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'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

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Within the framework of European Union (EU) Regulation 261/2004, one of the paramount issues remains whether or not a technical defect on an aircraft occurring beyond the control of the air carrier may amount to the concept of extraordinary circumstances for the purposes of Article 5(3) of the Regulation. Following its Wallentin-Hermann *ruling of 2008, the European Court of Justice (CJEU) has to deal with another referral on this specific subject ('van der Lans'). The preliminary ruling is to be expected before the end of this year.*

As regards the UK jurisdiction, the Court of Appeal (civil division) with its ruling (on 11 June 2014) in the Huzar v. Jet2 *case, came up with an interpretation pursuant to which a technical problem on an aircraft will almost never fall under this concept of extraordinary circumstance. The application seeking permission to appeal by the air carrier concerned was refused by the UK Supreme Court. Also the subsequent requests in the UK by various air carriers to stay proceedings pending the expected decision of the CJEU in respect of new prejudicial questions were turned down*

This article intends to provide an update on the discussion on technical problems and passenger rights, merely by some substantive considerations as to why the interpretation by the Court of Appeal in Huzar v. Jet2 *is wrong and the decision of the CJEU in the* Van der Lans *case should be awaited.*

1 INTRODUCTION

Alice: Would you tell me, please, which way I ought to go from here?
The Cat: That depends a good deal on where you want to get to.

Alice: I don't much care where.
The Cat: Then it doesn't much matter which way you go.

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> *Alice:* so long as I get somewhere.
> *The Cat:* Oh, you're sure to do that, if only you walk long enough.
>
> *Alice in Wonderland* by Lewis Caroll

This conversation between Alice and the Cat could be summarized as ' *If you do not know where you are going, you will end up somewhere else'*. I consider this observation as spot on for the continuing discussion on technical problems in light of European Union (EU) Regulation 261/2004 (the 'Regulation'), following the preliminary ruling of the European Court of Justice (CJEU) in December 2008 in *Wallentin-Hermann v. Alitalia* (Case No. C-549/07), hereinafter referred to as 'Wallentin-Hermann'.

A new element in this saga are the prejudicial questions submitted to the CJEU in the second half of 2014 in the *Dutch case of Van der Lans v. Koninklijke Luchtvaart Maatschappij NV* (Case No. C-257/14, hereinafter 'Van der Lans').[1] That reference includes ten questions for purposes of finding the proper determination of whether or not a technical defect occurring on an aircraft may constitute *extraordinary circumstances* for the purposes of Article 5(3) of the Regulation.

In February 2015, four air carriers separately requested the Liverpool County Court to stay any case in which a delay (or cancellation) was due to a technical problem. Their request was founded on the importance and desire for legal certainty throughout the EU. This legal certainty was possibly around the corner with Van der Lans. Unfortunately, the request was denied by the Liverpool County Court on 25 February last. The Liverpool Judge held '*a line should now be drawn. Justice delayed is justice denied*.'

2 SOME CONSIDERATIONS AS REGARDS TECHNICAL PROBLEMS

In the UK, on 11 June 2014 the Court of Appeal (civil division) ruled in the *Huzar v. Jet2* case.[2] Paramount in this ruling is paragraph 36 which reads as follows:

> *difficult technical problems arise as a matter of course in the ordinary operation of the carrier's activity. Some may be foreseeable and some not but all are, in my view, properly described as inherent in the normal exercise of the carrier's activity. They have their nature and origin in that activity; they are part of the wear and tear.*

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1 The case relates to a delay on a flight from Quito, Ecuador to Amsterdam, the Netherlands caused by technical defect (failure of oil filter) discovered after the flight had commenced. In defending the claim the air carrier relied on the exoneration of Art. 5(3) of the Regulation combined with the specific technical defect at hand being an 'unexpected flight safety shortcoming' as per recital 14 of the preamble to the Regulation.

2 *Huzar v. Jet2*.com Limited [2014] EWCA civ 791.

From this interpretation it follows that a technical problem will almost never constitute an 'extraordinary circumstance' pursuant to the EU regulation 261/2004.

In doing so the Court of Appeal has created a strict liability for air carriers with respect to all technical problems, irrespective of when they occur.[3]

This may seem as good news for passengers, but it has serious consequences for the balance of the relationship between passengers and air carriers. A high level of protection of the interest of the passengers should have a limit; it must not distort an economically viable and safe operation of air carriers.

