Regulation (EC) 261/2004 and Internal Strikes Under Article 5.3: '*It's All About Control, Stupid*'

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According to the preamble of the EU passenger rights regulation (EU Regulation 261/2004) strikes that affect the operation of an operating air carrier are explicitly provided as an example of extraordinary circumstances, exempting the air carrier from having to pay compensation to the passengers. Complex in this regard is how one should see strikes by airlines staff also named 'internal strikes'.

There are persons – often boosted by commercial claim companies – who advocate that due to the European Court of Justice ('ECJ') judgment of 17 April 2018, Helga Krüsemann and Others v. TUIFLY it has been clearly established that these internal strikes do not constitute an extraordinary circumstance and thus obliges the air carrier to pay compensation.

The authors have a different view. With this contribution, they want to put internal strikes and the concept of extraordinary circumstances in the proper context. For this they are 'filleting' EU Regulation 261/2004, the Montreal Convention, relevant ECJ case law and European social principles pursuant to which they want to show the proper nuances as regards internal strikes and the extraordinary ordinary defence for the air carrier. All of which should lead to a rewording of article 5(3) of the EU regulation 261/2004. Something for the EU legislator to take into account, as part of the still pending revision of this regulation.

1 INTODUCTORY REMARKS

EU Regulation 261/2004[1] on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights ('the Regulation') establishes, among other rights, a right to compensation for passengers who experience a cancellation[2] or a delay of more than three hours at the end destination of their flight.[3]

An airline is exempted from being held to pay compensation to passengers when it can prove that the cancellation or the delay is caused by 'extraordinary

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1 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 Feb. 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.

2 Art. 5 juncto 7 of the Regulation.

3 ECJ judgment (Fourth Chamber) of 19 Nov. 2009, *Christopher Sturgeon and others v. Condor Flugdienst GmbH*, joined cases C-402/07 and C-432/07.

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circumstances which could not have been avoided even if all reasonable measures had been taken' This is the available defence for the airline pursuant to Article 5(3) of the Regulation.

Considering the high number of requests for prejudicial questions[4] to the European Court of Justice (ECJ or the Court) as regards clarification on the application of this article, it can be concluded that national courts within the EU have difficulties with the interpretation. Especially determining whether or not an event can be qualified as 'extraordinary circumstances' has proven to be challenging.

One of the most complex events are strikes by airlines staff ('Internal Strikes'). Currently there is no uniformity to detect. Some national courts have established that such 'Internal Strikes' constitute extraordinary circumstance in the meaning of the Regulation,[5] where other courts have determined that these strikes are not an extraordinary circumstance, which means that the passengers are entitled to receive compensation from the airline.[6]

The purpose of this article is firstly, to further enlighten why in the opinion of the authors, Internal Strikes that have been initiated and announced by unions in general must be regarded as extraordinary circumstances within the meaning of the Regulation.

Secondly, whether the Montreal Convention (the 'Convention') itself or the jurisprudence concerning this Convention would influence the qualification of internal strikes at an air carrier as 'extraordinary circumstances', since the Convention's exemptions and limitations of air carrier liability are linked to those of the Regulation in Recital 14 of the Regulation.

Lastly, this article discusses the application of the 'Wallentin-Hermann' test and provide a suggested course in order to let the Regulation reflect the reality airlines face in case of disruptions more adequately.

2 WALENTIN-HERMANN TEST

There are no European Court of Justice ('ECJ' or the 'Court') rulings pursuant to which it is established that internal strikes are either always, or never to be considered as extraordinary circumstances. Whether or not a strike (or any other event for that matter) constitutes an extraordinary circumstance requires

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4 At the time of writing, there have been thirteen judgments by the ECJ on this particular article.

5 For example, Barcelona Commercial Court No. 06 (Spain) Judgment of 5 Sept. 2018, *Noelia Godoy and others v. Ryanair*, No. 196/2018.

6 For example, Judgment of the Court of North Holland, location Haarlem (The Netherlands) of 7 Nov. 2018, X v Deutsche Lufthansa Aktiengesellschaft, No. 6190613\CV EXPL 17-6724.

a case by case assessment, based on the specific facts and circumstance of each case.[7]

Recital 14 of the Regulation gives guidance in clarifying which events could constitute extraordinary circumstances and includes 'strikes' in principle as a possibility. It states:

> *'(14) As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of 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'. (emphasis added).*

According to the Article 5(3) of the Regulation, an air carrier shall not be obliged to pay compensation in accordance with Article 7 if it can prove that the cancellation is caused by (1) *extraordinary circumstances*, (2) *which could not have been avoided even if all reasonable measures had been taken*.

