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THE AFTER-INFRINGEMENT POSITION OF THE AGGRIEVED PARTY IN PORTUGUESE LAW: SUBJECT TO RESPOND FOR "CONTRIBUTORY WILFULNESS OR NEGLIGENCE", BUT NOT UNDER THE BURDEN OF "MITIGATION OF DAMAGES"

It is a frequent discussion to know if a legal system contemplates or not, and in the affirmative, in what extent, the concept of "mitigation of damages".

The topic is not abundantly treated in Portuguese doctrine and jurisprudence.

A look into Portuguese higher courts' decisions, which are the ones published and available for reading in a systematic basis, shows a substantial absence of development of the concept.

Once we change the searches from "mitigation of damages" to "contributory negligence" - which is the best comprehensive legal translation for the Portuguese expression "culpa do lesado"[1] - a substantial amount of cases suddenly appears mostly around tort liability involving car accidents.

In fact, the Portuguese Civil Code has a specific section devoted to the said concept:

> *Artigo 570.º*
> *(Culpa do lesado)*
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> *1. Quando um facto culposo do lesado tiver concorrido para a produção ou agravamento dos danos, cabe ao tribunal determinar, com base na gravidade das culpas de ambas as partes e nas consequências que delas resultaram, se a indemnização deve ser totalmente concedida, reduzida ou mesmo excluída.*
> *2. Se a responsabilidade se basear numa simples presunção de culpa, a culpa do lesado, na falta de disposição em contrário, exclui o dever de indemnizar.*
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> *Section 570.º*
> *(Contributory Negligence)*
>
> *1. When a fact caused by the aggrieved party has contributed for the production or increase of the damages, the court shall determine, based on the gravity of the infringing conducts of both parties and on the consequences which results from those conducts, if the indemnification must be fully awarded, reduced or even excluded.*
> *2. If the responsibility is based on a simple presumption of liability, contributory negligence, unless any provision established otherwise, excludes the right to indemnification.*

[1] Which literally translates as "liability of the aggrieved party".

This provision is often quoted by comparative legal analysts as an evidence that the Portuguese legal system contemplates, to a certain extent, the concept of mitigation of damages.

There is, in fact, a tendency to consider that, although the doctrine of mitigation is established in common-law jurisdictions and originally absent in the civil-law ones, these later have been evolved to introduce it in a certain portion and that the gateway for it are the pieces of legislation they have in the codes contemplating the concept of contributory negligence. Section 254 of the German Civil Code (BGB)[2], which wording, specially its paragraph 1, is significantly similar to the above transcribed Portuguese Civil Code provision[3], is often quoted in favour of this understanding and jurisdictions aligned with such civil-law matrix, like the Portuguese one, placed inside the group of those who supposedly embrace the same practical result of the mitigation doctrine.

It happens, however, that this is not the case.

As a matter of fact, nothing but the mere "contributory negligence", or to be more accurate, "contributory wilfulness or negligence", is established in the said provision of the Portuguese Civil Code and such provision does not grant the effects of the mitigation doctrine.

Indeed, "mitigation of damages" and "contributory wilfulness or negligence", despite its appearances, are different legal concepts.

"Contributory negligence" – in the way it is foreseen in Portuguese law and in most of civil-law jurisdictions – is a concept "born" in the tort liability legal atmosphere (although possible to apply to contractual liability too) which penalizes the aggrieved party in its right to receive compensation when such party has also contributed, and in a infringing manner, for the production or increase of amount of the damages. It is solidly established by Portuguese jurisprudence that such behaviour needs to be an "infringing behaviour", i.e., the aggrieved party incurs in contributory negligence, or in contributory wilfulness, should, by negligent or wilful acts or omissions, contributed to the event or damages[4].

The duty of "mitigation of damages" is something else. It is a new specific "obligational" framework which is generated as a consequence of the infringement, imposing upon the

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[2] *Section 254: Contributory negligence / (1) Where fault on the part of the injured person contributes to the occurrence of the damage, liability in damages as well as the extent of compensation to be paid depend on the circumstances, in particular to what extent the damage is caused mainly by one or the other party. (2) This also applies if the fault of the injured person is limited to failing to draw the attention of the obligor to the danger of unusually extensive damage, where the obligor neither was nor ought to have been aware of the danger, or to failing to avert or reduce the damage. The provision of section 278 applies with the necessary modifications.*

[3] The Portuguese Civil Code's main source of inspiration was indeed the BGB.

[4] Case law has been constant on this point for several decades. As examples, one can quote the Supreme Court judgment of 15.06.1989, case number 076061, and the Supreme Court judgment dated 17.10.2019, case number 15385/15.6T8LRS.L1.S1

aggrieved party the burden to take certain actions with the objective to minimize damages under the penalty of losing part, or even the integrity, of its rights to compensation.

