DECISION NO. 467-C-A-2012

December 7, 2012

COMPLAINT filed by Gábor Lukács against United Air Lines, Inc.

File No. M4120-3/12-03385

INTRODUCTION AND ISSUES

[1] On June 19, 2012, Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) alleging that certain United Air Lines, Inc. (United) terms and conditions of carriage relating to baggage liability appearing in United's International Passenger Rules and Fares Tariff, NTA(A) No. 361 (Tariff) are unreasonable. Mr. Lukács further alleges that United's "Damaged Items" page on its various Web sites misrepresents United's obligations under the Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention (Montreal Convention), contrary to paragraph 18(*b*) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR). Mr. Lukács states that his complaint is pursuant to sections 111, 113 and 122 of the ATR, and section 40 of the *Canadian Transportation Agency General Rules*, SOR/2005-35.

[2] The tariff, convention and statutory extracts relevant to this Decision are set out in Appendix A.

[3] There are five issues for the Agency to address:

1. Does Rule 28(C)(2) of the Tariff, as it relates to liability for delay, clearly set out United's terms and conditions respecting its liability for damage caused by certain facilities and personnel, as required by subparagraphs 122(*c*)(x) and (xi) of the ATR?

2. Does Rule 28(C)(2) of the Tariff, as it relates to liability for delay, accurately reflect Article 19 of the Montreal Convention?

3. Does Rule 28(C)(3) as it relates to liability for certain types of damages, accurately reflect Article 19 of the Montreal Convention?

4. Does Rule 28(D)(4) as it relates to liability for destruction, loss, damage or delay, accurately reflect Articles 17(2) and 19 of the Montreal Convention?

5. Has United publicly made any statement regarding its baggage liability policy on its Global Web site and Canadian Web page that is false or misleading with respect to its air service or any incidental service, contrary to paragraph 18(*b*) of the ATR?

PRELIMINARY MATTER

[4] The Agency notes that Mr. Lukács' submissions only address section 122, which relates to the clarity of a carrier's tariff, and are in response to submissions made by United in relation to Rule 28(C)(2) of United's Tariff. The Agency will therefore only address the issue of clarity in relation to Rule 28(C)(2).

1. DOES RULE 28(C)(2) OF THE TARIFF, AS IT RELATES TO LIABILITY FOR DELAY, CLEARLY SET OUT UNITED'S TERMS AND CONDITIONS RESPECTING ITS LIABILITY FOR DAMAGE CAUSED BY CERTAIN FACILITIES AND PERSONNEL, AS REQUIRED BY SUBPARAGRAPHS 122(*C*)(X) AND (XI) OF THE ATR?

[5] The Agency's jurisdiction in matters respecting international tariffs is set out in Part V, Division II, International service of the ATR.

[6] Subsection 110(4) of the ATR requires that tariffs must be consistent with the provisions of the ATR, which includes section 122 of the ATR.

[7] A carrier's tariff must conform to section 122 of the ATR which requires that, for international carriage, the terms and conditions of carriage contained in the carrier's tariff should clearly state the air carrier's policy in respect of, at minimum, certain enumerated matters.

[8] More specifically paragraph 122(*a*) of the ATR provides that:

> Every tariff shall contain:
>
> *a*) the terms and conditions governing the tariff generally, stated in such a way that it is clear as to how the terms and conditions apply to the tolls named in the tariff;

[9] Subparagraphs 122(*c*)(x) and (xi) of the ATR provide that:

> Every tariff shall contain:
>
> (*c*) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,
>
> [...]
>
> (x) limits of liability respecting passengers and goods,
>
> (xi) exclusions from liability respecting passengers and goods, and
>
> [...]

[10] The Agency has previously stated that an air carrier meets its tariff obligation of clarity when, in the opinion of a reasonable person, the rights and obligations of both the carrier and the passengers are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning.

Positions of the parties

[11] United maintains that Mr. Lukács' complaint misinterprets Rule 28(C)(2). United submits that Rule 28(C) must be read together along with the "chapeau" to Rule 28. United contends that to read paragraph two of Rule 28 in isolation from paragraph one inevitably leads to paragraph two being read out of context and in a manner contrary to the Vienna Convention on the Law of Treaties (Vienna Convention). United points out the principle that a tariff rule should be read within the context of related provisions was recognized by the Agency in Decision No. 249-C-A-2012 (*Lukács v. WestJet*). United further states that the "chapeau" at Rule 28 provides that the rules of liability set out in the Montreal Convention, including Article 19, are incorporated into Rule 28, and furthermore, that where two interpretations of the tariff rule are possible, the interpretation most consistent with the Montreal Convention prevails.

[12] United submits that Rule 28(C) begins with a broad general statement that United is liable for damage occasioned by delay, subject to further statements in subsequent subparagraphs. United points out that paragraph one to Rule 28(C) incorporates the "reasonable measures" defence where a carrier is not liable for damages occasioned by delay if it proves that its agents and servants took all measures reasonably required to avoid the damage. United adds that paragraph two of Rule 28(C) goes on to clarify paragraph one by setting out who is and is not an agent or servant of United. Thus, according to United, paragraph two does not establish an isolated exception; rather, it clarifies paragraph one. United therefore concludes that paragraph two must be read in a manner that is consistent with paragraph one, and that paragraph two does not contradict or render any part of paragraph one obsolete. According to United, as the second part of paragraph two, which states, "and the Carrier is not liable to the extent the delay is caused by these kinds of facilities or personnel," appears in the same sentence as the first part, both parts must be interpreted as a clarification of paragraph one, rather than as an exception.

[13] According to United, there are two possible interpretations of the second part of paragraph two, and the first interpretation reads this statement in isolation and concludes that by "extent," United means any delay caused by one of the specified third-party personnel or facilities. United submits that the problem with this interpretation is that it interprets the phrase outside the whole of the Rule, outside the context in which the phrase appears, and in a manner whereby a clarification is rendered a contradiction. United asserts that according to the isolationist interpretation, the second part of paragraph two then contradicts, rather than clarifies, paragraph one by stating that United is only liable for delay that it causes. United points out that had this been its intent, it would have stated at the preamble to Rule 28(C) or paragraph one that United is only liable for delays caused by United, rather than stating that it is broadly liable for damages related to delays. It follows that this first interpretation is contradictory and inconsistent with the rules and principles of interpretation.

[14] United submits that the second interpretation of the second statement at paragraph two is a clarification of paragraph one, and in a manner that considers both Rule 28(C) as a whole and Article 19 of the Montreal Convention. United submits that based on this second interpretation, the second part of paragraph two states that insofar as United's employees and agents meet the reasonable measures test, United is not liable for any damages resulting from the unreasonable actions by third parties. United therefore concludes that the second interpretation reads Rule 28(C)(1) and (2) to mean that firstly, United is not liable for damages occasioned by delay if it proves that it, its agents and servants took all reasonable measures to prevent damages; secondly, that certain persons are not the agents and servants of United; and thirdly, that to the extent these third parties cause the delay, United is not liable for the resulting damages provided it meets the reasonable measures defence because these third parties are not servants or agents of United. United submits that this interpretation is consistent with a previous Agency decision that recognized that carriers may not be liable for delays caused by third parties, such as customs officials.

