LIABILITY OF AIR CARRIERS IN CASES OF FLIGHT DISRUPTION CAUSED BY TECHNICAL PROBLEMS IN AIRCRAFT

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ABSTRACT

This thesis examines the current state of the law on the liability of air carriers in cases of flight disruption caused by technical problems in aircraft under the European and Canadian air passenger protection regimes. It begins by exploring the scope and objectives of the European Regulation 261/2004 and Canadian Air Passenger Protection Regulations (APPR). This is followed by the review of the main types of air carriers' compensatory and non-compensatory obligations as well as the liability events that trigger such obligations. The thesis then goes on to discuss the provisions that exonerate air carriers from the compensatory liability under the two regimes. It criticises the *Wallentin* test established in the landmark case of *Wallentin-Hermann v Alitalia* for creating legal uncertainty and ambiguity, and discusses the inconsistencies and potential implications of employing such a test. The thesis argues that 'inherency' should not be used as a main determining factor in establishing whether circumstances are extraordinary. It also reveals the ambiguity of the *Wallentin* test as to what constitutes an event from which the extraordinary circumstances are supposed to stem, and what the extraordinary circumstances in themselves are. This is followed by the discussion of the Canadian approach to the liability for safety-related flight disruptions. It is argued that the Canadian liability framework is preferable as it takes into account safety considerations and does not purport to penalise air carriers for being safe. At the same time, a major drawback of the Canadian approach is revealed, namely that any mechanical problems identified during scheduled maintenance are not included in the 'required for safety purposes' category that relieves air carriers from compensatory liability. The thesis also investigates the inconsistency in the CJEU's treatment of meteorological conditions and technical problems, and draws attention to the CJEU's one-sided approach to interpretation of the exoneration provisions of the European Regulation. In adopting the convenience-focused conception of passenger protection, the Court neglected safety, which is paramount in aviation. The thesis discusses the

implications of such a strict interpretative approach, which also neglects the competitive environment of air carriers and fails to achieve an adequate balance of interests. The CJEU's interpretative choices are questioned, as well as the resulting imposition by the Court in its case law of strict liability upon air carriers for flight disruptions. Instead of bringing clarity to what can constitute 'extraordinary circumstances', the CJEU created further uncertainty, thus making it more likely that national courts may reach divergent outcomes in broadly similar cases. The thesis concludes by discussing potential amendments to the liability framework under both the European and Canadian regulations.

RÉSUMÉ

Cette thèse examine l'état actuel du droit sur la responsabilité des transporteurs aériens en cas de perturbations de vol causées par des problèmes techniques à bord des aéronefs sous les régimes européens et canadiens de protection des passagers aériens. Il commence par explorer la portée et les objectifs du Règlement européen 261/2004 et du Règlement canadien sur la protection des passagers aériens (RPPA). Vient ensuite l'examen des principaux types d'obligations compensatoires et non compensatoires des transporteurs aériens ainsi que des événements de responsabilité qui créent de telles obligations. La thèse aborde ensuite les dispositions qui exonèrent les transporteurs aériens de la responsabilité compensatoire dans les deux régimes. Il critique le test *Wallentin* établi dans l'affaire historique *Wallentin-Hermann v Alitalia* pour avoir créé une incertitude juridique et une ambiguïté, et examine les incohérences et les implications potentielles de l'utilisation d'un tel test. La thèse soutient que l'inhérence ne devrait pas être utilisé comme un facteur déterminant principal pour établir si les circonstances sont extraordinaires. Elle révèle également l'ambiguïté du test de *Wallentin* quant à ce qui constitue un événement dont les circonstances extraordinaires sont censées découler, et quelles sont les circonstances extraordinaires en elles-mêmes. Vient ensuite une discussion sur l'approche canadienne de la responsabilité pour les perturbations de vol liées à la sécurité. On soutient que le cadre de responsabilité canadien est préférable car il tient compte des considérations de sécurité et ne vise pas pénaliser les transporteurs aériens pour être en sécurité. Dans le même temps, un inconvénient majeur de l'approche canadienne est mis en évidence, à savoir le fait que les problèmes mécaniques identifiés lors de la maintenance planifiée ne sont pas inclus dans la catégorie 'nécessaire par souci de sécurité' qui dégage les transporteurs aériens de leur responsabilité compensatoire. La thèse examine également l'incohérence dans le traitement par la Cour de justice de l'Union européenne

des conditions météorologiques et des problèmes techniques, et attire l'attention sur l'approche unilatérale de la Cour concernant l'interprétation des dispositions d'exonération du règlement européen. En adoptant la conception de la protection des passagers axée sur la commodité, la Cour a négligé la sécurité, qui est primordiale dans l'aviation. La thèse examine les implications d'une telle approche interprétative stricte, qui néglige également l'environnement concurrentiel des transporteurs aériens et ne parvient pas à atteindre un équilibre adéquat des intérêts. Les choix d'interprétation de la CJUE sont remis en question, ainsi que l'imposition qui en résulte par la Cour dans sa jurisprudence de la responsabilité objective des transporteurs aériens en cas de perturbations de vol. Au lieu de clarifier ce qui peut constituer des 'circonstances extraordinaires', la CJUE a créé une incertitude supplémentaire et a donc rendu plus probable que les juridictions nationales aboutissent à des résultats divergents dans des affaires globalement similaires. La thèse se termine par une discussion sur les modifications potentielles du cadre de responsabilité en vertu des réglementations européenne et canadienne.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS 8

INTRODUCTION 10

CHAPTER 1. OBLIGATIONS OF AIR CARRIERS UNDER THE EU REGULATION 261 AND THE CANADIAN APPR: A COMPARATIVE ANALYSIS 12

1.1 Objectives of the regulations 12

1.2 Scope of the regulations 15

1.3 Types of compensatory and non-compensatory obligations of air carriers 17

1.3.1 Obligation to provide information on passenger rights 19

1.3.2 Obligation to notify of flight changes 20

1.3.3 Disembarkation obligations 21

1.3.4 Obligation to provide care 22

1.3.5 Obligation to offer alternative travel arrangements or reimburse 23

1.3.6 Monetary compensation for inconvenience 26

1.4 Liability events and the obligations they create 27

1.4.1 Denied boarding 28

1.4.2 Tarmac delay 30

1.4.3 Cancellation and long delay 33

CHAPTER 2. FLIGHT DISRUPTIONS REQUIRED FOR SAFETY AND THE EXTRAORDINARY CIRCUMSTANCES DEFENCE 40

2.1 Overview of the provisions that exonerate air carriers from the obligation to pay compensation in cases of flight disruptions 41

2.2 Technical problems in aircraft and the *Wallentin* test for 'extraordinary circumstances' under the European approach 44

2.2.1 *Wallentin-Herman v Alitalia*: the test for extraordinary circumstances 44

2.2.2 Problems with the notion of 'inherency' 50

2.2.3 Difficulties identifying the 'event' 55

2.3 'Situations within the air carrier's control but required for safety' under the Canadian approach 58

2.4 Technical problems discovered during regular maintenance or pre-flight checks 61

CHAPTER 3. BALANCING THE INTERESTS OF PASSENGERS AND AIR CARRIERS 67

3.1 Safety or convenience: conceptions of passenger protection and value preferences 67

3.2 Towards a fair balance of interests 71

3.3 The future of the extraordinary circumstances defence 75

CONCLUSION 79

LEGISLATION 83

JURISPRUDENCE 85

SECONDARY MATERIALS 87

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INTRODUCTION

Air transport serves as a crucial driver of economic growth through creating jobs, promoting international trade and tourism, and facilitating general mobility.[1] A level playing field for airlines and further harmonisation are essential for the continuous creation of economic benefits. At the same time, maintaining a high level of passenger protection is important for air travel to be safe and convenient. In recent years, the trends and developments in the field of air passenger protection have led to a renewed interest in the issue of air carriers' liability in cases of a flight disruption caused by technical problems in aircraft.

The Regulation (EC) 261/2004 of the European Parliament and of the Council imposes on the airlines an obligation to compensate passengers for inconvenience suffered as a result of a cancellation, long delay, or denied boarding.[2] At the same time, it provides air carriers with an opportunity to invoke an extraordinary circumstances defence to be relieved from the obligation to pay compensation. In a similar way, the Canadian Air Passenger Protection Regulations (APPR),[3] which resemble in most of their provisions the European Regulation, aim to supply clear and fair rules on passenger rights protection in Canada. Although not directly providing for an extraordinary circumstances defence of the type present in the European regime, the Canadian APPR do not impose compensatory and other burdensome obligations upon air carriers unless the flight disruption is within the carrier's control and not required for safety.

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[1] *Aviation: Benefits Beyond Borders*, by Air Transport Action Group (2020).

[2] *Regulation (EC) 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91* [2004] OJ L46/1 [European Regulation].

[3] *Air Passenger Protection Regulations*, SOR/2019-150 [APPR].

Since the adoption of both the European and Canadian regulations, the interpretation of some provisions on the exoneration of air carriers from the compensatory liability has become a controversial and much disputed issue. Although a non-exhaustive list of events which may produce such circumstances is provided in recital 14 of the European Regulation, there is no definition of the concept of 'extraordinary circumstances' itself. This creates much uncertainty in determining when exactly air carriers can rely on the extraordinary circumstances defence, especially where flight disruptions are caused by technical problems. In the Canadian APPR, ambiguity arises when it comes to the rule that mechanical malfunctions that reduce safety of the flight and people on board are covered by the 'disruptions within the airline's control but required for safety' yet not if they are identified during scheduled maintenance.

This thesis is organised in three chapters. Chapter 1 provides a comparative overview of the obligations imposed upon air carriers under the European and Canadian passenger rights regimes. Chapter 2 deals with the main exceptions to the liability framework established by the two regimes. It introduces the concept of the extraordinary circumstances defence in the European approach, and discusses the 'flight disruptions required for safety' under the Canadian approach. It also analyses the *Wallentin* test for extraordinary circumstances and assesses its implications, calling into question the relevance and usefulness of the 'inherency' component. The chapter concludes by a critical assessment of the legal treatment of technical problems in aircraft discovered during regular maintenance. Chapter 3 investigates the broader effects of the interpretative choices made by the CJEU on the balance of interests of the key stakeholders in the airline industry, as well as the policy direction such choices represent.

CHAPTER 1. OBLIGATIONS OF AIR CARRIERS UNDER THE EU REGULATION 261 AND THE CANADIAN APPR: A COMPARATIVE ANALYSIS

This Chapter provides a comparative overview of the obligations of air carriers in cases of flight disruption under Regulation 261/2004 (European approach) and Air Passenger Protection Regulations (Canadian approach). Section 1 engages with the scope and objectives of the two regulatory regimes. It explores how the Court of Justice of the European Union sees the damage for which passengers are to be compensated under Regulation 261, and argues that the Court is biased towards one of the two main objectives of the Regulation. Section 2 goes on to explore the types of compensatory and non-compensatory obligations of air carriers in cases of flight disruption. This chapter concludes with Section 3 discussing the liability events that create compensatory and non-compensatory obligations for air carriers.

1.1 Objectives of the regulations

Protection of consumers has long been one of the central issues in European Union law. This is evidenced by the fact that the general principle of consumer protection is embedded in the Treaty on the Functioning of the European Union, one of the constituent instruments of the EU.[4] Further, the Charter of Fundamental Rights of the European Union confirms the EU's objective to ensure a high level of customer protection.[5] One of the main instruments of consumer protection in the

[4] *Consolidated Version of the Treaty on the Functioning of the European Union* [2012] OJ C326/47 (TFEU), arts 12, 114(3), 169.

[5] *Charter of Fundamental Rights of the European Union* [2012] OJ C326/391, art 38.

area of air transport is Regulation (EC) 261/2004.[6] It sets the minimum level of air passenger rights and imposes certain obligations upon air carriers.

In Canada, until recently there was no single and uniform piece of legislation that would consistently regulate the rights of air passengers. In 2019, following extensive consultations with various stakeholders (including the airline industry, customer rights groups, and the public), the Canadian Transportation Agency (CTA) developed the Air Passenger Protection Regulations (APPR).[7] The APPR is a set of rules that now govern the rights of air passengers by, *inter alia*, imposing the minimum standards of care obligations upon the air carriers and providing for a standardised compensation in cases of a flight disruption.

The European Regulation starts with recital 1 proclaiming one of the main objectives of the European action in the field of air transport, namely 'ensuring a high level of protection of passengers'.[8] Recital 2 then goes on to acknowledge that a cancellation or long delay causes 'serious trouble and inconvenience' to passengers.[9] It is for such inconvenience that the regulators make air carriers compensate the passengers.

The European Regulation states as its objectives both the strengthening of air passenger rights and ensuring a level playing field in a liberalised market with harmonised rules.[10] However, the two objectives do not seem to have been pursued with the same commitment. This fact, broadly

[6] *Regulation (EC) 261/2004*, *supra* note 2.

[7] *Air Passenger Protection Regulations*, *supra* note 3.

[8] *Ibid*, recital 1.

[9] *Ibid*, recital 2.

[10] *Ibid*, recital 4.

speaking, was the foundation of the Regulation's validity challenge in the *IATA case*,[11] which was focused on the infringement of the principle of proportionality. The main reason why the Court was able to conclude that the Regulation was not disproportionate as regards its objectives was the availability of the extraordinary circumstances defence.[12] Such a defence exonerates the air carriers from the duty to compensate, and can be invoked where extraordinary circumstances arise that could not have been avoided even if all reasonable measures had been taken. But as later noted in *Wallentin-Hermann*, such an exemption constitutes a derogation from the general principle of consumer protection inherent in the Regulation, and therefore must be interpreted strictly.[13]

As pointed out by Prassl and Bobek, the Regulation is primarily a consumer protection measure.[14] This may offer some explanation of the apparent unwillingness of the CJEU to engage in its case law with the second objective of ensuring a level playing field and fair competitive environment. In *van der Lans*, the CJEU even stated that 'the main' objective of the Regulation is ensuring a high level of protection for passengers.[15] In the landmark case of *Sturgeon v Condor*, the objective of the Regulation has been summarised by the CJEU as 'to strengthen protection for air passengers by redressing damage suffered by them during air travel'.[16] Although there is no

[11] *Case C-344/04 R (International Air Transport Association and European Low Fares Airline Association) v Department for Transport*, [2006] ECR I-403 [*IATA*].

[12] *Ibid* at para 91.

[13] Case C-549/07 *Wallentin-Hermann v Alitalia* [2008] ECR I-11061 at para 20.

[14] Michal Bobek and Jeremias Prassl, *Air Passenger Rights: Ten Years on* (EU Law in the Member States, Oxford 2016).

[15] Case C-257/14 *C van der Lans v Koninklijke Luchtvaart Maatschappij NV* [2015] ECLI:EU:C:2015:618, para 45.

