

Rome, 29 September 2022

***PERSPECTIVE FOR EUROPE: COMPARATIVE ANALYSIS
CONCERNING PRICE ADJUSTMENTS MECHANISM IN
COMMERCIAL CONTRACTS***

Prof. Avv. Francesco Sciaudone

The multiple regulatory interventions progressively enacted in order to deal with the **exceptional situation of increasing cost of construction materials and energy** have resulted in a stratified regulatory plethora of norms that is not easy to apply for contracting stations and operators in the public as well as private sector. Specifically, for public sector, two different problems have emerged and, namely. (i) at the awarding stage; and (ii) at the project implementation stage.

Moreover, without a concrete and unified vision at the European level, this has led to a diverse and often inconsistent landscape within individual member states, leading to important and critical imbalances in the market.

This also considering:

- i.** the ambiguity of some provisions;
- ii.** the unsuitability of the law to regulate in detail the specific hypotheses that may arise in practical application (for example with reference to the case of integrated procurement or competitive dialogue procedures in which there is usually a considerable lapse of time between the publication of the notice and the date of submission of the final bids);
- iii.** the situation of uncertainty and lack of clear and unambiguous indications, which has arisen with the consequent stalemate in the implementation of public investments (many of which are related to the implementation of the Recovery Plan for which stringent timelines are provided for the procedure). This is because they have multiplied:
 - (i)** on the one hand, appeals from companies and trade associations complaining about the inadequacy of the auction base of the tendering process that had been launched, and
 - (ii)** on the other hand, the procedures of revocation by the contracting stations of the previously called tenders or the negative outcome of the same which were unsuccessful.

The purpose of this paper is to present a schematic representation of legislative situations as well as the various initiatives that have been undertaken in the main Member States.

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<u>ITALY</u>		
Main critical issues in public contracts as a result of the Covid and Ukrainian crisis increase in prices of construction materials and energy - During the tender process	Main critical issues in public contracts as a result of the Covid and Ukrainian crisis increase in prices of construction materials and energy - During the performance of the contract	Main critical issues in private contracts as a result of the Covid and Ukrainian crisis increase in prices of construction materials and energy
<p>Article 29 of Decree-Law No. 4/2022, converted into Law No. 25/2022, introduced an exceptional and transitional discipline applicable until Dec. 31, 2023, in order to incentivize public investment and to cope with the negative economic fallout related to the pandemic in relation to procedures for the awarding of public contracts, the notices or notices of which are published after Jan. 27, 2022. Said regulations require, among other things, the inclusion in the initial tender documents of price revision clauses for material increases exceeding 5 percent (instead of 10 percent) compared to the price noted at the time of bid submission, and compensation is applied for the percentage exceeding 5 percent and in any case to the extent of 80</p>	<p>Article 26 of Decree Law 50/22 (conv. In Law No. 91/2022) allows entities required to apply the Contracts Code to cover the charges corresponding to the application of the extraordinary measures provided for contracts in progress and in case of insufficiency of the resources indicated therein through access to specific public funds : The timelines for submitting the application for access are the same for the two Funds: August 31, 2022 for the SALs related to the period 1/1/22 - 31/09/22 and January 31, 2023 for the SALs related to the period 1/8/22-31/12/22 . With reference, on the other hand, to the higher costs arising from the updating of the price lists used for awarding procedures initiated after the entry into force of Decree Law 50/22, namely from May 17, 2022 and until December 31, 2022, in case of</p>	<p>In the Private sector, the Civil Code generally provides that in case of excessive change in the starting circumstances, the Contract may be terminated for excessive onerousness under Article 1467 of the Civil Code. However, such a solution precludes the continuation of the activity, determining - in fact - damage to the economy and businesses. At the same time, in the specific cases of private contracting, Article 1665 of the Civil Code, provides that, in the case of excessive onerousness of the performance on the part of either Party, revision may be granted if the difference in price exceeds one-tenth of the price originally provided.</p> <p>In general terms, however, the Italian legal system recognizes principles - generically</p>