[15] United asserts that the second interpretation is the preferable of the two, as it is consistent with the chapeau at Rule 28, and because it interprets paragraph two in accordance with the whole of Rule 28, rather than in isolation. Finally, United submits that the second interpretation is preferable because it does not read Rule 28(C) in a manner that contradicts itself. United submits that nonetheless, Mr. Lukács encourages the Agency to adopt the first interpretation, which improperly isolates paragraph two to Rule 28, reads it out of context, reads it in a manner inconsistent with the Vienna Convention, and renders it incompatible with the remainder of Rule 28(C). Consequently, United submits that the Agency should find that the second interpretation set out above is the correct interpretation of Rule 28(C)(2) and that Rule 28(C)(2) is just, reasonable, and consistent with both the Montreal Convention and subsection 111(1) of the ATR.

[16] Mr. Lukács disagrees with the validity of United's second interpretation of Rule 28(C)(2) and submits that there is mischief in United's interpretation of Rule 28(C)(2). Mr. Lukács asserts that the aforementioned reservation is not present in Rule 28(C)(2) and no reasonable person would interpret the combination of Rules 28(C)(1) and 28(C)(2) in the way suggested by United. Mr. Lukács submits that if United intends to interpret Rule 28(C)(2) as it claims, then the second part of the rule concerning the exclusion of United's liability for delay to the extent it is caused by third parties, is redundant. Mr. Lukács points out that even if Rules 28(C)(1) and (C)(2) are read together, the common and ordinary meaning of the second part of Rule 28(C)(2) is an additional limitation of liability, which restricts United's liability even further than what is set out in Rule 28(C)(1). Alternatively, Mr. Lukács submits that if the Agency accepts United's position that it is possible to interpret Rule 28(C)(2) in more than one way, then the rule is ambiguous and/or it has uncertain meaning, and as such, fails to be clear, contrary to paragraph 122(*a*) of the ATR, and must be corrected.

Analysis and findings

[17] Regarding liability for damage, Rule 28(C)(1) of the Tariff states that United is not liable 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. Rule 28(C)(2) states that airport, air traffic control, security, and other facilities or personnel, whether public or private, not under the control and direction of the carrier are not servants or agents of the carrier, and the carrier is not liable to the extent the delay is caused by these kinds of facilities or personnel.

[18] The Agency agrees with Mr. Lukács' submission that no reasonable person would interpret Rule 28(C)(2) as stating that United is not liable for damages occasioned by delay if it proves that it, its agents and servants took all reasonable measures to prevent damages. The Agency notes that while Rule 28(C)(1) reflects the aforementioned liability regime, it is not immediately clear that this liability regime applies to Rule 28(C)(2), even when read together. The Agency is of the opinion that when read together with Rule 28(C)(1), Rule 28(C)(2) appears to contradict Rule 28(C)(1), rather than clarify it. Consequently, when read together, Rules 28(C)(1) and (2) raise doubt, uncertainty and ambiguity in the mind of a reasonable person as to United's liability obligations pursuant to Article 19 of the Montreal Convention. The Agency finds that a reasonable person could question the circumstances under which they could recoup damages caused by the facilities or personnel detailed in Rule 28(C)(2).

[19] The Agency is also of the opinion that, as stated by Mr. Lukács, if United's interpretation of Rule 28(C)(2) is correct, then the exclusion of certain facilities or personnel from United's liability regime is redundant. Furthermore, United's interpretation of Rule 28(C)(2) is but one of two possible interpretations of that rule, thus further rendering the rule unclear.

[20] The Agency finds the phrase "other facilities or personnel" unclear, in that a reasonable person may not be able to readily understand to whom or what that phrase applies, and whether United is liable for the delay caused by such facilities or personnel.

Conclusion

[21] Rule 28(C)(2) of the Tariff, as it relates to liability for delay, does not clearly set out United's terms and conditions respecting its liability for damage caused by certain facilities and personnel, as required by subparagraphs 122(*c*)(x) and (xi) of the ATR.

2. DOES RULE 28(C)(2) OF THE TARIFF, AS IT RELATES TO LIABILITY FOR DELAY, ACCURATELY REFLECT ARTICLE 19 OF THE MONTREAL CONVENTION?

Positions of the Parties

[22] Mr. Lukács submits that it is well established that the only factor to be considered for the purpose of exoneration from liability under Article 19 of the Montreal Convention is the actions taken by a carrier's servants and agents and that, as such, United cannot therefore exonerate itself

from liability by blaming third parties who are not its servants and agents, as the notion of liability under Article 19 is not based on fault. Mr. Lukács points out that even if United had nothing to do with the cause of a delay, United and its servants and agents must take all measures that could reasonably be required to avoid damage to passengers if it wants to be exonerated from liability. Mr. Lukács maintains that under Rule 28(C)(2), in its present form, United could argue that baggage handlers who transport baggage from the check-in counters to aircraft are not its servants or agents, even though they provide service in exchange for consideration to United.

[23] Mr. Lukács contends that the question of who servants and agents of United are for the purpose of Article 19 of the Montreal Convention can only be decided on a case-by-case basis, based on the evidence before a decision maker.

[24] United argues that the terms "agent" and "servant" each have a well-established legal meaning, and that the *Black's Law Dictionary* defines "agent" to include, "2. One who is authorized to act for or in place of another." United therefore points out that an agent acts in the place of its principal, and can bind the principal by contract or cause it to be liable in negligence. United further states that the *Black's Law Dictionary* defines "servant" as "A person who is employed by another to do work under the control and direction of the employer." As such, it is United's position that these definitions are the plain and ordinary meanings of the terms "agent" and "servant" and reflect the meaning of the terms as they are found at Article 19 of the Montreal Convention. United therefore concludes that pursuant to Article 19 of the Montreal Convention, an agent or servant is a person who is either an employee of United or who is authorized by United to act in its place. United argues that it therefore follows that in order for a person to be an agent or servant of United, the person's actions must be subject to the control and direction of United.

[25] United maintains that the first part of Rule 28(C)(2) is only inconsistent with the terms "agent" and "servant" in Article 19 of the Montreal Convention if the Rule asserts that persons who could fall within the meaning of these terms are not United's agents and servants. According to United, airports, air traffic controllers, security personnel and others who are not under the direction or control of United, and who are neither employees nor agents of United, cannot be its "agents" or "servants" within the meaning of the terms as they appear at Article 19 of the Montreal Convention. United points out that the first part of Rule 28(C)(2) clarifies that certain persons and facilities are not "servants and agents" and "agents" of United, and that contrary to Mr. Lukács' allegations, the use of the terms "servants" and "agents" at Rule 28(C)(2) is consistent with the meaning of the words in Article 19 of the Montreal Convention.

