of Procedure of the Slovenian legislator[21] regulating the adoption of authentic interpretations of laws by the Slovenian legislator, and in the same breath, annulling the authentic interpretations of certain articles of the Criminal Procedure Act because they had been adopted through unconstitutional methods (Slovenian Constitutional Court, case no. U-I-462/18-45, decision dated 3 June 2021, para. 43). In the aftermath of this decision, the Slovenian legislator amended the Rules of Procedure of the Slovenian legislator removing the annulled provisions.[22]

[20] *Official Gazette of the Republic of Slovenia*, no. 63/94, as amended.

[21] *Official Gazette of the Republic of Slovenia*, no. 35/02 as amended.

[22] *Official Gazette of the Republic of Slovenia*, no. 58/2023.

While this ruling was the final nail in the coffin for authentic interpretations, the constitutional overview of the Slovenian Constitutional Court was limited only to specific provisions of the Criminal Procedure Act, and did not extend to the constitutionality of the Authentic Interpretation of the Services of General Economic Interest Act, despite addressing arguments by the Slovenian Supreme Court in a related matter. Thus, the Authentic Interpretation of the Services of General Economic Interest Act remains formally valid (Djinović & Galič, 2023).

Some scholars consider the mere existence of the Authentic Interpretation of the Services of General Economic Interest Act a danger to viability of arbitration in Slovenia (Djinović & Galič, 2023; Plauštajner, 2011, p. 16). In an otherwise arbitration-friendly jurisdiction,[23] the Authentic Interpretation of the Services of General Economic Interest Act is the only regulation providing the contrary (Lahne, 2014, p. 36). The importance of comfort and legal certainty in arbitration is instrumental for international investment, business and commerce (Blackaby, Partasides & Redfern, 2023, para. 1.12; Mills, 2014, p. 445; Humar, 2020, p. 10). Consequently, there are calls for the Slovenian legislator to issue a formal document indicating that the Authentic Interpretation of the Services of General Economic Interest Act is null (Djinović & Galič, 2023).

7. Conclusion – Next Steps

Regulations can become obsolete even without a formal repeal, when the circumstances or relationships they were meant to govern change significantly (Služba Vlade Republike Slovenije za zakonodajo, 2018, pp. 123-124). In this sense, the Authentic Interpretation of the Services of General Economic Interest Act, while not expressly repealed by the Slovenian legislator, may already be considered obsolete.

Exhibiting the country's legal system as arbitration friendly is a consideration that has far-reaching effects on international investment, business, and commerce. However, the impact of retaining an obsolete regulation can be significant, particularly in terms of Slovenia being perceived as an arbitration-friendly country. If such a regulation, even one that is on the path to obsolescence, affects this perception, it cannot be considered without substantive impact. In weighing the gradual decay of a regulation against the risks posed by a potentially harmful yet ineffective provision, it would be prudent for the Slovenian legislator to formally terminate the validity of the Authentic Interpretation of the Services of General Economic Interest Act.

[23] A country that has adopted the UNITRAL Model Law is generally considered an arbitration friendly country. See: Blackaby, Partasides, & Redfern, 2023, para. 1.12; To note, as early as 1976, the Slovenian legislator was not averse to arbitration as an expression of the principle of party autonomy, and this is all the truer after the socio-economic changes in 1993. See: Galič, 2011, p. 11.

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