[16] Joined Cases C-402 and 432/07 *Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v Condor Flugdienst GmbH and Stefan Böck and Cornelia Lepuschitz v Air France* [2009] ECR I-10923 at para 49.

definition of 'damage' in the Regulation itself, the CJEU clarified that the type of damage remedied by the Regulation is that which is 'almost identical for every passenger',[17] with a particular focus placed on 'loss of time'.[18] Consequently, the Regulation aims to redress damage 'in an immediate and standardised manner'.[19] At the same time, other types of damage, such as individual damage inherent to the purpose of travel, can be remedied, according to the CJEU, by the means of the Montreal Convention of 1999.[20]

1.2 Scope of the regulations

The European Regulation applies to passengers departing from an airport located in the territory of a Member State whether or not the flight is operated by an EU air carrier, as well as to passengers departing from an airport in a third country on a flight bound to an EU airport and operated by the EU carrier.[21] The Canadian passenger rights regime goes further in its scope by covering flights to, from, and within Canada, including connecting flights, whatever the nationality of the operating air carrier may be.

It appears, therefore, that in practice both the EU Regulation and the Canadian APPR are extra-territorial in scope. This way, the APPR would apply, for example, to a single thoroughfare for a Kyiv to Montreal flight via Amsterdam, with the first segment (KBP-AMS) operated by a

[17] *IATA*, *supra* note 11 at para 43.

[18] *Sturgeon*, *supra* note 16 at para 52.

[19] *Ibid*, at para 51.

[20] *Convention for the Unification of Certain Rules for International Carriage by Air, (adopted 28 May 1999, entered into force 4 November 2003)* 2242 UNTS 309.

[21] *Regulation (EC) 261/2004* at art 3(1).

Ukrainian airline under a code-share agreement with KLM that, in turn, operates the second segment (AMS-YUL) and is the marketing carrier. Such a regime creates additional operational challenges for the two non-Canadian airlines engaged in the above single thoroughfare. In case of flight disruptions (such as delay, cancellation, or denied boarding) the operating carrier would have to differentiate between the passengers on the same KBP-AMS flight because different legal regimes and requirements of minimal care standards would apply to the passengers on the same flight depending, *inter alia*, on each passenger's final destination. In other words, passenger A on a KLM flight from Kyiv to Chicago via Amsterdam would be treated differently in terms of compensation or minimal standards of care from passenger B who is travelling on the same first-segment KBP-AMS flight but then continues to Montreal on another KLM flight. In such a case, passenger A would be covered by the European Regulation, while passenger B would find themselves covered by both the European and Canadian regimes.

Although it is possible that a passenger may be covered by more than one passenger rights regimes (e.g. by both Regulation 261 and APPR), the passenger can obtain compensation pursuant to the APPR only if he or she has not received compensation for the same flight disruption under any other passenger protection regulation in a different jurisdiction.[22] At the same time, the air carrier cannot refuse compensation under the APPR on the basis that the passenger is entitled to receive compensation for the same flight disruption under the European Regulation or another passenger rights regime.[23]

[22] Canadian Transportation Agency, *Flight Delays and Cancellations: A Guide*, 2019

[23] *Air Passenger Protection Regulations*, s 3(3).

It is important to note that the Canadian APPR make a distinction between 'small' and 'large' air carriers. The criterion used for differentiating is the number of passengers transported over a given period of time. A 'large carrier' is defined as the one that 'has transported a worldwide total of two million passengers or more during each of the two preceding years', while airlines that do not fall under the above definition are considered to be 'small carriers'.[24] Such a distinction was introduced to reflect the unique operating conditions and help maintain viability of smaller airlines that serve northern and remote areas of Canada.

1.3 Types of compensatory and non-compensatory obligations of air carriers

Both the European Regulation and the Canadian APPR impose upon air carriers a number of obligations that arise in the events of flight delay, cancellation, denied boarding, involuntary downgrading or upgrading. Remedies available to passengers through the obligations imposed by the regulations are not limited to the differentiated fixed monetary compensation (obligation to compensate for inconvenience). Depending on circumstances, the passengers may be entitled also to partial or full reimbursement of the ticket price (obligation to reimburse),[25] re-routing (duty to provide re-routing),[26] meals and refreshments,[27] and hotel accommodation (duty to care).[28]

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[24] *Air Passenger Protection Regulations*.

[25] *Regulation (EC) 261/2004*, art 8(1)(a); *Air Passenger Protection Regulations*, s 17(2).

[26] *Regulation (EC) 261/2004*, arts 8(1)(b)-(c); *Air Passenger Protection Regulations*, s 17 (within the carrier's control) and s 18 (outside the carrier's control).

[27] *Regulation (EC) 261/2004*, art 9(1)(a). *Air Passenger Protection Regulations*, s 14(1).

[28] *Regulation (EC) 261/2004*, art 9(1)(b). *Air Passenger Protection Regulations*, s 14(2).

The obligations arising from the European Regulation are imposed upon the operating air carrier and may not be limited or waived.[29] However, the air carrier may be exonerated from the obligation to pay monetary compensation for inconvenience if it can prove that the flight disruption was caused by extraordinary circumstances that could not have been avoided even if all reasonable measures had been taken.[30] In performing their obligations under the Regulation, operating air carriers may seek redress from third parties. Passengers, in turn, are not confined to the remedies available under the Regulation; they can also bring actions for redress under the Montreal Convention.[31]

The Canadian APPR list three categories of flight disruptions based on the notion of control: (i) situations outside the air carrier's control, (ii) situations within the air carrier's control but required for safety purposes, and (iii) situations within the air carrier's control and not required for safety purposes.[32] Thus, the amount and type of obligations owed by the airlines towards the passengers whose flight is disrupted depends in great part on whether such a disruption is within or outside the operating carrier's control. The obligation to pay fixed statutory compensation, for example, arises only if the flight disruption is within the carrier's control and is not required for safety purposes. Moreover, whether or not the disruption was required for safety purposes also determines the carrier's obligations as regards alternative travel arrangements. Furthermore,

[29] *Ibid*, arts 3(5), 15.

[30] *Ibid*, art 5(3).

[31] *Montreal Convention 1999*, *supra* note 20.

[32] *Air Passenger Protection Regulations*, s 10 (situations outside the carrier's control), s 11 (situations required for safety purposes), s 12 (situations within the carrier's control).

operating air carrier's obligations, or rather their extent, will also depend on whether the carrier is 'small' or 'large' as defined in section 2 of the APPR.[33]

1.3.1 Obligation to provide information on passenger rights

The regulators in both jurisdictions normally require air carriers to provide clear information to passengers concerning their rights in cases of delay, cancellation or denied boarding. Under the EU Regulation, it is the responsibility of the operating carrier to make sure that a specified text informing the passengers about their rights is displayed at check-in.[34] Furthermore, when a passenger is denied boarding or his or her flight is delayed or cancelled, the air carrier must provide a written notice containing the rules on compensation and other assistance.[35]

When compared with the EU Regulation, the Canadian APPR appear to be more detailed in prescribing how and by what means the passengers should be informed of their rights. Under Section 5 of the Canadian APPR, air carriers are required to ensure that their terms and conditions of carriage that apply in cases of a denied boarding, flight delay, and cancellation, are 'available in simple, clear and concise language'.[36] Such terms and conditions must be made available on all digital platforms used for ticket sales, as well as on all itinerary documents.[37] A hyperlink that leads to the web page that contains the relevant terms and conditions, rules on compensation and

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[33] *Ibid*, see s 17(1)(b) for rules on alternative arrangements when flight disruption is within the carrier's control, s 18(1)(b) for rules on alternative arrangements when flight disruption is outside the carrier's control, s 19(1)(b) and s 19(2)(b) for rules on compensation for delay or cancellation.

[34] *Regulation (EC) 261/2004*, art 14(1).

[35] *Regulation (EC) 261/2004*, art 14(2).

[36] Air Passenger Protection Regulations, s 5(1).

[37] *Ibid*, s 5(2).

minimum standards of care can satisfy the requirement.[38] Additionally, a special notice provided for in Sections 5 and 7 of the APPR must be displayed at the check-in desk, self-service machine and boarding gate,[39] as well as on all itinerary documents and digital platforms used for ticket sales.[40]

1.3.2 Obligation to notify of flight changes

In order to minimise inconvenience to passengers, air carriers are generally expected to notify them of the flight disruption sufficiently in advance, as well as provide reasons for the disruption.

The EU Regulation encourages the airlines to notify passengers of the potential cancellations before the scheduled departure time. If informed early, the passengers would be able to make changes to their travel plans. Importantly, the duty to compensate under Article 7 of the Regulation arises only if the air carrier fails to inform the passengers sufficiently in advance. It follows, therefore, that passengers will not be offered compensation if the air carrier notifies them of the cancellation (i) at least two weeks in advance; or (ii) between fourteen and seven days before the departure, and offers re-routing with departure time being no more than two hours before the scheduled time and arrival no later than four hours after the originally planned time; or (iii) less than seven days in advance of the scheduled departure, and offers re-routing with departure time being up to one hour before the scheduled time and arrival no later than two hours after the originally planned time.[41] Moreover, the amount of compensation may be reduced by 50% if re-

[38] *Ibid*, ss 5(3)-(4).

[39] *Ibid*, s 7(1).

[40] *Ibid*, s 5(5).

[41] *Regulation (EC) 261/2004*, art 5(1)(c).

routing is offered and the conditions of Article 7(2) are satisfied. Such requirements are intended to minimise the inconvenience suffered by those whose flights are cancelled or delayed, or who are denied boarding.

In a similar way to the EU approach, the Canadian APPR also seek to minimise the inconvenience caused to passengers when their travel plans get disrupted due to a flight cancellation or delay. Thus, for example, the air carrier that cancels a flight due to a reason within its control will not have to pay compensation for inconvenience under Section 19 of the APPR if the passenger was notified of the cancellation at least 15 days before the original departure time.[42]

1.3.3 Disembarkation obligations

The Canadian Air Passenger Protection Regulations impose certain additional obligations upon air carriers in cases of tarmac delay at Canadian airports, whether occurring prior to take-off or after landing. Thus, when a flight is delayed on the tarmac, the air carrier must provide an opportunity to disembark three hours after the aircraft doors have been closed for take-off or three hours after the landing.[43] Importantly, the air carrier also has an obligation to facilitate access to urgent medical assistance if any passengers on board require such medical assistance while the flight is delayed on a tarmac, whether at a Canadian airport or elsewhere.[44] Furthermore, if passengers are confined within the aircraft while the flight is delayed on a tarmac, the air carrier must also provide proper ventilation, cooling, heating, access to lavatories, food and drink in reasonable quantities,

[42] *Air Passenger Protection Regulations*, s 12(3)(d).

[43] *Ibid*, s 9.

[44] *Ibid*, s 8(2).

and means to communicate with people outside of the aircraft.[45] Notably, no such obligations are imposed upon air carriers under the European Regulation.

1.3.4 Obligation to provide care

Air carriers may also owe care obligations to passengers when their flight is delayed, cancelled, and/or when they are denied boarding and have to wait for re-routing. Article 9 of the European Regulation imposes upon air carriers an obligation to provide meals and refreshments 'in a reasonable relation to the waiting time',[46] as well as with the opportunity to make telephone calls, send fax messages, or e-mails.[47] Furthermore, the airline will have to provide hotel accommodation and transport from and to the airport when the new flight is reasonably expected to depart at least one day after the originally planned departure of the cancelled or significantly delayed flight.[48] It is important to note that a breach of the obligation to care triggers the duty to compensate. If an air carrier fails to comply with its obligation referred to in Articles 5(1)(b) and 9 to provide care, the passengers concerned can obtain reimbursement from the carrier for the incurred expenses on condition that such expenses were necessary, appropriate and reasonable.[49] In such a case, the amount of compensation is not fixed and must be assessed by the court on a case-by-case basis.

Under the Canadian APPR, the operating air carrier must provide food and drink in reasonable quantities along with access to a means of communication when a passenger has waited

[45] *Ibid*, s 8(1).

[46] *Regulation (EC) 261/2004*, art 9(1)(a).

[47] *Ibid*, art 9(2).

[48] *Ibid*, art 5(1)(b).

[49] Case C-12/11 *Denise McDonagh v Ryanair Ltd* [2013] ECLI:EU:C:2013:43 at para 66.

two hours after the departure time.[50] In the case when the airline expects that passengers on the disrupted flight will have to wait overnight, hotel accommodation together with transportation to and from it must be provided.[51] The air carrier also has a right to limit or refuse to provide such care if providing it would result in further delay.[52]

1.3.5 Obligation to offer alternative travel arrangements or reimburse

The obligation to provide reimbursement or re-routing arises in the European regime under Article 8 of Regulation 261 and gives passengers the choice of three alternatives that must be offered by the operating carrier. The first option is the reimbursement of the ticket price for the part or parts of the journey not made, as well as for the parts already made 'if the flight is no longer serving any purpose in relation to the passenger's original travel plan'.[53] While reimbursement is provided for in the event of cancellation, a long delay does not necessarily entitle the passengers to choose the refund. Under the Regulation, only delays of five or more hours create an obligation to reimburse.[54] In the case of connections, the carrier must also provide passengers with an earliest possible return flight to the airport of departure. The second option is re-routing to the final destination at the earliest opportunity and under comparable transport conditions.[55] The third alternative is re-routing

[50] *Air Passenger Protection Regulations*, s 14(1).

[51] *Ibid*, s 14(2).

[52] *Ibid*, s 14(3).

[53] *Regulation (EC) 261/2004*, art 8(1)(a).

[54] *Ibid*, art 6(1)(c)(iii).

[55] *Ibid*, art 8(1)(b).

to the final destination at a later date requested by the passenger subject to availability of seats and under comparable transport conditions.[56]

In the Canadian APPR, rerouting obligations depend on (i) the size of the air carrier, and (ii) whether the situation that caused the flight to be disrupted is within the carrier's control. In the case of a large carrier that delays a flight for three or more hours, cancels it, or denies boarding due to situations outside the carrier's control, the passengers affected must be offered a seat on the next available flight of the same itinerary that is operated by the original carrier or its commercial partner and departs within 48 hours of the end of the event that caused the disruption of the original flight.[57] Alternatively, if such an arrangement is not possible, the carrier must provide a reservation for a flight operated by any carrier from the original departure airport or another airport that is within reasonable distance, in which case transportation to that other airport must also be provided.[58]

On the other hand, if the flight disruption is caused by situations within the carrier's control, the airline must offer a seat on the next available flight of the same itinerary that is operated by the original carrier or its commercial partner and departs within nine hours of the original departure time.[59] If such an arrangement is not possible, a confirmed reservation for a flight operated by any other carrier must be offered instead. In such a case, the new departure time must be within 48 hours of the original one.[60] Alternatively, if the carrier cannot provide any alternative travel

[56] *Ibid*, art 8(1)(c).

[57] *Air Passenger Protection Regulations*, s 18(1)(a)(i).

[58] *Ibid*, s 18(1)(a)(ii).

[59] *Ibid*, s 17(1)(a)(i).