[26] United submits that Mr. Lukács' argument that the question of who are servants and agents can be decided only on a case-by-case basis is incorrect, as it is legally impossible for any third party to be a servant or agent of United if they are not under United's direction or control. Therefore, according to United, while the particular facts of a case will determine who is and is not an agent or servant at law, it is not possible as a matter of law for any of the persons described in Rule 28(C)(2) to be United's agent or servant.

[27] In response, Mr. Lukács submits that the phrase "servants or agents" must be interpreted according to the principles laid down in the Vienna Convention, and that Article 31(1) of the Vienna Convention refers to "ordinary meaning to be given to the terms of the treaty in their context." Mr. Lukács submits that while the *Black's Law Dictionary* is undoubtedly an authority on English legal language, its validity as an authority for interpreting an international treaty is questionable, and that resorting to authorities on national law defeats the purpose of unification and uniform application of the conventions.

[28] Mr. Lukács argues that the well-established criterion for who are "servants or agents" of a carrier for the purpose of the conventions is the "furtherance of the contract of carriage test," which states that servants and agents within the scope of the conventions are those performing services in furtherance of the contract of carriage. Mr. Lukács explains that according to the principle of "furtherance of the contract of carriage," the following are generally considered "servants or agents" of a carrier: the flight service manager and the technical service manager of an air traffic business as well as security officers on the flight (if any), the handling agents of another air carrier who carry out tasks for this carrier, the airport operator (and in particular also insofar as it operates the boarding equipment), the passenger movement area transporter, the fuel supplier who is established at the airport, the air traffic controllers (so long as they carry out duties of airport safety), the air cargo forwarding company, the charterer of the aircraft, and the cargo receiving office. Mr. Lukács asserts that there is nothing in the language of the Montreal Convention to limit the scope of "servants and agents" of a carrier to those over whom the carrier has some authority and control, as United claims.

[29] Mr. Lukács states that United's contention that it is legally impossible for any third party to be a servant or agent of United if they are not under United's direction or control is inconsistent with the interpretation courts gave to the phrase "servants and agents" in the conventions. Mr. Lukács points out that in order to determine whether a person belongs to the category of "servants or agents" of United, a court will need to examine both the legal relationship between the person and United, which is a question of law, and whether the person was performing services in furtherance of the contract of carriage, which is a question of fact.

[30] Mr. Lukács submits that the effect of the first part of Rule 28(C)(2) is to contractually exclude the above-noted facilities and personnel from the scope of "servants and agents" for the purpose of Article 19 of the Montreal Convention, even though a decision maker may find to the contrary. Therefore, according to Mr. Lukács, by narrowing the scope of who United's "servants or agents" are, United can more easily demonstrate that its "servants or agents" have taken all reasonable measures necessary to prevent the delay, and can evade liability for the failure of certain personnel or facilities to take all reasonable measures necessary to prevent the delay.

Analysis and findings

[31] A carrier is required to ensure that, with respect to international flights, its tariff is just and reasonable within the meaning of subsection 111(1) of the ATR. Mr. Lukács, in addition to his submissions setting out his concerns regarding the reasonableness of the Tariff rules, provides submissions on whether these Rules are in conformity with the Montreal Convention. In keeping with past Agency decisions where the Agency has determined that a tariff provision that is contrary to the Montreal Convention is unreasonable, the Agency will consider the submissions of the parties on the issue of conformity with the Montreal Convention.

[32] Mr. Lukács submits that the artificial exclusion of certain facilities and personnel from the circle of United's servants and agents for the purpose of Article 19 of the Montreal Convention has the effect of relieving United from liability for the conduct of these facilities, and as such, is null and void pursuant to Article 26. United submits that in order for a person to be a servant or agent of United, the person's actions must be subject to the control and direction of United.

Reasonableness of Rule 28(C)(2) - the phrase "...not under the control and direction of the Carrier are not servants or agents of the Carrier..."

[33] The Agency notes United's submission that the *Black's Law Dictionary* definition of an agent as: "[...] one who is authorized to act for or in place of another" and a servant as: "A person who is employed by another to do work under the control and direction of the employer," constitute the plain and ordinary meanings of the terms "agent" and "servant," and reflect the meaning of the terms as they are found at Article 19 of the Montreal Convention.

[34] Considering that Rule 28(C)(2) provides: "[...] under the control and direction [...] ", the Agency finds United's submission somewhat confusing. It provides in one paragraph that for a person to be an agent or servant of United, the person's actions must be subject to the control and direction of United, and in a different paragraph, that these actions must be subject to the direction or control of United. There is a difference between the word "and," which can be used to connect two words or phrases, and the word "or," which indicates an alternative between two words or phrases.

[35] The Agency notes that there is nothing in the Montreal Convention that specifies that for a servant or an agent to be considered as such, that servant or agent must be under the control and direction of the employer. Moreover, the Agency notes that even in the *Black's Law Dictionary* definition noted by United, it is only in the definition of servant that the notion of control and direction by the employer is present.

[36] The notion of control has been discussed by courts when deciding whether there exists an employee-employer relationship in a particular case (or what used to be called a master-servant relationship). In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, the Supreme Court of Canada noted:

> 34 What is the difference between an employee and an independent contractor [...] The answer lies with the element of control that the employer has over the direct tortfeasor (the worker). If the employer does not control the activities of the worker, the policy justifications underlying vicarious liability will not be satisfied.
>
> [...]
>
> 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, [...]. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

[37] The Agency is of the opinion that although an employer exercises control and direction over its employees/servants, an employer might exercise direction but little and sometimes no control over an agent. Therefore, the Agency is of the opinion that the issue of who is a servant or an agent for the purpose of Rule 28(C)(2) does not depend on whether United has control and direction over such servant or agent. The issue of who is a servant or an agent can only be decided on a case-by-case basis, after a decision maker examines whether such servant or agent was used to fulfill the carrier's obligations and out of a contract for air carriage. Therefore, because the phrase in Rule 28(C)(2) requires that both a servant and an agent need to be under the control and direction of United in order for United to assume liability, the Agency concludes that the phrase is unreasonable as it relieves United from its liability in a manner that is contrary to the Montreal Convention.

Reasonableness of Rule 28(C)(2) - the phrase "... and the Carrier is not liable to the extent the delay is caused by these kinds of facilities or personnel"

[38] This phrase, which is found at the end of Rule 28(C)(2), refers to "Airport, air traffic control, security, and other facilities or personnel, whether public or private, not under the control and direction of the carrier [...]".

