



ADR In the Aviation Sector and the Sector of Tour Operators



Troubles in Paradise: travelling and the force Majeure defense

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Towards a framework for the legal and factual issues surrounding the notion of force majeure



*Fortuna
velut luna
statu variabilis*

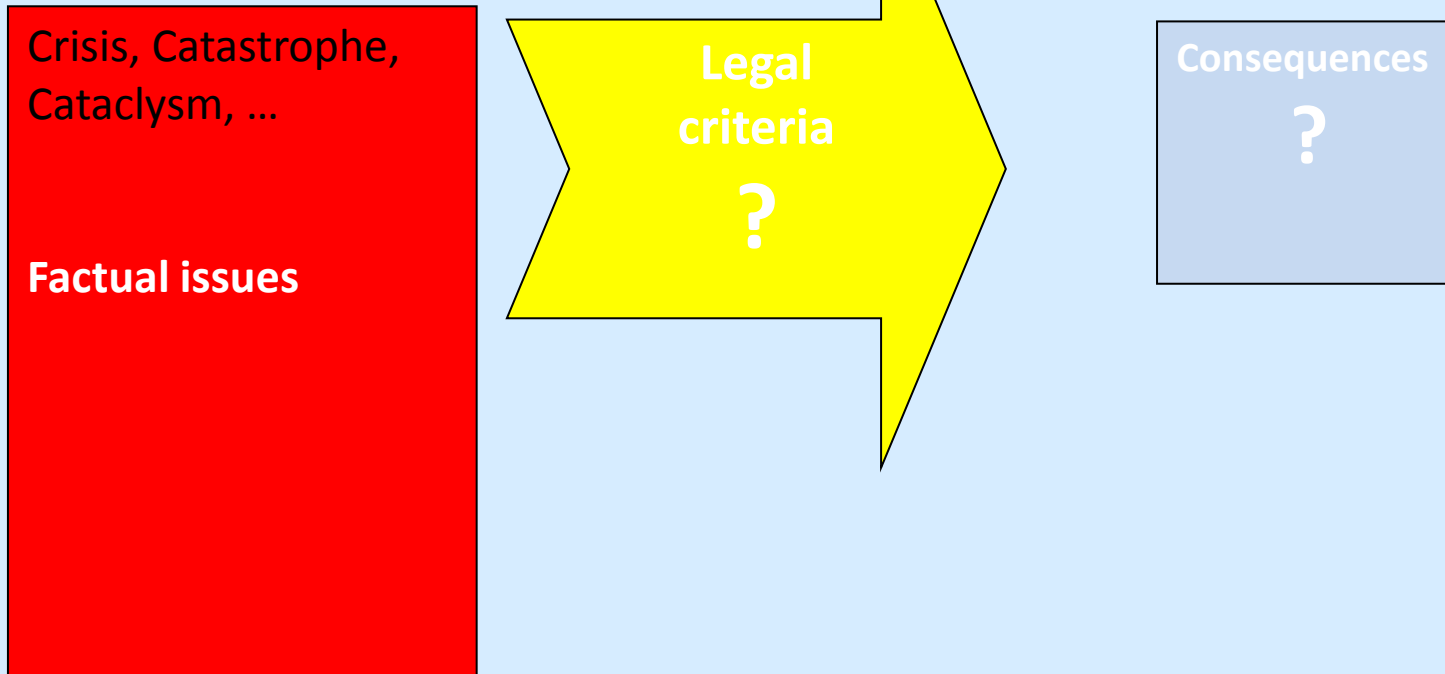
*O Fortune,
like the moon
you are changeable*

