

# THE INTERPRETATION OF “VIS MAJOR” IN MOTOR VEHICLE ACCIDENTS

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## INTRODUCTION

Force majeure is a general case of liability exemption in most European jurisdictions in particular in road traffic law.

After a brief historical remark, I would like to give an overview of regulations in some European countries and on the European scale.

### THE ORIGIN OF “VIS MAJOR”<sup>1</sup>

Servius Sulpicius (died 43 B.C.) is the first Roman jurist named in the sources who advocated the cases of vis major (force majeure) as an exception to the rule of strict liability. He defined the cases of liability exemption objectively: storms<sup>2</sup>, conflagration<sup>3</sup>, flooding<sup>4</sup> and piracy<sup>5,6</sup>.

During the ensuing period, two main criteria of force majeure are mentioned in Roman law: inevitability<sup>7</sup> and unpredictability<sup>8</sup> of the event. These criteria we find even today in almost all European jurisdictions: the party invoking force majeure may not be in the situation where it actually can avoid it and a foreseeable event may not be qualified as force majeure. Additionally we find as a common criterion the “non imputable” or “exterior” aspect of force majeure: force majeure may not be due to the fault of the person invoking it.

### VIS MAJOR IN THE ROAD TRAFFIC LAW OF SOME EUROPEAN COUNTRIES

#### A. France

- I. Before the law of 5 July 1985<sup>9</sup>, also known as Loi Badinter, was enacted, the rules governing the liability, following road traffic accidents, of drivers of land-based motorised vehicles were contained according to the „Arrêt Jand’heur“<sup>10</sup> of 1930 by the Cour de Cassation in Article 1384 para. 1 of the French Civil Code (liability of the custodian; strict liability for damage caused by defective objects). A driver who intended to pursue a claim could establish liability against another driver based on his fault, and on the basis of custody and control of a vehicle. The “custodian” could then seek to deny liability by demonstrating that the acci-

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<sup>1</sup> For details cf. *Wolfgang Ernst*, Wandlungen des vis maior-Begriffs in der Entwicklung der römischen Rechtswissenschaft, in: *Index 22* (1994) 293–321; *Theo Mayer-Maly*, Höhere Gewalt: Falltypen und Begriffsbildung, in: *Herman Baltl* (Ed.), Festschrift für Arthur Steinwenter zum 70. Geburtstag, Graz 1958, p. 57–77.

<sup>2</sup> D. 19, 2, 15, 2 (vis tempestatis calamitosae); D. 39, 2, 43 pr. (vis veni).

<sup>3</sup> D. 18, 6, 12 (incendium), D. 19, 2, 30, 4 (villam incendit).

<sup>4</sup> D. 13, 7, 30 (flumen crevit).

<sup>5</sup> D. 14, 2, 2, 3.

<sup>6</sup> Cf. also D. 50, 17, 23 (Ulpian).

<sup>7</sup> D. 19, 2, 33.

<sup>8</sup> D. 4, 4, 11, 5: Quod non prospexit posse evenire.

<sup>9</sup> Loi n°85-677 tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures d'indemnisation.

<sup>10</sup> Cass. (Ch. réunies), 13.2.1930, D.P. 1930. 1. 57.

dent was due to an outside cause such as force majeure (Article 1148 C.Civ.), hazard („cas fortuit“; Article 1148 C.Civ.)<sup>11</sup>, the act of the third party or the victim's own negligence.

The classical criteria of the “force majeure” were

- exterior (extériorité)
- unpredictability (imprévisibilité)
- irresistibility (irrésistibilité)

The Cour de Cassation (Assemblée plénière) settled in 2006 differences between the Chambers on the definition of force majeure by deciding that force majeure requires inevitability and unpredictability.<sup>12</sup>

Many accidents were resolved by an apportionment of liability; the behaviour of the two parties involved was analysed and judged. If the circumstances of an accident remained unclear this could also lead to a reciprocal requirement by each party to compensate the other completely (based on the application of Article 1384 C. Civ.).