[39] As noted above, the issue of who is a servant or an agent can only be decided on a case-by-case basis after one examines whether such servant or agent was used to fulfill the carrier's obligations and out of a contract for air carriage. The Agency is of the opinion that the same reasoning applies to the phrase "these kinds of facilities or personnel." Therefore, because the phrase in Rule 28(C)(2) requires that for United to be liable, "these kinds of facilities or personnel" are to be under the control and direction of United, the Agency finds that the phrase is unreasonable as it relieves United from liability in a manner contrary to the Montreal Convention.

[40] More importantly, and to avoid a largely sterile debate over who is or is not a servant or an agent, the Agency directs the parties to the phrasing in the first sentence of Article 19: "The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo."

[41] Contrary to the competing assertions of Mr. Lukács and United, there is no need to focus on delay ***caused*** by servants and/or agents or to winnow in the minute detail of who is or is not a servant or an agent. In short, the first sentence of Article 19 states clearly that the carrier is liable for delay. Article 19 only brings the carrier's servants and agents into play in terms of avoidance of liability when it has proven that these personnel 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.

[42] Accordingly, what is at issue, in terms of avoiding liability for delay, is not who caused the delay but, rather, how the carrier ***reacts*** to a delay. In short, did the carrier's servants and agents do everything they reasonably could in the face of air traffic control delays, security delays on releasing baggage, delays caused by late delivery of catered supplies or fuel to the aircraft and so forth, even though these may have been caused by third parties who are not directed by the carrier?

Conclusion

[43] Rule 28(C)(2) of the Tariff, as it relates to liability for delay, does not accurately reflect Article 19 of the Montreal Convention. Therefore, the Agency disallows Rule 28(C)(2).

3. DOES RULE 28(C)(3) AS IT RELATES TO LIABILITY FOR CERTAIN TYPES OF DAMAGES, ACCURATELY REFLECT ARTICLE 19 OF THE MONTREAL CONVENTION?

Positions of the parties

[44] Mr. Lukács submits that by excluding liability for mental injury occasioned by delay, Rule 28(C)(3) tends to relieve United from liability laid down in the Montreal Convention.

[45] While Mr. Lukács concedes that there are a number of Canadian and American authorities, such as *Lukács v. United Airlines Inc.*, 2009 MBQB 29, holding that general damages, such as mental injury damages are not recoverable under Article 19 of the Montreal Convention, he points out that given the rapid development and change in international law, these authorities no longer reflect the current state of the law as far as availability of general damages under the Montreal Convention is concerned.

[46] Mr. Lukács refers the Agency to several European Court of Justice and Quebec small claims court decisions, which, in his opinion, interpret the Montreal Convention correctly by allowing recovery for general damages. For example, Mr. Lukács refers the Agency to *Axel Walz v. Clickair SA*, [2919] All E.R. 53 (Case C-63/09), where the European Court of Justice held that the term "damage" referred to in Chapter III of the Montreal Convention must be construed as including both material and non-material damages. Mr. Lukács also cites the Quebec Superior Court's conclusion in *Yalaoui v. Air Algérie*, 2012 QCCS 1393, a case that in his view, indicates a change in the jurisprudence of Canadian Superior Courts.

[47] Mr. Lukács contends that Rule 28(C)(3) purports to force on passengers a narrow interpretation of "damage" in Article 19 of the Montreal Convention, even though there is nothing in the Montreal Convention itself to support such an interpretation, and it is not settled law. Mr. Lukács therefore concludes that Rule 28(C)(3) is a provision tending to relieve United from liability laid down in the Montreal Convention and, as such, is null and void pursuant to Article 26 of the Montreal Convention. As a result, Rule 28(C)(3) fails to be just and reasonable, contrary to subsection 111(1) of the ATR.

[48] United states that Mr. Lukács is asking the Agency to overrule Canadian Appellate and Superior Courts' interpretation of the term "damages" as it appears in the Montreal Convention, and find that it is unjust and unreasonable for United to rely on the interpretation of "damages" unanimously adopted by these Courts.

[49] United argues that Canadian Appellate Courts have consistently held that the Montreal Convention excludes damages for mental injury, and refers the Agency to *Lukács v. United Airlines Inc.*, where the Manitoba Court of Appeal held, in part, that "[...] the Canadian and American appellate court jurisprudence referred to by the trial judge in her reason seems to be clear; general damages for inconvenience or mental anguish are not compensable under the Montreal Convention." United cites other Canadian provincial courts of appeal cases and a Federal Court case to defend its position. For example, United refers the Agency to *Plourde v. Service aérien FBO inc. (Skyservice)*, where the Quebec Court of Appeal ruled that the term "damages" as it appears in Article 17 of the Montreal Convention does not include psychological damages. United submits that a similar finding was made in *Ehrlich v. American Airlines, Inc.*, 360 F.3d 366 (2nd Cir. 2004). United also refers to *Thibodeau v. Air Canada*, where the Federal Court acknowledged that Canadian jurisprudence rejects liability under the Montreal Convention for psychological damages.

[50] With respect to the cases referred to by Mr. Lukács, United submits that any Quebec Small Claims Court's interpretation of the Montreal Convention that is inconsistent with that of Quebec's Court of Appeal is erroneous and must be rejected. United further points out that in the context of recent decisions from higher Courts, the decisions of Quebec's Small Claims Court cited by Mr. Lukács do not evidence a newly accepted interpretation of the term "damages" as it appears in the Montreal Convention.

[51] With respect to Mr. Lukács' submission that *Yalaoui v. Air Algérie* establishes that Canadian law is not settled on the question of psychological damages, United argues that as an application for class action certification, *Yalaoui c. Air Algérie*, did not decide the merits of any case; it merely recognized that a foreign Court has reached a different interpretation of the Montreal Convention. United asserts that the Court did not reject the settled Canadian jurisprudence on this matter, nor did it suggest that the matter is not settled in Canada.

[52] Regarding Mr. Lukács reference to *Axel Walz v. Clickair*, a European Court of Justice case, United argues that this case has no precedential value in Canada, and that the Agency is not bound by it. United asserts that the judgment of a single foreign court does not reflect any "agreement" or "practice" between the parties to the Montreal Convention, particularly in light of judicial opinions from Canada, the United Kingdom and the United States of America taking an opposing view to that of the European Court of Justice.

[53] United concludes that it is well settled in Canada that the term "damages" in the Montreal Convention does not include psychological damages, and that Mr. Lukács' allegation that it is unjust and unreasonable for Rule 28(C)(3) to adopt the well established interpretation of the term "damages" as it is used in the Montreal Convention is without merit.

[54] In response, Mr. Lukács maintains that while it remains his position that damages for mental injury are available under Article 19 of the Montreal Convention, given the Agency's approach in Decision No. 249-C-A-2012, it is sufficient to demonstrate that such damages are available in some cases, and/or that the question is far from being settled.

