Gábor Lukács

Halifax, Nova Scotia

July 30, 2012

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, Ontario, K1A 0N9

Attention: Mr. Mike Redmond, Chief, Tariff Investigations

Dear Madam Secretary:

Re: Gábor Lukács v. United Air Lines
Reply concerning United's new Rule 28 and new "Damaged items" webpage
File No.: M 4120-3/12-03385

Please accept the following submissions in relation to the above-noted complaint as a reply to the submissions of United dated July 20, 2012.

ISSUES

I. Principles of interpretation

The present proceeding involves serious and complex questions related to the interpretation of the *Montreal Convention*. As for tariffs, there is a statutory requirement of clarity and unambiguity; however, United seems to suggest that the principles of contractual interpretation are applicable to them. Before turning to the questions themselves, it is important to settle the applicable principles of interpretation.

(a) *Vienna Convention* for interpreting the *Montreal Convention*

The parties agree that the *Vienna Convention on the Law of Treaties* (Vienna, 23 May 1969), Can. T. 1980 No. 37. ("*Vienna Convention*") is applicable to questions of interpretation related to the *Montreal Convention*. However, the Applicant submits that in addition to Article 31, also Articles 32 and 33 are relevant to the present proceeding:

> **Article 31 – General rule of interpretation**
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
>   (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
>   (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
>   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
>   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
>   (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 – Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33 – Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

(b) Interpreting United's tariff

The Applicant disputes that the principles of contractual interpretation cited by United are applicable to the interpretation of tariffs. There are a number of substantial differences between a contract freely negotiated and concluded between two parties and the tariff of an airline.

First, as the Agency observed in *Lukács v. WestJet*, 249-C-A-2012 (at para. 62), the terms and conditions of carriage are set out by an air carrier unilaterally without any input from passengers. The air carrier sets its terms and conditions of carriage on the basis of its own interests, which may have their basis in purely commercial requirements. In other words, the tariff is not the result of a negotiation between the passengers and the airline, but rather simply imposed upon passengers, and passengers can only choose whether to take it or leave it (contract of adhesion). Consequently, any principle that refers to the intent, state of mind, or the knowledge which would reasonably have been available to the parties is not applicable in the case of tariffs.

Second, pursuant to s. 122(a) of the *Air Transportation Regulations*, S.O.R./88-58 ("*ATR*"), an air carrier must clearly state its terms and conditions in a tariff. As United noted on page 5 of its July 20, 2012 submissions, the the Agency held in its previous decisions (such as *Lukács v. WestJet*, 249-C-A-2012, para. 23) that in order to meet this obligation, the tariff has to be worded so that:

> 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.

In *Lukács v. Air Canada*, 208-C-A-2009, the Agency also noted (para. 18) that:

> The Agency is also of the opinion that to promote and protect the interests of both consumers and carriers, in situations where it is clear that there are inconsistencies between provisions in tariffs, or between tariffs and referenced documents, such situations must be addressed, and the inconsistencies corrected.

Therefore, it is submitted a tariff must be worded in such a way that it can be unambiguously understood by the average lay member of the travelling public, and without resorting to legal principles of contractual interpretation. It is further submitted that a tariff provision that allows for two different interpretations fails to meet the statutory requirement of clarity pursuant to s. 122(a) of the *ATR*, and must be corrected.

II. Rule 28(C)(2): When can a carrier exonerate itself from liability for delay?

Rule 28(C)(2) of United's Contract of Carriage (revised June 15, 2012) contains two provisions that are tending to relieve United from liability under Article 19 of the *Montreal Convention*. For greater clarity, these provisions are discussed independently below.

A. Meaning of "servants or agents" within the meaning of the *Montreal Convention*

This issue concerns the underlined and emphasized portion of Rule 28(C)(2) below:

> 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.

(a) Role of the phrase "servants or agents" in the conventions

The phrase "servants or agents" plays a central role in the *Warsaw Convention, 1929*, its various amendments, and the *Montreal Convention, 1999*. The *Warsaw Convention, 1929* is Schedule I to the *Carriage by Air Act*, R.S.C. 1985, c. C-26. Section 1.1(2) of the *Carriage by Air Act* states that:

> For the purposes of this Act, any reference to "agent" in the English version of Schedule I shall be read as a reference to "servant or agent".

The word "agent" appears in the *Warsaw Convention, 1929* in Articles 16(1), 20(1), 20(2), and 25(2). In 1955, the *Warsaw Convention, 1929* was amended by the *Hague Protocol*, which is Schedule III to the *Carriage by Air Act*. It introduced the phrase "servants or agents" into Articles 25 and 25A. Article 25A(1), introduced by the *Hague Protocol*, is an important element of the regime:

> If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22.

The effect of this provision is that agents and servants acting within the scope of their employment are entitled to the same protection from liability as the carrier.

