Troubles in Paradise: travelling and the force Majeure defense

Jos Speybrouck
Knowledge Centre for Travel Law
President of arbitration board of the Travel Complaint Commission
Towards a framework for the legal and factual issues surrounding the notion of force majeure

Fortuna velut luna statu variabilis

O Fortune, like the moon you are changeable
The function of F.M

Input

Crisis, Catastrophe, Cataclysm, ...

Factual issues

Force Majeure

Legal criteria

Output

Consequences

?
The Non Imputability of the debtor

The Impossibility to perform the contract
The non-imputability:

Beyond control

Unwanted

Unavoidable

External

Non-imputable

Unusual

Unforeseeable

Impossible
<table>
<thead>
<tr>
<th>Criteria</th>
<th>The party is excused if:</th>
<th>+</th>
<th>-</th>
</tr>
</thead>
<tbody>
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<td><strong>Unwanted</strong></td>
<td>The party itself is not affirmatively the cause of the force majeure event</td>
<td>- earthquake, embargoes, war, hostilities</td>
<td>- overbooking</td>
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| **Beyond control** | 1. The party itself is not affirmatively the cause of the force majeure event  
2. By no reasonable measures could the event and its forthcoming consequences (the obstruction) have been prevented by the party                                                                                     |                                                                  |                                                                                                                                                                                                         |
| **Unavoidable** | The event and its forthcoming consequences must have been unavoidable                                                                                                           | - weather conditions (mist)                                   | - labor strike, bankruptcy of a supplier                                                                                                                                                                   |
| **External** | The party must have nothing to do with the event's happening                                                                                                                                                                                                                               | - terrorist attack                                            | - damage caused by hotel employee                                                                                                                                                                         |
| **Unusual** | The event, its forth coming consequences caused by unusual and unnatural consequences of external forces                                                                                                                                | - ash clouds, dead of a tour guide                            | - lower level of the Nile, hurricanes in Caribbean, weather conditions (Tsunami), Avalanches                                                                                                               |
| **Unforeseeable** | The party could not have predicted the event                                                                                                                                                                                                                                               |                                                                  |                                                                                                                                                                                                         |
No common notion of F.M. in the different laws concerning the rights of Travelers:

<table>
<thead>
<tr>
<th><strong>Law/Convention</strong></th>
<th><strong>Image</strong></th>
</tr>
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<tr>
<td>E.U.- Regulation 261/2004 on denied boarding, long delays and cancellation</td>
<td>![EU Flag]</td>
</tr>
<tr>
<td>Convention for the unification of certain rules for international carriage by air (Montreal Convention).</td>
<td>![UN Flag]</td>
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Check in what ‘travel relation’ (contract) the F.M. event occurs: package traveler rights, flight passenger rights …)
Definition of F.M. in the European Package Travel Directive (P.T.D.)

Principle of the P.T.D: Exclusion of liability in case of F.M. is accepted: liability of the tour operator in case of defective performance, unless e.g. a case of F.M. (consumer protection)
Definition of F.M.: “Unusual and unforeseeable circumstances beyond the control of the party by whom it is pleaded, the consequences of which could not have been avoided even if all due care had been exercised.” (art. 4, paragraph 6, b, (ii))
Definition of F.M. in the EU - Regulation 261/2004

- Denied boarding & long delays: No F.M. - defense

Reimbursement or rerouting + care taking + compensation (denied boarding)

- Flight- Cancellation: F.M. - defense possible
Article 5 on ‘flight- Cancellation’: “(3.) An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.”

<table>
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<th>unavoidable</th>
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<td>‘all reasonable measures’</td>
<td>‘extraordinary circumstances’</td>
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In the case Wallentin Vs Alitalia, the E.C.J ruled on the interpretation of this Article 5 on “technical and/or extraordinary circumstances”:

- any technical issues ≠ “extraordinary circumstances”
- it closed the loophole
- any carrier must prove that the alleged mechanical problem leading to the cancellation was:
  - ‘not inherent in the normal exercise of the activity of the air carrier concerned’
  - ‘beyond its actual control’ (confirmed in ECJ- Sturgeon case – C/432 -07).
Concept of F.M. in the Montreal Treaty

+ **Death and injury**: min. 100,000 SDR

- **Above 100,000 SDR**: due diligence defense → F.M. defense is possible (art. 21 § 2)

- **Equal or below 100,000 SDR**: strict liability

(S.D.R. = Special Drawing Rights / 1 SDR = 1.10990 €)
Concept of F.M. in the Montreal Treaty

+ Loss and destruction of baggage: max. 1.000 SDR
  - for registered luggage: strict liability, compensation restricted to 1.000 SDR
    → no F.M.- defense possible (art. 22 § 2)
  - for non-registered luggage: liability only if the damage is caused by the carrier
    → F.M.- defense is possible (art. 17 § 2)

+ Delay of passengers: max. 4.150 SDR

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures." (art. 19)
About the impossibility

+ From *absolute impossibility* towards a *commercial impracticability*

= This question focuses on cost. In spite of the exercise of all due care on part of the debtor, he could not have avoided except at the cost of excessive sacrifice.
How to deal with a still possible situation that may nevertheless be regarded as similar to a F.M. event?

1. Still possible ... but pointless and dangerous

There are situations where the contract is not impossible to perform but the performance would be pointless or dangerous

e.g. ...

In such cases, it depends:

+ on how the contract was presented in the brochure
+ of the events proximity in time and distance
+ if reference is possible to ‘Foreign office warnings’
2. Still possible ... but delayed

The consequences of force majeure depend upon the relevant circumstances. Often, force majeure will delay the performance of an obligation. In that event, the party whose performance has been delayed may be entitled to an extension of time for performance.

e.g. Package deal: the departing flight in the package is delayed by one day due to the fog at the airport. This delay is understandable (and desirable) in a two-week tour, but is probably useless for a weekend trip.
The consequences of F.M. in general

1) No compensation
   
   *ad impossibile nemo tenetur*

2) Pay back
   
   *res perit debitori*

3) Duty to notify

4) Duty of care

   + Duty of care in P.T.D.:

   + Duty of care in EU-regulation
The consequences of F.M. in European Travel law (P.T.D.)

Pre-departure problems
The consequences of F.M. in European Travel law (P.T.D.)

Pre-departure problems

Cancellation of the package by the organizer → the consumer is entitled:

- substitute package → - = - ↓ + refund difference in price

Or

- repayment (all sums paid)
The consequences of F.M. in European Travel law (P.T.D.)

Post-departure problems
The consequences of F.M. in European Travel law (P.T.D.)

Post-departure problems

possible: such arrangements have to be provided, at no extra costs

suitable alternative arrangements are:

impossible: equivalent transport back, at no extra costs