The function of F.M

Input

Force Majeure

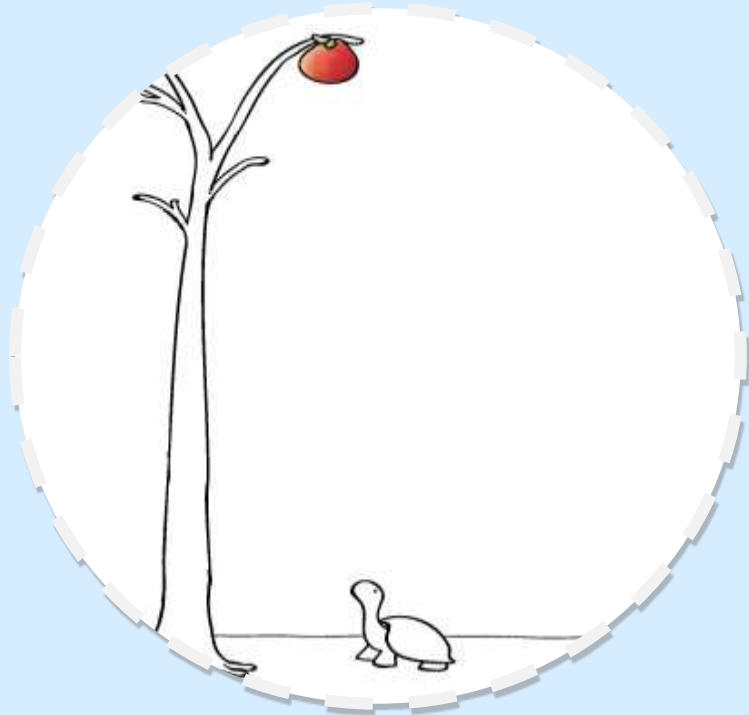
Output





The Non Imputability

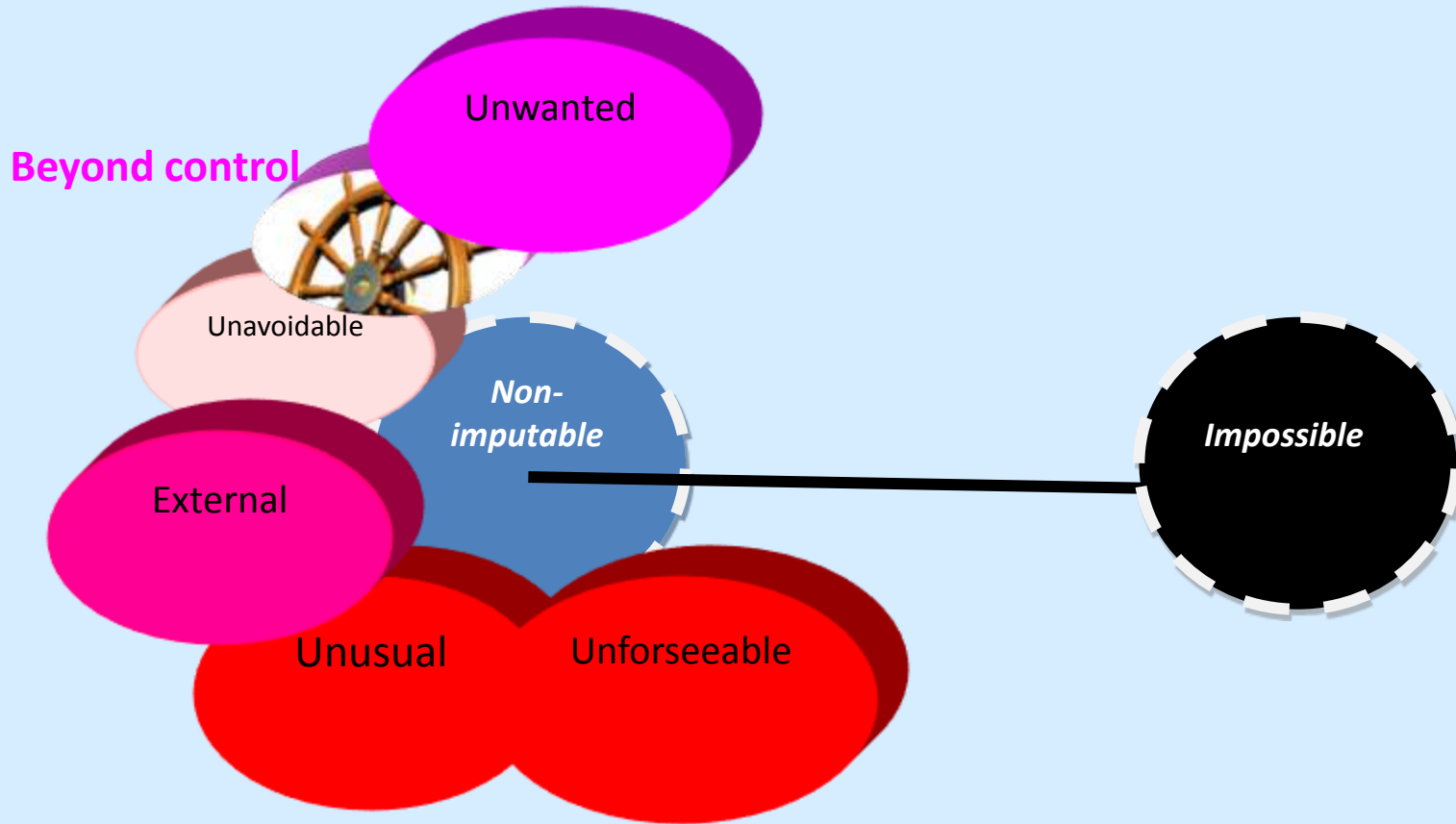
of the debtor



The Impossibility


to perform the contract

The non- imputability :



Criteria	The party is excused if:	+	-
Unwanted	<i>The party itself is not affirmatively the cause of the force majeure event</i>	- earthquake - embargoes, war, hostilities	- overbooking
Beyond control 	1. <i>The party itself is not affirmatively the cause of the force majeure event</i> 2. <i>By no reasonable measures the event and its forthcoming consequences (the obstruction) could have been prevented by the party</i>		
Unavoidable	<i>The event and its forthcoming consequences must have been unavoidable</i>	- weather conditions (mist)	- labor strike - bankruptcy of a supplier
External	<i>The event must have been external to the party's handling of the contract</i>	- terrorist attack	- damage caused by hotel employee
Unusual	<i>The event must be of an unusual nature, not a natural consequence of external forces</i>	- ash clouds - death of a tour guide	- lower level of the Nile - hurricanes in Caribbean - weather conditions (Tsunami) - Avalanches