- II. The Loi Badinter aimed at the improvement of the position of the victims of traffic accidents and the acceleration of compensation procedures by introducing a so-called no-fault accident compensation system in cases of accidents with the involvement of motor vehicles.<sup>13</sup> It creates an autonomous regime of liability, separate from, and independent of Article 1384 C. Civ.<sup>14</sup> Therefore, if the Loi Badinter applies, then other regimes are excluded. The Loi Badinter is a regime of liability without fault, since the conduct of the driver or custodian is not relevant. Focused on the compensation to be received by the victim, another major aim of the Loi Badinter was to limit the grounds available to the defendant and his insurer on which to seek a reduction of, or exoneration from liability. Thus, Article 2 states that neither force majeure nor the conduct of a third party can be invoked against the victim. The only defence left to the driver or custodian is therefore the gross fault of the victim (Article 3).

## B. Germany, Austria and Switzerland

### I. Germany

The German law recognises the exemption to contractual liability with regard to hazard and force majeure since the Allgemeines Landrecht für die Preußischen Staaten (General Territorial Law for the Prussian States; commonly abbreviated to ALR) of 1794<sup>15</sup> and the Badisches Landrecht (Baden Territorial Law) of 1809<sup>16</sup>.

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<sup>11</sup> Cf. J. C. Saint-Pau, *Jurisclasseur Code civil*, 30 juillet 2004, Fasc. 11–30.

<sup>12</sup> Arrêt n°537 du 14 avril 2006.

<sup>13</sup> *Michael G. Faure*, *Accident compensation*, in: *Elgar encyclopaedia of comparative law*, 2nd Edition, Edward Elgar Publishing Limited, Cheltenham 2012, p. 1 (9).

<sup>14</sup> Cass. Civ. 4.5.1987, GP 19.–20.7.1987

<sup>15</sup> Cf. Part 1, Title 6 Section 4 and Title 21 Sections 251, 299.

<sup>16</sup> Cf. Articles 1148, 1730, 1733.

In the area of non-contractual liability, we find the exemption with regard to force majeure for the first time in Section 25 of the Preußisches Eisenbahngesetz (Prussian Railway Act) of 1838<sup>17</sup>.

Concerning road traffic a special regulation can be found in Section 7 para. 2 of the Straßenverkehrsgesetz (Road Traffic Act):

§ 7 *Liability of the Keeper of a Vehicle*

(2) *The duty to compensate is excluded if the accident is caused by force majeure.*

According to the settled case law and the prevailing doctrine, force majeure exists only if the following criteria are met:

(1) The cause must be external.

In particular natural disasters (e.g. lightning strike, landslide,<sup>18</sup> avalanche), technical catastrophes (e.g. explosion, air crash), animal behaviour come into consideration, but also human actions which intervene in traffic flow from outside (e.g. acts of sabotage, which cannot be prevented,<sup>19</sup> external force against the driver).

The sudden physical or mental failure of the driver (e.g. fainting or epileptic seizure) does not justify force majeure according to the settled German case law<sup>20</sup> and the prevailing doctrine as well as in the Dutch and Polish law<sup>21</sup> unless caused by an external event.

(2) The cause must be entirely unpredictable.

Force majeure does not exist in the case of an event, which occurs frequently so the road user can prepare to.<sup>22</sup> The event must be so unusual that it amounts concerning the exceptional nature to an elemental force.

In addition, an accident sequence influenced by many coincidences is not based on force majeure if it is typical. E.g.: A cyclist being dragged or run over by a bus after being downed by a shove from a child.<sup>23</sup>

(3) The event cannot be averted neither by economically feasible measures nor by reasonable precautions.<sup>24</sup>

<sup>17</sup> Gesetzsammlung für Preußen (Prussian Collection of Laws) 1838, Nr. 35, p. 505.