The ECJ has interpreted Article 5(3) to the effect that circumstances can be characterized as 'extraordinary' when they relate to an event which – like those listed in recital 14 in the preamble – is: (1) not inherent[8] in the normal exercise of the activity of the air carrier concerned (i.e. a redefinition of 'extraordinary circumstances'); and (2) beyond the control of that air carrier on account of its nature or origin[9] (i.e. a redefinition of 'could not have been avoided even if all reasonable measures had been taken').[10]

Hence, pursuant to this new test (hereinafter called the 'Wallentin-Hermann test'), only when an event is both not inherent and subsequently beyond the control of the carrier, the carrier will be exempted from the obligation to pay compensation.

This is effectively a two-limb test, meaning that only when both are answered in the affirmative the circumstances in question qualify as extraordinary.

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7 *See* paras 21 and 22 of Case C-549/07 *Wallentin-Hermann v. Alitalia – Linee Aeree Italiane SpA (Wallentin-Hermann)* and para. 34 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 *Krüsemann and others v. TUIfly GmbH (Krüsemann).*

8 German is the authentic language of Wallentin-Hermann and therewith the only legally binding language. The word 'Inherent' however is an incorrect translation of the word 'Teil' from German. 'Teil' actually means 'Part' in English, but is wrongfully translated as 'Inherent'. *See* further 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, 40(4&5) Air & Space L. 331–40 (2015).

9 Para. 23 Case C 549/07 *Wallentin-Hermann v. Alitalia – Linee Aeree Italiane SpA (Wallentin –Hermann).*

10 On this redefinition of Art. 5(3) Regulation, *also see* Jochem Croon, *Placing Wallentin-Hermann in Line with Continuing Airworthiness*, 36 Air & Space L. 1–6 (2011).

The ECJ appears to regard these two limbs not as principally interrelated, as Article 5(3) of the Regulation does, but as separated and cumulative. This is often also the reality in the lower courts in the Netherlands.[11]

3 EVALUATION OF INTERNAL STRIKES

3.1 Evaluation of Internal strike should be with reservation and at 'arm's length'

According to the Regulation (see under paragraph 2 of this article above) a strike could be an event comprising extraordinary circumstance. This should include any Internal Strike (i.e. strike by own staff and crew of the airline). An evaluation (by the court) whether such Internal Strike constitutes extraordinary circumstance and whether there were any reasonable measures available for the air carrier to avoid the internal strike, should in anyway be with reservation and at 'arm's length' from the substantive specifics of the negotiations between the employer (i.e. the airline) and the unions/employees. The reason for this is the fact that (1) employers and employees have the right to negotiate and conclude collective agreements (see Article 28 of the Charter of Fundamental Rights of the EU) and (2) the freedom of the air carrier to conduct a business (Article 16 of the Charter of Fundamental rights of the EU).

Any interpretation of the Regulation that would mean the air carrier basically has to give in to the demands of the unions in order to avoid cancellations/delays and therewith compensations claims would unreasonable impinge on (1) the balance of employers and employees as part of their mutual right of collective bargaining and action and (2) also the freedom of the air carrier to conduct its business in any way it sees suitable, which would be contrary to the Charter of Fundamental rights of the EU (Articles 16 and 28 thereof).

3.2 Strike is considered a fundamental right: in principle no control for the air carrier

The right to strike is a fundamental right and is enshrined in Article 6(4) of the European Social Charter. According to Article G, this right cannot be restricted or limited, except by restrictions that are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

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[11] see the Noord Holland Court at Haarlem, 11 July 2018, passengers vrs Lufthansa ,number 6190613 \CV EXPL 17-6724text

This has been confirmed in the national case law of for example the Dutch Supreme Court of the Netherlands. Based on the Dutch *Enerco* and *Amsta*-case,[12] the starting point is the right of collective action the union has in accordance with Article 6(4) of the European Social Charter. The exercise of this right can only be limited by ways defined in Article G of the European Social Charter. It is up to the carrier to prove justification of a limitation or exclusion of the right to strike according to the criteria of Article G European Social Charter. This can only be the case when the limitations of the right to collective actions are seen as urgently necessary from the perspective of society.

