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Force majeure, *imprévision* and change in circumstances under Portuguese law*

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Introduction

I. In judicial and arbitration practice, it is relatively common to invoke (supervening) changes in circumstances in order to undermine the contractual obligations previously assumed. In particular, it is often claimed that it is now (at the moment of allegation) unfair (even if only for one party) to maintain those obligations, at least in the way they were initially agreed by both parties upon conclusion of the contract.

Nevertheless, there are several questions that have been raised in relation to the Portuguese legal regime of changes in circumstances set out in Articles 437 to 439 of the Portuguese Civil Code.

These questions are aggravated in disputes involving international contracts or agreements concluded between Portuguese and non-Portuguese entities whose interpretation, validity and execution have been made subject to Portuguese (substantive) law. This is particularly so when the scope of the Portuguese legal concept of change in circumstances is considered to be strange or less clear with respect to one or both of the parties involved.

II. When one compares the Portuguese concept of change in circumstances with the procedures in force in other legal systems (e.g. *imprévision* theory, impossibility for supervening excessive burden, modification of the contractual base or change in circumstances), which may be considered similar to our own, the concept has relevant specific characteristics and significant differences.

Such characteristics and differences – many of them justified and explained by the circumstances that surrounded the inclusion of the concept of change in

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circumstances in the Portuguese Civil Code – pose remarkable and very specific challenges, either to the parties when they enter into the contract or, subsequently, to the courts. A manifestation of these challenges lies in the proliferation of legal disputes, in the views of legal scholars on the principle in question and in judicial or arbitral decisions that focus *ex professo* on the topic of changes in circumstances or that address that topic incidentally.

These challenges are accentuated: (i) if we assume, as some legal scholars suggest, that we are facing a true fundamental rule/principle of the Portuguese legal system that has no real equivalent in other legal systems and for which it is not even possible to draw a complete parallel with other solutions that have been adopted in those legal systems; (ii) if we consider the practice, even if merely a trend, of using the concept of a change in circumstances in a wide variety of relationships that are private in nature and in the domain of public contracts.

III. This paper seeks to highlight some of the characteristics and differences that the Portuguese regime of change in circumstances has. It also seeks to identify some of the challenges posed by this regime in the dogmatic and practical legal domain. This will require us to engage in a fairly detailed presentation of that regime.

Since the Portuguese change in circumstances regime may be confused with force majeure situations and/or with other theories or perspectives adopted in other legal systems, it is important to start by distinguishing those situations and theories or perspectives from the cases to be considered part of the regime or at the core of the concept of change in circumstances.

We will then examine the possibility of using the change in circumstances regime in situations of economic hardship, particularly in cases of destruction or disturbance of equivalence between obligations of the parties.

Finally, we will address the possibility of using the principle of change in circumstances provided by the Portuguese Civil Code in the public contracts domain.

Hence, the following topics will be addressed in this paper: (1) Force majeure and *imprévision* under Portuguese law; (2) Application of Article 437 of the Portuguese Civil Code ("PCC") in relation to economic hardship; and (3) The principle of change in circumstances as applicable to administrative agreements under Article 314(1) of the Code of Public Contracts ("CPC").

LLR, LVIII, 2017/2, 213-231

1. Force majeure and *imprévision* under Portuguese law

1.1. Force Majeure ("força maior")

I. Under Article 798 of the PCC, "*the debtor at fault who does not comply with his obligation becomes liable for damages caused to the creditor*".

However, based on Articles 790 to 797 of the PCC, the debtor is not considered as having acted with fault where the failure to comply arises either from a fact related to the creditor or to a third party, either because of force majeure or a case of unforeseeable circumstances.[1]

II. A Force Majeure ("FM") situation or a case of unforeseeable circumstances may cause a situation of supervening impossibility (either temporary or definitive)[2] of compliance by the debtor (also known as a "casual supervening impossibility" situation)[3], which is normally considered as an insuperable or invincible event.[4]

The concept of FM is usually understood as a fact that is unpredictable and external to the will of the parties which makes timely or overall compliance with the relevant obligations absolutely impossible. It is often considered identical to the concept of unforeseeable circumstances.[5]

Nevertheless, it should be noted that the concept of FM differs from the concept of "unforeseeable circumstances" as several criteria may be used to distinguish them.

III. Different perspectives may be found in Portuguese legal literature.

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[1] João Antunes Varela, *Das Obrigações em Geral*, II, 7.ª ed., Coimbra: Almedina, 1997, p. 81. The solution is essentially not different from the one that was established in the previous Civil Code. However, it should be noted that, unlike the previous Civil Code, the PCC uses a negative criterion: the impossibility must be the outcome of a cause that is not attributable to the debtor - Pires de Lima/Antunes Varela, *Código Civil Anotado*, II, 4.ª ed., Coimbra: Coimbra Editora, 1997, p. 42.

[2] Inocêncio Galvão Telles, *Direito das Obrigações*, 7.ª ed., Coimbra: Coimbra Editora, 1997, pp. 360-363.

[3] Luís Menezes Leitão, *Direito das Obrigações*, II, 2.ª ed., Coimbra: Almedina, 2003, pp. 111-114.

[4] Fernando Pessoa Jorge, *Ensaio sobre os Pressupostos da Responsabilidade Civil*, Coimbra: Almedina, 1999, p. 122.

[5] Fernando Pessoa Jorge, *Ensaio sobre os Pressupostos da Responsabilidade Civil*, cit., 1999, p. 118.