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<p>percent of said excess. The periodic determination of percentage changes in the individual prices of the most significant construction materials relating to each semester is referred to special Decrees of the MIMS. Specific rules are dictated for the activation of the procedure and how to cover the higher charges for the contracting stations (allowing, among other things, until Dec. 31, 2026, in case of insufficient resources of the contracting stations and limited to public works financed, in whole or in part, with the resources provided by the NRP and the NFIP to use the resources of the fund referred to in Article 7 Decree-Law No. 76/2020.</p>	<p>insufficient own resources of the contracting stations specified by co. 6 of the same article, these may be financed from the resources for the commencement of works that cannot be postponed, limited to works financed in whole or in part with the resources of Regulations 2021/240/EU and 2021/241/EU, as well as without prejudice to the priority nature of the aforementioned interventions, to interventions fully financed with the resources of the PNC and those for which Extraordinary Commissioners have been appointed.</p> <p>Article 27 of Decree-Law no. 50/2022 provides for works concessions for the purpose of coping, in the year 2022, with exceptional increases in the prices of construction materials as well as fuels and energy products, the possibility of updating the economic framework or the metric computation of the executive project being approved or approved on the date of entry into force of the decree and in relation to which the awarding procedures have already been completed or are scheduled to begin by December 31, 2023, using the most updated reference price list. The economic framework or the metric computation of the project, as restated, is submitted to the grantor for approval and is considered within the framework of the concessionary relationship, in accordance with the resolutions adopted by the authority of</p>	<p>applicable - that can be invoked, such as good faith in the execution of the contract (Article 1375 of the Civil Code) or "<i>the principle of the preservation of the contract</i>" for which solutions that allow the renegotiation of prices and (at the same time) the continuation of the contract are possible even if not explicitly provided for by the private will (Article 1322 of the Civil Code).</p>
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	regulatory and supervisory authority for the sector, where applicable.	
<u>ROMANIA</u>		
<p>Possibility to refrain from signing the contract - Force majeure and fortuitous event</p> <p>Art. 207 of Law no. 98/2016¹ on public acquisitions and Art. 89 of Law no. 100/2016² regulates force majeure and fortuitous event as two events that allow a Bidder to refrain from signing the Contract after the submission of a bid.</p> <p>Force majeure and fortuitous event are regulated by Art. 1351 of the Romanian Civil Code. According to it, force majeure is any</p>	<p>Price adjustment mechanism</p> <p>Following raise in energy costs, inflation and the restrictions generated by the war in Ukraine, Romania adopted the Emergency Ordinance no. 47/2022. It allows for the adoption of a price adjustment mechanism, for signed contracts related to projects which are in progress.</p> <p>The mechanism is indexed to the total construction cost index, disseminated by the National Institute of Statistics through official publications. The Emergency Ordinance lays out the following formula:³</p>	<p>Force majeure and fortuitous event</p> <p>The above-provisions related to force majeure and fortuitous event become applicable in the area of civil law. As such, a contractor may be able to rely on the fortuitous event argument in order to refrain from executing the incumbent obligations.</p> <p>Theory of hardship</p> <p>In addition, the Romanian Civil Code adopted the theory of hardship (<i>imprévision</i> in French). According to Art. 1271 of the Romanian Civil Code, if the execution of the contract has</p>

¹ Law no. 98/2016 on public acquisitions.

² Law no. 100/2016 regarding works concessions and service concessions.