The right to strike is a fundamental right for the employees. It is the prerogative of the employees to decide whether or not and when to strike. They can basically go on strike for any reason as long as it does not unreasonably impact third parties. The decision to go on strike made by the employees is unilateral and is consequently in principle beyond the control of the air carrier on account of its nature or origin. Therefore, in essence, the availability for the air carrier to take reasonable measures to avoid the strike is in general very limited. The decision by the unions to go on strike is therefore clearly beyond the control of the air carrier.

3.3 Krüsemann: Internal strike and control by the air carrier

The Krüsemann-case[13] is the only ECJ ruling regarding whether a strike can be considered as a possible extraordinary circumstance or not. In Krüsemann, the carrier suffered from a spontaneous absence of a significant part of its flight crew staff (a so called 'wildcat strike'), which led to a large number of cancellations and delays.

The wildcat strike was a response to the air carrier's sudden and unilateral initiative of a surprise announcement of a corporate restructuring process. Because, according to the ECJ, the air carrier caused the strike by its own unilateral decision and subsequent surprise announcement, it was held by the Court that in this particular case the (wildcat) strike by the carrier's own crew was **not** beyond the actual control of the air carrier concerned.[14] Hence a conclusion based on an assessment of the specific facts and circumstances of the case.[15]

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[12] HR 31 oktober 2014, NJ 2015/252 en HR 19 juni 2015, JAR 2015/188.

[13] ECJ judgment (Third Chamber) of 17 Apr. 2018, *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.

[14] *See* paras 38 and 44 of Krüsemann.

[15] Another point in the Krüsemann-case, is that this was not only a wildcat strike, but an illegal strike. Due to the illegal nature, in principle it is possible for the airline to take action against the third parties, such as unions, that caused the damage. In cases where strikes are legal, this possibility of redress does not exist. It would therefore be grossly unfair to require an airline to pay compensation where it had no control or

From the Krüsemann judgment we may deduce that the following factors are of importance – according to the ECJ – in the evaluation of a specific strike action in relation to the right to compensation under the Regulation:

(1) the internal or external position of the actors that played a decisive role in the calling of the strike. In Krüsemann, importance was given to the consideration that the strike originated from within the airline's own work force. The Court emphasised in this respect, that the strike was settled quickly *after* the airline entered into contacts with the staff's outside labour representatives. Therefore, it follows that a strike called or instigated by a more 'external' actors like labour unions or other external representatives of employees, would be more likely to qualify as an extraordinary circumstance;
(2) whether the strike was induced by a specific act of the airline, or more generic, macro-economic or sector specific reasons. In Krüsemann – according to the Court – it was the airline that escalated matters and deteriorated its employment relations, by its abrupt decision-making and subsequent surprise announcement of a corporate restructuring process. If the airline itself behaves as 'a bull in a china shop', so to speak, the Court is not inclined to honour any invocation of extraordinary circumstances. If, however, broader economic concerns provide the immediate background to a strike, relating more to the company's external conditions, such as adverse trading conditions in the aviation industry, it is likely that such an invocation would be honoured;
(3) whether the immediate cause of the strike was of an event or decision that is common to the running of an airline. The Court stressed in Krüsemann, that reorganization and restructuring decisions that gave cause to the strike by the airline in question, are intrinsically common to running such an enterprise, as are the risks that arise due to the social consequences of such decisions;
(4) finally, the Court made the critical point, that the liability of an airline should not be made dependant on rules of labour protection.[16]

3.4 Internal strikes initiated by unions as extraordinary circumstance

Applying the above criteria to the situation that an Internal Strike is initiated by the union and due to its unilaterally decision to go on strike, should lead to the

opportunity to take reasonable measures to avoid the delay(s)/cancellation(s) and also had no ability to recoup these damages from the party actually causing the event leading to the delay(s)/cancellation(s).

[16] *See* § 47 of Krüsemann.

conclusion that these strikes constitute extraordinary circumstances which exempts the air carrier from paying compensation to affected passengers.

