



# Still extraordinary? Extraordinary circumstances under the Air Passengers' Regulation

German Case Law in 2014

*Prof. Dr. Ernst Führich Germany*



# 1. Introduction

## Reform of the Regulation

- Will passengers of a flight soon receive less compensation, whereas airlines will receive greater relief from their current liability? The proposal for the new regulation air passengers' rights envisages exactly that.
- The EU ministers of transport will hold a meeting regarding a reform of Regulation No 261/2004 in June 2015. On 11 June, all changes to the regulation should have been negotiated and the council of EU ministers of transport will decide in the matter.



## 2. Why talk about the exoneration in case of extraordinary circumstances?

- Where do I see the biggest threat for passengers' rights?
- Currently, it seems quite possible that airlines might be able to escape their liability by arguing the event was an “unexpected flight safety shortcomings affecting a single aircraft”.
- But it seems a general agreement that „technical defects“ should not be abused by airlines in order to refuse the compensations.



### 3. Why you might also be interested to hear about German case law on the matter?

#### a) Comparison of laws

- One of the important functions of IFTTA is the comparison of laws.
- Evidently, we ask ourselves how the Regulation on air passengers rights is being applied by airlines and how national courts interpret controversial provisions. By looking beyond the national borders, we can see new ways of solving legal issues.
- This is particularly important for the coherent application of EU regulations which apply without any national implementation.



## b) Passengers can make claims at locations of departure and arrival

- According to European and German legislation, air passengers can make claims under the Air Passengers Regulation at the place of departure or arrival of their flights.
- This has been confirmed by the European Court of Justice (ECJ) in its *Rheder* Decision in 2009 and by the German Federal Supreme Court (BGH) and German lower courts in subsequent years.
- The passengers can choose where they file their claims. Therefore, it is important that plaintiffs know the national legislation at the respective locations of departure and arrival.



## c) German Case Law influences the body of European Law

- Why is national legislation so important? When I look at some decisions of the German Federal Supreme Court I get the feeling the court wants to decide by itself – disregarding the European context of the law. I think this is wrong. I think the BGH should submit any controversial questions regarding the Regulation to the ECJ to preserve the uniformity of EU law.
- In principle, the ECJ determines the binding interpretation of EU regulations. At the same time, there are still national courts which doubt this binding character of ECJ decisions. With respect to Germany, the Regional Court of Stuttgart (Landgericht Stuttgart) reaffirmed against a disruptive judge of the district court at the Airport Stuttgart in March 2012 that there would be no justification to depart from the rulings of the ECJ since the landmark Sturgeon decision (13 S 93/11, RRa 2014, 192). In this decision the ECJ decided against the text of the regulation that passengers are also entitled to compensation in case of a delay of flights.
- Therefore I would like to outline how German courts interpreted the requirements for “extraordinary circumstances” in the last year.



## 4. Extraordinary circumstances – General Principles

- First of all, the exoneration in case of “specific circumstances” has to be interpreted narrowly as it constitutes a derogation from the principle in Art. 5 (1) that passengers have the right to compensation (judgment in *Wallentin-Hermann*, C-549/07, EU:C:2008:771, paragraph 20). Recital 14 of the regulation names several examples where damages do not have to be paid, for example in case of security risks, unexpected plane shortcomings or strikes.
- In general, airlines do not have to pay any compensation if they can prove:
  - that the cancellation is caused by “**extraordinary circumstances**”;
  - and that they took all “**reasonable measures**” to avert the delay or cancellation.



## 4. Extraordinary circumstances – General Principles

- According to the Judgement of the Court in *McDonagh* (C:2013/43) and *Sturgeon* (19/11/2009), “extraordinary circumstances” are usually beyond the air carrier’s actual control.
- With regard to the proof of “reasonable measures”, airlines have to show that they took all measures which were technically and economically feasible (judgment in *Eglitis and Ratnieks*, C-294/10, EU:C:2011:303, paragraph 25).





## 4 Extraordinary circumstances – General Principles

- Please find after my presentation copies of the draft list of extraordinary circumstances issued by the National Enforcement Bodies of the regulation in 2013.
- The list is not a statement of the European Commission. And when you look at the list, you will see that the events do not conform with the German case law in 2014 I just present you now.
- It seems like we will have to wait for the new Regulation from Brussels. Hopefully, the new Regulation will contain a conclusive list of events which constitute “extraordinary circumstances”.



## 4 Extraordinary circumstances – General Principles

In conclusion the definition of the extraordinary circumstance has three criteria: circumstances need to have been

- **unpredictable,**
- **unavoidable** and
- **external.**



## 5. Extraordinary circumstances – German Case Law





## a) Mobile boarding stair vehicle





## a) Mobile boarding stair vehicle

- For example, the Court ruled that a collision of a mobile boarding stair vehicle with a plane cannot be qualified as "exceptional circumstance".
- The Court argued that the stair vehicle was used in the **direct sphere of responsibility of the airline** operating the flight. The stairs secured the boarding and exiting of the passengers.
- Therefore, a collision of the stairs with the plane would be an attributable risk of the airline (14/11/2014, C-394/10 - Siewert v. Condor).



## b) Strike of air traffic control personnel and failure of radar equipment





## b) Strike of air traffic control personnel and failure of radar equipment

- The German Supreme Court ruled in two judgements in 2014 that the strike of air traffic control personnel or failure of radar facilities qualifies as “extraordinary circumstances” – in accordance with the case law of the ECJ.
- According to the BGH, strikes or radar outages are not part of the usual business activity of airlines and are beyond their actual control.
- For the interpretation of the Regulation it is irrelevant whether the strike occurs at the airlines or outside the airline.



