



# Claims from Passengers and arguments from Airlines (EU Reg. 261)

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## Claims from Passengers and arguments from Airlines

EU Regulation 261/2004	
Scope Art. 3	<ul style="list-style-type: none"> <li>• Flight departing EU airport</li> <li>• Flight to an EU airport by a Community Carrier</li> </ul>
Events covered Art. 4,5 and 6	<ul style="list-style-type: none"> <li>• Denied boarding</li> <li>• Cancellation</li> <li>• Delay</li> </ul>
Rights granted Art. 7,8, 9 and 14	<ul style="list-style-type: none"> <li>• Compensation (denied boarding, cancellation &amp; delay)</li> <li>• Reimbursement and re-routing</li> <li>• Care</li> <li>• Information on rights</li> </ul>
Exemptions Extraordinary Circumstances Art. 5	<ul style="list-style-type: none"> <li>• Proof that cancellation or delay is caused by events which could not have been avoided even if all reasonable measures had been taken.</li> </ul>

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### EXTRAORDINARY CIRCUMSTANCES – Art. 5 (3) EU 261/2004

In accordance with Article 5(3) of the Regulation, an air carrier is exempted from paying compensation in the event of cancellation or delay at arrival 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.

- In order to be exempted from the payment of compensation the carrier must therefore simultaneously prove:  
the existence and the link between the extraordinary circumstances and the delay or the cancellation, and
- the fact that this delay or cancellation could not have been avoided although it took all reasonable measures.

A given extraordinary circumstance can produce more than one cancellation or delay at final destination, such as in the case of an Air Traffic Management decision as referred to in Recital 15 of the Regulation.

# Claims from Passengers and arguments from Airlines

## English Courts

### Delay

English Court of Appeal reached its judgment in the joined cases of **Gahan v Emirates and Buckley v Emirates**[2017] EWCA Civ 1530, in which both the Civil Aviation Authority and the International Air Transport Association intervened.

First case: Passenger had booked with Emirates to travel from Manchester to Dubai (the first leg) and then from Dubai to Bangkok (the second leg). The first leg was delayed and the connecting flight was missed. Arrival in Bangkok 13 hours and 37 minutes late. At first instance, compensation under Art. 7 EU 261/2004 in respect of the first leg awarded but the second leg was discounted, i.e. €300 and not €600. Passenger appealed.

Second case: flight with Emirates to travel from Manchester to Sydney via Dubai. First leg delayed by 2 hours 4 minutes, second leg was automatically rebooked. Arrival in Sydney a further 16 hours and 39 minutes late. Claim allowed. Emirates appealed.

The Court of Appeal had to consider (1) whether compensation for the second leg of the journey in each case was awardable under Regulation (EC) No 261/2004 ("the Regulation"); and (2) as a result of arguments made by Emirates, whether there was jurisdiction under the Regulation itself; and (3) if so, whether it was excluded by the Montreal Convention. Section 19 of the Montreal Convention, of which the EU and UK are signatories, limits liability for damage caused by delay.

# Claims from Passengers and arguments from Airlines

## English Courts

### Connecting flights and delay

The Court of Appeal allowed the passenger's appeal in the first case and dismissed Emirates' so that compensation was available for both legs in both cases. The Court started with the basic proposition that:

... where a carrier provides a passenger with more than one flight to enable him to arrive at his destination, the flights are taken together for the purpose of assessing whether there has been three hours or more delay.'

### Jurisdiction under the Regulation

The Court rejected Emirates' second argument that the Regulation did not apply to flights operated by non-Community carriers (such as Emirates) outside of the EU. The Court considered that the Regulation took effect: when the carrier is present in the EU and it imposes a contingent liability on the carrier at that point. The liability may never crystallise but if it does do so, it will crystallise outside the jurisdiction.' The basis for jurisdiction over non-Community carriers under the Regulation was, contrary to the submission on behalf of Emirates, territorial in nature . It was sufficient that the first of two connecting flights departed from the EU.

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## English Courts

### Montreal Convention

- As an alternative submission, Emirates had argued that there was no jurisdiction to award compensation under the Regulation, since the Montreal Convention took precedence.
- That meant the Court was bound by *Nelson v Deutsche Lufthansa AG* [2012] (C-581/10) in which the CJEU had held that there was no overlap in scope between the Montreal Convention and the Regulation since the damage dealt with under each was different. The former provided for individual damage to be proved on a case-by-case basis. The latter dealt with fixed compensation for inconvenience which was identical for all passengers on a given flight [31]-[32].

# Claims from Passengers and arguments from Airlines English Courts

## Art. 15 EU 261/2004 Exclusion of Waiver

“Obligations vis-à-vis passengers pursuant to this Regulation may not be limited or waived, notably by a derogation or restrictive clause in the contract of carriage....”

## **Bott & Co Solicitors Ltd v Ryanair DAC [2018] EWHC 534 (Ch)**

Bott & Co. specialised in flight delay compensation claims. Ryanair included a clause in its general terms and conditions whereby Passengers must submit claims directly to Ryanair and allow 28 days for the airline to respond, before engaging third parties to claim on their behalf and the airline would refuse to process third party claims which had not been submitted directly first and respond directly to passengers even when claims were submitted by a third party. The court also rejected Bott & Co.'s arguments that Ryanair's terms were unenforceable due to (i) Article 15.1 of Regulation 261, or (ii) Article 3 of the Unfair Contract Terms Act. The Judge was of the view that the relevant section "neither puts a material obstacle in the way of making a flight delay compensation claim nor results in the passenger receiving less than she is entitled to recover". On the whole, the provision was "fair and reasonable".