Firstly, such labour union initiated internal strikes based on the unilateral decision by this union to use its fundamental right to go on strike, have their origin entirely in external sources – completely outside the control of the air carrier. Unlike in the Krüsemann case, these types of strikes do not originate or stem from a unilateral decision by the employer (i.e. air carrier) itself, accumulating into a sudden and unilateral surprise announcement of a restructuring process.

Furthermore, the primary actors that initiate the Internal Strike, are the employees' 'outside' representatives (i.e. the unions). Thus, an organized labour action has the critical involvement of outside actors. Clearly this is not a spontaneously adventure embarked upon by the airlines employees themselves (contrary to the action of the employees in *Krüsemann* who felt compelled to do so on account of the airline's escalating measures).

Finally, the consideration that labour rules cannot impinge on the question as to whether a right to compensation exists, implies that the Court would not delve too deeply into the specific circumstances that pertain to the legitimacy of the specific strike. The Court would only evaluate the strike by the relevant factors as outlined above: (1) the externality of the actors calling/organizing/inciting the strike, (2) the nature of the events providing the immediate background to the strike and (3) whether such events are a common occurrence in the normal activity of an airline.

4 REASASONABLE MEASURES/CONTROL UNDER THE MONTREAL CONVENTION AND THE REGULATION

In the aforementioned Wallentin-Hermann case, the ECJ had considered the Montreal Convention's relevance in judging whether a carrier can avail itself of the extraordinary circumstances defence. For three reasons, the ECJ decided that the Montreal Convention cannot determine the interpretation of the grounds of exemption under Article 5(3) of the Regulation[17]:

(1) Firstly, the Regulation provides an exemption when there are 'extraordinary circumstances', while this term does not appear in the Montreal Convention. Instead, the Montreal Convention exempts carriers from its liability for damage occasioned by delay in Article 19 ' … *if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures'*.

[17] *See* § 29 till 33 of Wallentin-Hermann.

(2) The second fact the ECJ considered was that the Regulation's exemption of extraordinary circumstances in Article 5(3) relates to cancellation and the Montreal Convention's exemption of 'all reasonable measures' relates to delay.
(3) Lastly, the Montreal Convention governs actions for damages by way of redress on an individual basis, while the Regulation provides for standardized and immediate compensatory measures.[18]

4.1 Montreal Convention relevant for the interpretation of the Regulation

Despite this ruling, the Montreal Convention is nevertheless relevant for the interpretation of the Regulation due to developments in the ECJ jurisprudence. Besides the fact that it was clearly the legislator's intention for the two legal instruments to be interrelated, as can be seen from the wording of recital 14, there are other reasons to suspect the ECJ may derogate from its own past decision on this issue if the matter would come before the Court again.

Firstly, although the Montreal Convention does not use the term 'extraordinary circumstances', in the way it was adopted by the Regulation, it does share the concept of having to take 'all reasonable measures' in order to avoid damages, which is also part of the control part of the Wallentin-Hermann test. Under the Convention and the Regulation, it is accepted that if a carrier has taken these reasonable measures or if there were no such measures available, then the carrier cannot be held liable for damages or compensation. The interpretation of reasonable measures has to be influenced by the Montreal Conventions, as instructed per the recital 14.

Under the Montreal Convention, a carrier must show that, on the whole, it took measures reasonably available and reasonably calculated to prevent the subject loss.[19] This means that precautions or reasonable measures must be appropriate to the risk.[20] According to the Convention's jurisprudence, the carrier must take reasonable measures to prevent the original delay causing the event and reasonable measures to minimize delay for the passengers or that is was impossible to take such measures. Interpretation of reasonable measures under the Regulation should be influenced by the Montreal Convention, in particular the questions of whether measures can be deemed to be appropriate or disproportionate.

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[18] Case C-344/04 *IATA and ELFAA v. Department of Transport*.
[19] *Helge Mgmt., Inc. v. Delta Air Lines, Inc.*, No. Civ.A 11-10299-RBC, 2012 WL 2990728, at 3 (D. Mass. 19 July 2012).
[20] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 Feb. 2004 establi, at *3 (n. D.Ill. 20 Apr. 2016).

The second argument the ECJ uses, is that the compensation or damage under the Montreal Convention is only for delay while the Regulation's compensation is only for cancellations. This argument will also not hold due to the Sturgeon case (which is post Wallentin-Hermann). After this ruling, passengers are also able to seek compensation in case of long delays as well, making the context in which the Montreal Convention and the Regulation operate the same.

