Eastern European
Journal of Regional Studies
ISSN: 1857-436X / ISSN: 2537-6179

Volume 8 / Issue 1/ June 2022
DOI: 10.53486/2537-6179.8-1.07

IMPACT OF FORCE MAJEURE ON INTELLECTUAL PROPERTY CONTRACTS

Olesea PLOTNIC*[1]*
Lucia POPESCU*[2]*

Abstract: *The topicality of the subject is determined by the devastating economic effects of the events of the last two years that have affected the economy of the whole world, namely the pandemic with Covid 19 and most recently, the war in Ukraine. These effects are equally disruptive for intellectual property contracts when it is impossible to perform the obligation for the length of time the force majeure event exists, or the party shall engage in efforts to mitigate the effects of the force majeure event to perform the obligation under intellectual property contract. The research aims to clarify what circumstances or events could be considered force majeure, as well as the applicability of legal provisions in the context of measures undertaken by authorities in relation to events occurred. In addition, the performance of intellectual property contracts in force majeure circumstances will be addressed. Following the compared analysis of national legislations and practices, as well as different opinions and considerations of academia, the research reveals what circumstances could be considered a force majeure event, what are its particularities and impact on intellectual property contracts.*

Keywords: *force majeure, impediment, contractual liability, intellectual property, contract*

JEL Code: *K 12, K 20*

Introduction

Force majeure is one of the usual clauses of contracts, including those relating to intellectual property. However, in the context of the pandemic with Covid 19, and most recently, the war in Ukraine, which affected trade relations worldwide, the subject of force majeure has become particularly important and up-to-date. Different companies encountered several obstacles to perform their obligations under intellectual property contracts, as license or franchising. In many cases, licenses provide the obligation to pay royalties, the minimum sales or purchases, which could be extremely difficult in high-risk environment as war or when restrictions related to pandemic are in force. At the same time, the confidentiality and security of data are more difficult to ensure.

The legislation of the Republic of Moldova does not provide any specific rules regarding the force majeure clause in intellectual property contracts. The same situation has been observed in other European legislations. Therefore, the general rules of civil law governing force majeure will be applicable to intellectual property contracts, taking into account the particularities of this type of contract. Although the force majeure might seem a trivial and simple provision, as we shall see, many questions in the current context arise in respect to such circumstances, to

[1] Olesea PLOTNIC, PhD hab., University Professor at Moldova State University, Republic of Moldova. E-mail: plotnicolesea.aum@gmail.com, ORCID: 0000-0001-9368-7806
[2]Lucia POPESCU has a Master Degree in Civil Law and is National Key Expert in the EU project "Enhance transparency, accountability of and access to the judiciary system in the Republic of Moldova" Email: luciapopescu888@gmail.com, ORCID: 0000-0002-0808-7724

determine whether to suspend or excuse the performance of intellectual property contracts. So that, the current research has a practical significance, since it answers to important questions raised in relation to particularities of force majeure and how such circumstances should be tackled in different intellectual property contract.

In this context, the current analysis aims to define the particularities of force majeure, as well as the circumstances and events, which could be interpreted as force majeure for intellectual property contracts. A particular focus will be paid to Covid 19 pandemic, especially now after two years of pandemic, as well as the current war in Ukraine, and measures undertaken by authorities in this context. In addition, the research will address the particularities of performance of intellectual contracts during force majeure, including under different jurisdictions and will provide recommendations for future regulation of intellectual property contracts for a better confrontation of such cases.

In this context, in section one of this paper, the definition of force majeure under several legislation is addressed, including its particularities for intellectual property contracts. The analysis focuses on the circumstances of war and pandemic. In addition, similarities and differences between force majeure and hardship are addressed. The second section concentrates on the performance of intellectual property contracts in force majeure circumstances, where the entire execution process is analysed, including in relation to contracts with foreign elements. In this respect, general provision of several countries on force majeure are provided.

1. Data and Methodology

The current research is a comparative work, as it describes, analyses and interprets information, in this case a set of norms belonging to the legal system, to demonstrate the *circumstances or events that could be considered force majeure, as well as the applicability of legal provisions in the context of measures undertaken by authorities in relation to events occurred.* The subject is analyzed from the point of view of intellectual property contracts and the doctrinal approach of both national and international authors.

The article provides initially the definition of force majeure and advances with distinctive particularities of force majeure for intellectual property contracts. In addition, the conditions of performance of the intellectual property contracts during the force majeure are described, in perspective to give, at the end, the conclusions and recommendations on the researched topic.

During the writing process, various research methods were used, particularly theoretical and practical ones, including:

a) analysis, by dividing the topic into paragraphs and subparagraphs, making references to legal doctrine and regulations;

b) synthesis, by identifying the special features of special concepts, tracking the development of force majeure throughout intellectual property contracts development;

c) deduction, by making conclusions on the basis of the researched material and presenting the personal point of view on the subject under the current research;

d) classification, by dividing certain categories into different groups depending on various criteria, which allowed us to research each of them in more detail;

e) analogy, by using and comparing different institutions, as well as the rules of law in different states, which makes it possible to identify similar and distinctive features;

f) observation - by observing the statistical data, the dynamics of force majeure in the field of intellectual property contracts.

g) comparison, by comparing the level of legal regulation of the institution of force majeure in the national legal system of the Republic of Moldova, with the legal regulation of this institution abroad.

2. Definition of force majeure and distinctive particularities for intellectual property contracts

Different legislations use different terms and meanings for force majeure. The current research will use the general, well-known term of ”force majeure”, although, in few cases, the text will refer to the ”impediment beyond the control of the party”, as this expression is used by the Moldovan legislation, as well as relevant international documents.