## Claims from Passengers and arguments from Airlines

German courts take a different view: the **municipal court in Nürnberg** ruled in a judgment handed down **11 January 2018 (Az. 17 C 5050/17 )** that a flight ticket purchased by a consumer in Germany meant the contract of carriage was governed by German law, contrary to the Irish choice of law clause in Ryan Air's ticket terms. Under German law a clause forbidding a passenger to assign its rights under EU 261/2004 to a passenger claims portal (Flightright & Co.) would be invalid under the German statute on unfair contract terms.

Ryan Air appealed to the Nürnberg appeal court but withdrew the appeal when the court in an indicative ruling ("Hinweisbeschlüsse"), confirmed the court below by expressing its opinion that the Ryan Air terms were invalid. This means the judgment of the court below is final.



## Claims from Passengers and arguments from Airlines European Court of Justice

1. Mass sick leave of employees no extraordinary circumstance  
(ECJ on April 17th 2018, C-195/17)

- Facts of the case:
  - After TUIfly announced entrepreneurial restructuring mass sick leave of TUIfly staff (about 89 %)
  - TUIfly refused passengers compensation for cancelled and delayed flights
  - argued “wildcat strike” was extraordinary circumstance
- **Held**, that “wildcat strike” no extraordinary circumstances, because
  - Entrepreneurial restructuring part of normal management
  - Protest not an unusual reaction
  - Protest ceased after agreement of TUIfly and staff
  - Unusual reaction beyond air carrier’s control necessary for it to be an exceptional circumstance

## Claims from Passengers and arguments from Airlines European Court of Justice

### 2. ECJ on Compensation in the Event of Chartered Plane (July 4th 2018, C-532/17)

- Facts of the case:
  - TUfly flight from Hamburg (Germany) to Cancún (Mexico) operated by Thomson Airways
  - Passengers claimed compensation for delay from Thomson Airways
  - Thomson Airways argued they were not air carrier
- **Held**, that air carrier is who decided to perform the flight, because:
  - it is who had the operational responsibility

## Claims from Passengers and arguments from Airlines European Court of Justice

### 3. Right to Compensation Includes Connecting Flights Outside the EU (ECJ on Mai 31st 2018, C-537/17)

- Facts of the case:
  - Travel from Berlin (Germany) to Agadir (Morocco) via Casablanca (Morocco) wit Royal Air Maroc
  - First flight to Casablanca departed late
  - Passenger was denied boarding of second flight, because her seat had been reassigned to another passenger
  - Royal Air Maroc refused compensation for denied boarding resulting 4 hours delay arguing that final flight lay outside the scope of the EU Reg.
- **Held**, that connecting flight outside the EU fell within the scope, because
  - concept of ‘connecting flight’ must be understood as constituting a whole in respect of the passenger's right of compensation
  - Flights must be booked as a single unit
  - Change of aircraft irrelevant

## Claims from Passengers and arguments from Airlines European Court of Justice

4. Territorial Jurisdiction for Connecting Flights Within the EU  
(ECJ on March 7th 2018, joined cases C-274/16, C-447/16 and C-448/16)

- Facts of the case:
  - Connecting flights from Spain to Germany, with stop in Spain
  - First of connecting flights was Spanish domestic flight operated by Spanish Airline Air Nostrum
  - Due to a delay passengers missed connecting flight to Germany
  - Passengers claimed compensation for delayed arrival before German courts
- **Held**, that passengers could sue at their final destination, because
  - Obligation is to carry the passenger from A to C
  - final destination in Germany can be considered 'place of performance' within the meaning of Brussels I Regulation not only for the second flight, but also for the first domestic flight in Spain

## Claims from Passengers and arguments from Airlines European Court of Justice

### 5. ECJ on Compensation Right Regarding Commission Fees (September 12th 2018, C-601/17)

- Facts of the case:
  - Flight from Hamburg to Faro (Portugal) booked via the internet portal Opodo for EUR 1,108.88.
  - Passengers claimed compensation for cancellation
  - Spanish airline Vueling only wanted to repay the sum they had actually received and not Opodo's commission fee
- **Held**, that airline had to refund commission fee
  - Compensation of full purchase price, if airline had knowledge of the commission fee

## Claims from Passengers and arguments from Airlines German Federal Supreme Court (BGH)

BGH, judgment dated 4. September 2018 - X ZR 111/17 –

A cancellation due a strike of security personnel is **only extraordinary** if the the strike results in circumstances which cannot be avoided by taking reasonable steps and if these circumstances necessitate the cancellation for factual or legal reasons. EU 261/2004 Recital (14) refers to security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.

**Held:** the cancellation was not necessitated; it might have if not just some but all passenger had missed the flight (which was not confirmed in then lower instances). Safety was objectively not compromised; the competent aviation security authority did not intervene.

## Claims from Passengers and arguments from Airlines

### BGH judgment dated 15. Januar 2019 – X ZR 15/18 und X ZR 85/18

This concerned a more than 13 hour delay from New York via London to Stuttgart. The delay on the New York – London leg was due to a computer-system break down in New York's JFK Airport. Repairs were delayed due a strike of the telecommunication services retained by the US airport. Passengers claimed compensation.

**Held:** the claim for compensation for delay was dismissed. A system failure at an airport is outside the control of the airline; it is not responsible for its functioning and maintenance. Whether the airline should or could have taken measures to reschedule the flight from London to Stuttgart was considered irrelevant as the delay concerned the New York London leg only and could not be prevented by any subsequent actions.

Thank you very much for your attention!



Source: Eurocontrol - Supporting European Aviation