Some authors argue that the distinguishing criteria is that unforeseeable circumstances occur as a result of natural forces independent of human action and that FM applies whenever there is a fact or act in respect of a third party (including the creditor) that impacts the timely or overall possibility of fulfilment of the relevant obligation and regarding which the debtor has no responsibility.[6]

Other authors support the view that the distinction between these two concepts lies in unpredictability: whereas in the case of FM, even if foreseeable, neither the event nor its harmful consequences could be avoided regardless of whether natural events or human actions occur (the relevant idea here is "inevitability"); in the case of unforeseeable circumstances, the event was not predictable, but it could have been avoided if it had been predicted (the factor of "unpredictability" being of relevance).[7]

1.2. *Imprévision* ("imprevisão")

1.2.1. The concept of change in circumstances ("o instituto da alteração das circunstâncias")

I. In Anglo-Saxon case law, FM and unforeseeable circumstances or misfortune and the change in circumstances theories and the concepts of impossibility of performance and frustration sometimes overlap.[8]

Inspired by the applications made by the *Conseil d'État* in the domain of concession contracts[9], some French legal literature (mainly from the domain of administrative law) construes the "theory of *imprévision*" when assessing the possible termination or waiver of compliance regarding contractual obligations. This theory, which has been developed in order to find subjectivist reasons for situations of abnormal

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[6] Marcello Caetano, *Manual de Direito Administrativo*, I, 10.ª ed., Coimbra: Almedina, 2008, p. 623.

[7] Manuel Gomes da Silva, *O Dever de Prestar e o Dever de Indemnizar*, Lisboa, 1944, p. 176, and Manuel de Andrade, *Teoria Geral das Obrigações*, Coimbra: Almedina, 1958, pp. 417-418.

[8] Pedro Pais de Vasconcelos, *Teoria Geral do Direito Civil*, 3.ª ed., Coimbra: Almedina, 2005, pp. 740-743.

[9] Inocêncio Galvão Telles, *Manual dos Contratos em Geral*, 4.ª ed., Coimbra: Coimbra Editora, 2002, p. 340, and António Menezes Cordeiro, *Tratado de Direito Civil Português*, II/IV, Coimbra: Almedina, 2010, p. 270, note 600.

changes in circumstances[10] but failed to succeed, for some time[11], in the domain of private law or private contracts[12], requires the existence of an unforeseeable change in circumstances that is external and independent of the will and behaviour of the parties.[13] More exactly, it may be said that at the centre of this theory, developed by the administrative courts for changes in circumstances in the domain of administrative contracts, is *"the idea that circumstances subsequent to the time of the contract will only be relevant if, having not been subjectively foreseen, were also objectively unpredictable, so that the contract can be terminated or modified in accordance with the hypothetical will of the parties"*.[14] Parallel to the concept of FM, the *imprévision* theory is based on four elementary requirements: a) supervening character of the event; b) unpredictability; c) irresistibility; d) exteriority.

In turn, German legal literature provides the theory of the loss of the contractual base (*Die Störung der Geschäftsgrundlage* or *Wegfall der Geschäftsgrundlage*),

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[10] José de Oliveira Ascensão, *Direito Civil. Teoria Geral*, III, Coimbra: Coimbra Editora, 2002, p. 190.

[11] However, this is not the case anymore. A modification of the *Code Civil* has been brought by the Ordonnance n.º 2016-131, dated 10 February 2016, which has entered into force on 1 October 2016 and that changed Article 1195 of the *Code Civil* as follows: *"If an unforeseeable change in circumstances when concluding the contract makes performance excessively onerous for a party that had not agreed to bear the risk of it, that party may ask the other party for a renegotiation of the contract. That party continues to perform its obligations during the renegotiation. In case of refusal or failure of the renegotiation, the parties may agree to terminate the contract at the time and under the conditions fixed by them, or, by way of mutual agreement, ask the court to adapt the contract. If no agreement is reached within a reasonable time, the court may, at the request of a party, revise or terminate the contract on the date and under the conditions fixed by the court"*. Moreover, see Eduardo Santos Júnior, "A Imprevisão ou Alteração das Circunstâncias no Direito Privado Francês e as Perspectivas de Evolução em Face dos Projectos de Reforma do Direito das Obrigações no *Code Civil*", in *Estudos de Homenagem ao Professor Doutor Jorge Miranda*, VI, Coimbra: Coimbra Editora, 2012, pp. 471-493 (481-483 and 486-492), for a presentation of three cases in which the French courts already expressed openness to admitting a duty on the parties to renegotiate in good faith and also for a discussion of the three preliminary drafts presented for the reform of the *Code Civil* in the domain of imprévision and change in circumstances, which (especially the Terré and Chancellerie preliminary drafts) seem to have inspired the changes introduced in Article 1195 of the *Code Civil*.

[12] António Pinto Monteiro/Júlio Gomes, "A «Hardship Clause» e o Problema da Alteração das Circunstâncias (Breve Apontamento)", in *Juris et de Jure nos Vinte Anos da Faculdade de Direito da Universidade Católica Portuguesa*, Porto, 1998, pp. 17-40 (19-20).

[13] Pedro Pais de Vasconcelos, *Teoria Geral do Direito Civil*, cit., 2005, pp. 736-737.

