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FORCE MAJEURE AND HARDSHIP WITHIN THE CONTEXT OF A GLOBAL PANDEMIC

European Approaches

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Abstract: Force majeure is a legal concept upon which the parties of a binding contract, legal obligation or procedure can base an exception to overrule the existing defined terms. The COVID-19 pandemic brought new challenges to this matter, considering the long periods of lock-down that can change on a weekly basis and the corresponding detrimental impacts on trade and commerce. This state of affairs renders the parties in an insecure and uncertain stance with regard to the performance of obligations. Further one can question if the traditional legal mechanisms are adequate and sufficient to tackle the upcoming paradigm where obligations are assumed or contracted by any relevant party within a pandemic scenario (which is no longer a novelty).

Key Words: Force Majeure; Extraordinary Circumstances; Contractual performance; Global Pandemic; COVID-19.

I. Introduction

The impact of the SARS-COV-2 virus (henceforth, Coronavirus or COVID-19) changed the world and its effects are still to be perceived within the context of trade and commerce, from a legal perspective. It was with this first argument that the idea of our essay came to life. Our main goal was to reflect on how a global pandemic, can affect the performance of contracts and the first question that came into our minds was how legal concepts like force majeure or extraordinary circumstances[1] can operate when the parties are celebrating the terms of the contract within the context of a global pandemic – that is, when the current state of instability is evident, therefore, at a first glance, such an event cannot be classified as unpredictable –.

This essay aims to give an overall perspective of the exceptional legal regimes that allow the parties to amend, excuse from performance or that exclude the right to a compensation within a European Union (EU) context.

Our aim is to perceive how concepts like force majeure are treated in the UE, in a substantive and procedural background and, for that, we will try to summon the pertinent comparative law, the jurisprudence of the Court of European Justice and also some brief examples of Portuguese Court decisions.

For practical reasons we will focus on Regulation 261/2004 and the Statute of the Court of Justice of the European Union (CJEU), to give some concrete examples on how such concepts are addressed.

We will endeavor summarize the manner in which these notions operate when the contract is celebrated before the event of force majeure and our reflections on how these regimes will be interpreted when the contract is celebrated in the heart of the global pandemic.

The question that we intent to raise, after the approach to above-mentioned legal mechanisms, is whether the systems in place are enough to face these challenges?

We expect to contribute to the understanding of these concepts within the EU and to bring some ideas to the matter at hand (global pandemic) ant that will certainly be in discussion, especially in the Members States' courts, not unlike the economic crisis of 2008[2].

[1] These figures can also be called: abnormal circumstances or unforeseeable circumstances.
[2] Which, we stress, was subject of judicial disputes, in Portuguese courts, for at least ten years.

II. Domestic Law – Comparative Review

The intent of this chapter is to outline the legal frameworks concerning force majeure and hardship within the EU Member States[3]. Even though force majeure and hardship are concepts and regimes mostly applied through contractual arrangements and, as such, subject to the agreement of the parties (concerning its scope and consequences), we endeavor to take a glance at the statutory regimes in the hope of reaching conclusions which afford concepts that may be commonly applicable in this respect.

The outbreak of the COVID-19 pandemic has evidently placed an outstanding amount of stress on contractual compliance / performance and on the global economy. Relief on the fulfilment of contracts (whose performance has become impossible, even if temporarily) has been ensured by i) provisions establishing the right to delay performance in light of unexpected and unavoidable circumstances; or by ii) the statutory legal regimes applicable to such agreements, where the parties have not agreed upon a set of rules within this context.

In this light, it is of the utmost importance to analyze the statutory applicable regimes and to consider if the corresponding provisions are adequate to tackle the level of uncertainty the pandemic has brought on contractual law. In this regard, we also purport to analyze the adequacy of these regimes upon the stabilization of the global pandemic, *i.e.*, if the above-mentioned level of uncertainty on contractual arrangements has rendered the statutory provisions inadequate.

As a point of reference, one must consider the following definitions.

Force majeure relates to "the occurrence of an event or circumstance that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that the party affected by the impediment proves: a) that such impediment is beyond its reasonable control; and b) that it could not reasonably have been foreseen at the time of the conclusion of the contract; and c) that the effects of the impediment could not reasonably have been avoided or overcome by the Affected Party."[4].

Similarly, hardship (where in respect to contract law) is the "the occurrence of events [that] fundamentally alter the equilibrium of the contract either because the cost

[3] For such purpose, we have elected the French, German and Italian jurisdictions, as we find they are representative of the legal traditions of the European Union. We have also elected the Portuguese jurisdiction, which is tied to the nationality of the authors of this essay.