[60] *Ibid*, s 17(1)(a)(ii).

arrangements that would follow the same itinerary, it must provide a confirmed reservation for a flight operated by any carrier from another airport that is within reasonable distance to the airport where the passenger is located. Transportation to that other airport must also be provided.[61] Finally, if the proposed alternative travel arrangements do not accommodate the passenger's travel needs, a refund must be offered.[62]

In the case where the operating carrier is a small one,[63] it must provide a confirmed reservation for the next available flight operated by the original carrier or its commercial partner.[64] This applies equally to flight disruptions caused by situations within and outside the carrier's control.

An important distinction between the Canadian and European approaches, when it comes to reimbursements, is that the former does not provide for an obligation on the part of the carrier to refund if the flight disruption is caused by (i) situations outside the carrier's control or (ii) situations within the carrier's control but required for safety. Under the European Regulation, on the other hand, air carriers must offer reimbursement irrespective of the reason of the cancellation, delay of five or more hours, or denied boarding. The extraordinary circumstances defence provided for in Article 5 relieves air carriers only from the obligation to pay standardised monetary compensation for inconvenience.

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[61] *Ibid*, s 17(1)(a)(iii).

[62] *Ibid*. s 17(2).

[63] For the purposes of the APPR, an airline that 'has transported a worldwide total of two million passengers or more during each of the two preceding years' is classified as a 'large carrier', while those airlines that do not fall under this definition are considered to be 'small carriers'. See *Air Passenger Protection Regulations*, s 1(2).

[64] *Air Passenger Protection Regulation*s, ss 17(1)(b) and 18(1)(b).

1.3.6 Monetary compensation for inconvenience

In the European air passenger rights regime, Article 7 of Regulation 261 governs the process of calculating the amounts of compensation due to passengers. The main differentiating criterion employed for quantification purposes in the Regulation is the flight distance. In this way, when a flight is delayed or cancelled, the operating air carrier must pay in compensation (a) €250 for flights of 1,500 kilometres or less; (b) €400 for intra-EU flights of more than 1,500 kilometres, and for all other flights in the range of 1,500-3,500 kilometres; (c) €600 for all other flights.[65]

The carrier has the right to reduce the amount of the compensation provided in Article 7 by 50% when passengers who are offered re-routing arrive at their final destination no later than (a) two hours after the scheduled arrival time for flights of 1,500 kilometres or less, (b) three hours for intra-EU flights of more than 1,500 kilometres, and for all other flights in the range of 1,500-3,500 kilometres, and (c) four hours for all other flights.[66] This provision applies to cases of delay, cancellation, and denied boarding.

Importantly, the obligation of air carriers to compensate for delays is not explicitly provided for in Regulation 261 itself. It was the Court of Justice of the European Union (CJEU) that subsequently confirmed in its case law that passengers on delayed flights should be treated similarly, in terms of compensation, to passengers on cancelled flights.[67]

In the Canadian APPR, the amount of the fixed statutory compensation depends on the type of the operating carrier (i.e. whether it is a 'small' or 'large' carrier) and the duration of the

[65] *Ibid*, art 7(1).

[66] *Ibid*, art 7(2).

[67] *Sturgeon*, *supra* note 16.

resulting delay. This is in contrast with the European regime, where compensation is based on the flight distance. Thus, in the case of a large carrier, the compensation payable under the APPR starts from $400 (if the passenger arrives at the final destination at least three but less than six hours late), increases to $700 (if the passenger arrives at the final destination at least six but less than nine hours late), and goes up to $1,000 (if the arrival is delayed by nine hours or more).[68] Small carriers, in turn, must pay in compensation $125, $250 or $500 respectively.[69] Importantly, such compensation for inconvenience is payable only if the flight disruption was caused by situations within the carrier's control and was not required for safety purposes. Moreover, the air carrier can avoid having to compensate the affected passengers for inconvenience if it informs them of the delay or cancellation at least 15 days before the original departure time.[70]

1.4 Liability events and the obligations they create

The obligations of air carriers and the rights of air passengers in the events of a flight disruption are comprehensively regulated by both the European and the Canadian air passenger protection schemes.[71] Remedies available to passengers may include, depending on the circumstances, a fixed monetary compensation, re-routing, and a full or partial refund. In addition to that, the affected passengers may also be entitled to the minimal standard of treatment or duty of care, as well as to clear and regular communication. Absent a flight disruption, none of the above obligations arise

[68] *Ibid*, s 19(1)(a).

[69] *Ibid*, s 19(1)(b).

[70] *Ibid*, ss 12(2)(d) and 12(3)(d).

[71] The Canadian Transportation Agency defines a 'flight disruption' as any event that prevents passengers from completing their itineraries on time. See *Canadian Transportation Agency, Types and Categories of Flight Disruption: A Guide,* 2019.

for the air carrier. Thus, compensatory and non-compensatory obligations only arise when triggered by a liability event such as denied boarding, tarmac delay, cancellation or long delay.

1.4.1 Denied boarding

Under the EU rules, when an air carrier 'reasonably expects' to deny boarding, it must ask the passengers to give up their seats voluntarily in exchange for benefits additional to the right to reimbursement or re-routing provided for in Article 8 of the Regulation.[72] If, however, passengers are denied boarding against their will, a right to compensation under Article 7 arises together with the right to reimbursement or re-routing in Article 8, and the carrier has a duty to provide care as regards such passengers pursuant to Article 9.[73] It is worth noting that the concept of 'denied boarding' in the EU Regulation is not limited to overbooking, and also extends to cases where boarding is denied on operational grounds.[74] At the same time, it does not cover occasions where boarding is denied on 'reasonable grounds', including for reasons of health, safety, security, or inadequate travel documents.[75] It is not clear, however, whether such reasonable safety grounds also have to satisfy the inherency and control requirements of the *Wallentin* test.[76]

In a similar manner to the European regime, the Canadian regulations require that air carriers call for volunteers to surrender their reservations before boarding can be denied.[77] The air carrier must also provide the volunteer with a written confirmation of the benefit in exchange for

[72] *Regulation (EC) 261/2004*, art 4(1).

[73] *Ibid*, art 4(3).

[74] Case C-22/11 *Finnair Oyj v Timy Lassooy* [2012] ECLI:EU:C:2012:604 [*Finnair*].

[75] *Regulation (EC) 261/2004*, art 2(j).

[76] Case C-549/07 *Wallentin-Hermann v Alitalia* [2008] ECR I-11061 [*Wallentin*].

[77] *Air Passenger Protection Regulations*, s 15(1).

his or her willingness to give up a seat on the flight.[78] A notable improvement from the EU Regulation is the APPR's ban on denying boarding to any passenger who is already on board, except when required for safety purposes.[79] Another novelty of the APPR, when compared to its European predecessor, is the requirement to prioritise certain categories of passengers when denying boarding involuntarily. In particular, passengers in the following order must be given priority: i) unaccompanied minors, ii) disabled passengers together with their support person or animal, iii) passengers travelling with family members, and iv) passengers previously denied boarding on the same ticket.[80]

Importantly, under the Canadian APPR it is clear that passengers are not entitled to a standardised monetary compensation if the denial of boarding is within the control of air carriers but required for safety purposes. The passengers do, nevertheless, retain a right to care, alternative travel arrangements or a refund.[81] When, on the other hand, the denial of boarding is within the air carrier's control and not required for safety purposes, the affected passengers become entitled to additional minimum compensation for inconvenience subject to Section 20.[82]

It is worth noting that the minimum compensation in such cases is remarkably high, ranging from $900 (if the passenger arrives at final destination less than six hours late) to $2,400 (if the passenger is delayed by nine hours or more as a result of the denied boarding).[83] Apparently, the

[78] *Ibid*, s 15(3).

[79] *Ibid*, s 15(2).

[80] *Ibid*, s 15(4).

[81] *Ibid*, s 11(5).

[82] *Ibid*, s 12(4)(d).

[83] *Ibid*, s 20.

intention of the Canadian regulators was significantly to deter the airlines' practice of overbooking. Such a practice is, nevertheless, one of the essential instruments for ensuring high capacity utilisation and consequently revenue maximisation. By discouraging the airlines from employing overbooking strategies, the CTA aims to minimise the instances of denied boarding. On the other hand, this has an effect of reducing flexibility in pricing for airlines, thus making air travel more expensive for passengers.

1.4.2 Tarmac delay

A tarmac delay is most accurately defined as the situation where 'an aircraft has not taken off within three hours of the doors closing or passengers have not been given an opportunity to disembark within three hours of the time the aircraft has landed'.[84] Such delays cause serious inconvenience to passengers and are also increasingly expensive for air carriers in terms of opportunity and actual costs. Interestingly, Canada is the only jurisdiction in the world that has both tarmac delay obligations and compensation for delays and cancellations.

Although the EU Regulation contains no provisions on tarmac delays, passengers delayed on a tarmac are nonetheless entitled to adequate care, which may include food and beverages, depending on circumstances. Until recently, it was not clear whether 'arrival time' meant the time when the aircraft touches down on the runway, or when the aircraft is in its parking position and the breaks have been applied, or when the aircraft door is open. In *Germanwings v Henning*, the CJEU held that 'arrival time' should mean the time 'at which at least one of the doors of the aircraft

[84] P Paul Fitzgerald, 'A Re-Examination of Tarmac Delays Causes and Solutions' (2019) 84 Journal of Air Law and Commerce 53 at 54.

is opened'.[85] As a result, any time that passengers spend on board after the aircraft landed, but before the door is opened, counts generally towards delay.

Under the Canadian Air Passenger Protection Regulations, on the other hand, when a flight is delayed on a tarmac, the air carrier has an obligation to provide a minimum standard of treatment as regards the affected passengers. In particular, the air carrier must provide access to lavatory facilities,[86] proper ventilation, cooling or heating,[87] means of communication with people outside of the aircraft (if feasible),[88] food and drink in reasonable quantities,[89] and urgent medical assistance if any of the passengers requires it.[90] Although the APPR do not employ any minimum time requirement to define a tarmac delay, the main criterion is whether the aircraft is on the tarmac with its doors closed (i) after boarding has been completed (i.e. before take-off) or (ii) after landing before disembarkation.[91]

Furthermore, the APPR impose an obligation upon the operating carrier to provide an opportunity for passengers to disembark if the tarmac delay occurs at an airport in Canada and reaches three hours.[92] However, such an obligation does not arise where the take-off is imminent (i.e. likely to occur less than three hours and 45 minutes after the doors are closed for take-off or

[85] Case C-452/13 *Germanwings GmbH v Ronny Henning* [2014] ECLI:EU:C:2014:2141 at para 27.

[86] *Air Passenger Protection Regulations*, s 8(1)(a).

[87] *Ibid*, s 8(1)(b).

[88] *Ibid*, s 8(1)(c).

[89] *Ibid*, s 8(1)(d).

[90] *Ibid*, s 8(2).

[91] *Ibid*, s 8(1).

[92] *Ibid*, s 9(1).

after landing) if the carrier is able to continue to provide the required minimum standard of treatment.[93] Additionally, passengers with disabilities and their support person as well as service or emotional support animal should be given an opportunity to disembark first, if feasible.[94] Importantly, air carriers are released from the disembarkation obligations if disembarkation is not possible due to reasons related to safety, security, customs or air traffic control.[95]

At the same time, the EU Regulation does not provide for any such obligations of air carriers in cases of a tarmac delay. Nevertheless, the proposed amendments to the Regulation include a provision requiring that in cases of a tarmac delay of more than one hour the air carriers should provide drinking water, adequate heating and cooling, access to toilet facilities, and ensure availability of adequate medical attention should it be needed.[96] Moreover, it has also been recommended that passengers should be allowed to disembark if the tarmac delay reaches five hours, unless the aircraft cannot leave its position on the tarmac due to security-related reasons.[97]

[93] *Ibid*, s 9(2).

[94] *Ibid*, s 9(3).

[95] *Ibid*, s 9(4).

[96] *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air*, COM (2013) 130.

[97] *Ibid*.

1.4.3 Cancellation and long delay

In the European passenger rights regime, a cancellation is a 'non-operation of a flight which was previously planned and on which at least one place was reserved'.[98] The CJEU subsequently clarified that a cancellation occurs when the planning of the original flight is abandoned and the passengers from that flight are transferred onto a flight that was planned independently of the non-operated flight.[99] Importantly, the cancellation does not necessarily have to be an express decision of the airline.[100] Furthermore, a flight will be treated as cancelled if an aircraft takes off but, for whatever reason, subsequently returns to the airport of departure without having reached the final destination as planned.[101] At the same time, such a flight might be regarded as delayed if re-routing under comparable transport conditions is offered to the passenger, and if the airport of arrival serves the same city or region as the airport indicated in the itinerary. In a similar way, a flight that is diverted with passengers arriving at an airport different from that indicated in the travel document will be treated as cancelled.

Under the EU Regulation, a cancellation of a flight creates for the operating carrier three main types of obligations: (i) to provide reimbursement or re-routing; (ii) duty of care and assistance to passengers; and, subject to failure on the part of the carrier to inform the passengers of the cancellation sufficiently in advance, (iii) to pay standardised monetary compensation.[102] The duty to provide reimbursement or re-routing pursuant to Article 8 entitles passengers to choose

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[98] *Regulation (EC) 261/200*4, art 2(1).

[99] *Sturgeon*, *supra* note 16 at para 36.

[100] Case C-83/10 *Aurora Sousa Rodriguez and Others v Air France SA* [2011] ECR I-09469.

[101] *Ibid* at para 28.

[102] *Regulation (EC) 261/2004*, art 5(1).

whether they receive reimbursement for the ticket price or are re-routed.[103] Passengers whose flight is cancelled and who are waiting for a return flight or re-routing are also entitled to assistance and adequate care pursuant to Article 9.[104] The amount of the monetary compensation for inconvenience is determined pursuant to Article 7 of the Regulation and ranges from €250 to €600 depending on the flight distance.[105] The air carrier may reduce the amount of compensation or avoid having to pay any if it offers re-routing or satisfies the early notification conditions respectively.[106]

The Regulation encourages the airlines to notify passengers of the potential cancellations before the scheduled departure time. The purpose is to allow an adequate amount of time for passengers to make changes to their travel plans in order to minimise potential inconvenience. This way, the duty to compensate under Article 7 arises only if the air carrier fails to inform the passengers sufficiently in advance. This way, the operating carrier can avoid having to pay compensation if it informs the passenger of the cancellation or delay (i) at least two weeks before the departure time,[107] or (ii) between two weeks and seven days before the scheduled departure time and offers re-routing allowing the passenger to depart no more than two hours before the scheduled departure time and arrive at destination less than four hours after the scheduled

[103] See Chapter 1.3.5 *supra* for discussion of the obligation to offer alternative travel arrangements or reimburse.

[104] See Chapter 1.3.4 *supra* for discussion of the minimum standard of treatment and obligation to provide care.

[105] *Regulation (EC) 261/2004*, art 7(1). See Chapter 1.3.6 *supra* for quantification of compensation.

[106] See Chapters 1.3.1 and 1.3.3 *supra* for the discussion of the provisions that allow air carriers to reduce the amount of compensation or avoid having to pay it.