[14] José Lebre de Freitas, "Contrato de Swap meramente especulativo: regimes de validade e de alteração de circunstâncias", in *ROA*, 2012, IV, pp. 943-970 (957).

which then leads to the possibility of extinction/termination of a certain contractual relationship. In this regard, the contractual base, which *"is a notion of considerable complexity"*[15], may be deemed to represent either the expressed will of one of the parties necessary to complete the agreement, and the elements acknowledged and accepted by the other party, or the common representation of the different parties on the existence or verification of certain conditions providing the grounds for the negotiations.[16]

II. The general idea is the following: in some situations, when the contractual base has been lost, it is considered to be fair to abandon the rigid principle of contractual stability.

Therefore, a compromise has to be reached on this matter. On the one hand, any contract implies the assumption of a risk, since entering into contracts consists in planning, anticipating the future and in exchanging the present for the future, or vice-versa, and in assuming a present disadvantage in exchange for a future advantage. On the other hand, a contract is not an isolated phenomenon and occurs in the context of social and human reality, a certain context or background that cannot be ignored. Furthermore, sometimes the contract economy is radically changed by factors that the parties do not control and on which the parties may not even have made any representation.[17]

Unlike other legal systems which do not have any legal provision and, therefore, are forced to construct legal doctrines, the PCC has a legal provision on the matter - Article 437[18] -, specifically included to render it possible to terminate and modify the contract in order to avoid an unfair situation.[19]

However, despite what a few isolated voices in Portuguese legal literature still advocate[20], the PCC did not adopt the French "theory of *imprévision*". Instead, it

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[15] José de Oliveira Ascensão, *Direito Civil. Teoria Geral*, II, 2.ª ed., Coimbra: Coimbra Editora, 2003, p. 148.

[16] Luís Menezes Leitão, *Direito das Obrigações*, II, cit., p. 126, and Pedro Pais de Vasconcelos, *Teoria Geral do Direito Civil*, cit., 2005, pp. 738-739.

[17] Carlos Mota Pinto, *Teoria Geral do Direito Civil*, 4.ª ed., Coimbra: Coimbra Editora, 2005, pp. 607-608.

[18] José de Oliveira Ascensão, *Direito Civil. Teoria Geral*, III, cit., pp. 185-186.

[19] Carlos Mota Pinto, *Teoria Geral do Direito Civil*, 4.ª ed., cit., pp. 608-609.

[20] Luís Carvalho Fernandes, *A Teoria da Imprevisão no Direito Civil Português*, Lisboa: Quid Juris, 2001. According to this author, the need to terminate or modify the contract is a consequence of the disappearance of the base of cooperation between the parties.

has followed the developments of German literature on the topic (specially the *Geschäftsgrundlage* theory).[21]

III. In fact, the contractual base and circumstances on which the parties based their will to contract are considered synonymous expressions: although one may find different meanings attributed to the contractual base, what is at issue are circumstances that commonly lead the parties to contract with each other and to contract in that specific way.[22]

As a result, Article 437 of the PCC provides that, where there is an abnormal change in the circumstances on which the parties based their will to contract, the injured party may terminate or modify the agreement under equity/fairness criteria, on condition that (if they were maintained) the obligations assumed would seriously offend *bona fide* principles and as long as the change is not covered by the risks of the agreement.

Thus, under Portuguese law, there are five cumulative requirements that must be satisfied in order to make use of the legal concept of change in circumstances[23]: 1) a change in the circumstances on which the parties based their will to contract, i.e., of the circumstances actually existing at the moment the contract was signed, which led the parties to sign it; 2) the abnormal character of such change, meaning, a change considered to be totally unpredictable as to its occurrence, by the parties; 3) the change must cause damage to one of the parties, that is, it must cause a modification in the contractual balance established by the parties; 4) the damage caused is such that the fulfilment of the contractual obligations is considered to be contrary to the requirements of good faith; 5) the damage is not covered by the contract's own risks. In other words, it is not considered to be included in the framework of risks viewed as usually associated to that contract.

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[21] António Menezes Cordeiro, *Tratado de Direito Civil Português*, II/IV, cit., pp. 277-279, and Supreme Court Decision of 13.11.2014, Case no. 138/2001.S1 (Mário Mendes), available at www.dgsi.pt. However, for some interesting differences (the weight and role attributed to good faith) regarding Section 313 of the BGB and Article 437 of the PCC, see Juan Carlos M. Dastis, "Change of Circumstances (section 313 BGB) Trigger for the Next Financial Crisis", in *European Review of Private Law*, 23, 2015, pp. 85-99 (especially 97-99).

[22] José de Oliveira Ascensão, "Onerosidade excessiva por "alteração das circunstâncias"", in *ROA*, 2005, III, pp. 625-648.

[23] Luís Menezes Leitão, *Direito das Obrigações*, II, cit., pp. 129-131, and Court of Appeals of Lisbon Decision of 03.07.2007, Case no. 648/2007-1 (Rui Vouga), available at www.dgsi.pt.