[4] International Chamber of Commerce, *ICC Force Majeure and Hardship Clauses*; March 2020; available at https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf.

of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party"[5].

The two legal regimes take into account the effects of events that dramatically alter the contractual scheme and the balance of the obligations contained therein. Notwithstanding such similarity, it should be stressed that whilst force majeure is primarily directed at excusing the obligor from performing and obligation which has become (at least temporarily) impossible, hardship is aimed at the renegotiation of the terms of an agreement whose obligations have become excessively burdensome on the obligor.

At this stage, we will delve deeper into domestic law and grasp the common traits amongst the elected jurisdictions.

The analysis of the BGB has evidenced that the German Civil Code does not address force majeure in a direct manner. There are, however, statutory provisions in respect of unexpected and unavoidable circumstances which may impede the normal dynamics of contractual performance.

Section 275 of the BGB deals with the impossibility of performance: where performance of an obligation is rendered impossible to the obligor or any other person, such performance is excluded. Likewise, the obligor may refuse the performance of a contractual obligation to the extent that such performance would require expense and effort which is grossly disproportionate to the interest in performance of the obligee. Remedies of the obligee are foreseen in Section 311 of the BGB, with a notable remark to the fact that the remedies provided are not entitled to the obligee as long as the obligor was not aware of the obstacle to performance when entering into the contract and shall consequently be deemed as not responsible for the lack of awareness.

Diversely, Section 313 of the BGB deals with the alteration of circumstances which interfere with the basis of a transaction. It is stated that if the circumstances that form the basis of a contract have significantly changed since its execution, adaptation of

[5] International Institute for the Unification of Private Law, *Unidroit Principles of Commercial Contracts*, (2016), Article 6.2.2., available at https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf.

the terms of the contract can be demanded by any of the parties to the extent that one such party cannot be reasonably expected to uphold the contract without the amendment of the terms contained therein. Should adaptation of the contractual terms prove itself impossible or unreasonably burdensome, the party intending the amendment may revoke or terminate (in the case of continuing obligations) the agreement. We note that Section 313 of the BGB bears some similarities to the above-mentioned concept of hardship, even though it is pinned to the undefined concept of the basis of a transaction.

In what concerns the French Code Civil, this legal act provides a specific provision concerning force majeure (Article 1218.). The concept of force majeure is defined as "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 which effects cannot be avoided by appropriate measures", which prevents performance of an obligation by the debtor.

In this regard, should the impediment be merely temporary, performance of the obligation is suspended (unless the corresponding delay constitutes cause for termination), whereas permanent impediments render the automatic termination of the contract, freeing the parties from their obligations in accordance with the regime concerning the impossibility of performance (Articles 1351. and 1351-1.).

Within this context, Article 1195. of *Code Civil* should also be considered, as it establishes a system comparable to the concept of hardship. Essentially, this provision entitles the contracting parties to renegotiate the contract to the extent that the circumstances at the time of execution have changed in an unforeseeable fashion and performance proves itself excessively onerous. Lack of agreement concerning the renegotiation of contractual terms may cause the parties to terminate the contract by mutual agreement or constitute cause to require the court's adaptation of the said terms or the contract's termination.

With regard to the Italian Codice Civile, as is the case with the German BGB, the referred code does not specifically foresee any legal institute which can be encompassed within the concept of force majeure.

Nevertheless, Article 1256. of this legal act provides a regime that deals with the impossibility of performance of a contract. Fundamentally, Article 1256. states that if an obligation is rendered definitively impossible and the cause of such impossibility is not attributable to the obligor, the latter shall be discharged from performance. Diversely, should the impossibility be deemed as merely temporary, the obligor shall not be responsible for the delay during the period of impossibility; long-lasting periods of

impossibility may cause the obligor to be discharged from performance (due to no longer being considered obliged or due to the loss of interest of the obligee on the obligation's performance).

In what concerns to the concept of hardship, Article 1467. of the Italian Codice Civile provides that contracts with continuing or periodic obligations (as well as contracts entailing delayed performance) where the performance of an obligation has become excessively onerous due to the occurrence of an extraordinary and unpredictable event, entitling the party obliged to such performance to the termination of the contract (except where the effects of such event are covered by the normal risks of the agreement). The provision above does not encompass contracts which require the immediate performance of obligations.

Lastly, a brief overview of the Portuguese Código Civil. An initial remark should be conveyed that, as is the case with the German and Italian domestic law, Código Civil does not afford a direct and comprehensive regime for force majeure, despite having a system that caters for the occurrence of extraordinary circumstances and its effects on the performance of obligations.