In 1975, the *Warsaw Convention, 1929* was amended further by the *Montreal Protocol No. 4*, which is Schedule IV to the *Carriage by Air Act*. It introduces the phrase "servants or agents" to Articles 16, 18(3)(b), and 20.

In the *Montreal Convention, 1999*, the phrase "servants or agents" appears in Articles 16, 17(2), 18(2)(b), 19, 21(2)(a), 22(5), 30, 41, 43, and 44, and it adopted the principle that servants or agents are entitled to the same protection from liability as the carrier if they act within the scope of their employment.

Thus, the phrase "servants or agents" plays an important role not only in Article 19, but also in other provisions determining the scope and applicability of the *Montreal Convention, 1999* (that is, the question of who can invoke defenses pursuant to it).

(b) Test for "servants or agents"

The phrase "servants or agents," which plays an important role in the *Montreal Convention*, must be interpreted according to the principles laid down in the *Vienna Convention*. Article 31(1) of the *Vienna Convention* refers to "ordinary meaning to be given to the terms of the treaty in their context."

The Applicant would like to draw attention to the difference between "ordinary meaning" and "ordinary *legal* meaning," referred to by United on page 6 of its submissions dated July 20, 2012. While Black's Law Dictionary is undoubtedly an authority on English legal language, its validity as an authority for interpreting an international treaty is questionable. Indeed, resorting to authorities on national law defeats the purpose of unification and uniform application of the conventions.

The Applicant submits that in light of the importance of who are "servants or agents" of a carrier for the purpose of the conventions, one ought to look at how this phrase was interpreted by the courts in the context of the conventions, and not at a dictionary, which reflects only national law.

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: Agents and servants within the scope of the conventions are those performing services in furtherance of the contract of carriage.[1] They can act independently, and they can be employed or self-employed provided that they act in execution of a duty which was assigned to them by the carrier.[2] There is nothing in the language of the convention to limit the scope of "servants or agents" of a carrier to those over whom the carrier has some authority and control,[3] as United claims.

According to the principle of "furtherance of the contract of carriage," the following are generally considered "servants or agents" of a carrier:[4] 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,

[1] *In re: Air Disaster, Lockerbie, Scotland*, 776 F.Supp. 710 (1991).
[2] E. Giemulla & R. Schmid, et al, Montreal Convention (Wolters Kluwer: Netherlands, 2011) at Article 19, para. 69.
[3] *Ibid* at Article 19, paras. 78-81.
[4] *Ibid* at Article 19, para. 71.

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.

In the opinion of the US District Courts, a private business which performs security checks of passengers and baggage is also considered a "servant or agent" of the air carrier.[5] Similarly, if security measures are carried out by government bodies or by the airport authorities at the request of individual air carriers, then they are considered to be "servants or agents" of the carrier while carrying out their tasks,[6] notwithstanding the fact that they are obviously not under the direction or control of the carrier.

The case *Taga v. DHL*, Tel Aviv-Jaffa Magistrate Court, Civil Action No. 01-19308, involved a claim for damages for an international shipment that was lost or stolen against four parties participating in the transportation of the shipment, including Maman Cargo Ltd, an airport warehouse and the operator of the cargo terminal that is a business independent from the air carrier. In reaching the conclusion that Maman was a "servant or agent" of the carrier for the purpose of the *Warsaw Convention*, the court applied the "in furtherance of the contract of carriage" test.

(c) The scope of "servants or agents" is a mixed question of fact and law to be decided on a case-by-case basis

As it has been demonstrated, United's contention that "[i]t 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 woefully misguided and is inconsistent with the interpretation courts gave to the phrase "servants or agents" in the conventions.

The Applicant submits that in order to determine whether a person (individual or corporation) 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. Consequently, it is submitted that the question of who United's "servants or agents" are is a mixed question of fact and law that has to be decided on a case-by-case basis.

(d) Conclusions: Rule 28(C)(2) purports to alter and narrow the meaning of "servants or agents"

The aforementioned authorities establish that airport, air traffic control security, and other facilities or personnel are or can be the servants or agents of a carrier, even if they are not under the control and direction of the carrier. In each case, it must be decided based on the concrete factual matrix who are the "servants and agents" of the carrier.

[5] *Ibid* at Article 19, para. 72.
[6] *Ibid* at Article 19, para. 56.

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 or agents" for the purpose of Article 19 of the *Montreal Convention*, even though a decision-maker may find to the contrary. Thus, the effect of the first part of Rule 28(C)(2) is to alter, to the benefit of United and the detriment of passenger, the scope of the defense of Article 19. Indeed, 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.

It is further submitted that the second part of Rule 28(C)(2) shows that the intended meaning of the entire Rule 28(C)(2) is to alter and narrow United's liability under Article 19, and it is a provision *tending* to relieve United from liability under the *Montreal Convention*. As such, it is null and void pursuant to Article 26.

B. Liability for delay to the extent that it is caused by third party

This issue concerns the underlined portion of Rule 28(C)(2) below:

> 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.