All these requirements are essential to limit the discretion of the judge and to serve as an auxiliary criterion for an evaluative appreciation of the remedy.[24]

In any case, for Article 437 of the PCC there are two crucial elements: first, the issue of contractual risk allocation, which is also relevant for Section 313 of the BGB; second, the significant role attributed to good faith, for which Section 313 of the BGB attributes a different weight.[25]

1.2.2. The main difference between change in circumstances and force majeure in Portuguese law

I. The extinction of the debtor's obligations may occur in a situation of supervening, objective, absolute and definitive impossibility[26], such as the one caused by FM.[27]

An impossibility situation should not be confused with a situation in which a change in the circumstances renders the fulfilment of the obligation excessively burdensome.[28]

In fact, although there have been attempts to equate the notion of absolute impossibility (FM and unforeseeable circumstances) with the notion of relative impossibility (change in circumstances), these attempts are not acceptable. In any case, the legal rules established for absolute impossibility and relative impossibility are quite different.[29]

Thus, given that changes in circumstances do not lead to a supervening impossibility of fulfilling the obligations arising from the contract[30], one must conclude that when the impossibility of the debtor complying with his obligations is only relative (not absolute) this may trigger only the applicability of the legal rules on change in circumstances and not of the FM or unforeseeable circumstances.[31]

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[24] Carlos Mota Pinto, *Teoria Geral do Direito Civil*, cit., p. 609.

[25] Juan Carlos M. Dastis, "Change of Circumstances (section 313 BGB) Trigger for the Next Financial Crisis", cit., pp. 98-99.

[26] António Menezes Cordeiro, *Tratado de Direito Civil Português*, II/IV, cit., pp. 180-183.

[27] Manuel de Andrade, *Teoria Geral das Obrigações*, cit., p. 415.

[28] Pires de Lima/Antunes Varela, *Código Civil Anotado*, II, cit., p. 42.

[29] Luís Carvalho Fernandes, *A Teoria da Imprevisão no Direito Civil Português*, cit., pp. 39-45.

[30] Luís Carvalho Fernandes, *A Teoria da Imprevisão no Direito Civil Português*, cit., p. 266.

[31] Luís Menezes Leitão, *Direito das Obrigações*, II, cit., p. 112.

In any case, the possibility of terminating or modifying the contract under Article 437 of the PCC is not limited to situations of supervening excessive burden of the obligation: the solution can be extended to other situations in which the achievement of the result is considered to be just.[32]

This is so, because, unlike FM which is related to a real impossibility of executing the contract, the resorting to the concept of change in circumstances is justified when there is a collision of two general principles (the *pacta sunt servanda* principle and the *bona fides* principle). In other words, one has to conciliate the demands of justice with the security of the legal commerce.[33]

II. As mentioned above, Portuguese law essentially follows the constructions of German literature and includes a complex provision[34] concerning change in circumstances occurring after entering into the contract.

An essential requirement of Article 437 of the PCC is the occurrence of an abnormal change in the circumstances on which the parties (therefore it must be bilateral)[35] based their will to contract: the relevant abnormal change is the one which calls into question the contractual balance established by the parties.[36]

These circumstances include those conditions which the parties have consciously considered necessary to be maintained and also the conditions which are necessary to be met for the contractual scope or the contractual balance to be achievable/ maintained.[37]

Some authors and case law[38] hold that Article 437 of the PCC covers all cases of subjective and objective changes in the contractual base.[39]

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[32] Carlos Mota Pinto, *Teoria Geral do Direito Civil*, cit., pp. 609-610.

[33] Mário Júlio Almeida Costa, *Direito das Obrigações*, 7.ª ed., Coimbra: Almedina, 1998, p. 279.

[34] Pedro Pais de Vasconcelos, *Teoria Geral do Direito Civil*, cit., p. 745.

[35] See, *inter alia*, Supreme Court Decisions of 28.05.2009, Case no. 197/06.6TCFUN.S1 (Oliveira Vasconcelos), of 10.01.2013, Case no. 187/10.4TVLSB.L2.S1 (Orlando Afonso), and of 10.04.2014, Case no. 1167/10.5TBACB-E.C1.S1 (Silva Gonçalves), all available at www.dgsi.pt.

[36] José de Oliveira Ascensão, *Direito Civil. Teoria Geral*, III, cit., p. 200, and Inocêncio Galvão Telles, *Direito das Obrigações*, cit., pp. 370, note 1.

[37] Pedro Pais de Vasconcelos, *Teoria Geral do Direito Civil*, cit., p. 747.

[38] "Case law" is used with a broad meaning, to the extent that no rule of precedent exists in Portugal.

[39] Heinrich Ewald Horster, *A Parte Geral do Código Civil Português*, Coimbra: Almedina, 1992, p. 578, Supreme Court Decision of 16.04.2002, Case no. 02A654 (Pinto Monteiro), and Court of Appeals of Lisbon Decision of 14.06.2012, Case no. 187/10.4TVLSB.L2-2 (Sérgio Almeida), both available at www.dgsi.pt.

Others prefer to stress differences in the configuration and provisions of Article 437 when compared with Article 252(2): by including the circumstances which constitute the contractual base understood as having an objective character, the legal regime established in Article 437 removes the possibility of invoking an imaginary false psychological representation regarding the maintenance of the circumstances mentioned.[40]

Nevertheless, some case law points out that *"the relevant facts that can give rise to a breach of the effective contractual basis can never arise from circumstances attributable to the party that is considered injured and the unforeseen facts must, for that purpose, fall outside the influence of that party"*.[41]

However, given the supplementary/default nature usually attributed to Article 437 of the PCC (in some cases, the law itself fixes the terms of the contractual modification and, in other cases, the parties agree to depart from the rules or to replace them by a different regulation[42]), its application is defined,

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[40] INOCÊNCIO GALVÃO TELLES, *Manual dos Contratos em Geral*, cit., p. 344, and Supreme Court Decision of 10.01.2013, Case no. 187/10.4TVLSB.L2.S1 (Orlando Afonso), available at www.dgsi.pt.