Like the German BGB, Article 437.º of Código Civil states that if the circumstances upon which the parties have based their decision to enter into a contract have been altered in an extraordinary fashion, the disadvantaged party is entitled to termination or the amendment of the corresponding contractual terms in an equitable fashion, to the extent that the performance of the contract i) is opposed to the principles of good faith; and ii) is not covered by the normal risks of the contract. In lieu of termination of the contract, the other contracting party may oppose to such termination and accept (impose) the amendment of the contractual terms.

Article 790.º of Código Civil also provides that the obligor is discharged from the performance of an obligation if such obligation has become impossible due to reasons not attributable to the obligor.

Bearing in mind the framework provided by the elected domestic laws described above, we can conclude that force majeure and / or hardship are legal regimes that benefit from the inclusion within the major legal acts of private law.

We note that, notwithstanding the conceptual and technical discrepancies of the analyzed provisions, the fact is that the occurrence of unintended, extraordinary and unavoidable circumstances within the performance of a contract, which are beyond the foresight of the contracting parties, is subject to a regime which either discharges the

party(ies) from performance or entitles any such party to renegotiate the contracting terms in a manner which is proportionate to the event which has brought a contractual imbalance.

We further note that most of these legal schemes have elements of both force majeure and hardship, evidencing that the effects of these extraordinary events can lead to both renegotiation and termination of the governing terms.

As related above, we have found that the legal regimes analyzed are (were) capable of being adequately utilized within the context of a global pandemic, relieving the stress that was brought upon by a multitude of restrictions and events which were, at the time, unforeseeable and which impeded the regular flow of businesses and contractual performance.

Nonetheless, we have noted that the applicability of these concepts and these statutory regimes may prove itself insufficient whilst considering the entering into and performance of a contract in the midst of a pandemic which has rendered the sense of security and stability somewhat volatile. On the one hand, the COVID-19 pandemic (and the ensuing circumstances and restrictions) may no longer be deemed as an unforeseeable event, whereas, on the other, contracting parties should be provided with a minimum level of security and the corresponding expectations (be it enforcement of performance, discharge or renegotiation of contractual terms).

III. Relevant Court Decisions – Interpretation and Conclusions

In this chapter we will summon jurisprudence of the CJEU deemed relevant for these purposes (and considering the economy of this essay) and also specific Portuguese decisions concerning the object of this essay and, therefore, try to interpret the concept of force majeure or extraordinary circumstances within the European substantive and procedural context. With the analysis and interpretation of this court decisions we expect to find some ground to – at least –, establish a congruent view on how these figures are dealt with in the UE context and how they may operate within the context of a global pandemic.

a) Force Majeure in a Substantive Perspective

The roots of the concept of force majeure within the CJEU, was bricked with the Case 4/68, *Firma Scharzwaldmilch and Einfuhr v. Und Vorratsstelle*,

(ECLI:EU:C:1968:41), on the interpretation of the Commission of the European Economic Community's Regulation 136/64, OJ 165 2601/64.

In short, *Firma Scharzwaldmilch* had lodged a deposit to guarantee the fulfillment of its obligation to import into Germany 100.000 Kg of skimmed milk powder from France. In spite of their efforts, they were not able to import those goods before 28/02/1968, which was the date of the expiration of the import license.

For those reasons, *the Einfuhrund Vorratsstelle für Fette* (Office for the importation and storage of fats and oils), declared the above-mentioned deposit forfeited.

In reaction, *Schwarzwaldmilch*, instituted proceedings against the decision before the administrative court.

The plaintiff claimed that it had been unable to perform the importation, because after the conclusion of the contract for the delivery of the powdered milk with the Laiterie Centrale de Strasbourg, an engine failure occurred in the powdered milk division. The plaintiff also states that he was informed of the impossibility of the Laiterie to deliver the goods in question only in 20/11/1967.

In this decision, although the court did not give an exhaustive interpretation of the concept of force majeure, the grounds on which the institute is based were subject to the interpretation of the Court.

The Court Stated that when a businessman has shown due diligence, he is in principle discharged from the obligation where breach of contract is generated by circumstances outside his control and those circumstances make it impossible for him to fulfil is obligation.

In the court decision it is also stated that *"when the event which renders impossible the performance in due time of a contract which, under normal circumstances, ought to have enabled the importer to fulfil is obligation to import, is so unusual that it would have had to be considered as improbable by a prudent businessman exercising all due care"*[6].

It is also referred by the Court that a case of force majeure should be based not only in the occurrence of an unexpectable event, but also that the consequences of the event could not be avoided. The Court also brings the attention to the need to demonstrate sufficient causal connection between the circumstances on which relied the event of force majeure and the breach of contract and also to the concept of excessive loss.