[107] *Regulation (EC) 261/2004*, art 5(1)(c)(i).

arrival,[108] or (iii) less than seven days before departure and offers re-routing allowing the passenger to depart no more than one hour before the scheduled departure time and arrive at destination less than two hours after the scheduled arrival.[109] The amount of compensation may be reduced by 50% if re-routing is offered and the conditions of Article 7(2) are satisfied.[110]

Under the Canadian Air Passenger Protection Regulations, when a flight is cancelled or delayed by three or more hours, the obligations of the operating air carrier may include the minimum standards of treatment, provision of information, alternative travel arrangements, refunds and monetary compensation for inconvenience. The precise set of obligations will depend on (1) the size of the air carrier ('small' or 'large'), (2) whether the flight disruption or the situation that causes it is within the carrier's control and (3) whether the disruption is required for safety.

When a flight is delayed or cancelled due to situations within the carrier's control, the affected passengers become entitled to the minimum standards of treatment (care obligations),[111] information as regards the reasons of the disruption,[112] alternative travel arrangements or a refund,[113] and a standardised monetary compensation dependent on the duration of the delay.[114] If the cancellation or delay is within the carrier's control but required for safety, all of the above

[108] *Ibid*, art 5(1)(c)(ii).

[109] *Ibid*, art 5(1)(c)(iii).

[110] See Chapter 1.3.6 *supra*.

[111] A*ir Passenger Protection Regulations*, s 14. See Chapter 1.3.4 *supra* for more detailed discussion of care obligations.

[112] *Ibid*, s 12(2)(a), s 12(3)(a).

[113] *Ibid*, s 17. See Chapter 1.3.5 *supra* for more detailed discussion of the obligation to provide alternative travel arrangements or a refund.

[114] *Ibid*, s 19. See Chapter 1.3.6 *supra* for more detailed discussion of the compensation amounts.

obligations apply, except for the obligation to compensate for inconvenience. Finally, when a flight is delayed or cancelled or a denial of boarding occurs due to situations outside the carrier's control, the air carrier has information obligations as well as the duty to offer alternative travel arrangements.[115] The airline, however, does not have to compensate for inconvenience or offer refunds. Moreover, the minimum standards of treatment do not apply in such a case (see Table 1).

Situations	Obligations
Outside carrier's control	1. Information 2. Alternative travel arrangements
Within carrier's control but required for safety	1. Information 2. Minimum standards of treatment 3. Alternative travel arrangements 4. Refund
Within carrier's control	1. Information 2. Minimum standards of treatment 3. Alternative travel arrangements 4. Refund 5. Compensation for inconvenience

Table 1. Obligations of air carriers under the Canadian Air Passenger Protection Regulations.

[115] *Ibid*, s 10(3).

Importantly, if the flight disruption is caused by a situation that is outside the carrier's control or required for safety reasons, the delay, cancellation or denial of boarding on subsequent flights using the same aircraft will also be regarded as outside the carrier's control or required for safety purposes if the carrier took all reasonable measures to mitigate the 'knock-on' effect.[116] This way, the Canadian regulators recognised the paramount importance of safety in aviation and chose to not penalise airlines for being safe.

Both the European and Canadian passenger rights regimes allow air carriers to limit or refuse to provide care to passengers experiencing long delay or awaiting re-routing if the provision of care itself can be reasonably expected to cause further delay.[117] The provision of hotel accommodation can be denied when the delayed flight can be reasonably expected to depart within a few hours and a transfer from the airport to the hotel and back may cause further delay. Furthermore, the obligation to pay compensation under Article 7 of the European Regulation can be waived if the air carrier proves that the delay was caused by extraordinary circumstances that could not have been avoided even if all reasonable measures had been taken. Under the Canadian APPR, no obligation to compensate for inconvenience will arise in the first place unless the flight disruption is caused by situations within the carrier's control and is not required for safety.

In interpreting the provisions of Regulation 261 and filling its definitional gaps, the Court of Justice of the European Union has generally been adopting a consumer-oriented approach. In the landmark case of *Sturgeon v Condor*, the Court went even further by extending the legal consequences of cancellations to cases of long delays.[118] At the time when the Regulation was

[116] *Ibid*, s 10(2), s 11(2).

[117] *Regulation (EC) 261/2004*, recital 18; *Air Passenger Protection Regulations*, s 14(3).

[118] *Sturgeon*, *supra* note 16.

adopted, it provided for a right to compensation only in cases of cancellation and denied boarding.[119] The text of the Regulation did not explicitly provide for compensation in the case of a flight delay. It was only in *Sturgeon* that the CJEU extended the obligation of air carriers to pay compensation for long delays (of three or more hours).[120] The Court noted that (a) passengers who lose at least three hours of their time because of the re-routing and (b) passengers affected by delays who arrive at their final destination three or more hours late suffer similar damage, that is the loss of time caused by the fact that their air travel plans are disrupted. The CJEU recognised that damage caused to passengers whose flight has been significantly delayed is comparable to that sustained by passengers in the event of a flight cancellation, and thus should be remedied accordingly. Therefore, following the decision in *Sturgeon*, subsequently confirmed in *Nelson v Lufthansa*,[121] passengers are now entitled to invoke Article 7 of the Regulation to claim compensation when their flight arrives at the final destination three or more hours late.[122]

Before the CJEU ruled in *Sturgeon* to extend the application of Article 7 to cover cases of long delays, the affected passengers could only rely on (i) the duty to provide adequate care,[123] and (ii) the duty to provide reimbursement where the delay was five or more hours.[124] Following

[119] *Regulation (EC) 261/2004*, arts 4-5.

[120] *Sturgeon*, *supra* note 16.

[121] Joined Cases C-581 and 629/10 *Emeka Nelson, Bill Chinazo Nelson, Brian Cheimezie Nelson v Deutsche Lufthansa AG and TUI Travel plc, British Airways plc, easyJet Airline Company Ltd, International Air Transport Association v Civil Aviation Authority* [2012] OJ C399/3 [*Nelson v Deutsche Lufthansa*].

[122] Arrival time is considered to be the time 'at which at least one of the doors of the aircraft is opened'. See Case C-452/13 *Germanwings GmbH v Ronny Henning* [2014] ECLI:EU:C:2014:2141 at para 27.

[123] *Regulation (EC) 261/2004*, art 9.

[124] *Ibid*, art 8(1)(a).

Sturgeon, passengers whose flight is delayed for three or more hours also have a right to compensation similar to that enjoyed by passengers whose flight is cancelled, with the limitation period for bringing such actions being a matter of national laws of each Member State.[125] The decision of the CJEU in *Sturgeon*, which significantly extended the duty of air carriers to compensate passengers for inconvenience, has become much disputed ever since, and has been criticised heavily as an example of excessive judicial activism or even of illegitimate judicial law-making.[126]

Importantly, the availability of the extraordinary circumstances defence allows the air carriers to overcome, in appropriate circumstances, the duty to compensate.[127] To invoke such a defence, a number of conditions must be satisfied. It is the ambiguity and the lack of legal clarity in the meaning of such conditions that create difficulties and uncertainty in their practical application. The following chapters will address these concerns.

[125] Case C-139/11 *Joan Cuadrench Moré v Koninklijke Luchtvaart Maatschappij NV* [2012] ECLI:EU:C:2012:741 at para 33.

[126] Sacha Garben, "The Turbulent Life of Regulation 261: Continuing Controversies Surrounding EU Air Passenger Rights" in Michal Bobek & Jeremias Prassl, eds, *Air Passenger Rights: Ten Years On* (Hart Publishing, 2016).

[127] Extraordinary circumstances cannot be invoked in cases of denied boarding: Case C-22/11 *Finnair Oyj v Timy Lassooy* [2012] ECLI:EU:C:2012:604 at para 40. Furthermore, the obligation of the air carrier to provide care subsists even when the cancellation is caused by extraordinary circumstances.

CHAPTER 2. FLIGHT DISRUPTIONS REQUIRED FOR SAFETY AND THE EXTRAORDINARY CIRCUMSTANCES DEFENCE

The European Regulation provides that an operating air carrier can be exempted from the obligation to pay compensation in the event of a cancellation or long delay if it can prove that the cancellation or delay was caused by 'extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken'.[128] At the same time, the Canadian Air Passenger Protection Regulations categorise the situations that can cause flight disruptions into three types, with only one of them (situations within the airline's control) triggering compensatory obligations for the operating air carrier. This chapter analyses the liability framework with regard to flight disruptions caused by technical problems in aircraft and examines the rules that purport to determine the availability of the extraordinary circumstances defence in such cases.

Section 1 provides a brief overview of the provisions that determine whether obligations to pay monetary compensation arise under the Canadian approach, as well as those that exonerate air carriers from such compensatory obligations under the European approach. Section 2 focuses on the landmark case of *Wallentin-Hermann v Alitalia*,[129] in which the *Wallentin* test was formulated for the purpose of interpreting the concept of extraordinary circumstances as regards technical problems in aircraft. It examines the notion of 'inherency' as introduced in *Wallentin*, and argues that it is not an appropriate determining factor for the purpose of establishing the existence of extraordinary circumstances. The chapter concludes by Section 3 that examines the Canadian approach to air carriers' liability for flight disruptions caused by technical problems and

[128] *Regulation (EC) 261/2004*, art 5(3).

[129] *Wallentin-Hermann*, *supra* note 13.

suggests that such an approach is preferable since it prioritises flight safety considerations.

2.1 Overview of the provisions that exonerate air carriers from the obligation to pay compensation in cases of flight disruptions

While the majority of non-compensatory obligations (such as the obligation to provide information, refreshments, food, or hotel accommodation) will arise for operating air carriers in most cases of a delay, cancellation or denied boarding,[130] the obligation to pay monetary compensation for inconvenience does not necessarily arise automatically.

Under the European regime, as soon as a liability event occurs, there is a rebuttable presumption of compensatory liability on the part of the operating air carrier. This means that the airline has a *prima facie* Article 7 compensatory liability unless it is able to prove that the cancellation or delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.[131] The burden of proof is thus on the airline. As will be discussed in the chapters that follow, the Court of Justice of the European Union in its decision in *Wallentin-Hermann v Alitalia* made such a defence tremendously difficult, if at all possible, to invoke.

The Canadian APPR, on the other hand, do not impose strict liability upon air carriers without firstly considering the cause of the flight disruption. To this end, the Canadian APPR define the majority of air carriers' obligations based on three types of a situation that cause flight

[130] Care obligations will arise automatically under the European regime whenever there is a flight disruption. Under the Canadian APPR, however, no such obligations will be imposed upon the carrier unless the disruption was within its control and not required for safety.

[131] *Regulation (EC) 261/2004*, art 5(3).

disruptions: (i) situations outside the carrier's control, (ii) situations within the carrier's control but required for safety purposes, and (iii) situations within the carrier's control and not required for safety purposes.

Where a flight delay or cancellation occurs due to situations outside the operating carrier's control, the airline's obligations include (i) providing passengers with the information concerning the reason of the disruption, the rights that the affected passengers have, and remedies to which they may be entitled,[132] as well as (ii) providing alternative travel arrangements in cases of a cancellation of delay of three or more hours.[133]

In the case of a flight delay or cancellation that is within the carrier's control but required for safety purposes, similar communications obligations arise for the operating carrier as in the case where the situation is outside the airline's control. Additionally, and depending on the circumstances, passengers may be entitled to receive food and drink in reasonable quantities,[134] hotel accommodation if overnight wait is expected, transportation to and from the hotel,[135] access to a means of communication,[136] as well as alternative travel arrangements or a refund.[137] Importantly, to avoid the interpretation ambiguity that has proved rather problematic in the European regime, the APPR provide a reasonably clear definition of what 'required for safety purposes' means:

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[132] *Air Passenger Protection Regulations*, s 13(1).

[133] *Ibid*, s 10(3).

[134] *Ibid*, s 14(1)(a).

[135] *Ibid*. s 14(2).

[136] *Ibid*, s 14(1)(b).

[137] *Ibid*, s 14(2).

> [R]equired for safety purposes means required by law in order to reduce risk to passenger safety and includes required by safety decisions made within the authority of the pilot of the aircraft or any decision made in accordance with a safety management system as defined in subsection 101.01(1) of the Canadian Aviation Regulations but does not include scheduled maintenance in compliance with legal requirements.[138]

Finally, where a flight delay or cancellation is within the operating carrier's control, the carrier has an additional obligation to compensate the affected passengers for inconvenience (along with the obligations it would have if the disruption was required for safety).

The EU Regulation, on the other hand, does not distinguish between different events that cause flight disruptions. Instead, it provides that an operating air carrier can be exempted from the obligation to pay compensation in the event of a cancellation or long delay if it can prove that the cancellation or delay is caused by 'extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken'.[139] Although recital 14 of the Regulation provides a non-exhaustive list of events which have the potential to constitute or create such circumstances, there is no clear definition of the concept of 'extraordinary circumstances' in the Regulation itself. The indicative list of events that may, according to the EU regulators, produce extraordinary circumstances includes unexpected flight safety shortcomings, political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks and strikes that affect the operation of the operating air carrier.[140]

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[138] *Air Passenger Protection Regulations*, s 1(1).

[139] *Regulation (EC) 261/2004*, art 5(3).

[140] *Ibid*, recital 14.

Notwithstanding the fact that unexpected flight safety shortcomings are included in such a list, it has been unclear whether an unexpected technical problem in an aircraft may constitute extraordinary circumstances that would exonerate the carrier from the obligation to pay fixed statutory compensation. Although recognising that a technical problem in an aircraft may be regarded as an unexpected flight safety shortcoming that produces extraordinary circumstances, the CJEU introduced further limitations by holding that the circumstances can be characterised as extraordinary only if they relate to an event which 'is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature of origin'.[141]

2.2 Technical problems in aircraft and the *Wallentin* test for 'extraordinary circumstances' under the European approach

The availability of the extraordinary circumstances defence under Regulation 261/2004 is essential for preserving the principle of proportionality.[142] It is also important for maintaining a fair balance of interests in the air transport industry. Nevertheless, recent interpretative attempts of the CJEU make it extremely difficult, if at all possible, for airlines to invoke the extraordinary circumstances defence when faced with a flight disruption caused by mechanical problems in aircraft.

2.2.1 Wallentin-Herman v Alitalia*: the test for extraordinary circumstances*

In *Wallentin-Hermann v Alitalia,*[143] the CJEU was specifically asked to bring clarity to the concept of 'extraordinary circumstances' within the meaning of Article 5(3) of the Regulation, and to shed

[141] *Wallentin-Hermann*, *supra* note 13 at para 23.

[142] See *IATA*, *supra* note 11.