[41] Supreme Court Decision of 13.11.2014, Case no. 138/2001.S1 (Mário Mendes), available at www.dgsi.pt.

[42] This is so because Article 437 of the PCC is not an absolutely imperative rule – ANTÓNIO PINTO MONTEIRO/JÚLIO GOMES, "A «Hardship Clause» e o Problema da Alteração das Circunstâncias (Breve Apontamento)", cit., p. 39.
Nevertheless, it is important to make a clarification concerning the supplementary/default nature usually attributed to Article 437 of the PCC.
In light of this supplementary/default nature, the parties may naturally agree (Article 405 of the PCC) "hardship clauses", stability clauses or safeguard clauses in order to prevent the need to resort to Article 437 of the PCC in situations of changes in circumstances. The parties may also invoke the supplementary/default nature of Article 437 of the PCC: (i) to set out a contractual regime of changes in circumstances that elaborates on the legal regime; (ii) to agree on a more favourable regime of changes in circumstances; or even (iii) to agree on a changes in circumstances regime that in certain respects (but not in the essential ones) diverges from the legal regime. Therefore, the parties may provide other ways to resolve changes in circumstance situations: rather than resorting to a solution of termination or modification of the contract, the parties may agree, for example, on a bilateral obligation to renegotiate in good faith when situations of changes in circumstances occur. Moreover, the parties may consider relevant (or irrelevant) certain changes in circumstances that would not be (or would be) considered relevant in the light of Article 437 of the PCC: for example, changes in circumstances usually considered as normal, usually seen as predictable or usually understood as covered by the risk of the contract.
However, the supplementary/default nature usually attributed to Article 437 of the PCC does not allow the parties to exclude or dismiss *in totum* what Article 437 provides. In other words, it does not allow the parties to agree to disregard a fundamental idea or principle of the

according to some authors, by the will of the parties and also by contractual interpretation.[43]

The parties may agree in the contract that certain changes are irrelevant or even agree to neutralise or immunise the contract against certain undesired effects.[44]

When defining *"abnormal changes"*, which are traditionally understood as changes that have a significant value or extraordinary proportions[45], some legal literature sustains the need to resort to the *"nature of things"* criterion to determine what consists "normality"[46] of, since an unusual modification (or significant change) of the contractual basis is required to satisfy this criteria.

Although it is usual to sustain a connection between abnormality and unpredictability[47], a distinction should be drawn between the two ideas.[48] Article 437 of the PCC attributes relevance to abnormality and not unpredictability. Further, although what is deemed as "normal" is usually considered predictable (taking into account that, if the change was normal, the parties would have predicted its occurrence and taken the necessary measures or precautions when entering into the contract), the construction of "abnormality" may include unpredicted and unpredictable or predicted and predictable acts or facts.[49]

Another important requirement is the idea of the abnormal change causing a disturbance to the contract's internal justice or to the contractual balance initially set. When the contract becomes unfair at a supervening moment, there should be

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Portuguese legal system that is expressed by that rule in the domain of changes in circumstances. Article 437 of the PCC must be understood as a fundamental rule/principle of the Portuguese legal system, which was especially created to resolve, through certain decision criteria, contractual situations where the occurrence of a supervening change in circumstances makes it materially unfair (in the light of the requirements of good faith) to maintain the contract as it was signed by the parties.

[43] António Menezes Cordeiro, *Tratado de Direito Civil Português*, II/IV, cit., pp. 299-303.

[44] Luís Carvalho Fernandes, *A Teoria da Imprevisão no Direito Civil Português*, cit., pp. 273-274.

[45] Inocêncio Galvão Telles, *Manual dos Contratos em Geral*, cit., p. 344.

[46] Pedro Pais de Vasconcelos, *Teoria Geral do Direito Civil*, cit., p. 748.

[47] Luís Menezes Leitão, *Direito das Obrigações*, II, cit., p. 129.

[48] Against this view, Inocêncio Galvão Telles, *Manual dos Contratos em Geral*, cit., p. 350, sustaining that an abnormal change is necessarily and at the same time an unpredictable change.

[49] Pedro Pais de Vasconcelos, *Teoria Geral do Direito Civil*, cit., p. 748. See also, Henrique Sousa Antunes, "A alteração das Circunstâncias no Direito Europeu dos Contratos", in *Cadernos de Direito Privado*, 47, 2014, pp. 3-21 (13).

an intervention in order to correct this injustice, either through the modification of the contract, or through its termination. Additionally, another requirement applies: the injustice must reach a minimum level of gravity. In other words, there must be such a grave injustice that no person, in good faith, would persist in demanding rigid compliance with the contract without giving due consideration to the injustice involved in the situation in question. In this regard, one should confirm whether maintaining the contractual relationship is considered to be too costly for the party invoking the change in circumstances. In other words, it is necessary to demonstrate that the change in question seriously unbalanced the contractual relationship. Thus, only the excessive burden that might seriously affect the principles of good faith can justify the termination/exceptional modification of the agreement. [50]

Finally, the occurrence of risks inherent to the contract is not considered sufficient to justify the termination or modification of the contract by excessive burden. Therefore, contractual compliance is not due only when it is not covered by the inherent risks of the contract.[51]

1.2.3. Change in circumstances discussed in Portuguese courts

I. It is relatively common to invoke the legal rules on change in circumstances in the Portuguese courts for different types of claims.[52]

Courts tend to grant or reject claims on the grounds of the rules on changes in circumstances using different standards for their decisions, notably varying in accordance with the specific circumstances of the case.