[6] Cf. Case 4/68, *Firma Scharzwaldmilch and Einfuhr v. Und Vorratsstelle*, (ECLI:EU:C:1968:41), on the interpretation of the Commission of the European Economic Community Regulation 136/64, OJ 165 2601/64.

The conclusion of the Court was that the *"importer must show that he was unable to effect the importation within the period laid down as a result of unusual circumstances outside his control, the consequences of which, in spite of the exercise of all due care on his part, he could not have avoided except at the cost of excessive sacrifice"*.

Having illustrated the view of one of the first interpretations of the CJEU about the concept of force majeure, we will analyze the interpretation that the Court established for cases of extraordinary circumstances under the article 5(3), of the Regulation 261/2004 on air passenger rights[7].

The referred article states that *"an operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken".*

As a complement to this article, recital (14), of the Regulation 261/2004 states that *"under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier".*

In the case C-549/07, *Friederike Wallentin-Hermann* against *Alitalia v. Linee Aeree Italiane, SPA*, (ECLI:EU:C:1968:41), the court was summoned to interpret the above-mentioned Regulation and convention, within the context of engine failure and subsequent cancelation of the flight.

The Regulation does not provide any specific definition of extraordinary circumstances and, as such, the court states that where there is no definition in community law for a specific term, the interpreter should seak the meaning within the context of the applicable rules and in the corresponding meaning in everyday language, especially when provisions like the article 5(3), of Regulation 261/2004, derogates general principles. The court also brings to the attention that where provisions like this restrict community rules for the protection of the consumers, they shall be strictly interpreted.[8]

[7] European Parliament and of the Council Regulation 261/2004, OJ L 46 L 46/1.
[8] To that effect, see case C – 549/07 Friederike Wallentin-Hermann against Alitalia – Linee Aeree Italiane, SPA, paragraphs 17 and 20.

It is also said, regarding the interpretation of article 5(3), that the fact that recital (14) of the regulation 261/2004 provides an exemplificative list of extraordinary circumstances, an event can only be classified as an extraordinary circumstance if – in itself –, the event, by nature or by origin, is abnormal to the normal exercise of the activity of the air carrier and its outside of its control.[9]

The court gave the following example: that if a technical issue is revealed during the maintenance of the aircraft this should not be considered an extraordinary circumstance event.[10] On the other hand, a manufacturing defect or sabotage could be classified as an extraordinary circumstance event beyond the control of the air carrier.

As a general basis, the court states that the party who wants to benefit from the exemption provided by the extraordinary circumstance event (Cf. article 5(3), of Regulation 261/2004), has the burden of proof that there was no possibility to avoid the event by any appropriate measures that does not imply an excessive sacrifice to the air carrier. The court also stresses that the air carrier should apply the reasonable measures in terms of staff, equipment and financial means to deal with an event of extraordinary circumstances and that these conditions should be viable in the light of the reasonable sacrifice.

In this regard, in case C-294/10 *Andrejs Eglītis* and *Edvards Ratnieks* against atvijas Republikas Ekonomikas ministrija, the court stated that the air carrier "…*must reasonably, at the stage of organizing the flight, take account of the risk of delay connected to the possible occurrence of such circumstances".*[11]

With the interpretation that the CJEU performed on article 5(3), of Regulation 261/2004, we can establish the similarity to that given in the first case analyzed in this chapter, despite the forty years elapsed and the diversity of terms.

Within a context which bears resemblance with the effects of a pandemic (at least in terms uncertainty of performance), the Portuguese Supreme Court, in 30 of March of 2017, in the case no. 1320/11.4TVLSB.L1.S[12], stated that notoriety of an economic crisis is not enough, by itself, to fulfill the concept of force majeure or abnormal circumstances,

[9] In this context see: case C-12/11, (EU:C:2013:43), paragraph 29; C-257/14, (EU:C:2015:618), paragraph 36; C-315/15, (EU:C:2017:342), paragraph 22.
[10] See, to that effect case C-257/14 *Corina van der Lans* against *Koninklijke Luchtvaart Maatschappij NV*, (EU:C:2015:618), paragraph 37.
[11] C-294/10, *Andrejs Eglītis* and *Edvards Ratnieks* against atvijas Republikas Ekonomikas ministrija (ECLI:EU:C:2011:303), in the decision segment.
[12] Case no. 1320/11.4TVLSB.L1.S1 of the Portuguese Supreme Court of Justice, available at http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/32a1060731153909802580f4003b1586?OpenDocument

on which the parties have based their arguments to change or exclude performance of the contract.

The Portuguese Supreme Court also stated that it is necessary to demonstrate the causal connection between the crisis and the event that leads to the contractual breach.