The development of the force majeure institution determined the coherence of both its conditions and effects. Thus, in the end, the debtor is required to execute the obligation or to be released from its execution.

It is generally assumed that force majeure circumstance is an event that comes from outside and cannot be avoided with reasonable actions, which affects contracting parties to such an extent that they could be realized temporarily or permanently from their contractual duties. Some European legislations define and regulate in detail the term of force majeure or impediment, but others do not, in which case the specialized legal doctrine or judicial practice gives a detailed interpretation of this term.

The Civil Code of the Republic of Moldova no. 1107, issued on 06/06/2002 defines the force majeure as an impediment beyond the debtor's control. The Art. 904 provides that non-performance of the debtor's obligation is justified if it is due to an impediment beyond the debtor's control and if the debtor could not reasonably be required to avoid or overcome the impediment or its consequences. The term ”impediment beyond the control of the party” was borrowed from the Article III. – 3:104 of the *Principles, definitions and model rules of European private law* of 2009, which is used as well in the Article 79 of the *United Nations Convention on contracts for the international sale of goods* of 11/04/1980*,* and introduced in the current version of the Civil Code of the Republic of Moldova. The previous version of the Civil Code, which was modified in 2018, provided the term of force majeure.

At the same time, the Article 31 of the *Principles and related rights* of the Republic of Moldova No. 139 of 02/07/2010 doesn’t provide the force majeure as obligatory clause of copyright contracts. However, other conditions “considered essential by parties” are allowed. In this context, any copyright contract could provide a force majeure clause and parties should use it to have a guaranteed protection.

Other European legislations, as France Civil Code (Civil Code of the French Republic, 1804), Dutch Civil Code (Civil Code of Netherlands, 1992) or Spanish Civil Code (Código Civil,

1889) use different notions, with slight different meaning for force majeure, which emphasize it in general as an event, circumstance or act beyond the control of the debtor or creditor. Still, questions may arise in relation to legislations that do not provide for the doctrine of force majeure as is the case of the German Civil Code (Bürgerliches Gesetzbuch, 1896), Swiss Civil Code (Zivilgesetzbuch, 1907), Portuguese Civil Code (Código Civil, 1966) etc. In this context, the role of courts would be decisive in the interpretation of this term, although it is not sufficient. So that, a specific clause should be provided for in the contract that would regulate this term and the list of events, which would fall under the term of force majeure and conditions of contractual enforcement in any of provided circumstances. The doctrine underlines the importance of including the force majeure clause in contracts, which should provide comprehensive details related to the circumstances relevant for the contract. These details should consider any external events, which might affect the performance of the contract, as development of the market or the location of performance. Such clause would ensure that specific events or circumstances will be considered as force majeure (Augenblick & Rousseau, 2012). If such a clause is not provided for in the contract, then it would be necessary to make an interpretation of terms of the contract in accordance with the general principles available and the relevant legal provisions of the civil law of the respective country.

Special attention must be paid to the doctrine that addresses this subject, given the theoretical differences of the meaning used for the term of force majeure. An eloquent example in this sense is the Romanian civil law, which still does not differentiate between force majeure and fortuitous case, which is based on subjective and objective theory, depending on the exteriority of the event. (Pop, 1996, p. 346)

3. Distinctive particularities of force majeure for intellectual property contracts

In general, a force majeure circumstance or event should be extraordinary, unpredictable, unavoidable, and non-faulty, although these conditions differ in foreign legislations. In most legal systems, these particularities must be combined cumulatively, so that a particular event to be considered a force majeure circumstance, which will differentiate it of hardship or frustration, as we shall see.

According to the Article 904 of the Civil Code of the Republic of Moldova, the force majeure should meet the following conditions: there should be an impediment, it should be out of the debtor's control, the impediment is unpredictable and the impediment and its effects are unavoidable.

3.1. Existence of the impediment

Usually, force majeure or clauses regulating the impediment out the control of the party, contain a list of exemplary events that are considered to be force majeure. Such circumstances or events could include natural phenomena (e.g. floods, earthquakes, fires, etc.), decisions of states/public authorities (e.g. state of emergency, security measures, restriction measures, economic sanctions applied to states, etc.) or acts of third parties (e.g. strikes, riots etc.), which were not known at the moment of the conclusion of the contract.

The current research will focus mainly on analysing pandemics, as well as wars, since these are the most recent circumstances, which affected the entire world.

3.1.1 Pandemic as force majeure circumstance

Although, wars are usually mentioned in this kind of lists, pandemics or epidemics are rarely listed as a separate case group, especially this was the case at the beginning of the pandemic. If pandemics or epidemics are not expressly listed in the force majeure clause or otherwise provided in the contract, parties shall analyse whether such pandemics are covered by the general definition of force majeure events (which can be found in the force majeure clause) or fall under any other category of circumstance specifically identified. Emergency measures to combat pandemics or contain an outbreak can be listed or fall under general conditions such as disturbances, quarantines, blockages or government orders.

Outbreaks of disease or epidemics could be in principle interpreted as force majeure circumstance. For example, the existing relevant case law in France on disease and epidemics tends to consider that previous health crisis, as plague bacillus, the H1N1 flu epidemics, the dengue virus or the chikungunya virus are not force majeure events, considering that either those diseases were known, as well as their risks of dissemination and effects on health, or that they were not (enough) fatal and therefore ruled out that they can be invoked to refuse to perform a contract. An epidemic is therefore not necessarily or automatically a case of force majeure. However, in the case of Covid-19, the situation is completely different.