³ Va represents the adjusted value of the payment request, Vo represents the value of the payment request according to the prices provided in the offer that was the basis for the conclusion of the contract/framework agreement, a represents the percentage value of the advance payment determined as a ratio between the amount of the

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<p>external, unpredictable, absolutely invincible and unavoidable event. The fortuitous case is an event that cannot be foreseen nor prevented by the person who would have been called to answer if the event had not occurred.</p> <p>Generally speaking, force majeure refers to events that have nothing to do with human action and that cannot be foreseen: natural calamities (earthquakes, tsunamis), epidemics (e.g. coronavirus). Force majeure refers to cases where the question of predictability is absolute and requires a heavy burden of proof. An armed conflict or a war would not obviously fall squarely within the scope and definition of the force majeure, inasmuch as is not taking place on the Romanian territory. As such, bidders would not generally be able to rely on force majeure as a way of refraining from signing the contract after submitting the bid.</p>	$V_a = V_o \times [(1-p-a) \times ICC_n / ICC_{data\ referin\c{a}} + (p+a)],$ <p>Based on it, contractors may ask for adjusted payments with each payment request submitted.</p>	<p>become excessively onerous due to an exceptional change in circumstances that would make it manifestly unfair to oblige the debtor to perform the obligation, the court may order (i) the adjustment of the contract, to fairly distribute between the parties the losses and benefits resulting from the change of circumstances; (ii) the termination of the contract.</p> <p>The provisions related to unpredictability become applicable if:</p> <ul style="list-style-type: none"> - The change of circumstances intervened following the conclusion of a contract; - It would not be reasonable to believe that the contractor assumed the risk of the changes in circumstances; - The contractor tried, in accordance with good will, to negotiate the adjustment of the contract.
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advance received and non-returned/ unjustified and the contract price, p represents the percentage value of the profit determined as a ratio between the value of the profit expressed in value and the contract price, ICC_n represents the total construction cost index related to the month of the payment request, and the reference ICC_{data} represents the total construction cost index related to the previous month the deadline for submitting the offer, according to the award documentation or the documents related to the direct purchase.

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<p>However, contractors would have a better chance on relying on the provision relative to fortuitous events. Such are external circumstances that cannot be attributed to individuals, that do not have an extraordinary character and could not have been foreseen, nor prevented or avoided except by the person most capable of maximum diligence and prudence. As such, as opposed to force majeure, fortuitous event refers to cases of relative predictability, lowering the burden of proof required. The war in Ukraine and the subsequent increase in prices could represent a ‘fortuitous event’ that would allow a bidder to refrain from entering the contract in the aftermath of a successfully submitted bid.</p>		<p>When there is a clause that regulates price adjustments, that clause could be applied in accordance with the other dispositions of the Civil Code.</p>
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FRANCE

<p>Negotiation Before the conclusion of the contract, the Bidder can request a negotiation of the price, in accordance if the acquisition procedure is one with negotiation (Arts. R.2124 <i>et seq.</i> of the Public Procurement Code (<i>Code de la commande publique</i>)).</p>	<p>Revisable price Art. R. 2312 of the Public Procurement Code sets out rules for a fix price and a revisable price in public tenders. Under Art. R. 2312-11 of the Public Procurement Code, the parties to revise the price of the contract based on economic variations, (i) either in accordance with a reference from which the price of the service is adjusted; (ii) or by applying a formula</p>	<p>The legal provisions on Force majeure and Hardship become applicable when there is no clause allowing for a price adjustment mechanism inserted within the contract.</p>
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<p>Article L. 2711-1 of the Public Procurement Code provides that a decree may provide for the application of all or some of the measures of this book to public contracts in progress, in the process of being awarded or whose procedure handover has not yet been initiated.</p> <p>Following the raise of prices, Circular n°6338/SG was adopted in March 30, 2022 relating to the execution of public procurement contracts in the context of rising prices of certain raw materials, which is addressed to the prefects and includes several recommendations:</p> <ul style="list-style-type: none"> - modification of public procurement contracts when necessary for the continuation of their execution; - terms of application of the contingency theory with payment of any compensation to the co-contracting party, - freezing of contractual penalties; - insertion of a price review clause in all future public procurement contracts; - dealing with similar difficulties in private law contracts. 	<p>representative of the evolution of the cost of the service; (iii) or by combining the above measures.</p> <p>Theory of hardship / Imprévision</p> <p>According to Art. R.2194-5 of the Public Procurement Code, the contract may be modified when the adjustment necessary by circumstances which a purchaser diligent could not foresee. The adjustment made to the price of the contract cannot be greater than 50% of the amount of the initial contract. In case of successive contracts, such limit applies to the limit of each change (Art. R.2194-3 of the Public order code).</p> <p>Therefore, hardship, allows the holder of a public contract to obtain compensation from the administration when faced with an event that was not foreseeable at the time of the conclusion of the contract, outside the will of the parties and which causes an upheaval in the general economy of the contract.</p> <p>Under Art. 1195 of the French Civil Code, if a change in circumstances unforeseeable at the time of the conclusion of the contract makes performance excessively onerous for a party who had not accepted to assume the risk, the latter may request a</p>	
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The Circular specifies that the absence of an appropriate revision clause may make the public contracting authority liable.