Therefore, the Court gave tree requisites to verify an event of force majeure or unforeseeable circumstances with the final aim to change or exclude performance of the contract: the event could not be the predictable development of a known situation on the date of the execution of the contract; the event should render the fulfillment of the obligation contrary to the principle of good faith and; the event cannot be deemed to fall within the natural risks of the contract.

b) Force Majeure in a Procedural Perspective

The mechanism of force majeure or extraordinary circumstances is present in several civil procedures of the EU, with special relevance to the small claims procedure, the European order for payment procedure, to the European enforcement order for uncontested claims procedure and to the Statue of the CJEU.

The European civil procedure for Small Claims, established in Regulation (EC) No. 861/2007 of the European Parliament and of the Council, of 11 July 2007, is characterized by being a simplified procedure, which applies, with some exceptions, to civil and commercial matters.

This Regulation provides several grounds for the review of the judgement delivered against the Defendant (Cf. article 18 of the referred regulation). With relevance to this essay, we note that this article establishes that the ground of review of the judgement may be that the Defendant has not been able to respond to the claim for reasons of force majeure or due to extraordinary circumstances, without such event being attributable to him. However, this will not apply if the Defendant could act promptly, but has not done so.[13]

The European Payment Order Procedure, similarly to the Small Claims procedure, aims to collect undisputed outstanding debts, being a supplementary and optional means available to the creditor to collect the capital in debt. In this procedure, the Defendant who has been prevented from lodging his statement of opposition by reason of force majeure or due to extraordinary circumstances, without such fact being attributable to

[13] Article 18, paragraph 1, indent b), of the European Parliament and of the Council Regulation 861/2007, OJ L 199 L 199/1 (Small Claims Regulation).

him, shall be entitled to request the review of the injunction. The Defendant may also be able to request the suspension of the enforcement process if an invocation of such extraordinary circumstances is carried out.[14]

Likewise, the European Enforcement Order for Uncontested Claims (notwithstanding the fact that it is currently a regulation of residual application) aims to provide the possibility of free circulation of judgments, court settlements and authentic instruments in all Member States, without the need to carry out any intermediate procedures in the Member States prior to recognition and enforcement.[15] In similar terms to the previously identified procedures, the Regulation provides that the debtor must be given the possibility to apply for a review of the judgment when prevented from deducting opposition to the credit due to force majeure or due to extraordinary circumstances, without any fault on his part, provided that, where possible, he has acted promptly.[16]

The Statue of the Court of Justice of the European Union establishes that periods of grace based on considerations of distance shall be determined by the Rules of Procedure and that no right shall be prejudiced as a consequence of the expiry of a time limit if the party concerned proves the existence of unforeseeable circumstances or of force majeure.

In all the aforementioned Regulations and Statue of the Court of Justice of the European Union, the extraordinary circumstances or force majeure situations are not, however, well-defined or precise enough, in such terms that its implementation to a concrete situation is not a simple task. That being said, it seems that the intention was that such implementation be carried out bearing in mind the doctrine and jurisprudence of the EU.

However, these Regulations provide clues about what should be taken into account whilst analyzing what constitutes a situation of force majeure or extraordinary circumstances.

Thus, in the referred regulations there is a segment that states that these events cannot be attributable to the party, that is, that it must be an event regarding which the party has not participated, that is beyond its control. Elaborating on the notion of absence

[14] Articles 20, paragraph 1, indent b) and 23, indent c), of the European Parliament and of the Council Regulation 1896/2006, OJ L 399 L 399/1 (European Payment Order Procedure Regulation).
[15] Article 1 of European Parliament and of the Council Regulation 805/2004, OJ L 143 L 143/15 (European Enforcement Order for Uncontested Claims Regulation).
[16] Article 19, paragraph 1, indent b), of European Parliament and of the Council Regulation 805/2004, OJ L 143 L 143/15 (European Enforcement Order for Uncontested Claims Regulation).

of control, it seems to be that is not possible to reproach the behavior of one who claims to be beneficiary of this legal mechanism, meaning that no other behavior was required. This mechanism arises in order to be possible to respect the defendant's rights of defense and the right to a fair trial, which, otherwise, would be affected.[17]

This idea is also present in the jurisprudential decisions relating to the European Payment Order Procedure Regulation, in which it is also considered that associated with the idea of force majeure or extraordinary circumstances must be the absence of fault, in addition to, in the specific case of that Regulation, being required to act promptly before the court.