The scale and gravity of the phenomenon include explicitly the Covid 19 in the list of force majeure circumstances, which is characterised by the high number of illnesses and deaths from this virus in a very short period. This phenomenon led to the declaration of the World Health Organization (WHO) on 30 January 2020, which recognised the epidemic of Covid 19 as pandemic, considering its effects at international level on public health. In this context, unprecedented measures, including on contractual relationships, were taken by national authorities in all countries, which clearly demonstrate the unprecedented and dramatic nature of the situation. Among such measures are the *Law Decree of the Italian Government on strengthening measures of the National Health Service and economic support for families, workers and businesses in relation to the COVID-19 epidemiological emergency*; the *German Law to mitigate the consequences of the COVID-19 pandemic in civil, insolvency and criminal procedure*; the *Coronavirus Act 2020 of the Parliament of England and Wales*, which imposed a moratorium on commercial landlords' ability to evict non-paying tenants etc.

However, at the beginning of the pandemic it could be certainly stated that this is a force majeure circumstance, especially following several decisions of national authorities to declare state of health emergency and limitation of travel, which made it difficult to execute numerous contracts at national and international level. However, the Pandemic is already in its second year and governments, as well as the private sector have gradually adapted to new conditions and resumed/continued much of the previous contracts or concluded new ones. In this case, the Pandemic cannot be considered as being unpredictable circumstance anymore. So that, parties of a contract have a certain predictability and can provide more accurately the conditions of the performance of the contract during the Covid 19 Pandemic.

However, in practice the contractual conditions, the national legislation, and in particular the stage of development of the pandemic situation (the state measures in force) must be well analysed as a whole, in order to determine if the contract obligations can be suspended / terminated based on the force majeure argument.

At the same time, in the context of pandemic, special consideration should be given to the manner in which the clauses are regulated in intellectual property contracts, in particular of license. The coronavirus pandemic serves to highlight the importance of including a most favoured licensee clause and a robust enforcement provision in a non-exclusive intellectual property license for products that may be vital in a public health emergency. During pandemic, owners of intellectual property on medical equipment, personal protective equipment, drugs, vaccine technology, and diagnostic tests may face pressure to license their patents at low or no cost or refrain from enforcing their patents (Collins, 2020). For instance, a patent owner who filed an infringement suit against a company that was developing coronavirus tests ended up having to offer a royalty-free license for pandemic-related uses (Davis, 2020). Also noted is the fact that Gilead Sciences Inc., maker of the experimental antiviral drug Remdesivir (originally targeted at Ebola but found to have potential in treating the coronavirus), abandoned its bid for orphan drug exclusivity after critics accused it of trying to profit from the pandemic (Collins, 2020).

3.1.2 War as force majeure circumstance

The term of war is clearly defined by international public law, as well as relevant conventions in this area (*Convention respecting the laws and customs of war on land and its annex*, 1907), correspondingly it would not indicate any question marks. However, taken into account the developments in last decades in starting of wars and their format, especially the most recent war in Ukraine, consideration should be given to clarify this term and adapt current contractual clauses.

There is no common definition of the term "war" in the international public law, however, it should involve a violent struggle through the application of armed force; use of armed forces, not private individuals; and war between states, not an internal civil war. At the same time, one should consider that armed conflicts since the second world war have many differences from those which occurred before 1945 (McKendrick, 1995, p. 154). The interpretation of this term is given in the Article 1 of the *Hague Convention respecting the laws and customs of war on land and its annex: Regulations concerning the laws and customs of war on land* of 18 October 1907, which specifies that in case of any hostilities between countries, previous and unequivocal alerts shall be provided in the form of declaration of war or ultimatum. However, as we may see in the last decades, almost all armed conflicts are initiated/held with other pseudonymous, than war and correspondingly no prior declaration or ultimatum is given. E.g. fighting in Korea or Vietnam in the 1950s and 1960s, armed conflict between Turkey and Cyprus, blockade of Iraq in 1990, invasion of Kuwait by Iraq in 1990, Turkish invasion of Cyprus in 1974, or newly war or so called "military operation" in Ukraine 2022 etc. So that, in interpreting the force majeure clause in contractual relations, the term "war" should be used in conjunction with other terms as "warlike events", "armed hostilities", "military operations" etc. In addition, in civil law, the term of war

should be interpreted in relation to its effects on the performability of contractual obligations, regardless of official declaration of wars.

In the context of wars, questions could arise on whether specific measures undertaken by a particular country in relation to this war could be interpreted as force majeure circumstances. E.g. the declaration of the state of emergency by the *Decision of the Parliament of the Republic of Moldova no. 41 of 24/02/2022* in relation to the start of the war in Ukraine, which introduced special rules for the use of telecommunications, the fight against misinformation, false news and hate speech. Following this Decision, few national websites were banned, since false information incited hatred in relation to the war in Ukraine. Another example are numerous sanctions adopted by the European Union or other countries to Russian Federation in relation to the war in Ukraine. As a result, several foreign companies have ceased / suspended their activities in the Russian Federation, many of them using intellectual property contracts. E.g. the franchising in the case of McDonalds restaurants, which were closed or cessation of broadcasting of Netflix channel. If these decisions affect directly the execution of intellectual property contracts, could they be considered as force majeure circumstance? The answer lies in the formulation of the force majeure clause of the contract and if such circumstances are expressly provided in the list of events. If such circumstances are not included in the list of force majeure events, than the interpretation should follow the analysis of the general provisions of the contract and the relevant legal framework.