For the real world it means compensation[4] with an amount without any correlation with the ticket price. Often (and certainly where it concerns low fares carriers) leading to compensation in excess of the ticket price. The occurrence of a technical problem beyond the control of the air carrier (i.e., where no reasonable measures were available to avoid such technical problem), can lead to the passenger flying at no cost and actually making money on his flight.

The interpretation by the Court of Appeal in *Huzar v. Jet2* not only leads to a disproportionate reality, this but also creates a strict liability in case of technical problems, which is not in line with:

(i) Wallentin-Herman on which the Court of Appeal based its decision in *Huzar v. Jet2*, but also;
(ii) the interpretation of Wallentin-Hermann by the legislator (European Commission); and
(iii) other, more recent CJEU case law.

3 WALLENTIN-HERMANN

With Wallentin-Hermann the CJEU tried to create legal certainty by considering technical problems as an extraordinary circumstance if it:

> *Stems from events which are 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 or origin.*

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[3] On 30 Oct. 2014, the Supreme Court of the UK refused the permission to appeal filed on behalf of Jet2.com Limited. The UK Supreme Court considered the application did not raise a point of law of genuine public importance.

[4] In case dealing with the respective technical problem (or indication of a possible technical problem) by the air carrier concerned leads to a delay of more than three hours, the passengers might become entitled for a flat rate compensation, ranging from EUR 250 till EUR 600 (depending on the distance of the flight).

Hence, according to the CJEU, the element of a circumstance which is extraordinary must stem from *events* which on account of its nature or origin are not inherent in the normal exercise of the activity.

An event which, according to the CJEU, can be considered as inherent in the normal activity is scheduled maintenance. In case a technical problem surfaces during (the event of) scheduled maintenance it cannot be seen as extraordinary. An event which according to the CJEU is not inherent in the normal exercise is for instance sabotage or terrorism or a manufacturing defect. In case these latter events create a technical problem it can be considered as extraordinary.

So far, this 'test' from Wallentin-Hermann has unfortunately not provided the intended clarity for courts and National Enforcement Bodies (NEBs).

In practice, the courts and NEBs often still do not consider the question 'from which event the technical problem flows'. They often merely state that the circumstance is 'inherent in' the normal activity of an air carrier and that from time to time 'technical problems occur'.

What it boils down to is foremost the lack of clarity created by the concept of 'inherent in'. In practice, applying this test whether or not something is 'inherent in the normal activity' seems to be the main issue. It is very appealing for the relevant court or NEB to consider a circumstance as 'inherent in'. It will end the discussion and by doing so you do not have to deal with the second part of the test, namely whether or not the event is beyond the actual control of the carrier concerned and could have been avoided by taking reasonable measures.[5]

A living example of such an incorrect application of this Wallentin-Herman test is indeed the *Huzar v. Jet2* ruling, which dealt with a spontaneous failure of a component. By simply saying that Wallentin-Hermann properly stipulates that all technical problems are inherent in the normal activity, the Court of Appeal ignores consideration 26 of the same ruling which provides that technical problems can be covered by the concept of extraordinary circumstances. This consideration 26 holds that:

> *it cannot be ruled out that technical problems are covered by those exceptional circumstance to the extent that they stem from events which are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control.*

This very strict interpretation by the Court of Appeal of Wallentin-Hermann does not concur with what the CJEU considered, nor the application of Wallentin-Hermann, be it by NEBs (including the UK CAA) or by courts around the EU.

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[5] *See also*, Croon, Jochem, *Placing Wallentin Hermann in Line with Continuing Airworthiness*, 36 Air & Space L. 1–6 (2011) and Croon, Jochem, '*Wallentin Hermann' and a Safe Flight*, ZLW 61. J9.4/2012.

The *Huzar v. Jet2* ruling has once again clearly demonstrated that thus far neither national or European case law nor the policy of the NEBs were able to provide the necessary legal clarity as regards the interpretation of the concept of extraordinary circumstances.

This current lack of clarity and legal certainty is the reason why the outcome of Van der Lans should be awaited. It should authoritatively determine the correct interpretation of Wallentin-Hermann.

4 IMPORTANT OTHER ELEMENTS FOR THE INTERPRETATION OF TECHNICAL PROBLEMS AS EXTRAORDINARY CIRCUMSTANCE

4.1 The proposal for revision of EU regulation 261/2004

The European Legislator has already recognized the lack of legal certainty as regards extraordinary circumstances and technical problems. Also at the request of the European Parliament the proposal for the revision of EU regulation 261/2004[6] defines the concept of extraordinary circumstance.