Therefore, the existing case law does not provide clear directions on how courts will tend to decide.

II. In claims concerning agreements regulating parental responsibilities courts tend to: (i) require the claimant to state the circumstances existing at the time the obligation was assumed and the circumstances existing at the time of modification of that obligation; and (ii) to allow changes in those kinds of obligations when a

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[50] Luís Menezes Leitão, *Direito das Obrigações*, II, cit., p. 130, and Pedro Pais de Vasconcelos, *Teoria Geral do Direito Civil*, cit., pp. 748-749.

[51] Luís Menezes Leitão, *Direito das Obrigações*, II, cit., pp. 130-131.

[52] Pedro Pais de Vasconcelos, *Teoria Geral do Direito Civil*, cit., p. 745.

comparative judgment makes it clear that there has been a variation between the circumstances at the time of the decision and the current circumstances.[53]

However, different standards of decision may be found in other claims.

For example, in financial and swap contractual disputes against banks, claimants tend to invoke the concept of change in circumstances to obtain termination of the contracts.

Courts have been discussing the possibility of resorting to the concept of change in circumstances in these disputes[54] and sometimes reject claims based on a change in circumstances on the grounds that: (i) some changes are not considered abnormal (for example, changes motivated by financial crises, interest rate changes, changes in bank lending conditions, unemployment or devaluation); (ii) some changes are considered part of the contract's specific risk or its inherent risk (for example, caused by a decrease in interest rates, even if sharp)[55].

The same can be said regarding commercial contracts, including supply agreements. Take, for example, a situation where, due to traffic difficulties caused by construction work in the street where a petrol station is located, the demand decreased by about 30%. In this case, the courts have held that this circumstance does not exceed the perimeter of normal risks of the contract. According to the court, the owner of a petrol station sale has to accept the possibility that the street where his station is located may be subject, at any time, to construction work or urban arrangements that cause a decrease in demand for fuel at the station.[56]

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[53] Court of Appeals of Lisbon Decision of 07.04.2011, Case no. 9079/10.6TBCSC.L1-2 (Henrique Antunes), available at www.dgsi.pt.

[54] In favour, see Supreme Court Decision of 10.10.2013 Case no. 1387/11.5TBBCL.G1.S1 (Granja da Fonseca), Court of Appeals of Lisbon Decision of 28.04.2015, Case no. 540/11.6TVLSB.L2-1 (João Ramos de Sousa), and Court of Appeals of Lisbon Decision of 08.05.2014, Case no. 531/11.7TVLSB.L1-8 (Ilídio Sacarrão Martins) (sustaining that the change in circumstances legal regime can be used in the domain of swap contracts), all available at www.dgsi.pt. Against, see Supreme Court Decision of 26.01.2016, Case no. 876/12.9TVLSB.L1.S1 (Gabriel Catarino), Supreme Court Decision of 27.01.2015, Case no. 876/12.9TBBNV-A.L1.S1 (Fonseca Ramos), and Supreme Court Decision of 05.11.2013, Case no. 1167/10.5TBACB-E.C1 (José Avelino Gonçalves), all available at www.dgsi.pt.

[55] See the case law identified in the previous note and also PEDRO GONZÁLEZ/JOÃO VENTURA, "Contrato de Swap e Alteração de Circunstâncias", in *Cadernos do Mercado de Valores Mobiliários*, 48, 2014, pp. 63-87.

[56] Supreme Court Decision of 03.07.2007, Case no. 648/2007-1 (Rui Vouga), available at www.dgsi.pt.

2. Application of Article 437 of the Portuguese Civil Code in relation to economic hardship

I. According to some legal literature, *"the ultimate problem of the change in circumstances is the existence of a valid contract, and (...) that, thanks to supervening events, enters in contradiction with basic postulates of the system"*.[57]

Taking into account the difficulty of that problem and the plurality of responses that have been given to situations of changes in circumstances, the parties tend to make prior agreements on the matter[58], by resorting to what are usually known as "hardship clauses"[59], stability clauses or price revision clauses.

These types of clauses are relatively common in international oil and gas agreements[60], international financial agreements and other agreements which are vulnerable to market fluctuations, such as energy purchase agreements and long term agreements. Including these types of clauses finds fruitful and relevant ground when the parties are trying to avoid the negative consequences of cyclical crises and severe financial disturbances, even if the legal system in question has specific legal provisions on the matter. These clauses do not operate automatically and, in the first instance, favour maintaining the contract. Although a renegotiation has to occur sometimes in order to restore the contractual balance between the parties, these clauses are clearly beneficial to the parties: legal certainty is unequivocally improved when one compares this with the security eventually achieved by using the courts to resolve the dispute.

However, when the parties do not stipulate anything in this regard[61], a solution has to be found in the applicable law.[62]

II. Although the Portuguese law is inspired by the German *Geschäftsgrundlage* theory, in some legal literature one may find the idea of making use of the change

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[57] António Menezes Cordeiro, *Tratado de Direito Civil Português*, II/IV, cit., p. 313.

[58] See, however, the clarification made previously (above no. 42) concerning the supplementary/default nature usually attributed to Article 437 do the PCC.

[59] António Pinto Monteiro/Júlio Gomes, "A «Hardship Clause» e o Problema da Alteração das Circunstâncias (Breve Apontamento)", cit. For a definition of hardship clauses according to the PECL, see Article 6.2.2.