But what exactly are those situations of force majeure or extraordinary circumstances? In the judgment of the CJEU in Case C-324/12, *Novontech-Zala kft. v. Logicdata Electronic & Software Entwicklungs GmbH*, (ECLI:EU:C:2013:205), it was considered that the wrong calculation and transcription of the opposition period, by the Defendant's Representative, did not constitute a situation of force majeure or extraordinary circumstances, but rather a lack of diligence on the part of the Defendant's Representative, which could have been easily avoided. Hence, the CJEU understands that the link between the event and the fault attributable to the party must be asserted, in the assessment of what are cases of force majeure or extraordinary circumstances.

There is a common element to the various regulations which has been identified by the CJEU: that the event has to be external and beyond the normal risk of the course of action by the party invoking it. Therefore, in the last example, the counting of the deadline and translation of the notification by the party's representative was a voluntary act that the party carried out, originating concatenation of events that had led to a result that cannot be considered force majeure or extraordinary circumstances. In fact, the translation of documents and the counting of deadlines is a normal and common act in litigation, especially for those who practice it professionally.

On other hand, it is well understood that the concept of extraordinary circumstances addresses abnormal events, out of the ordinary, that is, of what is expected in the day-to-day of a certain activities. For example, it is expected that a person who spends two weeks at home and another two away should find a system to check if they are receiving important mail, as it is expected that during that period, they may receive something important, that needs immediate attention. Diversely, it will no longer be

[17] Cf. C-300/14, *Imtech Marine Belgium NV* v. *Radio Hellenic SA*, (ECLI:EU:C:2015:825), at para. 34 to 42.

expected that someone who leaves home for work every day and, upon returning, suffers from a severe health problem, for which is hospitalized and, as a result, does not respond to a notice with a peremptory deadline.

That is why, when we return to the above CJEU's case, it is concluded that there was no force majeure event, or an abnormal circumstance impeding the act of presenting a statement of opposition to the Order notification that the Defendant had received.

It should be noted that it is in this sense that the CJEU has also been deciding at a substantive level, when, for instance, in the case of air travel, the court considers that it does not qualify as force majeure or extraordinary circumstances when the event, even if external, is not out of the ordinary to the activity carried out, in such a way that it is unexpected. It is, therefore, taking into account the perspective of the average man, within the risks associated with the daily life of that activity.[18]

From here, it is clear that this cannot result from a simple added difficulty in carrying out a certain procedural act. That is because, otherwise, we would be normalizing cases of force majeure or extraordinary circumstances, since the everyday affairs present us several difficulties that must be qualified as being a normal for risk of the activity at hand.

We note that such requirements do not actually differ from those applied regarding the corresponding legal concept (fair impediment) in the Portuguese legal system. Thus, in case no. 731/16.3T8STR.E1.S1, judgment of 29-09-2020, the Portuguese Supreme Court of Justice concluded that fair impediment is an event which is not attributable, due to negligent action in its production, to the invoking party, and, therefore, does not involve a judgment of reproach, constituting an event of force majeure, even if predictable or even prevented, the party cannot be held accountable by such an event.

This idea is, actually, present in the EU law and jurisprudence. In the C-284/82, *Acciaierie e Ferriere Busseni SpA. v Commission of the European Communities*, (ECLI:EU:C:1984:47), the CJEU has ruled that "*the concept of force majeure requires basically unusual circumstances making accomplishment of the matter in hand impossible*", but the impossibility does not need to be absolute, rather abnormal difficulties, which even if all due care is taken its verification would be unavoidable, such an event being independent of the will of the person concerned. That judgment has in its background the third paragraph of the Article 39 of the Statute of the Court of Justice of

[18] Cf. C-549/07, Friederike Wallentin-Hermann v Alitalia – Linee Aeree Italiane SpA., (ECLI:EU:C:2008:771), at para. 15 to 43.

the ECSC.[19] The decision ruled that the terms of force majeure will not be met in a case where closure of an enterprise undertaking did not mean either the winding-up of the undertaking or the termination of the responsibility of its management for the normal conduct of business, concluding that there were no abnormal and inevitable difficulties, external events independent of the will of the management of the undertaking, which might have justified a failure to open correspondence relating to the business of the undertaking.

From here a conclusion can be reached that, at a procedural level, the concepts of situation of force majeure or extraordinary circumstances are verified where an event that prevents a party from complying with a legal duty, needs to be external to its will and, although predictable or even forewarned, without any attributable fault.

IV. Force Majeure – Future Prospects

In the past chapters we tried to settle the grounds of how the legal concepts of force majeure, hardship and extraordinary circumstances are addressed in the pertinent comparative law of the elected UE Member States, jurisprudence of the CJEU and of the Portuguese Supreme Court, with focus on the substantive and procedural aspects.

Now it is important to give a congruent proposal of the requisites that are required to operate this kind of mechanisms.

Firstly, one must consider that force majeure, hardship and extraordinary circumstances can be perceived as ancillary concepts, given that they intend to intervene where the performance of a contract has rendered itself impossible or excessively onerous.