## b) Strike of air traffic control personnel and failure of radar equipment

- Furthermore, according to the BGH, the question whether the airline took all reasonable measures to avert delays or cancellations has to be decided on a case by case basis.
- Reasonable measures can include booking passengers on other flights.
- However, the Regulation does not require airlines to retain spare airplanes for the case of a strike. Because such arrangements would not be economically viable for airlines and would thus be “unreasonable”.





## b) Strike of air traffic control personnel and failure of radar equipment

- This has been confirmed by the district court of Rüsselsheim (27.11.2013, 3 C 305/13, RRa 2014, 146) with regard to a **strike of the runway personnel** and by the district court of Hamburg (9.5.2014, RRa 2014, 249) with regard to a **strike of security personnel**.
- It seems noteworthy, that until today, courts in Germany with respect to the Package Tour Directive still differentiate between
  - strikes by third parties (act of nature or force majeure) and
  - strikes within the travel company (breach of contract).



## c) Security issues of arrival or departure





## c) Security issues of arrival or departure

- The German Federal Supreme Court (BGH, 13/11/2013, RRa 2014, 78) decided a case where a passenger missed the connecting flight because the airplane was not allowed to land in time due to heavy airtraffic – even though the flight started on time.
- The BGH decided that such a denial of a permission to land by authorities would constitute a case of “extraordinary circumstances”.



## c) Security issues of arrival or departure

Security issues which qualify as “extraordinary circumstances” are also

- the **closure** of the airport by authorities,
- the discovery of a **bomb** at the airport,
- **hi-jacking** of the airplane,
- the occurrence of **unaccompanied baggage** and
- the removal of an **unruly passenger** from the aircraft.



## d) Catering





## d) Catering

- According to a decision of the District Court of Cologne (12.5.2014, 142 C 600/13), a **fire in the catering equipment** caused by the catering company cannot be qualified as “extraordinary circumstance” under Art. 5 (3) of the Regulation.
- The catering company is **not a third party** for the airline. It is a legal person used by the airline to fulfil its obligations to the passenger.



## e) Defect of Equipment attributable to the manufacturer





## e) Defect of Equipment attributed to the manufacturer

- The ECJ, the German Federal Supreme Court and the British High Court have all ruled that, in principle, a technical problem does not qualify as “extraordinary circumstances”. But the situation regarding a hidden manufacturer’s defect is not entirely clear.
- The Regional Court of Darmstadt ( 16.4.2014, RRa 2014, 137) has decided that a hidden manufacturer’s defect qualifies as “extraordinary circumstances”. The Court stated that it was not decisive whether the airline was at fault or the defect could have been averted.
- The question is rather whether a defect of a “working equipment” of the airlines occurred. The airline would not have to pay damages to its passenger if it proved that the “extraordinary circumstances” did not occur in the context of the normal business activity of the carrier and was unavoidable.
- According to the Court, the decisive criterion is the controllability of the defect and whether it is part of the operational process of the airline. The airline would not be liable, if the defect was external and uncontrollable for the same aircraft part of the fleet of the carrier.





## f) Smell of fire





## f) Smell of fire

- The District Court of Darmstadt (6.11.2013, NJW-RR 2014, 435) also had to decide a case where a delay of an **flight before** (Vorflug) was caused by smell of fire in the aircraft cabin due to turbulances.
- The Court decided that this constituted “extraordinary circumstances” which are not under the actual control of the carrier.
- The Court also repeated that airlines do **not** have to retain **spare airplanes** for such instances.



## g) De-icing liquids





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- According to the Higher Regional Court of Brandenburg (19.11.2013, RRa 2014, 81), delay or cancellation of flights because the airport ran out of de-icing liquids does not qualify as “extraordinary circumstances”. It would be an inherent part of the operational business of the airline.
- In the specific case, the airport company for De-icing would be a legal person used by the airline to fulfil its obligations (Erfüllungsgehilfe). Therefore, fault of the airport company’s management to order enough de-icing liquids would be attributable to the airline.



## h) Bird strike





## h) Bird strike

- It seems rather established that bird strikes during a flight are unpredictable and unavoidable external circumstances. However, the airline has to prove that a bird strike occurred.
- The BGH (24.9.2013, RRa 2014, 25), as well as the District Courts of Frankfurt (17.1.2014, RRa 2014, 254) and Düsseldorf (13.3.2014, RRa 2014, 146) all ruled that there is no presumption of bird strikes during the landing of an airplane.



## h) Bird strike

- At the same time, new case law seems to deviate from the rule. Recently, courts in Germany and the UK (Manchester County Court), have decided, that bird strikes, in principle, do not qualify as “extraordinary circumstances” anymore, as they would happen several times a day. Therefore, they would be neither unusual or rare.
- The judges said, a motorway collusion between two cars is unusal but not extraordinary. Whereas a motorway collision between a car and an horse would be extraordinary. Bird strikes happen very often and do not fall in the same category as a motorway collision between a car and horse, which would be extraordinary. Our skies are populated with birds, whereas our roads are not populates with horses.



## i) Sandstorm







## i) Sandstorm

- The AG Hamburg (10.1.2014, RRa 2014, 255) correctly decided that a sandstorm at an arrival airport has to be qualified as “extraordinary circumstances”.
- Furthermore, the airline was not obliged to retain a spare aircraft at the destination in Cape Verde.



## 6. Conclusion

- Now, let us see what decisions the EU ministers of transport will make on 11 June.
- Beside the list of extraordinary circumstances, the major outstanding issues are the potential extension of thresholds for compensation from 3 hours to 5, 9 or even 12 hours und the the payment of compensation with regard to connecting flights.

**Thank you very much!**

**Hvala vam puno!**

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