At the same time, considerations should be given to the Directive 2001/29/EC (EC, 2001) on the harmonisation of certain aspects of copyright and related rights in the information society, which regulates an exhaustive list of exceptions or limitations to the copyright rights. Among others, such exceptions and limitations could be invoked for the purposes of public security. However, the system of the exceptions and limitations cannot be deemed as fully harmonised in the European Union. In such circumstances, the lack of legal certainty is being cured by the caselaw of the Court of Justice. It is difficult to overestimate the importance of the Court's activities in interpreting the relevant provisions of European Union law, developing autonomous concepts with the ultimate aim of striking a fair balance between the interests of the creators and right holders, on the one hand, and those of the users of the protected works, on the other (Soroka, 2021, p.41).

An important aspect to be tackled when speaking about wars as force majeure is the information, which becomes highly disseminated and disputed and, in many cases, used as mean of public manipulation. A particular effective dissemination method constitutes the social networks and forums. In this case, questions may arise in respect to whether the information may or not be considered intellectual property. In this context, the doctrine specifies that although most of information has no intellectual content and is exclusively informational, the content of users in the form of messages on forums or social networks may contain a certain intellectual product and, in this sense, may become subject to copyright with a certain licensing regime for their users, being an exception, rather than the general rule of the content of the information in the virtual space (Cimil & Plotnic, 2021, p. 5). So that, if during a war the disseminated information violates any intellectual property rights, the force majeure conditions could be invoked, if all particularities of force majeure are met.

3.2. The impediment should be out of the debtor's control

This criterion refers to the capacity of the contract's party to control the occurrence of the event or circumstance.

> "Beyond control" would seem to emphasise that a party is not to escape liability for merely defective performance, such as non-conformity, or for what is done by his/her servants and employees (McKendrick E, 1995, p. 279).

Art. 904 of the Civil code of the Republic of Moldova provides that each contracting party has a "sphere of control", activities and relations with third parties on which it can influence either immediately or in advance, by undertaking organization or prevention measures.

> If the event falls within the control of the debtor, art. 904 paragraph (1) refuses to recognize it as justification. If the event falls within the control of the creditor, art. 903 letter b) qualifies it as "late creditor" (*mora creditoris*) and thus justifies the debtor (Cazac, 2020).

For instance, if the author of a book did not receive the advance payment for writing the book due to SWIFT disconnection sanctions imposed on the country where the publishing company is based (if it is a condition of the advance payment according to the terms of the contract), then the debtor is entitled to suspend execution of the contract until it receives this advance payment. In contrast, the damage of the author's computer, which impeded him/her to write the book on agreed deadlines, even if it was unpredictable and unavoidable, is an aspect that falls within the control of the debtor and therefore cannot be considered a case of force majeure.

However, questions may arise in cases when the non-performance is due to personal reasons, for instance the illness of the debtor. In this case, the illness might be considered a force majeure when the debtor should personally perform the obligation, as writing a book. In other cases, the illness should not be considered a force majeure circumstance. (McKendrick, 1995, p. 24).

Thus, the debtor's sphere of control is the one over which he/she has a personal responsibility, such as his/her financial condition or personal circumstances, which he can influence.

3.3. The impediment is unpredictable

Unpredictability is the impossibility of predicting an event or circumstance. This criterion has an objective and absolute character, since the impossibility of predicting is restricted to events which, although could be predictable, are still very rare and, by their nature, extraordinary (Baieș et al., 2005, p. 435).

The predictability presupposes the maximum diligence and prudence that a person is capable of in order to prevent an event, the only relatively unpredictable circumstance shall not constitute a case of force majeure (Amarița, 2006 a, p. 48).

In this case it would be recommended to apply the test of un-foreseeability at the time of concluding the contract, considering the condition in which it was signed (McKendrick, 1995,

p.24). In addition, the exhaustion of all reasonable efforts to prevent the non-performance should be demonstrated. The doctrine comperes this test with the application of the 'negligence' test, where the non-performing party cannot expect to be released from liability.

”The test of 'negligence' among others signifies that, if an event is expected, or it should have reasonably been foreseen, a party should take all necessary measures to prevent its disruptive effects on the contract” (Firoozmand, 2006, p. 56).

An eloquent example of unpredictability is the Pandemic with Covid 19, namely at the time of the first cases of Covid 19 in China, it was predictable that this virus would spread, but the speed of its spread and its magnitude / geographical coverage were not predictable. In contrast, according to the Article 904 of the Civil Code of the republic of Moldova “the non-performance is not justified if the debtor could reasonably have considered the impediment at the date of concluding the contract”. For example, the deployment of military troops by a country along the border of another country would be a clear sign that an armed conflict would follow in the near future, and therefore a possible war is foreseeable (Convention respecting the laws and customs of war on land and its annex: Regulations concerning the laws and customs of war on land, 1907).

3.4. The impediment is unavoidable

In general terms, the debtor must have the capacity and possibility to take any action or measure to avoid the risk of force majeure. The unavoidability is the lack of any possibility to prevent the production of the event or circumstance, as well as to prevent its damaging effects (Baieș et al., 2005, p. 436).

For instance, the author of a computer program must save a copy of it, in case the computer is damaged, in order to avoid losing the product he/she worked on for a company. At the same time, the debtor cannot be expected to take precautionary measures disproportionate to the risk (e.g. enter the fire to save the manuscript written for a publishing company) or to use illegal means (e.g. in case of contract between a bookstore with a publishing company to sell a certain number of books in a certain period, the bookstore owner keeps it open during pandemic restrictions, which obliged bookstores to close.) (Cazac, 2020). However, consideration should be given to the fact that ”there is room for some proportionality in assessing the impossibility. While one can be required to exhaust one’s fortune to perform a contract, one is not usually required to endanger one’s life” (McKendrick, 1995, p. 25). So that, this aspect should be analysed separately, depending on all circumstances of the case.