For the limited purpose of this issue, the Applicant will assume (without admitting) that the facilities and personnel listed in the first part of Rule 28(C)(2) are not servants or agents of United.

(a) Preliminary matter: The *Vienna Convention* is not applicable to interpreting tariffs

United argues at the bottom of page 7 of its July 20, 2012 submissions that to read Rule 28(C)(2) in isolation from Rule 28(C)(1) leads to the former being read out of context, and in a manner contrary to the *Vienna Convention*.

Article 1 of the *Vienna Convention on the Law of Treaties* states that:

> The present Convention applies to treaties between States.

Since airline tariffs are not treaties between states, it is plain and clear that, contrary to United's submission, the *Vienna Convention* cannot be used to interpret United's tariff.

(b) Are there two possible interpretations of the second part of Rule 28(C)(2), and if so, is Rule 28(C)(2) clear?

On page 9 of its July 20, 2012 submissions, United claims that "[t]here are two possible interpretations of this second part of" Rule 28(C)(2). According to United, the first interpretation is that United is not liable for any delay to the extent it is caused by one of the specified third party personnel or facilities, while the second one means that:

> 1) 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; 2) certain persons are not the agents and servants of United; and 3) 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.
>
> [Emphasis added.]

The Applicant respectfully disagrees with the validity of the second interpretation, and submits that there is a mischief in the underlined portion of United's submissions, because this 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. Indeed, if United sincerely intends to interpret Rule 28(C)(2) as it claims in its submissions, then the second part of Rule 28(C)(2), concerning exclusion of United's liability for delay to the extent it is caused by third parties, is redundant.

The Applicant submits that even if Rules 28(C)(1) and 28(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, if the Agency accepts United's position that it is possible to interpret Rule 28(C)(2) in more than one way, then Rule 28(C)(2) is ambiguous and/or it has an uncertain meaning, and as such it fails to be clear, contrary to s. 122(a) of the *ATR*.

(c) The Agency's decision in *Lukács v. WestJet*, 249-C-A-2012

At the bottom of page 9 of its July 20, 2012 submissions, United refers to paragraph 95 of the Agency's Decision in *Lukács v. WestJet*, 249-C-A-2012, and claims 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.

This statement is grossly misleading, and misstates the essence and thrust of the Agency's opinion. The context of paragraph 95 was that the Agency considered the reasonableness of Proposed Rule 15.1 of WestJet, which read as follows:

> The provisions of this Rule are not intended to make the Carrier responsible for the acts of nature or third parties and all the rights here described are subject to the following exception: The Carrier shall not be liable for damage occasioned by overbooking or cancellation if it, and its employees and agents, took all measures that could reasonably be required to avoid the damage or if it was impossible for the Carrier, and its employees or agents, to take such measures.
>
> [Emphasis added.]

The Applicant notes that this provision, proposed by WestJet for inclusion in its international tariff, is identical in nature and effect to the combination of United's Rule 28(C)(1) and the second part of Rule 28(C)(2). Concerning WestJet's Proposed Rule 15.1, the Agency held that:

> [95] With respect to third parties, a carrier may not be liable for delay caused by an unusually lengthy inspection by customs officials. However, it is possible that where security checks are regularly carried out by government bodies or airport authorities, such checks could be considered predictable. The Agency notes that with respect to staffing insufficiencies, the Cour du Québec has found that a failure to ensure sufficient staff does not exonerate a carrier from liability.
>
> [96] Accordingly, while WestJet may be able to relieve itself from liability for acts of third parties or acts of nature, it is not certain that this will always be the case.
>
> [97] Although it is clear from the submissions of WestJet that Proposed Tariff Rule 15.1 was not drafted to exclude WestJet's responsibility for acts of nature of third parties, the Agency is of the opinion that the proposed provision is not reasonable as it leaves the impression that WestJet is never responsible for such acts.

Finally, the Agency concluded at paragraph 103 of *Lukács v. WestJet* that:

> [T]he introduction of Proposed Tariff Rule 15.1 would be considered unreasonable if filed with the Agency, as it leaves the impression that WestJet is never responsible for acts of nature or third parties.

Similarly, the second part of Rule 28(C)(2) leaves the impression that United is never responsible for delay to the extent it is caused by third parties. Even if the Agency accepts that it is not United's intent to exclude such liability, this provision fails to be reasonable for the same reason as in the case of WestJet.

(d) Incorporating the *Montreal Convention* by reference

In *Lukács v. Air Canada*, 208-C-A-2009, the Agency rejected Air Canada's submission that incorporating the *Montreal Convention* by reference into its tariff can shield the carrier from a finding that a tariff provision is contrary to the *Montreal Convention* (para. 18).