renegotiation of the contract from his co-contracting party.

Force majeure

According to Art. L.3136-2 of the Public Procurement Code (*Code de la commande publique*), the contractor may terminate the contract in cases of *force majeure*, during the execution of the works.

Force majeure is regulated by Art. 1218 of the French Civil Code (*Code Civil*). According to this provision, there is a *force majeure* when an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and the effects of which cannot be avoided by appropriate measures, prevents the performance of the obligation. As such, in order for a debtor to rely on force majeure three conditions must be fulfilled:

- The event is outside the control of the parties (Extériorité);
- The event is unforeseen (Imprévisibilité);
- The event is unavoidable (Irrésistibilité)

Although these three characteristics are cumulative, case law attaches paramount importance to the unavoidability nature of the obstacle in order to recognize the debtor's exemption. The latter must

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	<p>have been totally unable to perform his obligation. A simple difficulty of exercise, however great it may be, cannot lead to exemption.</p> <p>The question of whether a war constitutes a case of force majeure has been the subject of divergent jurisprudential decisions illustrating the need to examine the detail of each case, taking into account in particular the attitude, diligent or not, of the debtor. The Court of Cassation (Civ. 1re, 8 December 1998, Bull. civ. I, no. 346), which had the opportunity to rule in the context of the first Gulf War, considered that a company cannot, on the eve of the conflict in Iraq, cancel the trip of its employees to Marrakech due to the aggravation of the crisis in the Gulf. The Gulf War could not constitute a case of force majeure allowing this company to obtain from the organizer of the trip the cancellation of the latter and its reimbursement because, according to the court, "<i>the circumstances invoked as constituting the force major were not insurmountable</i>". Conversely, the Court of Cassation considered that presented the characteristics of force majeure the situation of blockage which worsened in air transport because of the Gulf war and which a freight forwarder came up against despite all his diligence to prevent this event from delaying a delivery, but without being able to achieve this due to</p>	
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	<p>the irresistible nature of this situation (Com. March 16, 1999, Juris-Data No. 001252).</p> <p>The generally restrictive position of judges with regard to the termination of contracts on the basis of force majeure therefore promotes the security of transactions, the occurrence of events subsequent to the conclusion of a contract and upsetting its initial balance not necessarily affecting its binding force. However, this solution only applies to cases where there is no specific agreement between the parties. The situation would be different if the parties had agreed, as is customary in market transactions and in accordance with the principle of autonomy of will and contractual freedom of Art. 1134 of the Civil Code, that the occurrence of a conflict may constitute a case of force majeure.</p>	
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SPAIN