3.5. Force majeure versus hardship

When analysing the particularities of force majeure, differences between the hardship and force majeure should be considered. The hardship or the exceptional change of circumstances, as defined in the Article 1085 of the Civil Code of the Republic of Moldova, ”is performance of the obligation even when the benefit became more onerous because the cost of execution increased or the value of the other benefit decreased”. For instance, many licenses provide the obligation to pay royalties. In most cases, these are calculated by reference to production or sales and so a reduced volume of sales by the licensee will mean a corresponding reduction in the required royalty payment. In case of the reduction in sales, the licensee would

not have enough income to cover fixed or unavoidable costs, so that the licensee might be forced to require the amendment of the contract.

Whereas force majeure is considered as an adequate way to designate the complete impossibility situation, there is no generally admitted term in the various European legal systems for the hardship situation. This leads to much confusion, since both institutions have similarities and differences (Bar et al., 1998, p. 328). Their common element is unpredictability. As for the differences, they refer to:

- insurmountability: while the event of hardship makes much more onerous the execution of the obligation by one of the parties, the event of force majeure usually attracts the impossibility of executing the contract;
- the purpose of the institution: the invocation of the situation aims to adjust the contract to the new circumstances, so that the losses are fairly borne by both parties, while in case of force majeure the purpose is to regulate the suspension or termination of the contract and exonerate the incapable party from liability (Băieșu, 2020, p. 22).

However, the line between these situations is sometimes quite vague. There are circumstances when it is quite complicated to qualify an event. In these situations, the party affected by the event will decide on the legal means to use. If the party to the contract seeks to justify the non-performance of the service and, where appropriate, to terminate the contractual relationship, it will invoke force majeure. If, the party seeks to adjust the contract to allow its continued existence, it will invoke the hardship (Băieșu, 2020, p. 22).

4. Conditions of performance of the intellectual property contracts during force majeure.

The performance of the intellectual property contracts take place under the national legislation governing the contract, as well as international standards in this area, as the *Act relating to the Berne Convention for the Protection of Literary and Artistic Works* of 24/07/1979; *TRIPS Agreement*, which came into effect on 1/01/1995; *Rome Convention for the Protection of performers, Producers of Phonograms and Broadcasting Organisations* of 26/10/1961; *WIPO conventions* of 14/07/1967.

Usually, contracts include a clause referring to force majeure and the manner of performance of the contract. These clauses should be interpreted in relation to the provisions of national legislation. In general, one or both parties of the intellectual property contract could encounter a circumstance of force majeure, which impedes temporarily or permanently the performance of contractual duties.

The effects of force majeure manifest differently depending on the duration of the event. So that, the suspensive effect occurs in case of an unpredictable short-term event, and the extinctive effect occurs in case of an event that prevents the contract from running for a long period (Amarița, 2006 b, p. 40).

In this context, the duty should be suspended if there is a temporary force majeure (e.g. Netflix suspended its streaming service in a country during a war as sanctioning measure or the licensees coming to the end of the term cannot be extended during the force majeure event, considering that economical circuit and/or logistical transportation have

temporarily collapsed, or the supply chain was disrupted) or extinguished in case of permanent force majeure (e.g. in case of assignment of the copyright on the photographic works cannot be executed in case the films burned in a fire or a licensor will not be able to maintain its trademark due to the multitude of counterfeit or poor quality products that are highly required during the force majeure event). At the same time, the doctrine underlines the importance of distinction, in this respect, between the obligation of results, under which the obligor was strictly liable for non-performance and the obligation of means, which contains only an obligation to use best efforts (Bar et al., 1998, p. 345), which determines as well the way the obligation is performed during the force majeure event.

The Civil Code of the Republic of Moldova provides at the Article 904 para 3 that ”where the justification impediment is only temporary, the justification shall have effect for the duration of the impediment. However, if the delay acquires the essential features of non-enforcement, the creditor may have recourse to legal defence based on such non-enforcement”. At the same time, para 4 mentions tha ”if the justification impediment is permanent, the obligation shall be extinguished. The correlative obligation is also extinguished. In the case of contractual obligations, the restitute effects of this termination are regulated by the provisions of art. 926-932 of Civil Code, which applies accordingly”. In addition, para 6 states that "the impediment justifying does not exempt the debtor from paying compensation if the impediment arose after the non-performance of the obligation, unless the creditor could not, however, benefit from the performance of the obligation due to the impediment."

In the absence of force majeure clause in contracts, the interpretation of whether or not a particular circumstance or event is force majeure, will be based exclusively on national civil provisions. In case of international contracts, the interpretation of whether or not a particular circumstance or event is force majeure will be based exclusively on national rules, and in the case of international contracts the law of the country governing the contract. In international cases, the governing law should be determined based on the *EU Regulation No 593/2008 on the law applicable to contractual obligations (“Rome I”).*

In case, a force majeure circumstance occurred, neither the claim for compensation/reimbursement of expenses, nor unilateral termination of the contract could be automatically applied, since a prior notification of the other party shall be made. In this context, the Moldovan Civil code provides at Article 904 para 4 that ”the debtor has an obligation to ensure that the creditor receives a notice of impediment and its effects on his/her ability to perform, within a reasonable time after the debtor has known or should have known of these circumstances. The creditor is entitled to compensation for any damage resulting from failure to receive such notification”.