[143] *Wallentin-Hermann*, *supra* note 13.

some light on when, in cases of technical problems, air carriers are entitled to rely on the extraordinary circumstances defence to be exempted from the duty to pay compensation to passengers.[144]

Mrs Wallentin-Hermann together with her husband and her daughter had booked three tickets on an Alitalia flight from Vienna to Brindisi via Rome. Five minutes before the scheduled departure time the flight was cancelled and the passengers were transferred to the Austrian Airlines flight to Rome. As a result, Mrs Wallentin-Hermann and her family missed their connection flight and arrived in Brindisi more than three and a half hours late. The reason for the cancellation was 'a complex engine defect in the turbine'[145] that had been discovered during a regular maintenance check. Mrs Wallentin-Hermann submitted a claim for compensation pursuant to Articles 5(1)(c) and 7(1) of the Regulation, which was upheld by the District Commercial Court of Vienna. Alitalia, the operating carrier, subsequently appealed against such a decision, invoking the extraordinary circumstances defence.

The Austrian court decided to stay proceedings and asked the CJEU to interpret the concept of extraordinary circumstances defence provided for in Article 5(3) having regard to recital 14 of the Regulation. A major difficulty with this came from the need to reconcile Article 5(3), which represents a derogation from the general consumer protection principle, with recital 14, which purports to explain when, for the purpose of the Regulation, the extraordinary circumstances occur, and the objectives of the Regulation, expressed, *inter alia*, in the preamble thereto. However, by limiting the 'unexpected flight safety shortcomings' to hidden manufacturing defects that affect

[144] *Ibid* at para 14.

[145] *Ibid*.

all aircraft of the same type,[146] thus making the exemption for unexpected flight safety shortcomings practically impossible to invoke by air carriers, the CJEU failed adequately to reconcile Article 5(3) with recital 14.

The Court paid very little regard, if any, to the concerns of flight safety, which are paramount in aviation. This is evident in light of the fact that unexpected flight safety shortcomings are mentioned in recital 14 as one type of a situation (along with political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier) where the extraordinary circumstances defence is to be available,[147] and yet the Court chose to remove them from the range of circumstances regarded as 'extraordinary' under Article 5(3).

The CJEU held in *Wallentin*:

> … [A] technical problem in an aircraft which leads to the cancellation [or a long delay] of a flight is not covered by the concept of 'extraordinary circumstances' within the meaning of that provision, unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control.[148]

It follows that where an air carrier seeks to invoke the extraordinary circumstances defence to be relieved from the obligation to pay compensation for cancellations or long delays caused by

[146] Case C-257/14 *C. van der Lans v Koninklijke Luchtvaart Maatschappij NV*, *supra* note 15 at para 40.

[147] *Regulation (EC) 261/2004*, recital 14.

[148] *Wallentin-Hermann*, *supra* note 13 at para 34.

technical problems, it must first establish that the events which gave rise to the technical problem are, on account of their nature of origin, (1) not inherent in the normal exercise of the air carrier's activity, and (2) beyond the air carrier's actual control.

The test thus established by the CJEU in *Wallentin-Hermann v Alitalia* (the '*Wallentin* test') can be described as consisting of two limbs: (1) 'inherency' and (2) 'control'. To invoke the extraordinary circumstances defence, the air carrier has to satisfy both of them. This entails that if the event is considered 'inherent', the air carrier will not be able to rely on the defence. Equally, where the event is regarded to be in the air carrier's control, the defence will not be available. Importantly, the Court also held that technical problems discovered during regular maintenance or pre-flight checks would never pass the test of non-inherency and therefore could never constitute extraordinary circumstances for the purposes of the Regulation.[149] In contrast, technical problems which arise from the involvement of third parties, such as terrorist acts or sabotage, as well as hidden manufacturing defects, may be relied on to invoke the extraordinary circumstances defence.[150]

According to Article 5(3) of the Regulation, not all extraordinary circumstances waive the duty to compensate, but only those that could not have been avoided even if all reasonable measures had been taken. Thus, once the two limbs of the test are satisfied, the onus is on the air carrier seeking to invoke the extraordinary circumstances defence further to prove that such extraordinary circumstances could not have been avoided even if all reasonable measures had been taken. Such measures should be technically and economically viable for the air carrier concerned

[149] *Ibid* at para 25.

[150] *Ibid* at para 26.

at the time when the alleged extraordinary circumstances arise.[151] It is not sufficient for the air carrier to have complied with the maintenance requirements in order to prove that it has taken 'all reasonable measures'.[152] The air carrier has to establish that even if it had deployed all of its staff, equipment and financial resources available, it would clearly not have been able, unless it had made intolerable sacrifices, to prevent the extraordinary circumstances from leading to the cancellation or long delay.[153]

The CJEU was asked in *van der Lans* whether taking all reasonable measures refers to avoiding the occurrence of extraordinary circumstances, and not to taking measures to keep the delay within the three-hours limit.[154] This issue was also among those 'uncomfortable' questions that the Court avoided answering because that would require the CJEU either to reveal its convenience-focused approach that neglects safety or to change it to a more balanced one. It appears, however, that the legislators intended that it should have been the extraordinary circumstances which 'could not have been avoided', not the cancellation or delay itself. Nevertheless, the Court in *Wallentin-Hermann* imposed an additional requirement on air carriers if they are to raise the extraordinary circumstances defence. This way, after the existence of extraordinary circumstances has been proved, the air carrier must further establish that such extraordinary circumstances could not have been prevented from leading to cancellation of the flight, unless intolerable sacrifices had been made.[155]

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[151] *Ibid* at para 40.

[152] *Ibid* at para 43.

[153] *Ibid* at para 41.

[154] Case C-257/14 *C. van der Lans v Koninklijke Luchtvaart Maatschappij NV*, *supra* note 15 at para 18(8).

[155] *Wallentin-Hermann*, *supra* note 13 at para 41.

Moreover, in *Eglitis*,[156] the CJEU held that air carriers have to take account of the risk of delay connected to the possible occurrence of extraordinary circumstances *since* they are 'obliged under Article 5(3)' to implement all reasonable measures to avoid such circumstances.[157] The Court referred to paragraph 42 of *Wallentin-Hermann* and interpreted it as imposing an additional obligation on air carriers to have actually taken all reasonable measures.[158] Yet it is evident from the wording of that article that it does not contain an express requirement that an air carrier must have taken all reasonable measures to avoid extraordinary circumstances if it seeks to invoke the defence. What that article does require is for the air carrier to establish that even if all reasonable measures had been taken, the extraordinary circumstances could not have been avoided.

Overall, the extraordinary circumstances defence under the Regulation, as interpreted in *Wallentin-Hermann*, can be summarised in the following four key points. First, the notion of inherency appears to be the decisive factor in determining whether a particular event is of such a type with regard to which the extraordinary circumstances defence can be invoked. Second, the occurrence of such an event must be beyond the air carrier's control. Third, it must be established that even if all reasonable measures had been taken, it would not have been possible to avoid the extraordinary circumstances. Finally, the air carrier wishing to invoke the defence must further prove that it has actually taken all reasonable measures to avoid the cancellation or long delay.

The *Wallentin* test appears to allow the courts of the Member States considerable

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[156] Case C-294/10 *Andrejs Eglītis and Edvards Ratnieks v Latvijas Republikas Ekonomikas ministrija* [2011] ECR I-03983.

[157] *Ibid* at para 27.

[158] *Wallentin-Hermann*, *supra* note 13 at para 42.

discretion.[159] This means that national courts can in practice expand or restrict the range of circumstances that will be covered by the extraordinary circumstances defence. Such flexibility resides primarily in the inherency requirement.[160] Thus, the Court's definition of 'extraordinary circumstances' does not achieve greater clarity and consistency in the treatment of cases among different EU jurisdictions. Moreover, the failure by the CJEU to provide adequate guidance for national courts as to practical application of the test may lead to inconsistent and confusing judgments also within a single national jurisdiction.[161] It can be concluded, therefore, that the CJEU has failed to clarify the law of the extraordinary circumstances defence in cases of technical problems in aircraft.

2.2.2 Problems with the notion of 'inherency'

Inherency appears to be the most controversial concept employed by the CJEU to define 'extraordinary circumstances' for the purposes of the Regulation. The main problem with this concept is that its use does not always lead to the results intended by the Regulation. Moreover, it may produce inconsistent decisions throughout the EU as it is for the national courts to ascertain whether the events in every individual case are inherent.[162] This section argues that 'inherency' should not be the decisive factor in determining the availability of the extraordinary circumstances defence in cases of technical problems.

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[159] *Ibid* at para 27.

[160] Tom van der Wijngaart, 'Case Note: *van der Lans v. KLM* and 'Extraordinary Circumstances'' (2016) 41 Air and Space Law 59.

[161] See, for example, *Jet2.com v Huzar* [2014] EWCA Civ 791, [2014] All ER (D) 86 (Jun) .

[162] *Wallentin-Hermann*, *supra* note 13 at para 27.

Recital 14 of the Regulation, which provides a non-exhaustive indicative list of events that may produce extraordinary circumstances, includes, *inter alia*, unexpected flight safety shortcomings. Moreover, the CJEU does recognise that a technical problem in an aircraft may be among such shortcomings.[163] At the same time, the Court creates further ambiguity by saying that:

> … circumstances surrounding such an event can be characterised as 'extraordinary' within the meaning of Article 5(3) of the Regulation only if they relate to an event which, like those listed in recital 14 in the preamble to that Regulation, is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature of origin.[164]

A major drawback of this approach is that it implies that there would need to be two events: 'event B' that would be surrounded by circumstances characterised as 'extraordinary', and another, earlier 'event A', to which 'event B' relates. And it is the preceding one ('event A') that has to satisfy the two limbs of the *Wallentin* test. Difficulties arise, however, when an attempt is made to contemplate a set of facts to fit this in practice.

Secondly, the conclusion of the Court's argument seems to be based on a false premise. Namely, that the events listed in recital 14 of the Regulation are not inherent in the normal exercise of the activity of air carriers. The list in recital 14 includes, *inter alia*, meteorological conditions incompatible with the operation of the flight concerned. While it would be a credible assumption to make that cases of political instability are not inherent in the normal exercise of the air carriers' activity, incompatible meteorological conditions are part and parcel of the airline industry, and

[163] *Ibid* at para 23.

[164] *Ibid*.

thus it would be unreasonable to regard them as something which is 'not inherent' in the everyday operation of the airline business. In this context, understanding the exact meaning of the notion of 'inherency' is important. Nevertheless, this concept remains surrounded by ambiguity.

In *Pešková*,[165] for example, the only factor that the CJEU relies on when establishing 'inherency' and 'control' (the two limbs of the *Wallentin* test) is that of an 'intrinsic link':

> … [A] collision between an aircraft and a bird, as well as any damage caused by that collision, *since* they are not intrinsically linked to the operating system of the aircraft, are not by their nature or origin inherent in the normal exercise of the activity of the air carrier concerned and are outside its actual control.[166]

The reliance on the 'intrinsic link' in *Pešková* and the requirement of 'inherency' in *Wallentin* reveal noticeable inconsistencies in the reasoning of the Court. In *van der Lans*, where the language of the 'intrinsic linkage' was introduced,[167] the Court was of the opinion that an unexpected event, in that case being the breakdown caused by the premature failure of aircraft components, is inherent because 'air carriers are confronted as a matter of course with unexpected technical problems'.[168] But then it is not clear why poor weather conditions are not considered inherent as well. In fact, it could be argued that incompatible meteorological conditions are as inherent in the normal exercise of air carriers' activities as unexpected and unforeseen technical problems. [169] Air

[165] Case C-315/15 *Marcela Pešková and Jiří Peška v Travel Service a.s* [2017] ECLI:EU:C:2017:342.

[166] *Ibid* at para 24.

[167] *Case C-257/14 C. van der Lans v Koninklijke Luchtvaart Maatschappij NV*, *supra* note 15 at para 41.

[168] *Ibid* at para 42.

[169] It must be noted, however, that the issue of compatibility of meteorological conditions may differ by location. For example, Montreal would operate in conditions that would close Rome or Athens.

carriers are 'confronted as a matter of course' with meteorological conditions incompatible with flying just as much as they are with various technical problems. Moreover, it can be implied from the reasoning in *van der Lans* judgment itself that incompatible meteorological conditions are part of the everyday operations of airlines: the very complex operating system of the aircraft is 'operated by the air carrier in conditions, particularly meteorological conditions, which are often difficult or extreme'.[170] The ambiguity continues when the Court applies the *Wallentin* test not only to the technical problem or events that caused it, but also to its consequences, namely to the need to repair the breakdown.[171] It is apparent therefore that the lack of legal clarity as to how to establish inherency adds significantly to the ambiguity of the *Wallentin* test.

In this context, it is important to note that the original language of *Wallentin-Hermann* is German, and the English translation of the *Wallentin* test does not appear to be sufficiently accurate.[172] What has been translated into English to mean 'not inherent in the normal exercise of the activity of the air carrier concerned' in its original language means 'not *part* of the normal exercise of the activity of the air carrier concerned'.[173] It is suggested that the English word 'inherent' is too wide for the original German 'Teil'. While unexpected and unforeseen technical breakdowns can be regarded as something that is generally not unlikely to be present in aviation, they are definitely not 'part of' normal exercise of the activity of the air carriers. Quite the contrary, they impede the ability of air carriers to carry out their normal activities.

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[170] Case C-257/14 *C. van der Lans v Koninklijke Luchtvaart Maatschappij NV*, *supra* note 15 at para 41.

[171] *Ibid* at para 43.

[172] Jochem Croon, "'If You Do Not Know Where You Are Going, You Will End Up Somewhere Else': Update on the Continuing Discussion on Technical Problems and Passenger Rights" (2015) 40 Air and Space Law 331.

[173] In the original German: 'nicht Teil der normalen Ausübung der Tätigkeit des betroffenen Luftfahrtunternehmens'.

Another linguistic argument against the notion of inherency is that technical problems by definition cannot be 'inherent' in the normal exercise of the activity of air carriers. 'Inherent' is defined as 'existing in something as a permanent, essential, or characteristic attribute'.[174] Although technical problems occur from time to time, they are in no way permanent or essential attributes of normal flight operations. Nor do technical problems constitute a characteristic attribute of the modern airline industry: flights do not take off unless it is reasonably expected that they will be safe. Hence, it is apparent that the inaccuracy in translation produces further uncertainty as to when the *Wallentin* test applies in practice.

With this in mind, there is no doubt that the Court was correct in saying that the resolution of a technical problem caused by a failure to maintain an aircraft is to be regarded as 'inherent' in the normal exercise of an airline's activity, not allowing the air carrier to invoke the extraordinary circumstances defence.[175] Such technical problems are caused by a failure to do what is indeed part of everyday operations (ie regular maintenance). What is problematic, however, is that the Court treats the unexpected, unforeseen and unforeseeable technical problems not attributable to the fault of the air carrier in the same way. The consequences of such an approach are especially evident in *Siewert v Condor*,[176] a case decided in light of the *Wallentin* test, where there was no failure on the part of the air carrier to maintain the aircraft. The CJEU relied on the concept of inherency, introduced in *Wallentin-Hermann,* and ruled that the collision of mobile boarding stairs with an aircraft which results in damage to the aircraft, despite being caused by a third party operator of boarding stairs, cannot be categorised as 'extraordinary circumstances' relieving the

[174] *Oxford Dictionary of English* (Angus Stevenson ed, 3rd edn, OUP 2010) 899.