Thus, the undisputed fact that United incorporated the *Montreal Convention* by reference into its tariff and stated that it "shall supersede and prevail over any provisions of this tariff which may be inconsistent with those rules" has no bearing on whether Rule 28(C)(2) is consistent with the *Montreal Convention*.

(e) Conclusions

The common and ordinary meaning of the second part of Rule 28(C)(2) is a provision that exonerates United from liability for delay to the extent that it is caused by third parties. Based on the Agency's findings in *Lukács v. WestJet*, 249-C-A-2012, this is clearly inconsistent with Article 19 of the *Montreal Convention*, and as such it is null and void by Article 26. It cannot be saved even by the incorporation of the *Montreal Convention* by reference into United's tariff.

If the Agency accepts United's position that it is possible to interpret Rule 28(C)(2) in more than one way, then Rule 28(C)(2) fails to be clear, contrary to s. 122(a) of the *ATR*.

Regardless of the intentions of United, reading Rules 28(C)(1) and (the second part of) 28(C)(2) together, which are identical in nature and effect to WestJet's Proposed Rule 15.1, leaves the impression that United is never responsible for delays caused by third parties, and thus it is unreasonable pursuant to the Agency's opinion in *Lukács v. WestJet*, 249-C-A-2012.

III. Rule 28(C)(3): Are general damages recoverable under Article 19 (delay) of the *Montreal Convention*?

This issue concerns the underlined portion of Rule 28(C)(3) of United's Contract of Carriage (revised June 15, 2012) below:

> Damages occasioned by delay are subject to the terms, limitations and defenses set forth in the Warsaw Convention and the Montreal Convention, whichever may apply. They include foreseeable compensatory damages sustained by a passenger and do not include mental injury damages.

Although the Applicant's position is that damages for mental injury are available under Article 19 of the *Montreal Convention*, in light of the Agency's approach in *Lukács v. WestJet*, 249-C-A-2012 (at paras. 94-95 and 103), it is sufficient for the Applicant to demonstrate that such damages are available in *some* cases and/or that the question is far from being settled.

A. Importance of the Agency taking a fresh look at the question

The question of availability of damages for mental injury under the *Montreal Convention* is a complex one, where most courts had great difficulty avoiding the pitfalls below. 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. 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.

While part of this Anglo-American-centred approach can be excused due to the paucity of caselaw from non-English-speaking countries translated into English, the decision of the European Court of Justice (the court of final resort of the European Union) in *Walz v. Clickair* is readily available in English. It is the Applicant's understanding that *Walz v. Clickair* is the only authority from a supernational court of final resort that addresses the question of general damages under the *Montreal Convention*.

The decision of the Quebec Superior Court in *Yalaoui c. Air Algérie*, 2012 QCCS 1393 is exceptional in that it recognizes the importance and impact of *Walz v. Clickair*, and opens the door to reconcilling the Canadian jurisprudence with the rest of the non-English-speaking world on the interpretation of the *Montreal Convention*.

The *Yalaoui* decision is the first (and likely not the only) judicial recognition of the fact that the Anglo-American-centred approach in interpreting the *Montreal Convention* is incorrect, and caselaw from non-English-speaking countries must also be seriously considered.

Thus, it is submitted 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*.

(a) Common errors in interpreting Article 19 of the *Montreal Convention*

The most common mistakes that courts have made in the process of interpreting Article 19 of *Montreal Convention* are as follows:

1. *Confusing Article 19 (which governs "damage" in the case of delay) with Article 17(1) (concerning death and "bodily injury" caused by accident).* Due to the substantial difference in the wording of Articles 17(1) and 19, it is not possible to draw any conclusions about the types of damages recoverable under Article 19 from any authority addressing Article 17(1). Thus, even if damages for mental injury are not recoverable in the case of an accident under Article 17(1), this does not affect recoverability of such damages in the case of delay under Article 19.[7]

2. *Failing to distinguish between the Warsaw Convention and the Montreal Convention*. Although the wording of a number of provisions, including those governing delay, are identical in the two conventions, the preamble of the *Montreal Convention* is substantially different, and explicitly states the principle of restitution. According to Article 31(2) of the *Vienna Convention*, this difference in the preambles gives rise to a substantial difference in the interpretation of the two. In particular, one has to view caselaw barring recovery under the *Warsaw Convention* with a certain suspicion, and not automatically assume that it is applicable to the *Montreal Convention* in light of the preamble of the latter.

3. *Considering or giving weight only to Anglo-American authorities.* The *Montreal Convention* is applied not only by American, British, and Canadian courts, but also by a wide range of courts in other countries. The purpose of the *Montreal Convention* is to create uniformity in certain areas of the law that governs carriage by air. The intent of the drafters was not only to reach a uniformity within each nation, but also a uniformity among all states that are parties to the *Montreal Convention*. Thus, it is a serious error of law to fail to consider or give weight to authorities (case law) from other non-English-speaking countries, which form the majority of the parties to the *Montreal Convention*.