<p>Contract adjustment</p> <p>Law 9/2017, of November 8, on Public Sector Contracts (PSCA) introduced several reforms including to the contracts modification system (Articles 203 to 207). PSCA 2017 states that modifications will only be carried out if the</p>	<p>Force majeure and the theory of hardship</p> <p>In Spain, the regulation of unforeseen events and force majeure is contained in article 1105 of the Spanish Civil Code, which reads as follows:</p> <p>“Apart from the cases expressly mentioned in the law, and those in which the obligation so declares,</p>	<p>The legal provisions on Force majeure and Hardship become applicable when there is no clause allowing for a price adjustment mechanism inserted within the contract which would derogate from the applicable provisions.</p>
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<p>assessed premises mentioned in Article 203 are complied with</p> <ul style="list-style-type: none"> - When this has been provided for in the specific administrative clauses, under the terms and conditions established in article 204; - Exceptionally, when it is necessary to make a modification that is not provided for in the specific administrative clauses, as long as the conditions established in article 205 are met. <p>Art. 205(2)b) of the PSCA allows for the amendment of the Contract, under the hardship theory, when there are supervening circumstances that were unforeseeable at the time the contract was submitted for tender. The three conditions that need to be fulfilled are:</p> <ul style="list-style-type: none"> - That a need for the modification arises from circumstances that a diligent Administration could not have foreseen. - That the modification does not alter the overall nature of the contract. 	<p>no one shall be liable for those events which could not have been foreseen or which, if foreseen, were unavoidable.”</p> <p>The event must be unforeseeable or inevitable for the person invoking its lack of liability. The express or implied allocation of risk under the contract is essential to determine whether an event would qualify as unforeseeable or inevitable.</p> <p>This regime implies that if an unforeseen event or a force majeure event prevents a party from fulfilling its obligations, it shall not be liable for such lack of fulfilment. This regime does not entitle a party to terminate the contract, unless the event makes the performance of the contract impossible.</p> <p>It must be emphasised that this system is not mandatory. The parties may agree to exclude it in the contract, or they may agree on a different specific regime. In the light of this, some public procurement contracts include force majeure clauses specifying the events that would fall into this category, as well as the effects they will have on the contract</p>	
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<p>- That the modification of the contract implies an alteration in its amount that does not exceed, isolated or jointly with other modifications agreed in accordance with this article, 50% of its initial price, VAT excluded.</p> <p>In any other cases, if it is necessary for a contract in force to be executed in a manner other than that agreed upon, it must be terminated and another executed under the pertinent conditions, where appropriate, after calling and substantiating a new public tender for in accordance with the provisions of PSCA.</p> <p>Price adjustment</p> <p>In addition, Spain has adopted two royal decrees-law aimed at releasing some of the economic pressure generated by the war in Ukraine - Royal Decree-Law 3/2022 and Royal Decree-Law 6/2022 which amended the former. According to them, the price adjustment in public works contracts are extended, not only to contracts that were in execution at the time of the publication of RDL 3/2022, but also to those that are in the phase of "bidding, award or formalization at the entry into force of this Royal Decree-Law or whose</p>	<p>In general terms, a war might be considered a force majeure event under statutory law. However, Spanish case-law is restrictive in interpreting unforeseen events and force majeure events, so the event (i.e. the war/sanctions) must directly and seriously hinder the ability of a party to fulfil its obligations. A shortfall in supply, a rise in costs or any other indirect consequence of the war, which make it more burdensome to meet contractual obligations, should not be sufficient for the application of the force majeure statutory regime.</p> <p>In general terms, the application of the statutory regime on force majeure events requires:</p> <ul style="list-style-type: none"> - that the event is entirely independent of the party claiming it; - that the event is beyond all diligent control or foresight at the time of the signing of the contract, taking into account the normal and reasonable foreseeability or capacity for avoidance; - that the force majeure event prevents the party from complying with the obligation, making any diligent effort to comply with the obligation useless. 	
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<p>award notice of formalization is published on the public sector procurement platform within a period of one year from the entry into force of this Royal Decree-Law".</p> <p>The conditions for the price adjustment are the increase in costs of certain materials, such as steel, bituminous, aluminium, copper- whose increase must be taken into account for the purposes of the review.</p>	<p>To the extent that the war or sanction has such an effect on the fulfilment of the agreed-upon obligations, the statutory regime of force majeure could be invoked.</p> <p>In addition, under Spanish case-law, there is a legal concept called <i>rebus sic stantibus</i>, which can be applied by a court when an unforeseeable circumstance causes an exorbitant disproportion between the reciprocal obligations of the parties, causing an important imbalance between the obligations of the parties. However, the courts are very restrictive in the application of this figure, which only takes place in extreme cases.</p>	
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POLAND