[175] Case C-394/14 *Sandy Siewert and Others v Condor Flugdienst GmbH* [2014] ECLI:EU:C:2014:2377 .

[176] *Ibid*.

air carrier from its obligation to compensate.[177] This way, the CJEU further narrowed the scope of the 'extraordinary circumstances' available to air carriers.

2.2.3 Difficulties identifying the 'event'

It is 'apparent', in the opinion of the Court, that the purpose of recital 14 was not to list situations that themselves constitute extraordinary circumstances, but merely to provide examples of 'events' which may produce such circumstances.[178] Such a conclusion does not seem to follow logically from the wording of the recital itself. It may be true for some events, but clearly not for all. For example, such reasoning implies that it is not 'meteorological conditions incompatible with the operation of the flight concerned' that can be invoked as a ground for exemption from the duty to compensate, but rather something else which produced such meteorological conditions. Hence, a degree of uncertainty arises as to what such extraordinary circumstances produced by incompatible weather conditions are in practice.

Equally, in the case of technical problems, where it must be established that such problems stem from the event that is not inherent, it is not clear what that event may be. In a hypothetical situation where in the middle of a flight one of the engines stops working due to the spontaneous failure of a component that has been properly maintained, uncertainty arises as to which of the 'events' is the one that would qualify as producing 'extraordinary circumstances'. Spontaneous failures of components are generally foreseeable but only in the sense that 'the operation of aircraft *inevitably* gives rise to technical problems' and 'no component of an aircraft lasts forever'.[179]

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[177] *Ibid*.

[178] *Wallentin-Hermann*, *supra* note 13 at para 22.

[179] Case C-257/14 *C. van der Lans v Koninklijke Luchtvaart Maatschappij NV*, *supra* note 15 at paras 37 and 41.

However, they are not foreseeable in a more specific sense. While it is true that air carriers cannot completely rule out the possibility of technical problems occurring, they cannot be reasonably expected to know when, where, and what exactly type of technical problem will arise. An air carrier may be able to minimise the likelihood of a *particular* technical problem occurring, but it is practically impossible to achieve a zero probability of *any* technical problem arising. It follows that there is always a 'general' possibility of technical problems, and this fact should not be used to determine if a technical problem is 'inherent' or not. Moreover, not all technical problems are of the same kind.

Another ambiguous issue is whether it was intended that (a) the occurrence of the underlying event or rather (b) the consequential inability to operate the affected flight as originally scheduled is to be regarded as extraordinary circumstances. If, for example, incompatible meteorological conditions constitute extraordinary circumstances, then one would find it odd to think that such circumstances can be avoided by any kind of measures at all. Similarly, if extraordinary circumstances concern practical impossibility of operating a particular flight due to incompatible meteorological conditions, then again, one can hardly think of any reasonable measures to be taken to operate a flight where that is not possible due to safety concerns. What can be done in this case is taking reasonable measures to mitigate the consequences of incompatible meteorological conditions.

A similar analysis can be applied in the case of technical problems. If it is the occurrence of a technical problem itself that constitutes 'extraordinary circumstances', then it should follow that there exist some reasonable measures that the air carrier can take, without making 'intolerable

sacrifices',[180] to avoid the occurrence of the technical problem. Where such measures do not exist, it makes the extraordinary circumstances defence *a priori* impossible to invoke. And while such measures are difficult to think of in both cases of (i) bad weather conditions and (ii) unexpected, unforeseen, and unforeseeable technical problems (where there is no fault on part of the air carrier, aircraft manufacturer, or airport operator), it is the latter that courts are reluctant to accept as exempting the air carriers from the obligation to compensate.

Likewise, if the extraordinary circumstances are not the technical defects in themselves, but rather arise as a result thereof and make the operation (or the continuation) of a particular flight impossible, reasonable measures can only be taken to repair the technical problem and ensure a high level of flight safety, but not to remove their immediate consequences. It must be noted in this regard that the repair might not always be quick. Depending on the nature of the technical problem, some rare aircraft parts might have to be delivered from the air carrier's base or from the manufacturer. Moreover, a specialised maintenance technician may have to travel from another base. All that is done to ensure flight safety.

Among various measures that can be taken to minimise a delay may be creating reserve capacity, entering into wet-lease arrangements with other airlines, or transferring passengers to other flights. However, when it is apparent that the delay is likely to be more than three hours and the air carrier is not able to satisfy the *Wallentin* test for extraordinary circumstances, there would appear no need to resort to any additional measures in order to try to get the passengers to their destination as quickly as possible. At least there is no economic sense for the air carrier in doing so, as the obligation to compensate will have already arisen, and entering into additional business

[180] *Wallentin-Hermann*, *supra* note 13 at para 41.

arrangements in order to minimise further passenger inconvenience will only aggravate the financial burden. This raises concerns as to whether the application of the Regulation as interpreted in the subsequent case law always leads to the results consistent with the objectives it purports to achieve.

2.3 'Situations within the air carrier's control but required for safety' under the Canadian approach

In the landmark case of *Wallentin-Hermann v Alitalia*,[181] the CJEU interpreted the 'extraordinary circumstances' defence by limiting its application to events which are not inherent in the normal exercise of the air carrier's activity and are beyond its actual control, thus establishing what is known as the *Wallentin* test for extraordinary circumstances. According to the test, the air carrier that seeks to rely on the extraordinary circumstances defence to be relieved from the obligation to pay compensation for a cancellation or long delay caused by mechanical problems in aircraft, must first establish that the events which gave rise to the technical problem are, on account of their nature of origin (1) not inherent in the normal exercise of the air carrier's activity, and (2) beyond the air carrier's actual control. Hence, it is not sufficient to establish that the event that gave rise to the technical problem was not within the air carrier's control; it must be further proved that such an event was 'not inherent'. Such wording makes it extremely difficult, if not impossible, for an airline to exercise the extraordinary circumstances defence in the case of an unexpected mechanical problem.

Following the uncertainty and inconsistency in the interpretation of the EU Regulation's provisions by national courts of the member states, as well as by the CJEU itself, the Canadian

[181] *Ibid*.

regulators sought to avoid similar problems by employing a rather clear and unambiguous language in the APPR. This is evident in the context of the provisions that determine the circumstances in which air carriers have additional financial obligations, such as fixed statutory compensation, as regards the affected passengers. In this manner, a noticeable advancement in the APPR, when compared to their European counterpart, is the availability of a clear definition of the circumstances that allow air carriers to avoid paying statutory compensation for inconvenience. In particular, the Canadian regime avoids the unnecessary debates about what kind of events may cause extraordinary circumstances that, in turn, must result in a flight delay or cancellation. Nor do the APPR require distinguishing the event itself from the extraordinary circumstances that it causes, or the flight disruption that results therefrom. Instead, the Canadian regulations are explicit in stating that an air carrier will not have to pay compensation for inconvenience not only where the cancellation or delay is caused by the situation outside the carrier's control, but also where the situation is within the carrier's control yet required for flight safety. Importantly, the APPR provide a list of situations that are considered to be outside the carrier's control, with such a list being binding, although non-exhaustive.[182] This is in contrast to Regulation 261, which only provides an indicative list of extraordinary circumstances.[183]

The European Regulation's list of events that have a potential to constitute or create extraordinary circumstances required for the exoneration of air carriers from the obligation to pay compensation is non-exclusive, non-exhaustive, and not necessarily binding. This uncertainty is further exacerbated by the ambiguity created by *Wallentin*. In contrast, the Canadian APPR provide a clear list of situations that are always considered to be outside the operating carrier's

[182] *Air Passenger Protection Regulations*, s 10(1).

[183] *Regulation (EC) 261/2004*, recital 14.

control, and which can relieve the latter from the obligation to compensate passengers for inconvenience. In particular, such situations include war or political instability, illegal acts or sabotage, meteorological conditions or natural disasters incompatible with the safe operation of the aircraft, ATC instructions, NOTAM, a security threat, airport operation issues, a medical emergency, a collision with wildlife, a labour disruption, a manufacturing defect in an aircraft, and an order from a state official, law enforcement agency or a person responsible for airport security.[184] Such an extensive, albeit non-exhaustive, list of events that are considered to be outside the carrier's control, coupled with a clear definition of what is meant by 'required for safety purposes' and an absence of the obligation to pay compensation in the case of delay or cancellation caused by a mechanical malfunction, provides the much needed clarity to the liability framework in the APPR. It thus constitutes an important improvement from the rather ambiguous European rules.

Arguably, the most important APPR's distinction when compared to the European Regulation is that it does not require air carriers to pay statutory compensation in cases of a flight disruption caused by a technical or mechanical problem that reduces the safety of passengers if it was discovered other than during scheduled maintenance. At the same time, the overly strict interpretation of the extraordinary circumstances defence in the European regime, coupled with the convenience-oriented conception of consumer protection adopted by the CJEU, may serve as incentives for airline managers to give instructions that would not always be preferable in terms of safety. Although there is little freely-accessible evidence of airline managers requesting flight crews to operate aircraft with however minor technical problems, it would be unreasonable to

[184] *Air Passenger Protection Regulations*, s 10(1).

completely exclude the possibility thereof. Practical impossibility of obtaining evidence of an act does not necessarily mean that such an act never takes place in reality. Given that the amount of compensation often significantly exceeds the ticket price, flying an aircraft with some minor technical problems would allow avoiding significant losses resulting from the duty to compensate and unavailability of the extraordinary circumstances defence in such cases. With safety indisputably paramount in aviation, such an approach of the European regulators risks producing serious undesired consequences. It is submitted, therefore, that the Canadian approach to liability of air carriers in cases where flight disruption is caused by a situation that is within the carrier's control yet required for safety, is preferable as it does not purport to penalise airlines for being safe. At the same time, the APPR themselves are not devoid of ambiguity when it comes to scheduled maintenance. The following section will address this concern.

2.4 Technical problems discovered during regular maintenance or pre-flight checks

It is generally accepted that air carriers should be able to invoke the extraordinary circumstances defence (or in any other manner, depending on jurisdiction, be relieved from the compensatory obligation) when cancellations or delays occur due to meteorological conditions incompatible with safe operation of flights. It would be unreasonable to penalise air carriers for cancellations or long delays caused by something they cannot avoid no matter what they do. However, this logic seems to be applied selectively. Whilst incompatible meteorological conditions are not unforeseeable and can be forecasted, thus enabling air carriers to foresee and indeed expect flight disruptions, unexpected flight safety shortcomings occur, as their name suggests, unexpectedly, and their occurrences are not capable of being foreseen. Moreover, weather conditions, whether compatible with flight operations or not, are often not unforeseeable, and to some extent can be predicted and

thus expected.[185] The risk of flight disruptions caused by such weather conditions on a particular day or even at a particular hour can be measured and quantified *ex ante*. Whereas unexpected flight safety shortcomings, especially premature or 'spontaneous'[186] component failures, represent uncertainty and cannot be reliably forecasted. In this case, only *ex post* statistics can be used to estimate the probability of *a* technical problem occurring in the future in general, but not as regards any particular problem or any particular flight.

If the objective of the compensation provisions in the European Regulation is to provide redress to passengers, and not to penalise air carriers, then it is difficult to conceive that for passengers it would make any difference if 'serious trouble and inconvenience' is caused by 'meteorological conditions incompatible with the operation of the flight concerned' or by 'unexpected flight safety shortcomings' such as a spontaneous failure of a component. Both are equally inherent in the normal operations of the air carrier, and are beyond its control. The most noticeable difference is perhaps that meteorological conditions, whether compatible with flying or not, cannot be changed, whereas the risk of unexpected flight safety shortcomings can be eliminated. But the only way in which the latter could be eliminated completely is by ceasing flight operations. With this in mind, there is no doubt that technical problems that come to light on account of a failure to carry out maintenance of aircraft cannot constitute extraordinary circumstances.[187] However, it is difficult to justify why technical problems discovered during maintenance or in flight should also be excluded from the extraordinary circumstances' defence.

[185] Although the weather forecast might not always be sufficiently accurate.

[186] Jochem Croon and Jim Callaghan, 'Punctuality or a Safe Flight: Which Should Have Priority?' (2018) 43 Air and Space Law 53.

[187] Case C-257/14 *C. van der Lans v Koninklijke Luchtvaart Maatschappij NV*, *supra* note 15 at para 37.

Even if one assumes that the implicit objective of the compensation provisions of the Regulation is to discourage air carriers from cancelling or delaying flights by penalising them for such flight disruptions, it is unlikely that such measures would have any positive effect. It is a well-known fact that no functioning aircraft generates profit when it is not flying. This means that delaying or cancelling a flight, and this way keeping the aircraft on the ground, is not commercially viable, and airlines do their absolute best to avoid that.

Nevertheless, the CJEU noted in *Wallentin* that technical problems discovered during regular maintenance or pre-flight checks would not pass the non-inherency requirement and therefore could never constitute extraordinary circumstances for the purpose of the Regulation.[188] In practice this means that air carriers will be required to pay disproportionate compensation if their maintenance teams are not quick enough to repair the technical problem within three hours. It appears, therefore, that airlines are getting penalised for being safe when they disrupt a flight to repair a technical fault discovered before take-off. One might wonder what kind of incentives such an approach may create.

Following considerable uncertainty and ambiguity of the rather questionable European approach to the liability of air carriers in cases of technical problems in aircraft, the Canadian regulators developed what is arguably a much better, although not itself perfect, approach to safety-related flight disruptions. Under the Canadian APPR, the obligation to compensate passengers for inconvenience only arises when the flight disruption is caused by a situation within the air carrier's control. Importantly, it does not arise in cases of a delay or cancellation caused by situations within the carrier's control if they are required for safety. This way, the Canadian regulators recognise

[188] *Wallentin-Hermann*, *supra* note 13 at para 25.

that ‘not all mechanical malfunctions can be foreseen or prevented through regular maintenance’ and that unexpected technical defects can compromise flight safety.[189] Where, for example, due to an unexpected mechanical malfunction the air carrier needs to delay or cancel flights that were to be operated on the affected aircraft, find a substitute aircraft, or reduce the number of seats thus denying boarding to some passengers, such flight disruptions would normally be considered ‘required for safety purposes’ despite being within the carrier’s control. Therefore, no obligation to compensate the affected passengers for inconvenience will arise for the airline in such cases.

Importantly, the ‘required for safety purposes’ category in the APPR includes decisions as regards safety made by the pilot of the aircraft.[190] At the same time, although mechanical malfunctions that reduce safety of the flight and people on board are covered by the ‘disruptions within the airline’s control but required for safety’ category, mechanical problems identified during scheduled maintenance are not.[191] In the interpretation of the Canadian Transportation Agency, ‘routine maintenance, malfunctions identified during routine maintenance or malfunctions that do not impede the safe operation of the flight’ are not covered by the ‘required for safety purposes’ category. While such an exclusion is reasonable as regards malfunctions that do not impede the safe operation of the flight, it is rather ambiguous and unclear that malfunctions identified during routine or scheduled maintenance (which includes pre-flight checks) are deemed within the carrier’s control and not required for safety purposes.