Such obligation is also provided in the Article III.–3:104 of the *Principles, definitions and model rules of European private law* and Article 7.1.7(g) (UNIDROIT, 2009). As specified in the doctrine, the notification is a logic and straightforward duty which provides the creditor the possibility to contribute with reasonable and available mitigation measures (Augenblick & Rousseau, 2012). ”The notification of the event of force majeure must be made as soon as possible so that the contracting parties can take all necessary measures to reduce its effects. It is also

recommended, to remove any possibility of future disagreement, and the contractual clause should give sufficient details regarding the following issues:

- The person or authority to which the notice is required to be given;
- The form of notice, as well as means of its service" (Firoozmand, 2006, p. 190).

So that, the notification can be made, according to the contractual provisions, by telephone, telex, telegram or registered letter, the parties agreeing on the term in which the notification must be made. "The term shall run from the moment the injured party becomes aware of the occurrence of the event" (Amariţa, 2006a, p. 48). Notification obligations must be taken seriously. If the notification is not made or if the notification is delayed, there is a risk that the supplier will no longer be able to invoke force majeure to be released from the delivery obligations, at least temporarily.

At the same time, parties who are restricted in their activities and in their ability to fulfil their obligations by the force majeure circumstance or event should document their performance and / or inability to communicate with their contractual partner (s)[1] as soon as the performance becomes impossible for them, even if the impossibility is only temporary.

With regard to the prove of force majeure, this may be done after the notification, as the contractors are interested in acting with maximum efficiency. The evidence regarding the case of force majeure could be the documents issued by the authorities (Institute of Meteorology, Railway Company, Police), which certify the occurrence of the force majeure event. In addition, certain official actions/measures undertaken by authorities, such as declaration of the state of health emergency in a certain territory, interruption or limitation of traffic / travel, banning the organization of major events, etc. should be considered. An eloquent example in this respect is the Decision no 55 of 17/03/2020 of the Parliament of the Republic of Moldova on declaring the state of emergency in relation to the spread of the Covid 19.

As a legal consequence, the parties should be released of their obligation to execute temporarily or permanently the contract. So that, three legal consequences would be possible:

- The contract will be terminated;
- The contractual obligations will be suspended for the period of force majeure circumstance and resumed when the circumstance ends;
- The contractual obligations are suspended for the period of force majeure circumstance and if it continues for a longer period, either party has the right to terminate the contract.

In the process of execution of intellectual property contracts, questions may arise in respect to the intellectual property rights holders who are imposed by the force majeure circumstances to act in a particular way, other than provided in the contract. For instance, the licensor is bowed to pressure to license to other parties a technology that is vital in a public health emergency at a lower royalty rate or even for free or the licensor's technology is subjected to compulsory patent licensing during a public health emergency in a country that has such provisions. In this context, the doctrine

[1] E.g. dates/times of any communication, as phone calls, emails, bills of loading, purchase orders, letters of credit, etc. which would demonstrate the impossibility to execute the contract.

recommends to provide such risks during licensing negotiation, and if necessary, cover them in the licensing agreement. Furthermore, during the urgent medical research and experimental use of drugs that may occur during a pandemic, counsel for life sciences companies also need to be aware of strategic patenting tactics that may be used to obtain leverage in licensing negotiations (Collins, 2020).

However, national civil legislations of other countries could provide different provisions related to such consequences, which are important to be known for intellectual property contracts with an element of foreignness. In this case, of course, aspects of territoriality and the choice of law are important to be determined for each intellectual property contract. In addition, considerations should be given to the fact that "as a rule, a country's copyright law has no effect outside its territory, its copyright law will also be the only one that has effect inside its territory – at least so long as other countries follow the same rule. Since the relevant choice of law rule for copyright infringement calls for application of the law in force in the place where the infringement occurred, territoriality implies that the law governing an infringement will in most, if not all cases, be the law of the country where the infringement occurred" (Goldstein, 2001, p. 61). So that, below, general provisions and considerations related to the force majeure of other legislations to be applied eventually to intellectual property contracts with foreignness elements are offered.

For instance, according to the general provisions of Articles 106 - 119 of the Swiss Civil Code (Schweizerisches Zivilgesetzbuch, 1907), unless otherwise contractually agreed), both parties shall be immediately released from their respective obligations in the event of force majeure. In the case of long-term international contracts, however, force majeure usually only has a suspensive effect, at least initially. In the event of default by one party, the other party can set a reasonable deadline for performance (unless it is pointless or there is a specific time). If no service is provided during this period, the other party can withdraw from the contract. In the event of a party withdrawing, all payments or other services must be reimbursed. However, no damages are owed if a party has not acted at fault. This will usually be the case if one party was unable to perform the contract due to the Covid pandemic. If the performance becomes permanently impossible, for example because the event agreed for a certain date cannot take place due to official prohibitions, the obligation under the contract will be cancelled. The parties will be released from their unfulfilled obligations and will have to reimburse what they have already received.

According to the general provisions of the Art 275 of the German Civil Code (Bürgerliches Gesetzbuch, 1896), the performance of the obligations under a contract is excused to the extent that it is impossible for the responsible party or for any other person to perform the obligation. In addition, the responsible party may also refuse to perform its contractual obligations to the extent that unreasonable expenses and effort are necessary. At the same time, Section 313 provides that if the basic contractual circumstances have significantly changed, the contract may be amended (if possible) or terminated if one of the parties cannot reasonably be expected to execute the contract. The party claiming force majeure relief shall prove that he/she took all necessary and reasonable steps to avoid the effects of the force majeure event.

The Art 1218 of the French Civil Code (Code Civile Français, 1804) provides that the obligation to execute the contract is suspended if the impediment is temporary, unless the resulting delay would justify the termination of the contract. And, the contract will be terminated in case the impediment is permanent, and the parties are free from their obligations following the conditions provided in article 1351.