Unforeseeable	<i>The party could not have predicted the event</i>		

No common notion of F.M. in the different laws concerning the rights of Travelers:

<p>Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (no harmonized implementation of the P.T.D.)</p>		
<p>E.U.- Regulation 261/2004 on denied boarding, long delays and cancellation</p>		
<p>Convention for the unification of certain rules for international carriage by air (Montreal Convention).</p>		

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. in the European Package Travel Directive (P.T.D.)



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))*

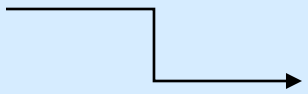


Beyond control	unavoidable	unusual	unforeseeable
event	consequences	event	

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."

unavoidable	unusual
'all reasonable measures'	'extraordinary circumstances'

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

(S

ense

: strict liability

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)

unavoidable

‘all reasonable measures’

About the impossibility

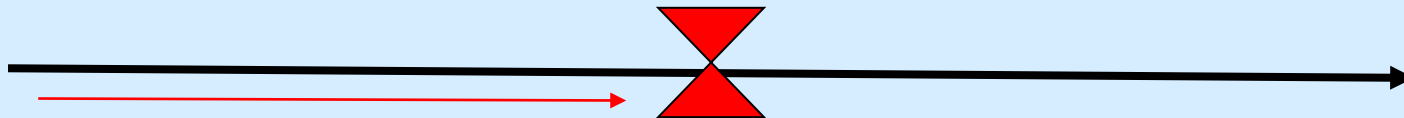
+ From '*absolute impossibility*' towards a '*commercial impracticability*'

= 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.