[55] Mr. Lukács submits that although the goal of the Montreal Convention is to create uniformity among its parties in the area of law applicable to certain aspects of carriage by air, this has not materialized so far, as most North American authors and courts seem to be taking an Anglo-American-centred approach and disregard caselaw from the non-English-speaking majority of the world. Mr. Lukács points out that *Yalaoui v. Air Algérie* is exceptional in that it recognizes the importance of *Walz v. Clickair*, and opens the door to reconciling the Canadian jurisprudence with the rest of the non-English-speaking world on the interpretation of the Montreal Convention. According to Mr. Lukács, the *Yalaoui* decision is the first and likely not the only judicial recognition of the fact that the Anglo-American-centred approach to interpreting the Montreal Convention is incorrect, and that caselaw from non-English-speaking countries must also be seriously considered. Mr. Lukács opines that due to the Agency's expertise, the Agency ought to lead the process of reconciling the Canadian jurisprudence with the rest of the non-English-speaking world on the interpretation of the Montreal Convention.

[56] Mr. Lukács states that the three most common mistakes that courts have made in the process of interpreting the Montreal Convention are: confusing Article 19 (which governs damage in the case of delay) with Article 17(1) (which concerns death and "bodily injury" caused by accident); failing to distinguish between the Montreal Convention and the Warsaw Convention; and giving weight only to Anglo-American authorities. Mr. Lukács opines that due to these circumstances, the Agency ought to consider a careful and broad review of the availability of general damages under the Montreal Convention.

[57] Regarding the cases cited by United to defend its position, Mr. Lukács argues that those cases ignore authorities from the non-English-speaking majority of the world, they repeat and perpetuate the errors found in *Ehrlich v. American Airlines, Inc.* and *Plourde v. Service aérien FBO inc. (Skyservice)*, they purport to draw conclusions about interpretations of Article 19 based on the interpretation of Article 17(1) of the Montreal Convention, and finally, all but one of them predates *Yalaoui v. Air Algérie*. Mr. Lukács maintains that even in cases where courts held that damages for mental injury are not available under Article 17 of the Montreal Convention, it is impossible to conclude that the same is true under Article 19 of the Montreal Convention.

Analysis and findings

[58] Mr. Lukács submits that Rule 28(C)(3) purports to force on passengers a narrow interpretation of "damage" in Article 19 of the Montreal Convention, even though there is nothing in the Montreal Convention itself to support such an interpretation, and it is not settled law. Mr. Lukács is of the opinion that the Agency ought to lead the process of reconciling Canadian jurisprudence with the rest of the non-English-speaking world on the interpretation of the Montreal Convention.

[59] Rule 28(C)(3) states that "damages occasioned by delay [...] include foreseeable compensatory damages sustained by a passenger and do not include mental injury damages."

[60] Pursuant to Article 29 of the Montreal Convention, any action for damages occasioned by delay is subject to the conditions and limitations of liability set out in the Montreal Convention. With respect to the present matter, the relevant articles are Articles 17 and 19 of the Montreal Convention. Pursuant to Article 29, punitive, exemplary or any other non-compensatory damages are not recoverable.

[61] The Agency notes that there are no provisions in the Montreal Convention specifying that the damages available pursuant to the Montreal Convention must be "foreseeable." The Agency is of the opinion that the lack of reference to the word "foreseeable" in terms of available damages in the Montreal Convention is voluntary, because for damages to be "foreseeable," they must be anticipated, which is rarely the situation.

[62] With respect to "mental injury damages", Mr. Lukács is of the view that the Agency ought to lead the process of reconciling Canadian jurisprudence with the rest of the world. Although the Agency notes that there is no provision in the Montreal Convention specifying that "mental injury damages" are excluded, the Agency is of the opinion that the issue of whether "mental injury damages" are recoverable under the Montreal Convention is an issue for the courts to decide, not the Agency.

[63] The preponderance of case law in Canada and the United States is that, notwithstanding Mr. Lukács' representations about cases in Europe or elsewhere, at present, mental injury damages are not recoverable under Article 19 of the Montreal Convention. Nonetheless, it is not for the carrier to set out in its tariffs provisions reflecting jurisprudence which may ultimately change.

Conclusion

[64] Rule 28(C)(3) of the Tariff, as it relates to liability for delay, does not accurately reflect Article 19 of the Convention. The Agency therefore disallows Rule 28(C)(3).

4. DOES RULE 28(D)(4) AS IT RELATES TO LIABILITY FOR DESTRUCTION, LOSS, DAMAGE OR DELAY, ACCURATELY REFLECT ARTICLE 19 OF THE MONTREAL CONVENTION?

Positions of the parties

[65] Mr. Lukács states that Rule 28(D)(4) purports to alter and narrow the intended meaning of the phrase, "in the charge of the carrier," and further, that the rule purports to exonerate United from liability for destruction, loss, damage or delay of baggage for certain items, contrary to Articles 17(2) and 36(3) of the Montreal Convention.

"In the Charge of the Carrier"

[66] Mr. Lukács maintains that Article 17(2) of the Montreal Convention imposes a regime of strict liability upon carriers for damage to checked baggage that is "in the charge of the carrier." Mr. Lukács submits that checked baggage remains in the charge of a carrier until it is delivered to the person entitled to delivery.

[67] Mr. Lukács submits that Rule 28(D)(4) purports to exclude the time when baggage undergoes security inspection or measures not under the control and direction of United from the period when checked baggage is "in the charge of" United, and relieves United from liability for destruction, loss, or damage to the baggage during that time. Mr. Lukács asserts that this interpretation of the phrase "in the charge of the carrier" is inconsistent with the intention of the drafters of the Montreal Convention, because it would make it impossible to enforce any liability under Article 17(2), as while passengers can prove that the destruction, loss or damage of their baggage occurred between the time they checked it in and the time they were supposed to receive it back, it is impossible to prove the exact time when the destruction, loss or damage occurred.

[68] United contends that checked baggage is "in the charge of the carrier" from the moment the carrier accepts the baggage until the moment it returns the baggage to the possession of the associated passenger, save for any intervening period where the baggage is under the lawful custody and control of a public authority or their designate. United points out that the view that "in the charge of the carrier" extends from the period where the baggage is accepted by the carrier until the carrier returns the baggage to the possession of the passenger is consistent with previous Agency decisions, such as Decision No. 371-C-A-2005, (*Pedneault v. Kelowna Flightcraft Air Charter Ltd.*). United submits that pursuant to this interpretation, and the wording of Rule 28(D)(4), United's responsibility for baggage includes where checked baggage is under the custody and control of not only United employees and agents, but also any third party relied upon by United in the process of returning checked baggage to the possession of the associated passenger, and the period when airport employees transport it through an airport facility or when it is stored by a third party.