<p>Amendments to the contract</p> <p>In justified cases, the contracting authority may amend the procedure documentation, including the draft public procurement contract, before the time limit for submission of tenders expires. If the changes to the documentation lead to a significant change in the nature of the contract compared to that originally specified, the contracting authority will cancel the procedure and a new one should be carried out in</p>	<p>Amendments to the contract</p> <p>The issue of change of remuneration in construction contracts in Poland, is regulated by the contract valorisation provisions of the Public Procurement Act (PPL). The objective of the mechanism is to reduce the high risk of cost escalation borne by firms that bid for, and receive, construction works contracts from public entities, by permitting modifications to the overall contract price to reflect cost increases.</p>	<p>Force majeure</p> <p>Polish law recognises the concept of force majeure, however, the term does not have a statutory definition. A definition of force majeure has instead been established in case law. According to the Polish case-law, force majeure is an external and unforeseeable occurrence, the effects of which cannot be avoided. Whether a particular occurrence satisfies these requirements is determined on a</p>
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<p>accordance with procurement procedures, in accordance with Art. 454(1) of the Polish law on Public Procurement 2019 (PLL). Art 454(2) of the PLL specifies that the amendment to the contract will be substantial when:</p> <ul style="list-style-type: none"> - it introduces the conditions which, if they were applied in the proceedings for the award of a contract, it would be open to others or could take part in it economic operators or other content offers would be accepted; - it infringes the economic equilibrium of the parties to the contract in favour of the contractor, in a manner not provided for in the original contract; - substantially extends or reduces the scope of benefits and obligations resulting from the contract; - consists in replacing the economic operator to which the contracting authority has awarded the contract, a new economic operator in cases other than those referred to in article 455(1)(2). 	<p>The part of current PPL that deals with change of remuneration is Article 439. Under it, any public construction works contract longer than 12 months has to include a change of remuneration clause that provides for the adjustment of the contract price to account for changes in the prices of materials or other cost components of performing the contract. In shorter contracts, change of remuneration clauses are optional, although in the prevailing market conditions it appears they should be widely used in such contracts, too.</p> <p>Art. 439 sets out elements that the change of remuneration clause of a public construction works contract should contain.</p> <p>First, it should specify what extent of changes in materials prices or other cost components of the contract will trigger change of remuneration (e.g. raw materials, construction materials, electrical supplies, prices for fuel or waste disposal, as well as the costs of services that go into delivering a contract, including labour costs), and what the initial date of determining the change of remuneration will be (Article 439 paragraph 2 item 1).</p>	<p>case-by-case basis. A party is discharged from liability for non-performance or improper performance of a contract where this is caused by force majeure. However, unless otherwise provided for under the contract, force majeure does not discharge a party from performing its obligations once the event of force majeure has passed. As a general rule, parties are free to regulate force majeure clauses.</p> <p>As a result of globalisation of economic relations and contracts, the performance of a public contract under Polish law, within the territory of Poland, is influenced by circumstances taking place outside Poland's borders and exposed to the effects of military actions undertaken in the territory of Ukraine. If the war is ongoing in Ukraine, it could constitute force majeure in Poland if it disrupts the performance of a Polish contract. For example, if a contractor is hindered by a sudden outflow of manpower, a sudden increase in the cost of fuel and other key raw materials, or a sudden shortage of certain raw materials or goods due to the ongoing situation in Ukraine, it may invoke the force majeure clause.</p> <p>Theory of hardship</p>