Nevertheless, such a categorisation is still better than the European approach, under which the operating air carrier is liable to pay fixed monetary compensation even if the disruption results

[189] Canadian Transportation Agency, *Types and Categories of Flight Disruption: A Guide, 2019* at V.

[190] *Air Passenger Protection Regulations*, s 1(1).

[191] *Ibid*.

from repairs that are necessary and urgent to ensure safety of the flight, passengers and crew on board. In this way, a safety-related decision made by a captain to delay or cancel a flight may entail compensatory obligations for the air carrier under the European regulation, with the amount of compensation often exceeding the ticket price. With this in mind, it is important to note that the events listed in recital 14 of the European Regulation are examples of those types of extraordinary events that keep aircraft grounded: the meteorological event that closes an airport, the political unrest that makes it dangerous for an aircraft to take off or land at an airport, the last minute discovery of a problem that deprives an aircraft of its 'airworthy status'. Flights do not take off unless it is safe to do so; danger is not inherent to the airline industry. Nevertheless, both the European and Canadian regulators chose to exclude safety-related repairs resulting from scheduled maintenance from those that exonerate air carriers from the obligation to compensate passengers for inconvenience.

In conclusion, although the CJEU in *Wallentin-Hermann* was supposed to clarify and bring certainty to the concept of extraordinary circumstances, it has failed to do so. The lack of clarity has been further exacerbated by employing the concept of inherency to determine what events produce 'extraordinary circumstances'. This has made the application of the rules on the extraordinary circumstances defence even more complex and ambiguous. Moreover, it remains unclear what factors determine whether a technical problem falls into the category of unexpected flight safety shortcomings. And even for those breakdowns that can be proved to fall into this category, there is still a high degree of ambiguity as to whether they may constitute 'extraordinary circumstances' in themselves, or only an 'event' which may be surrounded by extraordinary circumstances. If the latter is true, then further uncertainty arises as to what those extraordinary circumstances are in practice that must have surrounded the technical problem in order for it to

satisfy the *Wallentin* test. The Canadian APPR represent a major step forward towards recognising the paramount importance of safety in aviation. Importantly, the Canadian regulators appear to have learnt from the European mistakes. Nevertheless, the ambiguity as regards scheduled maintenance has created uncertainty and may lead to air carriers being liable to pay compensation for repairs deemed necessary and urgent for the safety of the passengers and crew.

CHAPTER 3. BALANCING THE INTERESTS OF PASSENGERS AND AIR CARRIERS

This chapter discusses policy implications of the interpretative choices made by the European Court of Justice with regard to the extraordinary circumstances defence. The first section argues that in adopting a convenience-focused conception of consumer protection the CJEU either overlooked or simply decided to ignore the issue of safety, despite it being central to the concept of passenger protection. The second section explores the implications of such a strict interpretative approach as regards the competitive environment in which air carriers operate, and examines whether a balance of interests is maintained. The chapter concludes by discussing potential amendments to the Regulation as regards extraordinary circumstances.

3.1 Safety or convenience: conceptions of passenger protection and value preferences

It might seem at first glance that the two targets at which the Regulation claims to be aiming, namely achieving a high level of passenger protection and ensuring a level playing field for air carriers, have nothing in common. Moreover, it appears to be a common fallacy to think that 'ensuring the high level of protection for passengers', as proclaimed in recital 1 of the Regulation, refers only to protection of the passengers' economic rights and avoidance of 'inconvenience'.[192] However, it is not the case in aviation, where it is safety that always comes first. As such, safety should be regarded as the most important part of the concept of 'high level of protection for passengers'. Recital 1 refers to 'passenger protection' and general 'consumer protection' separately, indicating that these two concepts do not mean the same. The fact that the focus of the recital is on 'passenger protection' further demonstrates its importance as including

[192] *Regulation (EC) 261/2004*, recitals 1 and 2.

not only protection of economic rights but also ensuring a high level of safety, even though that is not straightforwardly visible in the way the Regulation is worded.

Nevertheless, the CJEU appears to have adopted a convenience-focused conception of consumer protection in aviation, as opposed to the safety-focused one. This is apparent from the CJEU's strict approach to the interpretation of concepts that exclude compensatory liability of air carriers. In particular, it has been noted that the Court has 'consistently prioritised punctuality over safety' in its case law interpreting the Regulation.[193] It can be argued that apart from the stated objectives, such an approach has a potential to produce side effects that are not intended by the Regulation.

In a hypothetical situation where a minor technical problem is discovered during the pre-flight maintenance check (or during the engine starting procedure), the operating carrier faces a choice: it can either ignore the problem and continue the operation of the flight, or delay the flight for the time necessary to repair the problem. In the former situation, the passengers would be put in danger, although they would avoid the inconvenience of having their flight delayed. In the latter case, if the delay is for three or more hours, the air carrier would often have to operate the flight concerned below the break-even point, as the amount of potential compensation would in many cases be higher than the revenue generated by that flight.

When faced with a technical problem in aircraft, air carriers not only incur additional costs of prompt repair or otherwise resolving the technical issue (which might even involve replacing the aircraft), but in certain cases are also required to provide refreshments, meals and

[193] Jochem Croon & Jim Callaghan, "Punctuality or a Safe Flight: Which Should Have Priority?" (2018) 43 Air and Space Law 53.

accommodation to passengers on cancelled or delayed flights.[194] Such a financial burden already implies that the flight concerned would in most cases be operated below the break-even point, with the air carrier suffering significant financial losses as a result thereof. Additionally, when the carrier is unable to raise 'extraordinary circumstances' defence, its losses with regard to that particular flight will increase by €250-600 per passenger, which would often exceed the ticket price by unreasonable amounts. Further, it has also been suggested that such an unreasonable amount of compensation, which has no correlation with the ticket price, can produce situations where some passengers not only fly at no cost, but actually make money on their delayed flights.[195] Apparently, such an effect is not among those intended by the Regulation.

In practice, when an unexpected technical problem arises, the resolution of which requires some time, unless the air carrier has spare aircraft available at the point of departure, it is forced to prioritise between (a) flight safety and (b) not causing 'inconvenience' of delay or cancellation to passengers. In 2012, for example, a Lufthansa 747 was diverted to the closest airport, Goose Bay, due to a malfunctioning coffee maker in the galley.[196] The result was a 23-hour delay, because mechanics had to fly over from Germany to ensure that continuing the diverted flight would be safe. This demonstrates that there is absolutely no doubt that safety is the top priority in the airline industry. Delaying a flight in order to repair any unforeseeable and unexpected technical fault is sometimes the only way to ensure that all safety requirements are met before passengers can step on board the aircraft.

Even though the decision in *Wallentin-Hermann v Alitalia* and its subsequent application

[194] *Regulation (EC) 261/2004*, art 9. See Chapter 1 *supra* for discussion of various obligations of air carriers.

[195] Croon, *supra* note 172.

[196] Fitzgerald, *supra* note 84.

have been extensively criticised for having a potential to undermine flight safety,[197] the CJEU in its case law has long shared the view that 'shortcomings in safety are irrelevant considerations in justifying the abrogation of other rights', especially the right to be compensated for inconvenience.[198] It was only in *Pešková* that the CJEU drew its attention to the issue of flight safety and recognised for the first time that punctuality of flights should not take priority over flight safety.[199] Moreover, the Court for the first time recognised that bird strikes may in fact constitute extraordinary circumstances.[200] This is a noticeable step forward from the previously held opinion of the CJEU that bird strikes were not extraordinary circumstances even though they generally occur from time to time, just like unexpected technical problems. The decision in *Pešková* represents a noticeable shift in the approach of the Court that had previously decided to focus exclusively on passenger convenience. As accurately noted by Croon, 'a high level of protection of the interest of the passengers should have a limit; it must not distort the economically viable and safe operation of air carriers'.[201]

[197] Kinga Arnold & Pablo Mendes de Leon, "Regulation (EC) 261/2004 in the Light of the Recent Decisions of the European Court of Justice: Time for a change?!" (2010) 35 Air and Space Law 91. See also Croon & Callaghan, *supra* note 193.

[198] Jeremias Prassl, "EU Aviation Law before the English Courts: Dawson, Huzar, and Regulation 261/2004" (2014) 39 Air and Space Law 365.

[199] Case C-315/15 *Marcela Pešková and Jiří Peška v Travel Service a.s.* (n 130), para 25.

[200] *Ibid* at para 26.

[201] Croon, *supra* note 172.

3.2 Towards a fair balance of interests

Any air passenger rights regulation typically brings at least two key stakeholders into play: passengers and airlines. At first glance, regulating air passenger rights might seem a zero-sum game, where the more benefits given to passengers, the less remains for the air carriers. However, this is not actually the case in aviation, where safety is the primary consideration affecting all other decisions in the industry. It is in the air carriers' economic interest to maintain high standards of safety. In fact, it is at safety where the interests of passengers and air carriers intersect.

The Court of Justice of the European Union appears to believe that the main objective of the Regulation is to compensate passengers for 'serious trouble and inconvenience' caused by cancellations or delays, without paying sufficient attention to safety considerations and the business environment in which airlines operate. Whilst Article 5(3) of the Regulation does represent a derogation from the principle of consumer protection, it can be argued that the purposes of the rules in which the ambiguous concept of 'extraordinary circumstances' occurs (i.e. the objectives of the Regulation) are not such as to impose strict liability upon air carriers for cancellations and long delays. Even more so as regards cases of a flight disruption caused by what the Canadian Air Passenger Protection Regulations refer to as 'situations within the carrier's control but … required for safety purposes'.[202]

It is evident from recital 12 of the Regulation that one of the main intentions behind the imposition of duty to compensate for inconvenience was to induce air carriers to inform passengers of cancellations before the scheduled departure time and offer them reasonable re-routing. Where an air carrier fails to do so, the obligation to compensate arises under Article 7, which in turn may

[202] *Air Passenger Protection Regulations*, s 11.

be waived if such a flight disruption occurred in extraordinary circumstances. This is supported by the intentions and motives behind the proposal for the Regulation.[203] Its adoption was proposed in order to protect passengers from cancellations and denied boarding resulting from the decisions made by air carriers for commercial reasons (e.g. when a flight is not sufficiently booked and its operation would not be economically viable). It was not intended to impose strict liability generally for cancellations and long delays. Neither did it intend what is now the result of the restrictive interpretative approach in *Wallentin-Hermann*, namely that 'virtually all technical problems are excluded' from the extraordinary circumstances concept.[204]

With this in mind, it is understandable why in recital 14 the unexpected flight safety shortcomings are included in the non-exhaustive indicative list of cases in which extraordinary circumstances may occur.[205] Both 'meteorological conditions incompatible with the operation of the flight concerned' and 'unexpected flight safety shortcomings' are mentioned in recital 14 on an equal basis.[206] However, while the former seems to be taken for granted by both judges and academics, the latter has been a much-disputed ground when it comes to exempting air carriers from the obligation to pay monetary compensation for inconvenience. The CJEU has been pursuing the strict approach to the interpretation of all concepts in the Regulation that preclude

[203] *Proposal for a Regulation of the European Parliament and of the Council establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights*, COM (2001) 784.

[204] John Balfour, "Airline Liability for Delays: The Court of Justice of the EU Rewrites EC Regulation 261/2004" (2010) 35 Air and Space Law 71.

[205] *Regulation (EC) 261/2004*, recital 14.

[206] *Ibid*.

passengers from getting compensation, and the category of unexpected flight safety shortcomings is among such concepts.

Interestingly, when the validity of the Regulation was challenged by the IATA, it was the availability of the extraordinary circumstances defence that allowed the CJEU to conclude that the compensation provisions of the Regulation are not incompatible with the principle of proportionality.[207] However, it appears that proportionality risks being undermined by the CJEU in *Wallentin* narrowing the scope of the defence to such an extent that it becomes practically impossible to invoke. This has a potential significantly to affect the competitive environment of airlines.

It is apparent that such a narrow interpretation of already strict rules puts the EU air carriers in a disadvantageous position compared to non-EU air carriers. The additional compensation costs that the European air carriers have to bear often exceed the ticket price by more than twice. This puts a disproportionate burden on the airlines already operating in a very low profit-margin industry. It is doubtful whether this in practice creates a level playing field for all air carriers in Europe. Because of the scope of the Regulation, non-EU carriers are not liable under the Regulation for delays or cancellations of flights to the EU from non-EU airports. Thus, for example, when a European air carrier competes with a non-EU air carrier on a 'Beijing – London' route, the EU carrier is put into a competitively disadvantageous position vis-a-vis the non-EU airline by having to bear significant amounts of additional costs in cases of a flight delay or cancellation.

[207] *IATA*, *supra* note 11 at para 91.

The only minor benefit that such strict compensation rules indirectly confer upon the air carriers may be found in sales marketing. A rational passenger is likely to choose an EU carrier, rather than an air carrier that is not covered by Regulation 261 or a similar passenger protection regime, because the passenger would be able to claim compensation should their flight be cancelled or delayed. The availability of compensation in this case plays the role of some kind of indemnity. However, not everyone is aware of the complex European rules of consumer protection in aviation. Moreover, it would not be a sensible assumption to make that all passengers are rational.[208] Hence, the availability of such an indirect benefit does not seem to be of a significant value to air carriers, especially when compared with enormous expenses incurred due to the inability to raise the extraordinary circumstances defence. Even more so, given that countries around the world are now increasingly copying the European approach (such as, for example, Canada in its Air Passenger Protection Regulation), the marketing benefit slowly subsides.

Last but not least, the focus of the Regulation on the standardised compensation, that is not in any way linked to the fare paid, or the actual loss suffered, raises concerns as to the nature and objectives of such a remedy. It is not easy to accept the view taken by the CJEU in the *IATA* case that when a flight is cancelled or delayed, all passengers on that flight sustain 'almost identical' damage that can be remedied equally for all, without any proof of loss, by a fixed monetary compensation not linked to the fare paid.[209] While business travellers may lose an opportunity to conclude a business deal, leisure passengers may experience a different type of loss (e.g. time they could have spent on the beach). Often these losses will not be 'almost identical' even among

[208] Herbert Simon, "A Behavioral Model of Rational Choice" (1955) 69 The Quarterly Journal of Economics 99.

[209] *IATA*, *supra* note 11 at para 43.

passengers of the same category. With this in mind, it is not evident that the remedies made available to the passengers by the Regulation are compensatory in nature and not at all punitive.

To conclude, a reasonable approach to tackle the issue of balancing the interests of key stakeholders would be to recognise that technical defects which arise while the aircraft is in operation and which are not the result of poor maintenance 'could be a matter of extraordinary circumstances provided the technical defect could not have been avoided even if all reasonable measures have been taken'.[210] The same would hold for technical problems caused by external factors (such as lightning strike, collision with a third party operator, or bird strike).[211]

3.3 The future of the extraordinary circumstances defence

The lack of legal clarity in the provisions of the Regulation, and the resulting inconsistency in its implementation has prompted a proposal for amendment of the Regulation.[212] While the Proposal does introduce several improvements, it is still not devoid of ambiguity, and has even been

[210] Jochem Croon, "Placing Wallentin-Hermann in Line with Continuing Airworthiness" (2011) 36 Air and Space Law 1.