<sup>18</sup> However, not the nightly fall of a chunk of a steep rock along a rail track, because the danger can be avoided by regular inspections of the track (BGH NJW-RR 2004, 959).

<sup>19</sup> BGHZ 105, 135, 136 f.; RG JW 1904, 577: stone throwing; OLG Frankfurt a. M., Order of 03.06.2013 – 4 U 42/13 (juris): disposal of a bicycle on the rails.

<sup>20</sup> RGZ 54, 404 (406); 117, 12 (15); BGH VersR 1957, 219 = NJW 1957, 674 and OLG Stuttgart VersR 1977, 383 for “inevitable event” in terms of Section 7 para. 2 StVG (old version) = Section 17 para. 3 StVG (new version); different view RGZ 2, 355; 21, 13 (15, 20).

<sup>21</sup> References see *Christoph Oertel*, *Objektive Haftung in Europa*, Tübingen 2010, p. 72.

<sup>22</sup> BGH VersR 1953, 27; 1957, 433; 1987, 781; OLG Stuttgart VersR 1959, 117; OLG Hamburg VersR 1979, 549; OLG Schleswig VersR 1983, 163.

<sup>23</sup> OLG Celle ZGS 2005, 278.

If an event of the above-mentioned types exists, e.g. a landslide, in addition the prevention of damages with the utmost care must be proved. That is e.g. not the case where the temporary cessation of the motor traffic was possible and necessary.<sup>25</sup>

## II. Austria

According to Section 1311 (1) of Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code) the mere coincidence must be borne by the victim. The Austrian Supreme Court (Oberster Gerichtshof <OGH>) has decided that force majeure only exists in cases of inevitable natural events, which could not be averted by reasonable precautions.<sup>26</sup>

Section 9 para. 1 of the Railway and Motor vehicle Liability Act (Eisenbahn- und Kraftfahrzeughaftpflichtgesetz <EKHG>) provides an exemption to strict liability if the accident is caused by an inevitable event (“unabwendbares Ereignis”).

## III. Switzerland

Besides fault liability according to Article 41 of the Swiss Code of Obligations (Obligationenrecht <OR>) the Swiss law recognises the strict liability. The law imputes strict liability to situations which are considered to be inherently dangerous. A distinction is made between simple objective liability (e.g. Articles 54, 55, 56, 58 OR) and strict liability in the strict sense.

The most relevant regulation of strict liability is the automobile liability according to Article 58 para. 1 Strassenverkehrsgesetz (Road Traffic Act). The rule reads:

*“If death or bodily harm or material damage is caused with a motor vehicle that is in service, the registered keeper of the motor vehicle is liable for the damages.”*

Article 59 para. 1 SVG rules the exemptions:

*“The registered keeper of a motor vehicle will be exempted from liability, if he proves, that the accident is caused by force majeure or by gross fault of the victim or a third party without his own fault or the fault of a person he is responsible for and without contribution if defects of the vehicle.”*

The dogmatic basis of this rule is that the chain of causation is broken in such cases of third causes.<sup>27</sup>

According to the settled case law of the Swiss Federal Court<sup>28</sup> and the prevailing doctrine<sup>29</sup>, force majeure exists only if it is an extraordinary event that was un-

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<sup>24</sup> RGZ 14, 83; 64, 404; 101, 94; 104, 150; 109, 172; RG JW 1911, 595; 1920, 710; 1931, 865; BGHZ 7, 338, 339; BGH VersR 1955, 346; 1967, 139; 1976, 963; NZV 1988, 100; OLG Celle ZGS 2005, 278.

<sup>25</sup> See RGZ 101, 94; RG JW 1905, 321; 1921, 343.

<sup>26</sup> 16.2.1967 – 2Ob293/66.

<sup>27</sup> See e.g. *Hardy Landolt*, Sachschadenhaftung unter besonderer Berücksichtigung von verkehrsunfallbedingten Sachschäden, in: Jahrbuch zum Strassenverkehrsrecht 47 (2007) 67–153 = <http://tinyurl.com/pwavmj1> (31.8.2013), p. 108 f., 135.