One of the best sources to realize the precise borders and differences between the two concepts is the wording of the UNIDROIT Principles on International Commercial Contracts[5]. The said displays the two concepts in separate articles inside Section 4 (Damages), of Chapter 7 (Non-Performance), in a manner that clearly illustrates each of the concepts' purposes and effects:

> *ARTICLE 7.4.7 (Harm due in part to aggrieved party) Where the harm is due in part to an act or omission of the aggrieved party or to another event for which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties.*
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> *ARTICLE 7.4.8 (Mitigation of harm) (1) The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps. (2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm*

The concept of "Harm due in part to the aggrieved party" is what we have been describing as "contributory negligence or wilfulness" (the "culpa do lesado"). The provisions of article 7.4.7. of the UNIDROIT principles and section 570 of the Portuguese Civil Code, as one may note, are fundamentally similar.

"Mitigation of Harm", on its hand, corresponds to the concept of "mitigation of damages".

An aggrieved party will avoid incurring in "contributory wilfulness or negligence" simply by not producing an action or omission which is qualified as negligent or wilful. In principle, its simple quietude is enough for such purpose.

However, on legal regimes which contemplate the "mitigation of damages" ("of harm") doctrine or concept, the aggrieved party is "forced" to act should there are "reasonable steps" which are found suitable to minimize the damages. Those may exist even if no negligence or wilfulness is at stake. A non-action in those circumstances will lead to a failure to comply with a legally established burden and the compensation may be partially, or even totally, lost.

This is the reason why we mentioned earlier on this article that "mitigation of damages" consists in a new "obligational" framework which is generated by the infringement. The aggrieving party, despite infringing, "gains" a certain "right" to mitigation against the aggrieved party, who becomes burdened with it despite having suffered the infringement.

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[5] The version considered in this article is the one of the 2016 Edition.

The said post infringement new "obligational" relationship is well established in the UNIDROIT principles in such a manner that the provision addresses a second stage of that relationship when, after meeting its burden to mitigate, the aggrieved party becomes entitled to recover expenses from the aggrieving party. It is fundamental to note that the obligation to pay these expenses is not a direct consequence of the infringement anymore, but a normatively imposed consideration of the action of mitigation the aggrieved party took.

The presence of a mitigation of damages concept in a certain legislation, or its adoption by the parties through other instruments (soft law or alike), creates a much more complex post infringement relationship, which ceases to be a mere passive calculation of amounts of damages under the "theory of difference".

While under contributory negligence or wilfulness the aggrieved party is merely forbidden to infringe, under the mitigation doctrine it must take a proactive approach to defend its compensation and, if necessary, to advance effort and costs, which will be further compensated.

This often creates complex cases. Let us think, for instance, in a case where it is found reasonable that an aggrieved cargo owner tranships a cargo to avoid further damages. The said cargo owner is burdened to do so, otherwise it loses the portion of the damages that could have been avoided by that transhipment. Now imagine that, for reasons not attributable to it, the transhipment costs scale during the task for an amount which becomes even higher than the value of the damages it was supposed to avoid. Is the aggrieving party responsible for them? The apparently correct reply under the doctrine of mitigation is that it is, which would produce a final "bill" to the aggrieving party higher than the one that would have occurred without mitigation efforts.

Nothing of this complexity is present in the concept of "contributory negligence or wilfulness", the only one which, as pointed out above, is established in Portuguese law.

Can, nevertheless, certain aspect of the mitigation doctrine be enforceable in the Portuguese jurisdiction *via* other concepts?

Such would imply an extensive explanation and it can be a matter for a future article.

We may, however, advance that the prospects of such use are not high.

Portuguese case law and doctrine do not debate the topic significantly.

In theory, we find that debates may occur mostly around the causality analysis under the principle that the aggrieving party is only responsible for the damages which, on a judgment

of probability of adequate cause, one can attribute to its actions or omission[6]. In certain extreme cases, actions or inactions by the aggrieved party may be elected as an independent cause for certain damages and to set aside the aggrieving party's liability for that portion of them.

One can eventually also call the main principle of the bona-fide established in section 334 of the Portuguese Civil Code[7] to say that certain aggrieved party's actions or omissions would place it in a situation of substantial excess of the bona-fide principles should it claims damages which could have been avoided by the absence of those actions or omissions.

However, the above is reserved to very exceptional cases and stays short from the "mitigation of damages" concept and, above all, does not really extend significantly the scope of application of the "contributory wilfulness or negligence" (the "culpa do lesado" contained in section 570 of the Portuguese Civil Code).

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[6] Section 563 of the Portuguese Civil Code.

[7] Section 334 of the Portuguese Civil Code: "It is illegitimate the exercise of a right when the right's holder substantially exceeds the limits imposed by bona-fide, by good morals or by the social or economic purpose of such right".