For the sake of further clarity the European Commission has attached as part of its proposal for revision an annex (Annex 1) containing a list of examples of events which are to be considered as extraordinary circumstances and events which will not constitute extraordinary circumstances.

This attempt to provide clarity by the legislator must be seen as the interpretation by the European Commission of what already has been stipulated by the European Court of Justice in Wallentin-Hermann and should be considered the applicable law within the EU. Paragraph 3 of the preamble of this proposal for revision is unambiguous in this regard:

> *In order to increase legal certainty for air carriers and passengers, a more precise definition of the concept of 'extraordinary circumstances' is needed, which takes into account the judgement of the European Court of Justice in the case C-549/07 (Wallentin-Hermann). Such a definition should be further clarified via a non-exhaustive list of circumstances that are clearly identified as extraordinary or not.*

The European Commission, with its proposal for revision, proposes the following definition:

> *'extraordinary circumstances' means circumstances 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. For the purposes of this Regulation, extraordinary circumstances shall include the circumstances set out in the Annex.*

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6 COM(2013) 130 final, 2013/0072 (COD).

This Annex 1 on extraordinary circumstances provides guidance on how the test from Wallentin-Hermann should be seen and properly applied:

Not extraordinary are:

> *technical problems inherent in the normal operation of the aircraft, such as a problem identified during the routine maintenance or during the pre-flight check of the aircraft or which arises due to failure to correctly carry out such maintenance or pre-flight check* (underlining by author).

Extraordinary are:

> *technical problems which are* ***not*** *inherent in the normal operation of the aircraft, such as the identification of a defect during the flight operation concerned and which prevents the normal continuation of the operation; or a hidden manufacturing defect revealed by the manufacturer or a competent authority and which impinges on flight safety* (underlining by author).

From this very clear guidance regarding technical defects (as provided by the European Commission with this Annex 1) simply flows that technical problems which surface outside routine maintenance (e.g., after the passing of the pre-flight check, for example during taxiing or on flight) are to be seen as 'not inherent'. For these events during flight operation it subsequently has to be established whether or not the occurrence of such event was beyond the actual control of the carrier.

Clearly this interpretation of Wallentin-Hermann by the European Commission is not in line with the *Huzar v. Jet2* judgment, which sees every technical problem as inherent to the normal activity of an air carrier.

4.2 German is the authentic language of Wallentin-Hermann

In this context it is to note that Wallentin-Hermann in the German language[7] seems to have a different implication of relevance. Whereas pursuant to the English version of Wallentin-Hermann it is required that the event which produces an 'extraordinary circumstance' is not 'inherent' in the normal exercising of the activity, in the German language the event should be:

> *nicht Teil der normalen Ausübung der Tätigkeit des betroffenen Luftfahrtunternehmen ist.*[8]

The German word 'Teil' actually means in English 'part', but in the English translation of the judgment, it has been translated as 'inherent in'. This translation does not appear to be correct. 'Inherent in' in this context has a wider connotation.

Regarding technical problems/defects that are discovered during scheduled maintenance on aircraft (as was the situation in Wallentin-Hermann) or are the

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7 The authentic language of the ruling and therewith the only legally binding language.

8 Translation in to English: 'is not *part* of the normal exercising of the activity of the airline company concerend.'

result of imperfections in the maintenance, there will be no reasonable doubt about what 'extraordinary circumstance' yields under the terms of the Regulation. Those defects stem from an event (i.e., scheduled maintenance) which is part of the normal activity of an air carrier.

In less obvious cases, however, confusion can arise. That occurs when a particular technical problem does take place in the reality of aviation, but stems from an event (or activity) which is not 'part' of a carrier's normal activity. This confusion can for example arise with technical problems that occur outside the normal activity of scheduled maintenance. Like an indication during taxiing that one engine is not working properly due to the spontaneous failing of a properly maintained component. Such failing component might seem 'inherent to' but is clearly not 'part of', or necessarily specific to the carriers normal activities. To the contrary: they indeed hamper the carrier in exercising its normal activities.

What is more: in case of such spontaneously failing component during operation it is not clear what the *event* is from which the spontaneous failing stems. The cause cannot be established. If that's the case you cannot answer the first question of the Wallentin-Hermann 'test' and therewith it remains unclear whether the technical problem is 'inherent to' (or 'part of') the normal activity or not.

