Force majeure clauses and the Covid-19 pandemic.
The Portuguese case

1. Introduction

The Covid-19 pandemic is an event with very significant economic impacts on the agreements concluded by companies, especially because it calls into question the ability of contractual parties to satisfy contractual obligations. Although it is not possible to understand, at this moment, all the consequences that may arise from the pandemic crisis, it is already possible to verify the multiplication of cases that can be studied.

The analysis of this problem must be framed within two limits: both the contractual regulation (the force majeure clause itself) and the legal rules established by the Portuguese governmental entities approved in the context of Covid-19 pandemic (e.g. the declaration of a state of emergency, moratorium concerning loan agreements, moratorium regarding lease agreements, etc...).

The establishment of a force majeure clause in commercial agreements is common practise, namely, in context of international commercial agreements. The first and more significant step to approach the problem is the interpretation of the clause itself in order to verify if Covid-19 pandemic (strictly speaking, any pandemic) is listed as force majeure event. This matter may arise interpretation challenges given the nearly unprecedented nature of the Covid-19 pandemic and the governmental measures, through the passing of various laws. Even considering the importance of these measures, it is doubtful that contractual parties are protected from the consequences of contractual breaches (in definitive or temporary, total or partial terms).

In this article we will have the chance to also briefly highlight situations in which the contractual relationship established between the parties does not provide for a force majeure clause, which implies the application of the Portuguese Civil Code.

2. The situations of application of the force majeure clause

a. The concept of force majeure

A force majeure event constitutes an unpredictable, irresistible and beyond the control of the debtor situation, which makes the obligation impossible to be performed, even if temporarily. It must be understood that the impediment is beyond the control of the debtor, that is, this contractual party could not reasonably foresee that the event would occur at the moment of the conclusion of the agreement. Also, it must be concluded that the effects of the event could not be avoid or overcome by the debtor.

It should be noted that the situations included in the force majeure clause are situations of impossibility and not situations where it can be verified a significant increase (even if excessive) of the efforts that the debtor has to incur to perform the contractual obligation, under the terms initially established. In abstract, these last situations can also be prevented by the parties through hardship clause (or even be subjected to the general institute of the change of circumstances); however, these clauses are situated in a different field from force majeure. The situations to be addressed in this article relate to circumstances of unpredictable impossibility that are beyond the control of the parties and, in particular, the debtor. As in the case of the Covid-19 pandemic, the discussion will always take place having as background an extraordinary event that determines situations of physical or legal impossibility.

As a consequence, the party that foresees a situation in which there is a risk of not performing the contractual obligation due to shortening of staff due to quarantines self-imposed or imposed by governmental instructions or due to a significant break in the supply chain, must, respectively, if legally possible, seek for more labour force, and look for alternative ways to acquire the assets/materials needed to guarantee the performance of the obligations. This conclusion is applicable even if it implies a significant increase in costs. Such situation may lead to the

application of a hardship clause or the legal regime of the change circumstances, however, this hypothesis is not the subject of this article.
As we will approach below, force majeure clauses may allow parties to not be liable for failures or delay in performance of their obligations caused, directly or indirectly, by circumstances beyond their reasonable control.