[69] United maintains, however, that it does not choose to deliver checked baggage to the custody and control of public authorities; rather, it is required to do so by law. United adds that unlike other third parties in the system that transport checked baggage, there is no commercial relationship between United and the public authorities that inspect baggage and enforce customs laws and other statutes. United submits that while it has some control over how certain third parties handle checked baggage, United has no control over how public authorities treat checked baggage. United further points out that it would be unreasonable to interpret the Montreal Convention to hold carriers liable for a public authority's legitimate exercise of authority, such as seizing prohibited goods from checked baggage.

[70] United states that given that carriers have no control over the actions of public authorities, it is reasonable to interpret the phrase "in the charge of the carrier" as excluding the period of time during which checked baggage is under the exclusive custody and control of public authorities. As such, United submits that "in the charge of the carrier" does not include periods where public authorities take custody and control of checked baggage for purposes of security inspection, customs and law enforcement.

[71] In response, Mr. Lukács argues that he never suggested that United would be liable for seizure of prohibited goods by the authorities, and that the exoneration of the carrier from liability in such exceptional cases is not found in the exceptions of Articles 17(2) or 19, but rather in Article 20 of the Montreal Convention, which addresses contributory negligence.

[72] Mr. Lukács also points out that with the exception of the extraordinary circumstances covered by Article 20 of the Montreal Convention, a carrier is not supposed to deliver the baggage of its passengers to the custody and control of a third party, including public authorities. Instead, Mr. Lukács asserts that, pursuant to *Baker v. Lansdell Protective Agency*, 590 F.Supp. 165(1984), the normal course of security checks is that the carrier "briefly relinquishes physical possession of" the baggage "for a necessary security check conducted in her presence, but retains responsibility for the transportation of that property." Mr. Lukács also refers to the Agency's finding in Decision No. 211-C-A-2004 (*Zimmermann v. Skyservice*), wherein the Agency stated that, "Not only does the carrier undertake to transport the baggage, it also takes charge of the baggage in order to prevent it from being damaged or lost." According to Mr. Lukács, pursuant to Article 37 of the Montreal Convention, there is nothing to prevent United from overseeing the security inspection of baggage, and having recourse against the body performing the inspection, if the baggage is destroyed, damaged or lost by it.

[73] Mr. Lukács submits that the drafters of the Montreal Convention did not intend to exclude the carrier's liability for checked baggage under Article 17(2) of the Montreal Convention in the case of "an act of public authority," as they chose to permit this defence only for cargo. In order to demonstrate this notion, Mr. Lukács reviews the historical development of the Warsaw Convention, specifically, with regard to the splitting of liability for cargo and baggage as was the case in the Warsaw Convention, by virtue of Article IV of the Montreal Protocol No. 4, in 1975.

[74] Mr. Lukács further points out that while private businesses performing security inspections of passengers and baggage were held by US District Courts to be "servants or agents" of an airline, even if security inspectors are not "servants or agents" of a carrier, the mere fact that a piece of baggage was delayed by security inspections does not necessarily exonerate a carrier from liability, as the carrier will also have to show that it has taken all measures reasonably necessary to avoid or mitigate the delay, or that no such measures were available.

[75] Mr. Lukács maintains that the Agency's findings in Decision No. 211-C-A-2004 reflect the state of the law, specifically, that baggage is "in the charge of the carrier," is a continuum, which starts at the moment when the baggage is put on the scales by either the passenger himself or by the carrier's representative, and ends when the passenger leaves the baggage claim area together with the baggage. Mr. Lukács, however, disagrees that "in the charge of the carrier" excludes any intervening period where the baggage is under the lawful custody and control of a public authority or their designate. Mr. Lukács asserts that in the same way a passenger's baggage that had already been retrieved from the baggage claim area remains in the passenger's charge during inspection by customs, baggage that has not been returned to the passenger remains in the carrier's charge while it undergoes any kind of inspection, unless it is seized.

[76] Mr. Lukács states that pursuant to Article 19 of the Montreal Convention, a carrier can relieve itself from liability for delay of baggage only if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the delay or that it was impossible to take such measures. Mr. Lukács adds that by not referring to the "all measures that could reasonably be required" test, Rule 28(D)(4) purports to relieve United from liability pursuant to the Montreal Convention.

[77] United contends that Section (C) of Rule 28 incorporates the reasonable measures defence, and that the reasonable measures defence is also referred to at Rule 28(D)(5). United therefore asserts that the fact that United does not replicate a reference to Article 19 of the Montreal Convention at Rule 28(D)(4) does not render Section (D) null and void. United is of the opinion that there is no obligation to repeatedly make passengers aware of this defence, particularly within a single rule, and that such an obligation would be unreasonable and only result in lengthier tariffs with redundant passages.

[78] In response, Mr. Lukács reiterates his position that pursuant to Article 19 of the Montreal Convention, in order to exonerate itself from liability, United must demonstrate the "all reasonable measures test," which is focussed on the actions of a carrier's "servants and agents," and not on the cause of the delay.

Successive carriage/causal relationship

[79] Mr. Lukács maintains that if United is one of the three carriers described in Article 36(3) of the Montreal Convention, which governs the case of successive carriage, then United is jointly and severally liable to passengers for destruction, loss, damage, or delay of their baggage. Consequently, the liability regime of Articles 17(2) and 19 apply to United. Mr. Lukács submits that, in particular, United can exclude liability for damage to baggage only if there is a causal relationship between the damage and an inherent defect, quality or vice of the baggage.

Mr. Lukács therefore states that Rule 28(D)(4) purports to relieve United from liability in the case of successive carriage for "excluded items," that is, items that one of the carriers does not allow in checked baggage, and that Rule 28(D)(4) makes no reference to the inherent defect, quality or vice of the baggage.

[80] United argues that in the case of damage to baggage carried by successive carriers, only three carriers could face liability; the first carrier, the last carrier, and the carrier that performed carriage when the baggage was lost or damaged. United points out that Rule 28(D)(4) provides that in the case of successive carriage, United is not liable for damage to baggage when, firstly, baggage is carried "via" United, and, secondly, when other carriers otherwise liable for damage to the baggage have excluded certain baggage items from their liability. United explains that the term "via" means, "by way of," "through," "using," "through the medium or agency of," or "by a route that touches or passes through." United submits that the phrase "when transportation is via UA," in the context of the paragraph and the remainder of Rule 28(D), refers to circumstances when United is an intermediary successive carrier, not the first or last carrier. In addition, the exclusion from liability only pertains to circumstances where another carrier would be liable for damage to baggage, but for that carrier's exclusion from liability relating to the damaged items. Thus, United adds that Rule 28(D)(4) refers to circumstances of successive carriage where another carrier that is not United should be liable for damage under the Montreal Convention, but the passenger seeks damages from United merely because it was a successive carrier.

[81] United submits that it follows that Rule 28(D)(4) simply states that in the case of successive carriage, United is not liable for damage to baggage solely because another carrier that should be liable for damage to baggage excluded the item from liability, and United happened to be an intermediary carrier.