The event of force majeure should be generated by circumstances outside the control of the party who wants to benefit from its regime.

Also, the party must prove the causal connection between the circumstances on which relied the event of force majeure and the non-performance of the contract; therefore, the event of force majeure must be the cause of the contractual breach.

It is also needed to be taken into consideration or, at least, put in perspective, that the force majeure event should be so unusual that a diligent party could not have predicted the outcome. So, it is always required that the party acts with all the due diligence and

[19] Which corresponds to the actual second paragraph of the Article 45 of the Statute of the Court of Justice of the European Union, OJ C 202 C 202/210.

care, and that despite such diligence the prediction of the force majeure event was impossible.

In this sense, regarding article 5(3) of Regulation 261/2004[20], the air carrier who wants to benefit with the exemption of payment of the compensation for the cancelled flight, should apply all reasonable measures in terms of staff, equipment and financial means to deal with an event of extraordinary circumstances.

Relevance should be placed on the fact that the consequences of the event could not be avoided or, if they could be, such avoidance rested on an excessive or unreasonable loss and / or sacrifice for the disadvantaged party.

Finally, it is also required that the force majeure event is not provided by the natural risks of the contract.

With this context, it is important to reflect on how we should address the events of force majeure according to their different origin. To that effect, our assertions will be focused on the global pandemic, and its qualification as a force majeure event.

Thus, we will delve into the contracts that have been executed prior to the event of force majeure and ascertain the effects such an event has had on the fulfilment of the contractual obligations.

In these cases, after we verify the above-mentioned requisites for the verification of a force majeure event, the answer is quite simple: the disadvantaged party should be allowed to amend the contractual terms, to take resolutory actions.

Now, we will try to figure it out how apply the above criteria when a contract is entered into during the global pandemic and the force majeure event is the global pandemic itself.

The requirement that implies that the force majeure event should be generated by circumstances outside the control of the party and that those circumstances shall make it impossible for the same party to fulfil their obligations is relatively simple to be verified, because even when we are contracting during a global pandemic, there are certain events generated by the pandemic that are outside of the control of the party, like government measures to close borders, establishments and to enforce the general lock-down. As such, in this case, these circumstances are absolutely outside of the control of the parties involved and can render the contract impossible to fulfil. Therefore, the party can easily prove the causal connection between the global pandemic and the breach of contract.

[20] European Parliament and Council Regulation 261/2004, OJ L 46 L 46/1.

The verification of the requirement that the event is unusual and unpredictable for a diligent party is less obvious, nonetheless. Firstly, we must ask ourselves what is the meaning of a predictable event? We can say that everything is predictable or, at least, that in the moment that our brains fabricate an idea of an event, that same event is predictable. With that said, for example, the world has already experienced a global pandemic in the past (black death or the Spanish flu) and the uprising of a new global pandemic was already predicted a long time ago by the scientific community. So, by all means, the Coronavirus pandemic was a predictable event and in a short statement, if the parties celebrate contracts within the context of a global pandemic it´s fair to say that they can predict the consequences of the global pandemic in their contracts and they shouldn´t be protected by the force majeure or extraordinary circumstances juridic figures.

Although that being said, we need to dig deeper in these arguments.

To prevent this kind of consequences, when the parties execute their contracts in a context of global pandemic it is mandatory that they surround themselves with extra care and due diligence and we think that the establishment of a hardship clause is advisable.

When contracting in the midst of a global pandemic the definition of what is predictable is a strenuous task, because the state of affairs changes from one a weekly basis with the enforcement of all kind of measures to prevent the escalation of the infections. We believe that it is important for the interpreter to i) seek within the contractual relationship whether the parties have acted with due diligence; and ii) if the specific occurrence of the event, although predictable, in the moment of the agreement, was unforeseeable for the parties (e.g., the mandatory closure of the borders or a general lock-down), due to the state and evolution of the pandemic at that time.

Lastly, the fulfilment of a contractual obligation should not create an excessive loss or sacrifice to the disadvantaged party, which can occur if the parties were obliged to fulfil the agreement by all means without taking into consideration the principle of good faith, who imposes that the contract cannot be fulfilled without taking into account the abnormal context of the global pandemic.

Should the sacrifices and losses brought upon by the fulfilment of the contract be considered as a natural risk of the contract which has been executed in the context of a global pandemic? And if so, the natural conclusion is that the force majeure clauses are not applicable to contracts celebrated within the context of a global pandemic?

Should the force majeure regime be inapplicable, we believe this could constitute a clear derogation to the principle of good faith – i.e., to considerer that a specific event is covered by the natural risks of the contract, such as the examples of unexpected government-imposed measures –.