[60] Nélia Dias, "A Estabilidade nos Contratos Petrolíferos Internacionais e alguns dos Princípios Gerais de Direito Conexos: do Mito à Realidade", in *ROA*, 2011, III, pp. 815-866.

[61] That is not an unusual situation according to Manuel de Andrade, *Teoria Geral da Relação Jurídica*, II, Coimbra: Almedina, 1998, p. 403.

[62] Carlos Mota Pinto, *Teoria Geral do Direito Civil*, cit., p. 608.

in circumstances rules, even in situations in which the requirements of the above theory (in any of its formulations) are not totally fulfilled.[63]

In fact, the relevant contractual base is usually understood as the base which the parties knew or should know, in terms of reasonableness and good faith, since it is part of the nature, purpose and content of the contract, taking into account all the circumstances of the case.

Nevertheless, one of the parties may use Article 437 of the PCC to terminate or modify the contract in cases where, at the relevant time, good faith justifies that result, even if at the moment of signing the contract, no party was required to stipulate a clause including a condition to that effect.[64]

III. That happens when, as a result of unforeseen events, the relationship between the parties has turned into a blatant non-relationship.

For example: changes in prices, salaries, expenses and other things, which are normally borne by the parties, may be considered relevant in the context of Article 437 of the PCC when they are the result of events not normally foreseen in a bilateral contract and when they provoke such a serious non-relationship that a reasonable judge cannot consider the fulfilment of one party's obligation a counter-value to the other party's obligation.

This tends to occur in situations of long term bilateral contracts in which, by virtue of changes in the value of money or extraordinary difficulties in acquiring certain goods, the fulfilment by one party of its obligations becomes unbearably burdensome in respect to the obligation of the other party.[65]

When economic and social crises with a cyclical nature (for example, interest rate changes) are at issue, typically one cannot resort to Article 437 of the PCC, since the changes are considered to fall within the scope (are covered by the risk) of the contract.

Nevertheless, case law considers situations of destruction or disturbance of equivalence between obligations as cases of loss of contractual base: for example, legislative changes or changes in the business regulatory framework may justify,

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[63] MÁRIO JÚLIO ALMEIDA COSTA, *Direito das Obrigações*, cit., pp. 290-292.

[64] In addition, the stipulation of a condition presupposes a state of doubt and not a state of certainty regarding the occurrence of the event or the presupposed circumstance – MANUEL DE ANDRADE, *Teoria Geral da Relação Jurídica*, II, cit., p. 405.

[65] MANUEL DE ANDRADE, *Teoria Geral da Relação Jurídica*, II, cit., pp. 407-408.

if the other legal requirements of Article 437 are met, the termination of the contract or the modification of its content, grounded on the fact that the obligations of both parties to a bilateral agreement become a blatant non-relationship[66]; the same can be said in cases of amending legislation existing at the moment of the contract, political events or sudden changes to the current economic system.[67]

IV. In any case, case law has been relatively restrictive in situations of changes in economic and political circumstances[68] and insists on the idea of reserving the legal concept of change in circumstances to situations of supervening circumstances that are common to both parties (that is, bilateral circumstances), which can be considered abnormal and are not covered by the risks of the contract.

For example, in an energy purchase agreement, the court has denied the right of the buyer to invoke a change in circumstances essentially because it did not demonstrate: (i) the unpredictability of the alleged supervening circumstance for the supplier (the supplier was aware of the competition and, for that reason, proposed a contractual term of 10 years); (ii) a significant change in the circumstances on which the buyer based its will to contract (there was no term making a comparison between the costs of the energy supplied and the costs of other kinds of energy); (iii) that the fulfilment is not covered by the risks of the contract (since the energy market is very dynamic, there are risks of the appearance of alternative forms of energy more favourable to the buyer of energy, and the buyer has agreed to be bound long-term by an energy supply agreement).[69]

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[66] Supreme Court Decision of 09.03.2010, Case no. 134/2000.P1.S1 (Hélder Roque), available at www.dgsi.pt.

[67] Court of Appeals of Coimbra Decision of 13.05.2014, Case no. 1097/12.6TBMGR.C1 (Artur Dias), available at www.dgsi.pt.

[68] ANTÓNIO PINTO MONTEIRO/JÚLIO GOMES, "A «Hardship Clause» e o Problema da Alteração das Circunstâncias (Breve Apontamento)", cit., pp. 28-31.

[69] Court of Appeals of Porto Decision of 09.02.2015, Case no. 173/11.7TBPRG.P1 (Carlos Gil), available at www.dgsi.pt.

3. The principle of change in circumstances and the administrative agreements under Article 314 (1) of the Code of Public Contracts

I. In any contractual relationship, whether public or private, there is an inherent and an unavoidable risk that necessarily arises from that relationship.

Former specific Portuguese legislation has provided for the possibility of modifying administrative contracts affected by several constraints, such as the ones created by the two world wars.

The majority of traditional legal administrative literature has argued that the principle of change in circumstances could also be considered a general one in administrative law and that this principle could even be especially useful in situations where the economic conditions on which the decision to contract was based on have changed.[70]

In fact, even though it was done under the label of the theory of *imprévision* created by the French *Conseil d'État* first [71] and then taking into consideration the German *Geschäftsgrundlage* theory[72], legal literature and case law have sustained an idea according to which an administrative contract can be modified whenever its full performance is seen as too burdensome for the private party.[73]

The concept of change in circumstances has, since its beginnings, been linked, in the domain of administrative contracts, to *imprévision* and unforeseeable circumstances[74], although more recently it has been closer to the German tradition.