The third ECJ argument, on the fact that the reason for compensation under the two legal instruments is different, can also be opposed. Upon close reading of recital 14, it can be seen that the reference to 'as under the Montreal Convention' is meant as a link to the limitation and exclusion of the obligation for carriers to pay compensation. This is not a reference to the reason behind any compensation (i.e. individual damage under the Convention or the inconvenience of loss of time as claimed by the ECJ as the rationale under the Regulation[21]). There is nothing in recital 14 that would support the Court's contention as to the relevance of the rationale of the compensation, as the plain language of the Recital relates entirely to 'exemptions'.

For the reasons stated above, European national courts should in their judgments adopt a degree of confluence between the Montreal Convention and the Regulation, as regards the interpretation of reasonable measures and therefore the control part of the Wallentin-Herman test, as stated in recital 14 of the Regulation. This would lead to the conclusion that Internal Strikes initiated by Unions are beyond the control of air carriers as there are no reasonable measures available, to avoid these.

5 THE WALLENTIN-HERMANN TEST IN DAY-TO-DAY REALITY

On a wider scope the subject is all about the application of the Wallentin-Hermann test. The test often leads to incomprehensible results. If a wildcat strike is not extraordinary because it is 'inherent to the normal exercise of an air carrier', can it then be categorized as an 'ordinary' circumstance? Or running a mobile boarding stairs into an aircraft, is that an ordinary circumstance as well?[22]

5.1 Wallentin-Hermann test applied on the examples provided in the Regulation

It seems very odd to classify these events as 'inherent in the normal exercise of the air carrier's activities', but the ECJ did. Furthermore, if running mobile boarding

[21] *See* § 55 of the joined cases Nelson/TUI ruling (c-581/10 and 629).

[22] ECJ judgment (Fifth Chamber) of 14 Nov. 2014, *Sandy Siewert and Others v. Condor Flugdienst GmbH*, case C-394/14.

stairs into an aircraft and wildcat strikes are not 'extraordinary circumstances', because they are 'inherent', then what about the events summed up in recital 14 and 15 of the Regulation?

What will happen when one applies the Wallentin-Hermann test, which is a tool for interpreting a term of the Regulation, on these recitals, which are part of that same Regulation? It leads to incomprehensible reasoning. Circumstances or events clearly inherent to the normal exercise of an air carrier are then nevertheless qualified as 'not inherent'.

For instance: recital 14 states among other things that extraordinary circumstances '*… may, in particular, occur in cases of 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*'.

As the aviation industry often involves flying from one country to another, while passing territories of third countries, is having to deal with political instability not something ordinary, meaning something which is inherent? As the main activity of an air carrier is providing air transport by operating aircraft, is dealing with meteorological conditions not ordinary or inherent?

As the transport involves the movement of different people or cargo on which, as an air carrier, you cannot run a full background check prior to flight, are security risks not ordinary circumstances and thus inherent? As co-operation with different entities, such as air traffic control, is needed for air transport, is a strike by these entities influencing the carrier's operation not inherent?

And then there is recital 15 of the Regulation:

> *Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.*

This recital shows beyond any doubt why the question whether the event is extraordinary/not inherent or ordinary/inherent, is not relevant and should be disregarded.

How many commercial flights can take place *without* air traffic management decision for a particular aircraft on a particular day? Even if such decision constitutes an approval or clearance, it is still a decision. Without ATC decisions, no commercial aviation is possible. There is nothing more inherent to the normal exercise of air carrier's operations than receiving air traffic management decisions. Air Traffic Control (ATC) decisions are ordinary as the rising of the sun every morning.

Still it is an extraordinary circumstance according to the recital, but pursuant to applying the Wallentin-Hermann test it would be 'inherent' and hence 'ordinary'.