(b) Authorities and caselaw to be considered

The Agency is an expert tribunal established by statute, whose findings of facts are final, and whose findings of law are subject to review by the Federal Court of Appeal only with the leave of that court. Thus, the Agency is not bound by the findings of any Canadian provincial Superior Court or provincial Court of Appeal. It is bound only by substantive decisions of the Federal Court of Appeal and the Supreme Court of Canada. (Refusal of leave to appeal by the Supreme Court of Canada is not a proof of its endorsement of a decision. It merely reflects the view that the legal question is not sufficiently important or not "ripe" yet for a final review by that court.) As the Agency noted in *Lukács v. Air Canada*, 251-C-A-2012, the Agency is not bound by the principle of *stare decisis* either (para. 101).

[7] See *Bensimon c. Agence de voyages Travelocity.ca*, 2008 QCCQ 12778, paras. 74-76.

Therefore, there are no decisions cited by either parties in the present proceeding that have any binding effect upon the Agency.

A number of cases cited by United interpret the *Montreal Convention* based on American authorities. This correctly suggests that reference can be made to foreign caselaw for the purpose of interpreting an international treaty such as the *Montreal Convention*. However, there is no reason to "prefer" an American authority to a French, Italian, Spanish, or Israeli one. Nor is it reasonable to ignore the recent decision of the European Court of Justice in *Axel Walz c. Clickair SA*, [2010] All E.R. 53, which is a landmark ruling from a court of final resource for 27 parties to the *Montreal Convention*; in sharp contrast, the United States, although it consists of many states, is only *one* party to the *Montreal Convention*.

Most international treaties are based on the principles of mutual respect for the sovereignty of the parties (unless it is specifically agreed to the contrary). Consequently, all parties to the *Montreal Convention* are equal parties, and the decisions of their courts ought to carry equal weight. There is neither logical nor legal reason to prefer authorities from a certain group of states to another.

Hence, it is submitted that the Agency ought to engage in as broad a review of caselaw as possible, and refuse to give preference or more weight to authorities from Canada or the rest of the English-speaking world. Furthermore, the Agency ought to consider how many of the parties to the *Montreal Convention* follow a particular interpretation. In particular, decisions of the European Court of Justice, which reflect the interpretation of 27 parties (approximately one third of all parties to the *Montreal Convention*) ought to be given a significant weight.

(c) Conclusions

There is a substantial amount of caselaw from the non-English-speaking part of the world, from countries that are parties to the *Montreal Convention*, on the interpretation of the *Montreal Convention*. The vast majority of these have never been considered by Anglo-American courts.

There is no legal or logical justification for ignoring caselaw on the interpretation of the *Montreal Convention* from non-English-speaking countries.

The recent decision of the European Court of Justice in *Axel Walz c. Clickair SA* reflects the contemporary interpretation of the *Montreal Convention* by 27 parties to the convention. It is a landmark decision whose importance was acknowledged also by a Canadian court in *Yalaoui c. Air Algérie*.

The *Yalaoui* decision has put into question the validity of the interpretation preferred by Anglo-American courts, and the Agency ought not forego the opportunity to fully review it for its strong and persuasive arguments, which reflect the principles of the *Vienna Convention*.

These circumstances ought to attract a careful and broad review of the availability of general damages under the *Montreal Convention* by the Agency.

B. Critique of the Anglo-American approach to mental injury

The most comprehensive review and critique of the Anglo-American approach to mental injury under the conventions is found in the article of McKay Cunningham entitled "The Montreal Convention: Can Passengers Finally Recover for Mental Injuries?" published in the *Vanderbilt Journal of Transnational Law*, 1043 (2008), 1043–1081. The article reviews the entire history of the conventions, starting with the *Warsaw Convention, 1929*. It also includes a thorough analysis of the drafting conference of the *Montreal Convention*, and a critique of *Ehrlich*.

The Applicant's submissions below are meant to complement the analysis of Cunningham, and to apply it to the Canadian jurisprudence.

(a) Absurd decisions: Human rights and dignity do not exist on international itineraries

The following American decisions deal with the scope and interpretation of "bodily injury" and the preemptive effect of the old *Warsaw Convention, 1929*; they strongly militate in favour of the troubling conclusion that passengers cease to have any human rights once they set foot on an international flight.

***Li v. Quraishi and United Air Lines*, 780 F. Supp. 117 (E.D.N.Y. 1992)** In this case, a drunk passenger exposed himself and urinated into the mouth and eyes and over the body of a two-year-old girl and onto her mother's lap. The claimant alleged that United Air Lines permitted the drunk passenger to board and continued serving him alcohol while he was intoxicated. The claim was for severe emotional and psychological damage (both for mother and child) that was not accompanied or related to bodily injury. Based on *Eastern Airlines Inc. v. Floyd*,[8] the court held that the *Warsaw Convention, 1929* precluded recovery for purely psychological damages even though the causative conduct was willful.