The Art 1351 of the Romanian Civil code (Civil Code of the Romania, 2009) provides force majeure and fortuitous case as grounds for exoneration from liability. The Article specifies that force majeure is any external event, unpredictable, absolutely invincible and inevitable, at the same time, the fortuitous event is an event that cannot be foreseen or prevented by the person who would have been called to answer if the event had not occurred. In both cases, the debtor is exonerated of his/her obligation.

Although the Italian Civil Code (Civil Code of the Italian Republic, 1941) doesn't provide the force majeure, the general provisions at Section 1256 regulate that the debtor's obligation expires when the performance becomes impossible in case of a circumstance for which the debtor is not responsible. At the same time, the debtor could not be held responsible for the delay in execution of contract when the impossibility is temporary and it lasts. If the debtor can no longer perform the obligation in relation to its title or nature or the creditor is no longer interested in receiving the service, the obligation shall be extinguished. At the same time, the *Law Decree of the Italian Government no. 18/2020 on strengthening measures of the National Health Service and economic support for families, workers and businesses in relation to the COVID-19 epidemiological emergency* makes specific reference to COVID-19, and provides as follows: "the debtor's respect for the measures relating to the containment of COVID-19 will be taken into account for the purposes of determining exclusion of liability, pursuant to Articles 1218 and 1223 of Civil Code, even with regard to any waivers or penalties relating to delayed or omitted performance.

The Article 416 para 1 of the Civil Code of the Russian Federation (1994) provides force majeure in general terms without providing any legal particularities. It states that an obligation is terminated by the impossibility of performance if it is caused by a circumstance that has occurred after the obligation has arisen, for which neither party is responsible.

The force majeure is not defined at all by the England and Wales law. In this context, it is up to the parties to provide specific contractual clauses in this respect, which will define the term and its consequences. However, each clause will be interpreted by Courts on a case-by-case basis to see whether the wording covers the specific circumstance and its impact on performance of contracts. In this context, consideration should be given to the English doctrine and courts practice, which have developed a number of rules that influence the way the patent claims are interpreted. The more important of these provides that a patent specification must be read as a whole; that the description and drawings shall be used to interpret the claims; that the claims must be interpreted as a part of the entire document and that the court can hear the expert evidence on the meaning of technical terms. (…) Moreover, the patent document is read from the point of view of a person skilled in the art and is understood according to the common general knowledge available at the time of its publication (Bently & Sherman, 2003, p. 499).

Conclusions and recommendations for future regulation of intellectual property contracts

This research has sought to provide a general overview on the particularities of force majeure and performance of contracts in such circumstances. The study aimed to determine as far as possible the understanding of theoretical and practical aspects of force majeure impact on intellectual property contracts, based on general principles of civil law.

Following this analysis the general conclusion is that the force majeure requires a specific approach depending on each intellectual property contract wording in relation to circumstances occurred, depending on the legislation applied, contractual clauses, all developments, as well as measures taken by national authorities in this respect.

At the same time, the impact of force majeure intellectual property contracts is relative, since the party could be released temporarily or permanently of his/her obligation only if it will be demonstrated that all conditions are met, namely the existence of the event, that it was beyond the control of the party, that it was unpredictable and unavoidable. So that, there is no one model that would be applicable to all cases. A recommendation in this respect would be a detailed and comprehensive force majeure clause drafted for each intellectual property contract.

In conclusion, we can resume that in the XXI century the regulation of intellectual property contracts must be revised in conditions of new circumstances of force majeur, as intelectual property remains an important element that ensures technical and intellectual progress of civilization.

Acknowledgement: This paper is elaborated in the framework of the Jean Monnet Support to Associations in European Integration and Intellectual Property Protection Studies / EUPROIN, nr. ref. 611344-EPP-1-2019-1-MD-EPPJMO-SUPPA, implemented with financial support of the Erasmus+ programme of the European Union.
"The European Commission's support for the production of this publication does not constitute an endorsement of the contents, which reflect the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein"

References

Act relating to the Berne Convention for the Protection of Literary and Artistic Works (1979) of 24/07/1979. https://www.wipo.int/treaties/en/ip/berne/

Amarița, A. (2006a). Clauza de forţă majoră în dreptul comparat [Force majeure clause in comparative law], *Legea și viața*, 4.

Amarița, A. (2006b). Forţa majoră, frustration, hardship [Force majeure, frustration, hardship], *Legea si viata*, 5

Augenblick, M. & Rousseau, A.B. (2012, January 1), Force majeure in tumultuous times: impracticability as the new impossibility. It's not as easy to prove as you might believe, *The Journal of World Investment & Trade,* 13 (2012) https://www.pillsburylaw.com/images/content/3/9/v2/3990/BylinedArticleForceMajeureinTumultuousTimesJournalofWorldInvestm.pdf

Baieș, S., Cebotari, V., Crețu, I., Mîțu, G., Cazac, O., Brumă, S., Robu, O., Tabuncic, T. & Cara, A., (2005). *Drepturi reale. Teoria general a obligaiilor* [Civil law, rights in rem. General theory of obligations], vol.II, Tipografia Centrală

Bar, C., Clive, E. & Schulte-Nöl, H, (1998). *Towards European Civil Code*, Second revised and expanded edition, Ars Aequi Libri – Nijmegan, Kluwer Law International

Băieșu, A., (2020). Soluţii juridice în situaţiile contractuale excepţionale: impreviziunea vs forţa majoră [Legal solutions in exceptional contractual situations: unpredictability vs. force majeure], *Revista națională de drept*, 1-3

Bently, L. & Sherman, B., (2003). *Intellectual property law*, Oxford University Press Inc.