5.2 Wallentin-Hermann test should not be used outside its scope

Therefore, the conclusion must be made: the Wallentin-Hermann test can only be used in the situation it was created for, which is technical problems/failures surfacing during scheduled maintenance. The Wallentin-Hermann ruling confirms this. Paragraph 24 of the Wallentin-Herman ruling states, in brief, that given the technology involved with aircraft, it is normal that technical problems can arise. Because of this normality, regular maintenance is needed. If there is a failure in maintenance which leads to a technical failure, then *this* is inherent in the normal exercise of an air carrier's activity.[23]

This paragraph shows that the inherency-requirement is created completely within the context of technical problems and scheduled maintenance. Timely and proper scheduled maintenance is indeed 'inherent to the normal activity of an air carrier'. The exceptions that were given in paragraph 26 on what may not be deemed as inherent are also technical in nature: a hidden manufacturing defect and damage to aircraft caused by acts of sabotage or terrorism. Nowhere in the entire Wallentin-Hermann judgment can it be inferred that this test may be used in other circumstances than ones involving technical problems and maintenance. This test is simply not meant to be applied to events such as strikes.

Ideally, the Wallentin-Hermann test should not be applied to any other situation than technical problems and maintenance. In these cases, a court should only investigate if a cancellation or delay with more than three hours is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, pursuant to Article 5(3) of the Regulation.

When interpreting the term 'extraordinary circumstances', the means of interpretation will be used according to customary international law as it has been codified in Article 31 of the Vienna Convention on the law of treaties.[24] This article states that interpretation shall be done in good faith in accordance with the ordinary meaning (such as can be found in the dictionary)[25] and in the context and in the light of object and purpose of the legal instrument itself (which would include the recitals of the Regulation in this case). When interpreting a term of the Regulation in context, then the link between the Montreal Convention and the Regulation should be taken into account.

By not using the Wallentin-Hermann test for classifying strikes, but by using these interpretation methods as prescribed by international customary law, of

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[23] *See* Jochem Croon, *Wallentin-Hermann and a Safe Flight, Zeitschrift fur Luft- and Weltraumrecht*, ZWL 61. J9.4/2012.

[24] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155

[25] The Merriam-Webster dictionary describes 'extraordinary' for example as: (1) going beyond what is usual, regular or customary, (2) exceptional to a very marked extent.

course the conclusion will be that strikes are extraordinary circumstances and in principle beyond the control of the air carrier. After arriving at this conclusion, a court has to determine whether these extraordinary circumstances could have been avoided by the air carrier with taking reasonable measures. This last determination will lead to a justifiable result.

This point can be illustrated with the following examples. Internal strikes organized by unions cannot be avoided. A birdstrike cannot be avoided. Adverse weather conditions cannot be avoided. But a wildcat strike which originate from a unilateral surprise announcement *could have been* avoided. If an air carrier will be held to pay compensation in the situation where it had control, then this is a justifiable result.

Currently, it is an impossible mission to persuade the ECJ, let alone the national courts, to abandon the application of the Wallentin-Hermann test to circumstances other than technical problems in the scope of maintenance, even if this is the most reasonable and logical step to take. It would mean an opposition of years and years of jurisprudence in which this test has established a deeply rooted significance in all EU passenger cases. Courts simply cannot go back. It is too late.

Therefore, the suggested approach is not to go back, but to go forward. For years a revision of the Regulation is planned. In this new revised Regulation one radical solution will bring an end to all numerous requests to the ECJ to clarify the term 'extraordinary circumstances'. As radical as it is, it is also a simple solution: the omission of one word. The word 'extraordinary'.

Why does it matter whether an event which caused a delay or cancellation of a flight is extraordinary or ordinary in its nature?

The most important and basically only question should be: 'was there anything the air carrier could do about this event or circumstance leading to a delay or cancellation or not?'. It is irrelevant whether the circumstance is extraordinary or ordinary (or inherent – or not inherent to the normal activity if an air carrier) It cannot be acceptable that air carriers are held to pay compensation for 'the inconvenience of suffered loss of time' (additional to providing proper care and assistance), when it had no control over the situation.

In order to eliminate the wrongful use of the Wallentin-Hermann test and achieve a balanced situation that not only protects passenger interest but also takes into account air carriers' reasonable capabilities, the new Article 5(3) of the Regulation should be worded as follows:

> *An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by circumstances which could not have been avoided even if all reasonable measures had been taken.*

Hopefully the EU legislator will take matters in their own hands again and push forward with the proposed revision of the Regulation.

6 CONCLUSION

To conclude, when a court has to decide on whether a passenger is entitled for compensation in cases of cancellation or delay due to an Internal strike initiated by unions, factors the court should not have to consider is the classification of the event being: extraordinary and/or not inherent. The only relevant question that has to be answered is whether or not the strike was beyond the control of the air carrier.