***Carey v. United Airlines*, 255 F.3d 1044, 1053 (9th Cir. 2001)** In this case, the claimant's three daughters, who were sitting in economy class, developed earaches. The children were in great pain to the point of tears. United's flight attendant prevented the children from visiting their father, who was sitting in first class. The flight attendant threatened to have the father arrested. A confrontation between the father and airline personnel ensued, leading to the father's allegations of embarrassment, insult,and profanity. The airline's motion for summary judgment was granted, because the court held that "[t]o the extent such plaintiffs are left without a remedy, no matter how egregious the airline's conduct, that is a result of the deal struck among the signatories to the Warsaw Convention." In footnote 47, the same court also proposed a troubling hypothetical, "a flight attendant [...] puts an unloaded gun to a passenger's head and pulls the triger," and wonders whether in such case a the passenger may have a recourse against the airline.

[8] *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991). The decision concerns Article 17 (bodily injury in the case of an accident) of the old *Warsaw Convention, 1929*.

***King v. Am. Airlines Inc.*, 284 F.3d 352 (2d Cir. 2002)** In this case, an African-American couple possessing confirmed tickets and boarding passes for an international flight alleged that the defendants bumped them from an overbooked flight because of their race. The court held that discrimination claims that arise in the course of embarking on an aircraft are preempted by Article 17 of the *Warsaw Convention, 1929*. Since the latter does not allow a claim for discrimination, the passengers were left without a remedy.

***Morris v. KLM Royal Dutch Airlines*, [2002] 2 A.C. 628 (H.L.) (U.K.)** In this case, an unaccompanied minor fell asleep on an international flight and woke to discover the hand of the man next to her touching her left thigh from the hip to the knee. He was caressing her between her hip and knee and his fingers dug into her thigh. She got up, walked away, and told an air hostess what had occurred. She became very distressed and on her return to her home she went to see a doctor, who found that she was suffering from a clinical depression amounting to a single episode of a major depressive disorder. The court again relied on *Eastern Airlines Inc. v. Floyd* to conclude that the *Warsaw Convention, 1929* barred the child from maintaining an action against the airline for her injuries.

Vienna Convention One of the interpretive principles establishes by the *Vienna Convention* is the requirement to avoid giving a meaning to terms that are manifestly absurd or unreasonable (Article 32(b)). It is submitted that the aforementioned four decisions, which have been widely cited and followed, show that the narrow interpretation of "bodily injury" promoted by Anglo-American courts leads to absurd outcomes that shock the legal conscience, and which are inconsistent with Canadian public policy and the *Charter*.

The *Charter* and Parliament's intent The Canadian Parliament ratified the *Montreal Convention* a long time after the *Canadian Charter of Rights and Freedoms* was enacted, and Parliament made no "notwithstanding" reservation under s. 33(1) of *Charter*. Thus, Parliament did not intend to alter or override any of the rights laid down in the *Charter* by ratifying the *Montreal Convention*. In particular, Parliament did not intend to interfere with the rights of air passengers under ss. 7, 9, and 15 of the *Charter*.

Therefore, the *Montreal Convention* must be interpreted in a way that is most consistent with the principles laid down in ss. 7, 9, and 15 of the *Charter*. In particular, the *Montreal Convention* cannot be construed to effectively authorize airlines to discriminate against passengers based on their race, or have passengers arrested without cause, or interfere with passengers' rights for life, liberty and security of the person, and do these with complete immunity and impunity.

Hence, it is submitted that the American interpretation of "bodily injury" is inconsistent with the intention of Parliament in ratifying the *Montreal Convention*, and it is inconsistent with the *Charter*; as such, it ought to be rejected by the Agency.

(b) Failing to distinguish between the *Warsaw Convention* and the *Montreal Convention*: *Ehrlich*

Followers of the Anglo-American approach to mental injury consider the *Ehrlich v. American Airlines, Inc.*[9] case a landmark decision, and rarely miss an opportunity to cite it. In *Plourde c. Service aérien FBO inc. (Skyservice)*, 2007 QCCA 739, the Quebec Court of Appeal asked counsel for Plourde to explain what was wrong with the *Ehrlich* decision, but he did not do so. In what follows, the Applicant addresses this point.

First, the events leading to the *Ehrlich* case took place on May 8, 1999, before the *Montreal Convention* was ratified in the United States. Consequently, the *Ehrlich* case was decided based on the 70-year-old *Warsaw Convention, 1929*, and not the *Montreal Convention*. The *Ehrlich* court specifically cautioned at footnote 18 against applying its decision to the *Montreal Convention*:

> [W]e offer no opinion as to whether, or under what circumstances, carriers may be held liable for mental injuries under Article 17(1) of the Montreal Convention. We need not decide that issue because this appeal is governed by the text of the Warsaw Convention and the specific expectations of the contracting parties to that treaty.