Cimil, D & Plotnic, O., (2021). European Union view on Personal Data in Intellectual Property Rights, *Eastern European Journal of Regional Studies, 7*(1), 92-106.

Civil Code of the French Republic (1804), issued on 21/03/1804, version of 26/01/2022 https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000032041431/

Civil Code of the German Federal Republic (1896), issued on 18/08/1896, version of 2/01/2002, with last amendments of 21/12/2021 https://www.gesetze-im-internet.de/bgb/index.html

Civil Code of the Italian Republic (1942), issued on 16/03/1942 last version of 30/12/2022 https://www.altalex.com/documents/codici-altalex/2015/01/02/codice-civile

Civil Code of the Dutch(1992), version of 01/01/2022 https://wetten.overheid.nl/BWBR0005289/2022-01-01

Civil Code of the Portuguese Republic (1966), issued on 25/11/1966, version of 7/02/2022 https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?ficha=401&artigo_id=&nid=775&pagina=5&tabela=leis&nversao=&so_miolo

Civil Code of the Kingdom of Spain (1889), issued on 25/07/1889, version of 15/03/2022 https://www.boe.es/buscar/act.php?id=BOE-A-1889-4763

Civil Code of the Republic of Moldova (2002), issued on 02/02/2002, republished under Law no. 133 of 15.11.2018 https://www.legis.md/cautare/getResults?doc_id=110279&lang=ro#

Civil Code of the Romania (2009), issued on 17/07/2009, version of 4/02/2016 https://legislatie.just.ro/Public/DetaliiDocument/175630

Civil Code of the Russian Federation (1994), issued on 30/11/1994, version of 09/04/2022 https://www.zakonrf.info/gk/

Civil Code of the Swiss Confederation (1907), issued on 10/12/1907, version of 1/01/2022 https://www.fedlex.admin.ch/eli/cc/24/233_245_233/de

Collins, C., (2020). IP Licensing in the Age of Coronavirus. *The Lexis Practice Advisor Journal,* Summer 2020 https://www.lexisnexis.com/community/insights/legal/practical-guidance-journal/b/pa/posts/ip-licensing-in-the-age-of-coronavirus

Convention respecting the laws and customs of war on land and its annex: Regulations concerning the laws and customs of war on land (1907) issued on 18 October 1907 https://ihl-databases.icrc.org/ihl/INTRO/195

Coronavirus Act (2020) of the Parliament of England and Wales, issued in March 2020 https://www.legislation.gov.uk/ukpga/2020/7/contents

Decision of the Parliament of the Republic of Moldova on declaring the state of emergency no. 41 (2022) of 24/02/2022 https://www.legis.md/cautare/getResults?doc_id=130079&lang=ro

Davis, R., (2020). *How COVID-19 could shake up patent strategies.* Law360 https://www.law360.com/articles/1260795/how-covid-19-could-shake-up-patent-strategies

EC (2001). Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. European Parliament, Council of the European Union https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0029

Firoozmand, M.R., (2006). *The impact of supervening events on the performance of contractual obligations: the concept of force majeure in international petroleum contracts*, [Unpublished doctoral dissertation, University of Dundee]. https://ethos.bl.uk/OrderDetails.do?uin=uk.bl.ethos.569185

Goldstein, P., (2001). *International copyright. Principles, law, and practice*, Oxford University Press Inc.

Law Decree no. 18/2020 of the Italian Government on strengthening measures of the National Health Service and economic support for families, workers and businesses in relation to the COVID-19 epidemiological emergency of 17/03/2020 https://www.gazzettaufficiale.it/eli/id/2020/03/17/20G00034/sg

Law of the German Parliament to mitigate the consequences of the COVID-19 pandemic in civil, insolvency and criminal procedure (2020) issue on 27/03/2020 https://www.buzer.de/gesetz/13843/index.htm

Law on copyright and related rights no. 139 (2010) issued on 02/07/2010 https://www.legis.md/cautare/getResults?doc_id=4405&lang=ro

McKendrick, E., (1995). *Force majeure and frustration of contracts* (2nd edition), Informa Law from Routlege. https://www.auraleague.com/lpdf/contracts/Force-Majeure-and-Frustration-of-Contract%20-%20Deeksha%20s.pdf

Cazac, O., (2020), Articolul 904. *Justificarea datorită unui impediment* [2020, October 10]. Annotation at art. 904 of the Civil Code of the Republic of Moldova]. *Animus*. http://animus.md/adnotari/904/

Pop, L., (1996). *Drept civil. Teoria generală a obligațiilor* [Civil Law. General theory of obligations. Treaty]. Second edition, Fundația

UNIDROIT (2009). *Principles, Definitions and Model Rules of European Private Law*, III. – 3:104. http://www.transformacje.pl/wp-content/uploads/2012/12/european-private-law_en.pdf

Rome Convention for the Protection of performers, Producers of Phonograms and Broadcasting Organisations (1961), issued on 26/10/1961 https://www.wipo.int/treaties/en/ip/rome/

Soroca, N., (2021). Exceptions and limitations to copyright and related rights in the light of the caselaw of the Court of Justice of the European Union, *Eastern European Journal of Regional Studies*, 7(1), 26-43. DOI: https://doi.org/10.53486/2537-6179.7-1.02

TRIPS Agreement (1995), came into effect on 1/01/1995 https://unctad.org/system/files/official-document/edmmisc232add18_en.pdf

United Nations Convention on Contracts for the International Sale of Goods (1980) issued on 11/04/1980 signed in Vienna https://uncitral.un.org/sites/ uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf

WIPO conventions (1967) issued on 14/07/1967. https://www.wipo.int/treaties /en/notifications/convention/treaty_convention_36.html