<sup>28</sup> BGE 36 II 60; 38 II 100; 49 II 266; 81 II 443; 88 II 283 (291, E. 3 c); 90 IV 270 E. 2; 91 II 474 (487, E. 8).

<sup>29</sup> See e.g. *Landolt* p. 135.

predictable and inevitable and the consequences could not be averted by reasonable precautions.

### **C. Spain**

Basic norm is Article 1902 Cc on liability for unlawful acts. The function of this rule is to subject the infringement of legal regulations, e.g. the Road Traffic Act (Ley de Responsabilidad y Seguro en la Circulación de Vehículos de Motor) to the obligation to pay damages.

Besides fault liability (responsabilidad subjetiva o por culpa) the Spanish law recognises the strict liability (responsabilidad objetiva o por el riesgo creado). As a rule the tortfeasor only can be exonerated if he e.g. proves that the damage is caused by force majeure (fuerza mayor), Article 1.1(2) of the Road Traffic Act.

### **D. Some other countries**

Liability exemptions are also found for example

- in Article 185 (1) of the Dutch Wegenverkeerswet of 1994: “overmacht”<sup>30</sup>.
- in Article 436 section 1 in conjunction with Art. 435 section 1 Polish Civil Code (Kodeks cywilny)
- in Article 505 Portuguese Civil Code (Código Civil): “força maior”.

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<sup>30</sup> See HR 22 mei 1992, NJ 1992/527 (ABP/Winterthur).

## VIS MAJOR IN THE EUROPEAN LAW

For about four decades, there exist efforts of harmonization and unification of European Private Law and in particular of tort law and road traffic law. In this context, the following treaties and drafts deserve a particular mention:

### A. The European Convention on Civil Liability for Damage caused by Motor Vehicles

The European Convention of 14.5.1973 by the Council of Europe, which did not entry into force, does not use the term “force majeure” in connection with the defence against strict liability but enumerates reasons for exemption.

Article 11 (Exceptions to the application of the Convention) provides:

1. *This Convention shall not apply to:*
  - a. *damage caused by a vehicle and resulting from its use exclusively for a non-vehicular purpose;*
  - b. *nuclear damage;*
  - c. *damage directly due to an act of armed conflict, hostilities, civil war, insurrection or a grave natural disaster of an exceptional character.*

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### B. The Draft Common Frame of Reference (DCFR)

The Draft Common Frame of Reference (Version 11/2006) by the Study Group on a European Civil Code<sup>31</sup> provides

- in Article VI.–3:205 (Accountability for damage caused by motor vehicles)
  - (1) *A keeper of a motor vehicle is accountable for the causation of personal injury and consequential loss, loss within VI. – 2:202 (Loss suffered by third persons as a result of another’s personal injury or death), and loss resulting from property damage (other than to the vehicle and its freight) in a traffic accident which results from the use of the vehicle.*

...

- and as defence in Article VI.–5:302 (Event beyond control)
 

*A person has a defence if legally relevant damage is caused by an abnormal event which cannot be averted by any reasonable measure and which is not to be regarded as that person’s risk.*

### C. The Principles of European Tort Law (PETL)

The Principles by the European Group on Tort Law provide in Article 7:102 (Defences against strict liability):

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<sup>31</sup> For the history of the origins, the aims, the structure and the terminology of the DCFR see *Christian von Bar, Eric Clive and Hans Schulte-Nölke* (Ed.), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (Outline Edition)*, Munich 2009.

- (1) *Strict liability can be excluded or reduced if the injury was caused by an unforeseeable and irresistible*
- a) *force of nature (force majeure)*

...

## **CONCLUSIONS**

Vis major with its three classical criteria is a traditional and well-founded exemption of strict liability. For all the differences in detail, there exists a common understanding in Europe that permits a handling without any real problem – at least for the specialist.