b. The interpretation of the clause

When the parties have established a force majeure clause, the analysis of the problem must be performed on a case by case basis, namely, to understand whether, based on the clause drafting, a pandemic is foreseen as force majeure event.
The drafting of force majeure clauses may have several configurations.
Apart from situations where the clause combines a specific list of force majeure events and an element that suggests the non-exhaustive nature of the events listed or that allows for a comprehensive interpretation, parties may opt solely to establish a list of specific events. This list may be intended to be exhaustive or non-exhaustive and normally includes events such as earthquakes, fires, floods, wars, civil or military disturbances, acts of terrorism, sabotage, strikes, riots, power failures, etc. One of the commonly foreseen force majeure events listed in the clauses are epidemics and/or pandemics. In these cases, the interpretation of the clause is easily achievable. In simple terms, the interpretation can only have two results: either the pandemic or some effect resulting from it are foreseen and the force majeure clause is applicable; or not, and in the latter case it is difficult to argue that it can be applied.
In case the events listed are not exhaustive through the inclusion of a word suggesting it or when undetermined concepts are used («events beyond parties' reasonable control»), the difficulties in interpreting the clause increase significantly. In these cases, it is essential that an interpretation of the clause is made taking into account the object of the agreement to understand if the hypothetical will of the parties includes or not an event such as the Covid-19 pandemic, which will always be dependent on the nature and object of the obligation. Furthermore, the application of force majeure clause requires a demonstration that the failure to comply is a consequence of the effects of the pandemic.
In summary, the party claiming the occurrence of a force majeure event must demonstrate three assumptions:

- The occurrence of the event has a causal connection with a situation of permanent or temporary impossibility to perform the obligation;
- The event is not / could not be controlled by parties; and
- No measures could have been taken to prevent or mitigate the effects of the event.

Thus, in the abstract, it is plausible to consider that the SARS-CoV-2 viral outbreak may be a force majeure event. On the other hand, although the pandemic is the primary cause of situations where it is impossible to perform obligations, the clause must be assessed to determine whether there are any effects arising from the existence of the pandemic which, itself, are already force majeure events (e.g. cancellation of transport, closing of borders due to travel restrictions, mandatory quarantines, etc.).

c. Accessory obligations arising from the lawful application of the force majeure clause

In case a force majeure clause is applicable, the party that benefits from it (that is, the party that cannot perform the obligation), maintains some typical obligations in order to ameliorate the effects of the failure or delay on the counterparty legal situation.
These obligations typically include the obligation to notify the counterparty of the particular event that has taken place, due to the pandemic, so that the pandemic causes the least possible loss related to the non-compliance with an obligation that it legitimately expected.

d. Typical effects of the application of the force majeure clause

The typical effect of applying the force majeure clause is to discharge the obligation (even if temporarily) from the obligation of the debtor.
Thus, a distinction must be made as to whether the Covid-19 pandemic or its effects, regarding the compliance with the contractual obligation, are temporary or definitive. In the first case, typically, there will be a suspension of contractual execution during the impediment period. The debtor is only obliged to perform the obligation when the event that generated the impediment ceases.
On the other hand, if the impossibility is definitive, the question arises whether the contract can be terminated. In any case, being a case of impossibility, the debtor will not be obliged to indemnify the creditor due to contractual default.

e. Non-application of the force majeure clause

If the assumptions aforementioned are not verified, the first remedy should be found in the contractual regulation. One of the routes may be the application of a hardship clause. Unlike what happens in the case of force majeure, the matter to be addressed is not a situation of impossibility. In fact, the question to be discussed is whether the performance of the obligation has become excessive, given the contractual equilibrium, as it appears to be disproportionate to require the debtor to comply with the obligation under the agreed terms.

f. Non-establishment of the force majeure clause

On the other hand, if the agreement does not provide express regulation on this issue, the applicable law will have to be applied.
The applicable rule depends on the particular contractual regulation and the impact that the Covid-19 pandemic had on the contractual legal relationship.
In abstract, there are two legal regimes that can be applied: i) the force majeure / impossibility of performance (articles 790 and ff. of the Civil Code); and the regime of the change of circumstances.
Regarding the first case, the applicable rules relate to situations of permanent and temporary impossibility and absorb the assumptions related to the application of force majeure clauses mentioned before.
However, there may be reasons to apply articles 437 and ff. of the Civil Code. This solution is reserved for situations when the circumstances in which the parties based the decision to conclude an agreement have experienced an abnormal change. The debtor may have the right to terminate the agreement, or to modify it according to a fairness criterion, provided that the performance of the obligation in cause seriously affects the principle of good faith and is not covered by the agreement inherent risks.

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