Absolute impossibility

Commercial impracticability

Economic hardship



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

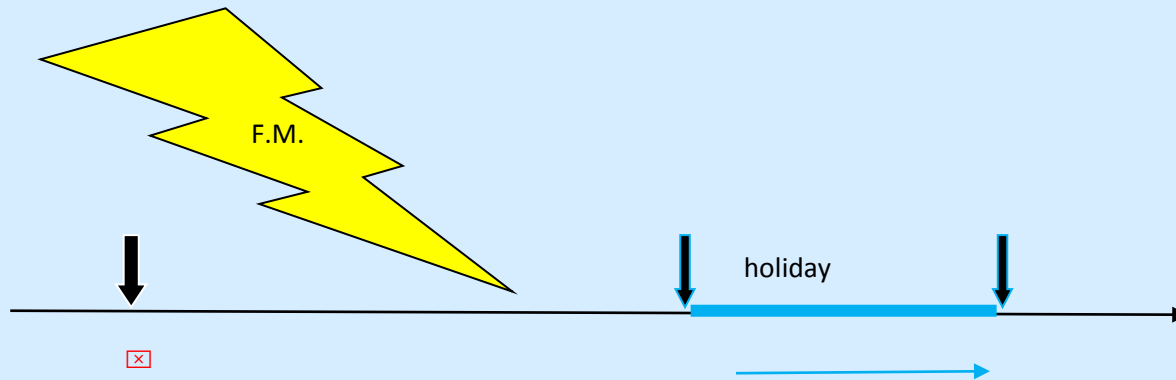
4) Duty of care

+ 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.)

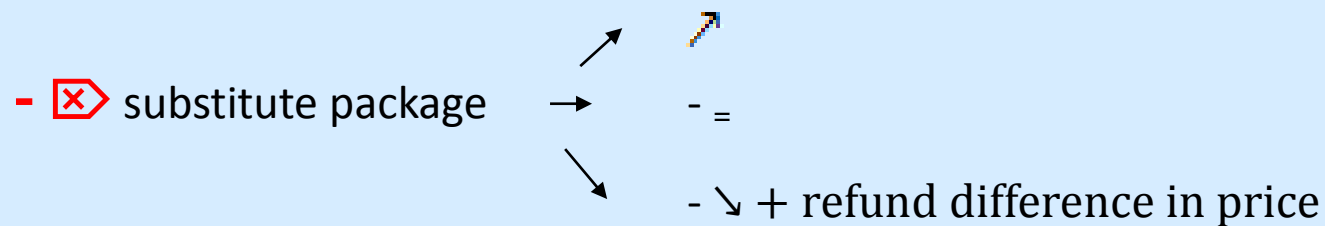
Pre- departure problems



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:

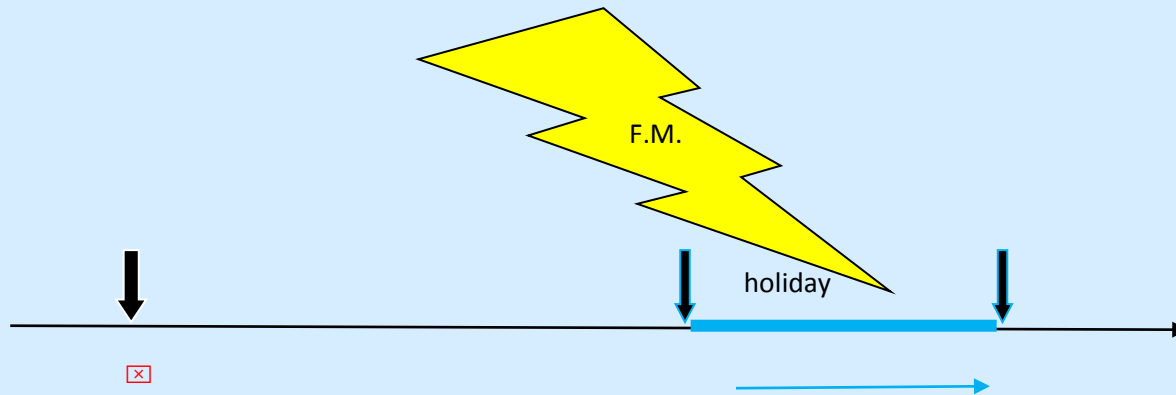


Or

-  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

suitable alternative arrangements  *are:*

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

Impossible: equivalent transport back, at no extra costs