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<p>Negotiations following the submission of a bid</p> <p>Negotiations between the contracting authority and the economic operator concerning a tender submitted are not permitted. However, during the examination and evaluation of tenders, the authority may request explanations from economic operators concerning tenders submitted.</p>	<p>Secondly, a remuneration change clause also has to specify “the method of determining the change of remuneration” (Article 439 paragraph 2 item 2). The provision says that the change of remuneration can be based on indices of costs or prices, such as those published by the Central Statistical Office (GUS), or some other point of reference, e.g. a mutually agreed list of materials or other cost components whose price changes can trigger change of remuneration.</p> <p>Thirdly, a change of remuneration clause has to specify the way of establishing the impact of changes in materials prices and other cost components on the overall project cost, and indicate time periods when change of remuneration can be made (Article 439 paragraph 2 item 3). This is especially important in the case of raw materials prices, which are subject to major seasonal fluctuations.</p> <p>Finally, a change of remuneration clause must necessarily specify the maximum change in the contract price permitted by the contracting authority (Article 439 paragraph 2 item 4). This requirement, which runs counter to the spirit of the other provisions, is meant to ensure that</p>	<p>A party can apply to a court on the basis of a fundamental change in circumstances (<i>rebus sic stantibus</i>), if the Coronavirus outbreak happened after the contract was entered into.</p> <p>According to the Polish Civil Code, if owing to an extraordinary change in circumstances, the performance of an obligation would be excessively onerous or would threaten one of the parties with a material loss, a court may determine the manner of the performance of the obligations and the amount of the consideration. The court might rule to dissolve the contract. An extraordinary change in circumstances must have been unforeseeable to the parties at the time the contract was entered into.</p> <p>However, a party is not entitled to suspend the performance of its obligations due to <i>rebus sic stantibus</i> prior to obtaining a ruling or injunctive relief from the court.</p>
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	<p>contracting authority maintain financial discipline.</p> <p>Theory of hardship Besides the contract valorisation provisions, Art. 455(4) of the PPL provides for the possibility to amend the contract under the theory of hardship. According to the provision, where the need to amend a contract is due to circumstances which the contracting authority, acting with due care, could not foresee, unless the amendment modifies the general nature of the contract and the price increase caused by each subsequent amendment does not exceed 50 % of the value of the original contract.</p> <p>In the case of the pandemic, the method for adjustment of contracts under the theory of hardship was laid out in the Covid Special Act, but an act of that sort is unlikely to be seen in this case. Although Art. 15r of that act does not apply to the war in Ukraine, the rationale behind it may offer valuable guidance on how contracting authorities should proceed with respect to the need to amend public contracts accordingly.</p> <p>In this case, the contractual right of withdrawal from a contract due to prolonged operation of force majeure is not excluded. As a result, it is in</p>	
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	<p>the public interest to proceed with these changes quickly, so that public contracts can be performed despite obstacles.</p> <p>In addition, in accordance with Art. 456(1) of the PPL, the contracting authority can cancel the contract within 30 days of the date of the communication that a substantial change in circumstances has occurred which makes the performance of the contract not in the public interest, which could not have been foreseen at the time of the conclusion of the contract, or the continued performance of the contract could jeopardize the essential interest of state security or public security.</p>	
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BULGARIA