4.3 More recent European court of justice case law

In its judgment in the case *McDonagh v. Ryanair*[9] on 31 January 2013, the CJEU held (paragraph 29) that extraordinary circumstances relate to all circumstances which are beyond the control of the air carrier, regardless of the nature and seriousness of these circumstances:

> *In accordance with everyday language, the words 'extraordinary circumstances' literally refer to circumstances which are 'out of the ordinary'. In the context of air transport, they refer to an event which is not inherent in the normal exercise of the activity of the carrier concerned and is beyond the actual control of that carrier on account of its nature or origin (Wallentin-Hermann, paragraph 23). In other words, as the Advocate General noted in point 34 of his Opinion, they relate to all circumstances which are beyond the control of the air carrier, whatever the nature of those circumstances or their gravity* [underlining by author].

Finally, a case that deserves to be mentioned is the judgment by the CJEU in *Air France v. Folkerts*[10] of 26 February 2013. In its assessment, the Court recalled its previous judgment in the area of extraordinary circumstances, but also introduced an important clarification (under paragraph 43):

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[9] European Court of Justice, 31 Jan. 2013, McDonagh/Ryanair Case C-12/11.
[10] European Court of Justice, 26 Feb. 2013, Airfrance/Folkerts c.s. Case C-11/11.

> *First of all, it should be noted that air carriers are not obliged to pay compensation if they can prove that the cancellation or long delay is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, that is, circumstances which are beyond the air carrier's actual control (Case C-549/07 Wallentin-Hermann [2008] ECR I-11061, paragraph 34, and Nelson and Others, paragraph 79)* [underlining by author].

It is worth to note that the CJEU, by way of derogation from Wallentin-Hermann, did not use the term 'inherent' in both cases.

The CJEU thus seems to have slightly diminished the importance of the first question, in the sense that to successfully claim extraordinary circumstances within the meaning of Article 5 paragraph 3 of the Regulation it is not required that the circumstances relate to an event that is 'not inherent to' the normal exercise of the activities of the airline concerned, but that this only comes down to the question of whether the airline could have exercised effective control over the circumstance (on account of the nature or origin of the event).

However in the judgment of the CJEU of 14 November 2014 in *Siewert v. Condor Flugdienst*,[11] the term 'inherent in' (or 'part of' since also here the authentic language happens to be German) is brought back on stage again.

Consideration 19, first part thereof reads:

> *However, as regards a technical problem resulting from an airport's set of mobile boarding stairs colliding with an aircraft, it should be pointed out that such mobile stairs or gangways are indispensable to air passenger transport, enabling passengers to enter or leave the aircraft, and, accordingly, air carriers are regularly faced with situations arising from their use. Therefore, a collision between an aircraft and any such set of mobile boarding stairs must be regarded as an event inherent in the normal exercise of the activity of the air carrier.*

Hence, the CJEU deems of relevance that the use of mobile stairs are indispensable to passenger air transport. That event (i.e., the activity of using mobile stairs) is therewith 'part' of the normal activities of an air carrier.[12] Thus any technical problem that stems from such activities are not to be seen as extraordinary.[13]

5 CONCLUSION

From the foregoing, it can be inferred that according to the European Court of Justice and the European Commission, an air carrier invoking an extraordinary

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[11] European Court of Justice, 14 Nov. 2014, *Siewert v. Condor Flughdienst Gmbh* (Case C-3894/14).

[12] This is completely in line with Wallentin-Hermann where the inherent event was scheduled maintenance.

[13] Unlike –as was the case in Huzar/Jet2 – the spontaneous failure of a component or system of an aircraft while in operation, because it is not clear what the event was that caused the spontaneous failing.

circumstance (e.g., in connection with a technical problem) indeed bears the character of a force majeure defence and not a strict liability as pursuant to *Huzar v. Jet2*.

It will still (also) have to be determined whether, and to what extent, the air carrier could have exercised effective control over the relevant circumstance.

Of course where it concerns force majeure, the obligation and burden of proof that there was an 'extraordinary circumstance' (see the text of Article 5(3) of the Regulation) remain on the air carrier.

Furthermore at the moment it is not clear how one should deal with technical problems (like the spontaneous failure of a component or system of an aircraft while in operation) of which it is not clear what caused it, or in the terms of Wallentin-Hermann: from which event it stems.

Van der Lans actually deals with what should be the correct interpretation of Wallentin-Hermann. The outcome thereof should be awaited for the sake of legal clarity across the EU.

So much for the firm statement of the Liverpool judge 'a line should now be drawn. Justice delayed is justice denied.'