[82] In reply, Mr. Lukács states that liability under Article 36(3) of the Montreal Convention is described as "jointly and severally," and as such, the fact that another carrier should also be liable for the damage and the other carrier refuses to assume liability does not relieve United from its joint liability under Article 36(3) of the Montreal Convention.

[83] Mr. Lukács submits that regardless of the intent of United, the common and ordinary interpretation of the second part of Rule 28(D)(4) is an exclusion from United's liability in the case of successive carriage for items that are labelled as "excluded items" by one of the other participating carriers, without reference to United's role in the carriage. As such, Mr. Lukács maintains that it is an exclusion from liability that is inconsistent with Articles 17(2) and 19 of the Montreal Convention, or alternatively, it is a provision that leaves the impression of a blanket exclusion of liability.

Analysis and findings

[84] Rule 28(D)(4) of the Tariff provides, in part, that United "[...] is not liable for destruction, loss, damage, or delay of baggage not in the charge of the Carrier, including baggage undergoing security inspections or measures not under the control and direction of the Carrier [...]."

Reasonableness of Rule 28(D)(4) - "In the Charge of the Carrier"

[85] Mr. Lukács contends that Rule 28(D)(4) purports to exclude the time when baggage undergoes security inspection or measures not under the control and direction of United from the period when checked baggage is "in the charge of" United, and relieves United from liability for destruction, loss, or damage to the baggage during that time. United submits that given that carriers have no control over the actions of public authorities, it is reasonable to interpret the phrase "in the charge of the carrier" as excluding the period of time during which checked baggage is under the exclusive custody and control of public authorities.

[86] The Agency has previously decided in Decision No. 211-C-A-2004 that:

> [...] the mere arrival of the checked baggage at the place of destination does not constitute delivery, nor does the period of liability end with the unloading of the goods from the aircraft. Liability also extends to the period during which the carrier stores the baggage **until delivery to the passenger** [emphasis added]. Loss must be assumed if the carrier is not able to carry out its contractual obligation of putting the passenger in possession of his baggage. Not only does the carrier undertake to transport the baggage, it also takes charge of the baggage in order to prevent it from being damaged or lost. The *Carriage by Air Act* does not define the term "charge"[...]. The carrier's charge does not end just because the baggage is handed over to a third party [...] This does not free the carrier from its obligations vis-à-vis the entitled claimant. This means that the period after the landing, during which the baggage is stored with a third party (within the airport's boundaries) until delivery to the rightful owner, is still part of the carriage by air.

[87] The Agency further stated in Decision No. 371-C-A-2005 that:

> [...] a carrier is responsible for the care and safekeeping of bags entrusted to it until such time as those bags are reunited with their owners. A carrier is therefore liable for any loss of bags or items contained in the bags during the period in which they are in the carrier's care, including the time that the bags are in the hands of a third party. The failure of a carrier and/or its agents to exercise due diligence in this regard can lead directly to the loss of goods, with no fault or negligence on the part of the passenger.

[88] The Agency remains of the same opinion. The Agency is of the opinion that during the period that baggage is undergoing security inspections, the baggage is in the charge of the carrier. The statement in Rule 28(D)(4) that United is not liable for destruction, loss, damage or delay of baggage occurring during that period is a provision that relieves United from liability for destruction, loss, or damage to baggage in a manner that is inconsistent with Article 17(2) of the Montreal Convention.

[89] Mr. Lukács states that under Article 19 of the Montreal Convention, a carrier can relieve itself from liability for delay of baggage only if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the delay or that it was impossible to take such measures. Mr. Lukács submits that Rule 28(D)(4) purports to relieve United from liability for delay of baggage without any reference to the "all measures that could reasonably be required" test. According to United, it is not necessary to again refer to the reasonable measures defence at Rule 28(D)(4), as section (C) of Rule 28 incorporates the reasonable measures defense and it is also referred to in Rule 28(D)(5).

[90] The Agency accepts Mr. Lukács' submission and notes that Rule 28(D)(4) fails to correctly represent that United's limitation with respect to liability only arises when it proves that the carrier and its servants and agents took all measures that could reasonably be required to avoid damage occasioned by any delay or that it was impossible for the carrier or its servants to take such measures.

Reasonableness of Rule 28(D)(4) - Successive Carriage/ Causal Relationship

[91] With respect to instances of successive carriage, Rule 28(D)(4) provides that, "[...] When transportation is via UA and one or more carriers that exclude certain items in checked baggage from their liability, UA will not be liable for the excluded items."

[92] Article 36(3) of the Montreal Convention states in part that:

> [...] the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier which performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

[93] As stated by Mr. Lukács, in the case of successive carriage by more than one carrier, Article 36(3) of the Montreal Convention grants passengers a right of action against both the first carrier and the last carrier that performed the carriage during which the destruction, loss, damage or delay took place.

[94] Moreover, the Agency has previously decided (Decision No. 208-C-A-2009, *Lukács v. Air Canada*), that regarding a carrier's liability for damage to baggage, "[...] to exempt a carrier from liability for damage to baggage under Article 17(2) of the Montreal Convention, there must be a causal relationship between the damage and an inherent defect, quality or vice of the baggage." The Agency finds that these principles are equally applicable to the present matter, and that Rule 28(D)(4) fails to respect these principles.

[95] The Agency is of the opinion that the fact that another carrier in an instance of successive carriage excludes liability for destruction, loss, damage or delay of baggage, does not relieve United from liability. Consequently, the Agency finds that the statement "When transportation is via UA and one or more carriers that exclude certain items in checked baggage from their liability, United will not be liable for the excluded item," tends to relieve United from liability or fix a lower limit than that which is laid down in the Montreal Convention.

Conclusion

[96] Rule 28(D)(4) of the Tariff, as it relates to liability for delay, does not accurately reflect Articles 17(2) and 19 of the Convention. The Agency therefore disallows Rule 28(D)(4).

5. HAS UNITED PUBLICLY MADE ANY STATEMENT REGARDING ITS BAGGAGE LIABILITY POLICY ON ITS GLOBAL WEB SITE AND CANADIAN WEB PAGE THAT IS FALSE OR MISLEADING WITH RESPECT TO ITS AIR SERVICE OR ANY SERVICE INCIDENTAL THERETO, CONTRARY TO PARAGRAPH 18(*B*) OF THE ATR?

[97] Mr. Lukács submits that while Article 31(2) of the Montreal Convention requires that damage to checked baggage be reported within 7 days, this deadline applies only to giving notice of the complaint, not to presenting evidence to substantiate the claim. Mr. Lukács further submits that there is nothing in the Montreal Convention or United's contract of carriage that requires passengers to return to the airport to report damage to their baggage and have the damage inspected by a baggage agent.