Indeed, the *Ehrlich* court was clear that it was looking at the minutes of the drafting conference of the *Montreal Convention* only for the limited purpose of assessing the application of the *Warsaw Convention, 1929*.[10]

Second, the *Ehrlich* court failed to recognize the significant distinctions between the *Warsaw Convention* and the *Montreal Convention*, manifested in the era of their drafting and the preamble of the *Montreal Convention*, and failed to follow the hierarchy of interpretative tools established by the *Vienna Convention*.

In the 1920s, civil aviation was in its infancy. Charles Lindbergh's historic transatlantic flight did not take place until 1927. The primary purpose of the *Warsaw Convention, 1929* was to limit the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry.[11] The airline industry has developed to an extent that was unforeseeable to the drafters of the *Warsaw Convention, 1929*. One outcome of this development was the growing challenge that courts faced in interpreting the *Warsaw Convention, 1929* in modern times. While several attempts at patchwork solutions were made over the decades, only the *Hague Protocol, 1955* was widely ratified. The *Guatemala City Protocol, 1971* and some of the *Montreal Protocols, 1975* never came into force due to an insufficient number of states ratifying them.

The *Montreal Convention* was created in order to put an end to the various patchworks, and entirely replace the outdated *Warsaw Convention, 1929*. Thus, it is important to remember that the *Montreal*

[9] 360 F.3d 366 (2004).

[10] "[W]e see no reason why we should turn a blind eye to the views expressed by various delegates at the Montreal Conference where they shed light on the Warsaw Convention."

[11] McKay Cunningham, The Montreal Convention: Can Passengers Finally Recover for Mental Injuries?, *Vanderbilt Journal of Transnational Law*, 1043 (2008), 1043–1081, at page 1047.

Convention is not an amendment of the *Warsaw Convention, 1929*, but a brand new convention. In particular, jurisprudence relating to the *Warsaw Convention, 1929* is not automatically applicable to the *Montreal Convention*.

The *Vienna Convention* establishes a clear hierarchy of the tools for interpreting treaties. First, one has to look at the text, preamble, and annexes (Article 31(2)), and only if these do not provide a clear answer, then resort to supplementary means of interpretation (Article 32). The third preamble of the *Montreal Convention* reads as follows:

> RECOGNIZING the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution;

It is an articulation of the principle of *restitutio in integrum*, which is clearly manifested in Article 29 that excludes "punitive, exemplary or any other non-compensatory damages." However, it is impossible to reconcile this principle with excluding recovery for certain compensatory damages, such as mental injury.

It is difficult to understand why the *Ehrlich* court chose to not embark first on an analysis of the Third Preamble of the *Montreal Convention* even though the court was clearly aware of its existence, as demonstrated by footnote 4, which includes a quote stating that "commentators have described the Montreal Convention as a treaty that favors passengers rather than airlines."

Third, the analysis of the minutes of the *Montreal Convention* in *Ehrlich* is misleading in that it quotes from delegates selectively, without presenting a factual account of the views expressed.[12] In particular, it fails to mention that recovery for "mental injury in the absence of accompanying physical injury" was a primary objective and was listed as a condition to the United States' participation in the drafting conference of the *Montreal Convention*.[13]

Fourth, the *Ehrlich* court cited only Anglo-American authorities (e.g., from Australia and Ireland) under the heading "Judicial Decisions of Sister Signatories," and entirely ignored caselaw from the rest of the non-English-speaking world.

Fifth, *Ehrlich* imposes the interpretation of Article 17 of the *Warsaw Convention, 1929* by the Supreme Court of the United States on the new *Montreal Convention*.

For the aforementioned reasons, it is submitted that *Ehrlich* is of highly questionable precedential value with respect to the *Montreal Convention*.

[12] *Ibid* at pages 1078-1080.
[13] 'Montreal Convention Minutes,' ICAO, Doc. 9775-DC/2 (2001), p. 44, para. 25.

(c) Failure to distinguish Article 19 (delay) from Article 17(1) (bodily injury)

For the very limited purpose of arguments in this subsubsection, the Applicant assumes that mental injury is not recoverable under Article 17(1) (bodily injury in the case of an accident) of the *Montreal Convention*, and addresses the question of whether a conclusion can be drawn from that about recoverability of damages for mental injury, such as inconvenience and fatigue, under Article 19 (delay). The answer lies in the wording of the convention:

> **17(1)** The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.
>
> **19** The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay 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.
>
> [Emphasis added.]

The two articles, as well as the liability limit for each of them under Articles 21 and 22(1), are drastically different. Article 17(1) deals with damages in a very special and rare case, namely, in the event of an accident, and it qualifies the word "damage" by "death or bodily injury." Articles 17(1) and 21 impose *absolute* liability upon the carrier up to a limit of 100,000 SDR,[14] and *strict liability* for damages exceeding 100,000 SDR.