[211] Recently in *Pešková* it was indeed recognised that bird strikes are covered by the concept of extraordinary circumstances. See Case C-315/15 *Marcela Pešková and Jiří Peška v Travel Service a.s.* [2017] ECLI:EU:C:2017:342 [*Pešková*] at para 26.

[212] *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air,* COM (2013) 130.

characterised as showing a 'tendency for overregulation'.[213] Moreover, one of the most uncertain and ambiguous issues, namely what is considered 'not inherent in the normal exercise of the activity of the air carrier', is again left without a proper explanation. It is this concept that continues to cause confusion both for passengers and the airline industry. Nevertheless, the Proposal can be viewed potentially as a noticeable step towards balancing out the interests of the key stakeholders in the airline industry.

The Proposal suggests defining extraordinary circumstances as 'circumstances which by nature of their origin are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control'.[214] Such a definition would indeed be different from the interpretation adopted in *Wallentin-Hermann*, where it was held that for a technical problem to be covered by the concept of extraordinary circumstances it has to *stem* from the 'events which, by their nature of origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control'.[215] The proposed definition moves away the need to construct what constitutes the 'event' that gave rise to the technical problem. It also avoids the ambiguity of whether the extraordinary circumstances are the underlying 'event', technical problem itself, or the resulting inability to safely operate the flight concerned. Nevertheless,

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[213] Kinga Arnold, "EU Air Passenger Rights: Assessment of the Proposal of the European Commission for the Amendment of the Regulation (EC) 261/2004 and of Regulation (EC) 2027/97" (2013) 38 Air and Space Law 403.

[214] *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air*, *COM (2013) 130*.

[215] *Wallentin-Hermann*, *supra* note 13 at para 34.

considerable uncertainty would still remain as to what is 'inherent in the normal exercise of the activity of the air carrier' and what is not.

In addition, the Proposal introduces a potentially binding but non-exhaustive list of circumstances to be considered extraordinary for the purposes of the Regulation. It includes, *inter alia*, natural disasters, security risks, life-threatening health risks or medical emergencies, air traffic restrictions, and meteorological conditions incompatible with flight safety. Moreover, it proposes to include labour disputes not only at service providers, such as airports and air navigation centres, but also those within air carriers. Thus, the outcome in *Krusemann v TUIfly,*[216] where the CJEU held that the 'spontaneous absence of a significant part of the flight crew staff' is not covered by the concept of extraordinary circumstances, might have been different had the Proposal been implemented at the time of the decision.

Importantly, the Proposal suggests that technical problems which are not inherent in the normal operation of the aircraft should also be included in the concept of extraordinary circumstances. Notably, the 'identification of a defect during the flight operation concerned and which prevents the normal continuation of the operation' is among such technical problems. It would be reasonable to suppose that in light of the decision in *Germanwings,* 'during the flight' means from the moment when all of the doors of the aircraft are closed before take-off up until the time at which at least one of the doors is opened after landing.[217] This way, if a technical defect is detected before the engine starting procedure but after the doors have been closed, it will be

[216] Joined Cases C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17 *Helga Krüsemann and Others v TUIfly GmbH* [2018] ECLI:EU:C:2018:258 [*Krüsemann v TUIfly*].

[217] Case C-452/13 *Germanwings GmbH v Ronny Henning*, *supra* note 85.

covered by the concept of extraordinary circumstances. If implemented, this will be one of the most significant improvements towards an equitable balance between the interests of the passengers and air carriers. The other one being the decision in *Pešková*, which ultimately recognised that safety should always be prioritised in aviation.

CONCLUSION

The CJEU has played a significant and decisive role in interpreting the Regulation, its provisions and concepts that called for further clarification and explanation. In many cases, the Court has been successful in explaining the meaning of terms that lacked definition (such as the arrival time, cancellation, and delay). However, some of the most practically important concepts still remain unclear and ambiguous.

It is the extraordinary circumstances defence that exonerates air carriers from the obligation to pay compensation to passengers in cases of a flight cancellation of delay. In *Wallentin-Hermann*, it was established that a technical problem may only be invoked for the purpose of raising the extraordinary circumstances defence if it stems from the events which are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control. Yet no explanation was provided as to how the 'inherency' should be established. Moreover, it is difficult to conceive in general that a technical problem that renders the operation of the flight unsafe can be characterised as being 'part of' (or 'inherent' in) the *normal* exercise of the activity of the air carrier. Anything that precludes normal and safe flight operations is clearly undesirable for air carriers, who will always do whatever they can to avoid it. Much uncertainty also remains as to what factors determine whether a particular technical problem falls into the category of 'unexpected flight safety shortcomings' as expressly mentioned in recital 14 of the Regulation.

Furthermore, it appears that the CJEU has adopted a convenience-focused conception of passenger protection, without paying due regard to safety concerns. In so doing, the CJEU either overlooked one of the two main objectives of the Regulation, namely ensuring a level playing field for air carriers, or simply chose to ignore it. Due to the inability to raise extraordinary circumstances defence, air carriers may be forced to bear additional costs of paying compensation

for something they cannot foresee and thus avoid, no matter what they do and how good their intentions might be. When added to the cost of aircraft repair or replacement, it entails significant losses, which in turn have a potential to affect the cost of air travel. Such an approach moves the Regulation in the direction of strict liability. This, in turn, might aggravate another unintended consequence of the Regulation, namely the expansion of the automated claim-handling agencies.

Apparently, the CJEU has failed to bring clarity to what can constitute extraordinary circumstances, despite having been specifically asked to do so. This further complicated already ambiguous legal rules as regards extraordinary circumstances defence in cases of technical problems. The Proposal for amendment of the Regulation, introduced in 2013, although not devoid of ambiguity itself, aims to mitigate several undesired consequences of the strict interpretative approach to the extraordinary circumstances defence by providing a non-exclusive list of events that are to be considered extraordinary circumstances for the purposes of the Regulation. This may help to bring more certainty to the rules governing the extraordinary circumstances defence. Whether any part of the Proposal will be implemented is not clear at this stage. Nevertheless, the decision in *Pešková,* where the Court recognised that bird strikes may constitute extraordinary circumstances and emphasised that safety must never be compromised for punctuality, can now be seen as a strong sign of the CJEU reconsidering its one-sided approach to interpretation of the provisions governing the extraordinary circumstances defence.

The effects of the Regulation have been spreading well beyond the EU borders, as countries around the world introduce their own regulations that in many aspects copy the European regime. Some, however, do it better than others. The Canadian Air Passenger Protection Regulations may be argued to be the best example so far of a regulator putting safety first by allowing exceptions for safety-related mechanical delays. The APPR represent a noticeable step forward when

compared with the European air passenger rights regime, in that when dealing with what is known as the extraordinary circumstances defence, the Canadian regulators have been much more careful to prioritise aviation safety and to not create false incentives. The APPR also aim to avoid any inconsistency in interpretation by clearly defining the air carriers' obligations based on two main criteria: (i) control and (ii) safety. This way, under the Canadian regime, a delay or cancellation caused by a mechanical malfunction that is discovered other than during regular maintenance will not create compensatory obligations for the operating carrier. In contrast, in the landmark decision of *Wallentin,* the CJEU effectively narrowed the scope of technical problems falling under the 'extraordinary circumstances' to just two cases: (1) technical problems caused by a hidden manufacturing effect and (2) acts of terrorism or sabotage. In practice this means that air carriers in the European regime are left to be penalised for something they cannot avoid nor foresee no matter what they do.

Nevertheless, it appears that currently, under the APPR, taking time to repair any unexpected and unforeseeable mechanical malfunction identified during the pre-flight check would trigger compensatory liability on the part of the operating carrier. This is so even though in such a situation, what the carrier is doing by disrupting the flight is ensuring that passengers can step on board and fly only if it is safe to do so. In effect, therefore, air carriers may end up having to pay disproportionate amounts in compensation for repairs deemed necessary and urgent for safety purposes. It is suggested therefore, that if it is not the intention of the APPR to penalise air carriers for being safe, it would make more sense to regard flight disruptions caused by unexpected mechanical malfunctions that reduce safety of the flight and people on board, including malfunctions identified during pre-flight checks, as being 'within the airline's control but required for safety'.

In sum, and notwithstanding the fact that the Canadian APPR are not flawless themselves, it is apparent that the Canadian Transportation Agency has carefully sought to balance the interests of the key stakeholders, as well as minimise interpretation challenges and other unintended consequences present in the European regime. It remains to be seen whether the Canadian approach in fact proves to be more successful in protecting passengers and achieving a fair balance of interests in the airline industry.

LEGISLATION

Air Passenger Protection Regulations, SOR/2019-150.

Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

Commission Notice C/2016/3502 – Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council [2016] OJ C214/5.

Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights' COM (2001) 784.

Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air' COM (2013) 130.

Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

Convention for the Unification of Certain Rules for International Carriage by Air (adopted 28 May 1999, entered into force 4 November 2003) 2242 UNTS 309.

Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport [1991] OJ L36/5.

Regulation (EC) 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004] OJ L46/1.

JURISPRUDENCE

Andrejs Eglītis and Edvards Ratnieks v Latvijas Republikas Ekonomikas ministrija [2011] (C-294/10) ECR I-03983

Aurora Sousa Rodriguez and Others v Air France SA (C-83/10) [2011] ECR I-09469

C. van der Lans v Koninklijke Luchtvaart Maatschappij NV (C-257/14) [2015] ECLI:EU:C:2015:618

Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v Condor Flugdienst GmbH and Stefan Böck and Cornelia Lepuschitz v Air France SA (Joined Cases C-402/07 and C-432/07) [2009] ECR I-11061

Denise McDonagh v Ryanair Ltd (C-12/11) [2013] ECLI:EU:C:2013:43

Emeka Nelson, Bill Chinazo Nelson, Brian Cheimezie Nelson v Deutsche Lufthansa AG and TUI Travel plc, British Airways plc, easyJet Airline Company Ltd, International Air Transport Association v Civil Aviation Authority (Joined Cases C-581 and 629/10) [2012] OJ C399/3

Finnair Oyj v Timy Lassooy (C-139/11) [2012] ECLI:EU:C:2012:604

Germanwings GmbH v Ronny Henning (C-452/13) [2014] ECLI:EU:C:2014:2141

Helga Krüsemann and Others v TUIfly GmbH (Joined Cases C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17) [2018] ECLI:EU:C:2018:258

Jet2.com v Huzar [2014] EWCA Civ 791, [2014] All ER (D) 86 (Jun)

Joan Cuadrench Moré v Koninklijke Luchtvaart Maatschappij NV (C-139/11) [2012] ECLI:EU:C:2012:741

Marcela Pešková and Jiří Peška v Travel Service a.s. (C-315/15) [2017] ECLI:EU:C:2017:342

Sandy Siewert and Others v Condor Flugdienst GmbH (C-394/14) [2014] ECLI:EU:C:2014:2377

The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport (C-344/04) [2006] ECR I-00403

Wallentin-Hermann v Alitalia (C-549/07) [2008] ECR I-11061

SECONDARY MATERIALS

Arnold, K and Mendes de Leon, P, 'Regulation (EC) 261/2004 in the Light of the Recent Decisions of the European Court of Justice: Time for a change?!' (2010) 35 Air and Space Law 91.

Arnold, K, 'EU Air Passenger Rights: Assessment of the Proposal of the European Commission for the Amendment of the Regulation (EC) 261/2004 and of Regulation (EC) 2027/97' (2013) 38 Air and Space Law 403.

Arnold K, 'Application of Regulation (EC) No 261 on Denied Boarding, Cancellation and Long Delay of Flights' (2007) 32(2) Air and Space Law 93.

Balfour, J, 'Airline Liability for Delays: The Court of Justice of the EU Rewrites EC Regulation 261/2004' (2010) 35 Air and Space Law 71.

Bobek, M and Prassl, J, *Air Passenger Rights: Ten Years on* (EU Law in the Member States, Oxford 2016).

Croon, J and Callaghan, J, 'Punctuality or a Safe Flight: Which Should Have Priority?' (2018) 43 Air and Space Law 53.

Croon, J, 'If You Do Not Know Where You Are Going, You Will End Up Somewhere Else': Update on the Continuing Discussion on Technical Problems and Passenger Rights' (2015) 40 Air and Space Law 331.

Croon, J, 'Placing *Wallentin-Hermann* in Line with Continuing Airworthiness' (2011) 36 Air and Space Law 1.

Fitzgerald, P, 'A Re-Examination of Tarmac Delays Causes and Solutions' (2019) 84 Journal of Air Law and Commerce 53.

Fitzgerald, P, ‘Automating the Process of Passenger Claims under the EU Passenger Rights Regime’ [2018] Alma Mater Studiorum.

Garben, S, ‘Sky-high controversy and high-flying claims? The Sturgeon case law in light of judicial activism, euroscepticism and eurolegalism’ (2013) 50 Common Market Law Review 15.

Garben, S, ‘The Turbulent Life of Regulation 261: Continuing Controversies Surrounding EU Air Passenger Rights’ in Michal Bobek and Jeremias Prassl (eds), *Air Passenger Rights: Ten Years On* (Hart Publishing 2016).

Gogl, I, ‘EuGH erfindet die EG-Verordnung Nr. 261 neu: Ausgleichszahlung auch für Verspätungen’ (2010) 59 Zeitschrift für Luft- und Weltraumrecht 82.

Grard, L, ‘Voyages aériens: Les nouveaux droits des passagers’ in C Bloch (ed), *Mélanges en l’honneur de Christian Scapel* (Presses universitaires d’Aix-Marseille, 2013) 235.

Havel, B and Sanchez, G, *The Principles and Practice of International Aviation Law* (Cambridge University Press 2014).

McClean, D, ‘EU Law and the Montreal Convention of 1999’ in Michal Bobek and Jeremias Prassl (eds), *Air Passenger Rights: Ten Years On* (Hart Publishing 2016).

Malenovsky, J, ‘Regulation 261: Three Major Issues in the Case Law of the Court of Justice of the EU’ in Michal Bobek and Jeremias Prassl (eds), *Air Passenger Rights: Ten Years On* (Hart Publishing 2016).

Oxford Dictionary of English (Angus Stevenson ed, 3rd edn, OUP 2010).

Prassl, J ‘EU Aviation Law before the English Courts: *Dawson, Huzar,* and Regulation 261/2004’ (2014) 39 Air and Space Law 365.

Prassl, J, ‘Welcome Aboard: Revisiting Regulation 261/2004’ in Michal Bobek and Jeremias Prassl (eds), *Air Passenger Rights: Ten Years On* (Hart Publishing 2016).

Simon, H, ‘A Behavioral Model of Rational Choice’ (1955) 69 The Quarterly Journal of Economics 99.

Van der Wijngaart, T, ‘Case Note: *van der Lans v KLM* and “Extraordinary Circumstances”’ (2016) 41(1) Air & Space Law 59.