Another perspective worth considering, is the verification of force majeure regarding the end of the pandemic. One may claim that the end of the pandemic is a foreseeable event. It seems that in this case, a prudent and diligent person can no longer state that the end of the pandemic could not be predicted.

This idea paves the way for new points of debate. There are obligations which are set by legal measures to combat the spreading of COVID-19, that, in most cases, are defined in matter of days, without previous warning. The main problem here is the following: can we consider the end of the pandemic, with the corresponding lifting of restrictions (including the wearing of masks, need of disinfectants, ventilators, thermometers, etc.) an unexpected event? Many enterprises (or governments) order high volumes of those products, which constitutes a diligent economic choice, which leads to the question of what happens when suddenly those ordered goods are no longer needed and or legally imposed? Should we consider this constitutes force majeure and allow the buyer to cancel the order (in case of continuing obligations) and place the risk and losses on the seller? It seems rather harsh to conclude in that manner, meaning that it may be necessary to amend or alter the terms of the contract, guided by the good faith principle. Despite the above, one can question: was it not foreseeable and expected, since the parties could not ignore that they were contracting in a pandemic situation? Was it not an inherent risk of contracting in a pandemic situation?

Another problem can be put in the following manner: given that the rate of vaccination is not constant throughout the territories (particularly, within the EU) a situation may arise where the normal course of business has been restored in a country and the country of a party's counterpart has not. These hypothetical circumstances reveal a new predicament concerning the level of diligence attributable to the contracting parties and puts further stress on the concepts of force majeure.

In all these cases the main problem seems to be the predictability or the risk of events associated to this new paradigm, which may need to be interpreted in a more flexible fashion. At any rate, it should be noted, however, that there is a general recognition (throughout the EU) of the impossibility to carry out the performance of an obligation to the extent that such impossibility is not attributable to the obligor. We

believe this to be a last-tier alternative if applied in a global pandemic scenario as it generally constitutes grounds for the parties to terminate the contract (and consequently handing back anything which has been rendered in the performance of the obligation) and, thus, detrimental to the normal course of business and flow of commerce.

V. Conclusion

Having analyzed the relevant legal acts in terms of domestic law of the EU (with the exclusions inherent to the economy of this essay) and the selected secondary legislation of the EU, we have ascertained the existence of legal provisions that address the subsequent occurrence of circumstances that drastically alter the paradigm of contractual performance (e.g., these provisions are to be found on Regulation 261/2004 and the Statute of the Court of Justice of the European Union (CJEU), and on the domestic law which has been identified in Chapter II).

Further, we note that, notwithstanding the discrepancies of the solutions analyzed which result from the non-harmonization of the concepts enshrined in the applicable law of each Member State, there are common grounds and traits to be explored within the legal traditions of the EU.

In light of the above, we believe that, despite the evident manifestation of economic loss and loss of business brought upon by the Coronavirus pandemic, the national substantive law of the three Member States mentioned above has been capable of addressing and mitigating the most distressing impacts brought upon by such an event on trade and commerce.

However, with the protracted situation (that is, the effects of the pandemic are no longer novel), on the one hand, and the state of uncertainty extended to a large number of countries, on the other hand, one must question if the solutions so far provided by national law are applicable and, if so, their sufficiency and adequacy to ensure legal certainty. In this regard, we consider that there may be a tendency of disregarding the emergence of new restrictions and set-backs that could negatively impact trade and commerce, with these events falling out of scope of what is currently considered force majeure and hardship, in opposition with the notions of good faith in the performance of contracts. In this event, the parties may have to rely on the regimes that establish the impossibility of performance which have the unfortunate consequence of suspending the normal course of business.

It should be noted that contractual provisions (clearly defined, in terms of scope and consequences) agreed upon by the parties as well as choice of law agreements, are more advisable than ever to cope with the occurrence of extraordinary and unavoidable events. The level of caution and due diligence of the contracting parties should be proportional to the shifts of the level security and certainty of contractual performance. One must ponder, however, on the increasing risks of uncertainty and if such risks should solely rest upon the disadvantaged obligor

In case a joint reply to this question has to be found it may be preferable for the Union to legislate. Although harmonization of concepts of applicable law is less common and more difficult to achieve at EU level, there are some examples, as mentioned above, namely regarding air travel.

In the midst of these queries and considering the absence of court decisions providing a clear-cut framework in this respect, it is worth mentioning that the harmonization of the concepts of hardship and force majeure, possibly through an autonomous concept of EU law, not only in terms of procedural law but also in terms of substantive law, applicable to a wider range of contractual relations, could be beneficial by shedding some light in these dire times of uncertainty.