Although the legal concept of change in circumstances is more developed in private law, the concept of change in circumstances is known and, in general, accepted in the domain of administrative contracts.[75] Even in situations where it does not have a public power of modification or termination, the Public Administration may judicially require the modification or termination of the contract.[76]

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[70] Pedro Gonçalves, *O Contrato Administrativo. Uma Instituição do Direito Administrativo do Nosso Tempo*, Coimbra: Almedina, 2003, pp. 128-129.

[71] Inocêncio Galvão Telles, *Manual dos Contratos em Geral*, cit., p. 340.

[72] António Menezes Cordeiro, "A proposta na contratação pública e a alteração das circunstâncias", in *O Direito*, 2010, II, pp. 275-315 (303-305).

[73] Luís Carvalho Fernandes, *A Teoria da Imprevisão no Direito Civil Português*, cit., pp. 231-243.

[74] PGR, of 04.05.2010, Case no. PGRP00003093, available at www.dgsi.pt.

[75] Administrative Supreme Court Decision of 03.02.2011, Case no. 0474/10 (Costa Reis), available at www.dgsi.pt.

[76] Pedro Gonçalves, *O Contrato Administrativo. Uma Instituição do Direito Administrativo do Nosso Tempo*, cit., p. 126.

For some authors, assuming that supervening circumstances are much more relevant in public law than in private law because of the constant evolution of the public interest[77], changes in circumstances are *"integrated in the contract of public law"*.[78]

II. The CPC follows this line of thought by including some situations of change in circumstances: as administrative contracts are always concluded taking into consideration the public interest, a modification or even a termination of the contracts must be allowed if there is a change in the circumstances that undermines the ability for the contract to pursue this purpose.

First of all, the CPC gives the public party the power to unilaterally modify the clauses relating to the content and mode of performance of the services under the contract for reasons of public interest (Articles 302(c) and 307(2)(b) of the CPC). With this power, the public party can modify, without agreement of the private party or without judicial intervention, the terms of the contract and the manner of performance of the services, adapting it to any changes in the public interest that the contract aims to meet.

Second, the CPC makes it possible to modify the administrative contract in two other situations. First, where there is an abnormal change in the circumstances on which the parties based their will to contract, on condition that (if they were maintained), the obligations assumed would seriously offend *bona fide* principles, as long as these are not covered by the risks of the agreement, or when there are reasons of public interest resulting from new needs or a new consideration of the existing circumstances. In this case the modification can be made by agreement between the parties or by judicial or arbitral decisions. Second, the CPC allows modification of the contract when there are reasons of public interest, in which case the modification can be made by an administrative act (Articles 311 and 312 of the CPC). In the first situation, one finds a change in circumstances, which is external and brought about by an act of the public party consisting in exercising powers or duties that have nothing to do with the contract, but which, in any case, impact the contract, even if only indirectly.

However, the CPC imposes several limits on objective modification of administrative contracts: (i) the situation cannot represent a way to prevent, restrict or distort

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[77] ANTÓNIO MENEZES CORDEIRO, "A proposta na contratação pública e a alteração das circunstâncias", cit., p. 296.

[78] ANTÓNIO BARBOSA DE MELO, "A Ideia de Contrato no Centro do Universo Jurídico-Público", in *Estudos de Contratação Pública*, I, Coimbra, 2008, pp. 20-21.

competition guaranteed by the pre-contractual procedure; (ii) the main benefits covered by the object of the contract must be maintained; (iii) the financial equilibrium of the contract must be also maintained when the modification has an unilateral origin (Article 313 of the CPC).

Whenever an objective modification of the administrative contract occurs, the CPC establishes the consequences associated with that modification: the private party has the right in some cases to a reset of the financial balance and, in other cases, to a modification of the contract or to receive financial compensation according to fairness criteria (Article 314 of the CPC). However, the reset of the financial balance is excluded in cases of modification caused by abnormal and unforeseen circumstances. Such circumstances can only give rise to a modification of the contract or to financial compensation determined according to fairness, and can only be imposed in situations where the contract is not terminated.

III. Since the CPC does not set out autonomous legal treatment of the matter (Articles 312(a) and 335(1) of the CPC), one may apply the civil law provisions of Article 437 of the PCC to situations in which a modification of an administrative contract occurs on the ground of an abnormal and unpredictable change in the circumstances.[79]

This is not the case when the public party exercises a power which is normal and predictable (referred to as "fait du prince"): in these latter situations, the private party may have the right to receive just compensation (Article 335(2) of the CPC).

In any case, a situation of change in circumstances gives rise, preferably, to a modification of the contract (Article 332(1)(a) and (2) of the CPC), because administrative contracts are signed to pursue a public goal and not just private interests. Therefore, the possibility of terminating the contract in administrative law must be seen as a last resort solution.[80]

Nevertheless, one cannot say that the CPC rules regarding situations that involve changes in circumstances are, in general, less restrictive than the ones provided by the PCC.

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[79] ANTÓNIO MENEZES CORDEIRO, "A proposta na contratação pública e a alteração das circunstâncias", cit., pp. 307-310.

[80] ALEXANDRA LEITÃO, "O Tempo e a Alteração das Circunstâncias Contratuais", available at www.icjp.pt, pp. 4-6 and 17-18.