[98] Mr. Lukács asserts that in times when technology, such as digital cameras and the Internet, is available to many passengers, the requirement to return to the airport to report damage is not only inconsistent with Article 31(2) of the Montreal Convention, but is also unreasonable and serves the sole purpose of creating a barrier and unnecessary expenses for passengers who wish to report damaged items and make claims.

[99] Mr. Lukács acknowledges that while United is entitled to proof of damage before it settles a claim, United has to provide a reasonable and accessible method for passengers, other than visiting an airport to report damaged items and provide proof of damage. Mr. Lukács therefore concludes that United's "Damaged items" Web page is misleading in regard to United's liability for baggage, contrary to paragraph 18(*b*) of the ATR.

[100] United points out that the Montreal Convention does not provide any rights, substantive or procedural, with respect to proving a claim, and furthermore, that Rules 28(D)(5) and 28(E) of the Tariff incorporates Article 31(2) of the Montreal Convention.

[101] United asserts that the Montreal Convention does not prohibit United from requiring proof of a claim by this date, simply because the Montreal Convention does not address proof. United points out that an inherent part of making a substantiated claim for damage is providing evidence of actual damage and, as such, it follows that providing evidence of damage is an essential part of making a claim. United is of the opinion that the presenting of evidence of damage is an administrative element of the claim and it does not regulate the relationship between a carrier and a passenger. As such, there is no need for it to be included in the Tariff.

[102] United states that it is perfectly reasonable for United to physically examine an item that it is alleged to have damaged before settling a claim. United further notes that its Web site does not require that individuals present themselves to United at an airport, rather, it simply requires that the baggage be "viewed" by United's Baggage Service Office. United submits that even if the Web site specifically required that passengers bring damaged baggage to an airport, this is not unreasonable.

[103] Mr. Lukács points out that in Decision No. 477-C-A-2010 (*Lukács v. WestJet*) the Agency observed that a provision whose effect is denial of a right under the Montreal Convention cannot be consistent with the Montreal Convention. Mr. Lukács submits that the effect of United's policy concerning damaged baggage is that United will deny the right of passengers to compensation for damage under Article 17(2) of the Montreal Convention if they do not provide proof of their damage within 7 days, or if they fail to bring their damaged baggage to the airport.

[104] Mr. Lukács maintains that it is plain and obvious from the language of the Montreal Convention that the 7-day deadline applies only to notifying the carrier about the complaint, and not about providing all evidence substantiating the claim.

[105] Mr. Lukács argues that Article 26 of the Montreal Convention renders any contractual provision tending to relieve a carrier from liability under the convention null and void. The effect of Article 26 is that a carrier cannot make up additional requirements, beyond and above what is provided for in the Montreal Convention, as a pre-condition for compensating passengers.

[106] Mr. Lukács contends that while United is entitled to some proof of damage before compensating a passenger, the Montreal Convention does not require passengers to deliver their baggage for inspection to the carrier, and as such, United's requirement that passengers do so tends to relieve United from its obligations under Article 17(2) of the Montreal Convention. According to Mr. Lukács, a report from a baggage repair shop together with a receipt showing the payment for repair costs equally constitutes a proof of damage, and it is commonly accepted by most airlines.

[107] Mr. Lukács submits that this requirement is not only contrary to the Montreal Convention, but is also patently unreasonable, and only serves the purpose of frustrating and discouraging passengers from making claims for damaged baggage.

[108] Mr. Lukács states that if United wishes to inspect the damaged baggage of its passengers, it has to do so at its own expense, in that it can either send an agent to the passenger's house (a practice common to moving and relocation companies, for instance), or it has to pick up the damaged baggage at its own cost, have it delivered to its facilities, and then have it returned to the passenger at its own cost.

Analysis and findings

[109] Article 31 of the Montreal Convention lays out the timeframes within which a complaint for damage to and/or delay of baggage must be filed. Article 31 specifies that passengers must complain to the carrier forthwith after the discovery of damage to checked baggage, and, at the latest, within 7 days from the date of receipt of the baggage. While Article 31 requires that a passenger complains about the damage within 7 days, it does not specify that the damage be viewed by the carrier within 7 days. The Agency, however, accepts that a carrier must be able to satisfy itself that a claim is legitimate, and has previously ruled that complainants must provide proof of the expenses that they are claiming. The Agency is of the opinion that such proof may not necessarily be in the form of physical inspection of the damage. The Agency has previously found, for example, that a photograph demonstrating damage to baggage constitutes reasonable proof of damage.

Conclusion

[110] United's "Damaged Items" page on its Global Web site and Canadian Web page contains misleading information, contrary to paragraph 18(*b*) of the ATR.

SUMMARY OF CONCLUSIONS

[111] As noted above, the Agency concludes that:

1. Rule 28(C)(2) of the Tariff, as it relates to liability for delay, does not clearly set out United's terms and conditions respecting its liability for damage caused by certain facilities and personnel, as required by subparagraphs 122(*c*)(x) and (xi) of the ATR.

2. Rule 28(C)(2) of the Tariff, as it relates to liability for delay, does not accurately reflect Article 19 of the Montreal Convention. Therefore, the Agency disallows Rule 28(C)(2).

3. Rule 28(C)(3) of the Tariff, as it relates to liability for delay, does not accurately reflect Article 19 of the Convention. The Agency therefore disallows Rule 28(C)(3).

4. Rule 28(D)(4) of the Tariff, as it relates to liability for delay, does not accurately reflect Articles 17(2) and 19 of the Convention. The Agency therefore disallows Rule 28(D)(4).

5. United's "Damaged Items" page on its Global Web site and Canadian Web page contains misleading information, contrary to paragraph 18(*b*) of the ATR.

ORDER

[112] The Agency orders United, within 30 days from the date of this Decision, to:

1. File a reworded provision with respect to the definition of "servants" and "agents," as found in Rule 28(C)(2), that takes into account the Agency's findings on clarity and reasonableness set out in this Decision;

2. File a reworded provision with respect to the definition of damages occasioned by delay, as found in Rule 28(C)(3), that takes into account the Agency's finding on reasonableness set out in this Decision;

3. File a reworded provision with respect to the definition of the period for which United is liable for damage or delay of baggage, as found in Rule 28(D)(4), that takes into account the Agency's finding on reasonableness set out in this Decision; and

4. Ensure that United's Global Web site and Canadian Web pages reflect the findings made by the Agency in this Decision and remove any language that is contrary to these findings.

[113] United shall, within 30 days of the date of this Decision, make and file any consequential amendments to its Tariff, and remove any wording that is contrary to the Agency's findings on United's Global Web site and Canadian Web pages, that are required to respond to the ordered disallowances and rewording set out above.

[114] Pursuant to paragraph 28(1)(*b*) of the CTA, this disallowance is effective when United complies with the above or in 30 days from the date of this Decision, whichever is sooner.

(signed)

J. Mark MacKeigan
Member

(signed)

Geoffrey C. Hare
Member