<p>Amendments to the contract</p> <p>The Bulgarian Law on Public Procurement (LPP) of 2nd February 2016 (in force since 15 April 2016) is restrictive in terms of modification opportunities during the tender procedure. However, under the theory of hardship, the authority may admit an amendment to the contract for unforeseen circumstances. Such amendments however may</p>	<p>Theory of hardship</p> <p>For unforeseen circumstances, an amendment to the value of the contract may be agreed by the public authorities according to Art. 116(2)(3) of the LLP. However, certain conditions should be met before such amendments can be demanded, such as:</p> <ul style="list-style-type: none"> - the amendments are envisaged in the public procurement documentation and 	<p>Force majeure</p> <p>Force majeure is a legal term defined in Art. 306 of the Bulgarian Commerce Act (BCA). According to the provision, a debtor in a commercial transaction shall not be liable for non-performance as a result of a force majeure. A force majeure shall be an unforeseen or unavoidable event of an extraordinary nature that has occurred after the conclusion of the</p>
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<p>not be substantial (Arts. 112 (4) and 116(1)7 LLP).</p> <p>Negotiation Prior to the conclusion of a contract, contractors can negotiate different aspects – including the introduction of a price adjustment clause in procurement procedures which involves negotiation (such as: Competitive procedure with negotiation; Negotiated procedure with a prior invitation to tender; Negotiated procedure with publication of a contract notice; Negotiated procedure without a prior contract notice; Negotiated procedure without a prior invitation to tender; Negotiated procedure without publication of a contract notice).</p>	<p>in the contract with clear, exact and unambiguous clauses, including clauses for change of the price or options</p> <ul style="list-style-type: none"> - due to unforeseen circumstances, that the contracting authority could not envisage, a need of change has occurred. <p>The conditions seem to favour more the position of the authorities than the one of the constructor. As such, their applicability in the context of high inflation and prices of raw materials would probably be limited. A price increase shall not exceed more than 50% of the value of the basic contract or framework agreement. Where successive amendments are made, the restriction shall apply to the total value of the amendments.</p> <p>Prolongation of execution The Bulgarian Law on Public Procurement (LPP) of 2nd February 2016 (in force since 15 April 2016) is restrictive in terms of modification opportunities for existing contracts. Following the amendments made due to COVID-19 crisis, the LPP now explicitly states, that the contractor can request from the contracting authority a prolongation of the term of the executed public procurement. The term for performance of the contract can now be prolonged.</p>	<p>contract. It should be noted that the contract will not be terminated from the start. Rather, the performance of the contract will be suspended and termination may take place insofar as the creditor is no longer interested in the performance of the contract (Art. 306(5) BCA).</p> <p>The conditions of force majeure under Bulgarian law are that:</p> <ul style="list-style-type: none"> - The force majeure event must have occurred after signing the agreement – the circumstance should be one adversely affecting the performance of the agreement; - The circumstances triggering the force majeure must be of an accidental and unforeseeable nature, including inter alia earthquakes, floods, heavy snowfall, major droughts, war, embargo, strikes and other events; - The event must be unavoidable – the counterparty should not be objectively able to overcome it; and - The event must be the direct cause of the impediment.
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	<p>Price adjustment</p> <p>On 5 August 2022, a further amendment of the LPP came into force, allowing for price indexation of public procurement contracts in the event of inflation. The amendment aims to address the effects of industrial inflation caused by the COVID-19 pandemic and amplified by the war in Ukraine. The new provision applies to public procurement contracts in all industries.</p> <p>While the new provision generally allows for a price adjustment in case of significant material price increases, it does not specify how such indexation is to be calculated. Instead, it refers to a calculation methodology to be adopted by the government.</p> <p>The draft version of the methodology currently published by the government envisages the following conditions:</p> <ul style="list-style-type: none"> - Only works certified/invoiced or carried out after 30 June 2021 are subject to price adjustments; - The total amount of the increase may not exceed 15% of the contract value; 	<p>According to Bulgarian case-law, there is no force majeure in case of changes in economic conditions such as inflation. As such, it is not entirely clear whether the war in Ukraine would qualify as a force majeure event in accordance with the Bulgarian legislation.</p> <p>Theory of hardship</p> <p>In addition, the BCA fully implemented the theory of hardship. In accordance with Art. 307 of the BCA, the court may, at the request of one of the parties, modify the consequences of a contract or dissolve it entirely or partially in an event which the parties cannot and were not obliged to foresee and where the preservation of the contract is contrary to the standards of reasonableness and fairness. As such, parties would be able to rely on this provision in order to either adjust the price of the contract or terminate it, following the inflation and rise in costs generated by the war in Ukraine.</p>
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	<ul style="list-style-type: none"> - Contracts already completed before the new rules take effect are not subject to indexation; - Indexation can only be carried out if funding has been secured and if the indexation is feasible for the contracting authority. 	
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