In sharp contrast, Article 19 deals with the very mundane event of a delay of flight or baggage, and the phrase "damage" is unqualified. Article 19 imposes a regime of *strict liability* (as opposed to *absolute liability* under Article 17(1)), and Article 22(1) limits the carrier's liability to 4,150 SDR.

It is clear that the two provisions are incomparable, and courts have frequently failed to recognize the distinction, and made the leap of drawing conclusions about Article 19 on the basis of Article 17(1).[15] This leap was analyzed in great detail and rejected in *Bensimon c. Agence de voyages Travelocity.ca*, 2008 QCCQ 12778 (paras. 69-83), where the court concluded that (para. 84):

> À ce stade-ci du développement jurisprudentiel, on ne peut affirmer avec certitude que tout dommage psychologique ou d'inconvénient est exclu du recours de l'article 19. S'il faut appliquer l'article 19 d'une façon symétrique avec l'article 17, ce qui est suggéré par certaines autorités, peut-être faudrait-il exclure les réclamations pour lésion psychologique "pure" permettant les cas d'inconvénient, perte de temps et détresse en tant qu'accessoire ou résultat direct de dommages matériels et pécuniaires.

[14] Liability caps are shown as in the original convention, before the review and adjustment of the caps in 2009.

[15] See, for example, *Lukacs v. United Airlines Inc.*, 2009 MBQB 29, at paras. 41-43.

This conclusion is particularly attractive in light of the observation (at para. 79) that while the most direct consequence of an accident is bodily harm, the most direct consequence of delay is inconvenience and partial loss of the benefit of the trip. In other words, it would be unreasonable to assume that the drafters of the *Montreal Convention* intended to provide a remedy for the most common consequence of accidents, but leave the most common consequence of delays without remedy, contrary to the principle of restitution, enshrined in the Third Preamble. The same criticism, concerning the principle of restitution and the unreasonableness of the leap from Article 17 to Article 19 was also formualted by the Quebec Superior Court in *Yalaoui v. Air Algérie*, 2012 QCCS 1393:

> [108] Le préambule de la Convention de Montréal reconnaît spécifiquement l'importance d'assurer la protection des intérêts des consommateurs et la nécessité d'une indemnisation équitable fondée sur le principe de réparation.
>
> [109] Avec égard pour les quelques jugements qui ont refusé d'autoriser un recours collectif réclamant des dommages moraux, le Tribunal ne peut pas abonder dans le même sens, entre autres, parce que plusieurs de ces jugements traitaient d'un recours en vertu de l'article 17 de la Convention de Montréal et non de l'article 19.

Therefore, it is submitted that even if the cases where courts held that damages for mental injury are not available under Article 17 were correctly decided, it is impossible to conclude that the same is true under Article 19 of the *Montreal Convention*.

(d) Cases cited by United

In Section E of its submissions dated July 20, 2012, United cites a few Canadian authorities in support of its position. It is submitted that these cases were wrongly decided as a result of the three common errors mentioned earlier (p. 15). The following is a summary of the flaws in each of them.

***Plourde c Service aérien FBO inc. (Skyservice)*, 2007 QCCA 739** The case concerned an application for certification of a class action seeking damages in relation to an emergency landing after one of the engines stopped. Although Article 19 is quoted in the body of the decision, the court considered only Article 17(1) of the *Montreal Convention*; as such, it has no precedential value concerning Article 19. It fails to give effect to the preambles of the *Montreal Convention*, and fails to distinguish the *Montreal Convention* from the *Warsaw Convention*, and relies on *Eastern Airlines v. Floyd* (para. 28), a decision of the United States Supreme Court in 1991 concerning Article 17 (bodily injury) of the *Warsaw Convention, 1929*. It also relies on a decision of questionable quality of the United States Federal Court of Appeals for the Second Circuit in *Ehrlich v. American Eagle Airlines*, a highly questionable decision that deals exclusively with Article 17 (bodily injury) of the *Warsaw Convention, 1929*, and specifically states that it does not purport to rule on availability of damages for psychological injury under the *Montreal Convention*.[16] Finally, this decision fails to consider any authority from a non-English-speaking country.

[16] See footnote 18 in *Ehrlich v. American Eagle Airlines*.

Subsequently, Quebec courts have, on more than one occasion, questioned the precedential value and/or applicability of *Plourde* to claims under Article 19 (delay).[17]

***Croteau c Air Transat AT inc.*, 2007 QCCA 737** The case concerned an application for certification of a class action seeking damages in relation to an emergency landing after experiencing technical failure in midair. It considered only Article 17(1) of the *Montreal Convention*, and as such, has no precedential value concerning Article 19. It follows *Plourde*.

***Lukács v United Airlines Inc.*, 2009 MBCA 111** This decision is an archetype of the Anglo-American-centred jurisprudence on the interpretation of the *Montreal Convention*; it acknowledges the existence of international caselaw to support availability of general damages under the *Montreal Convention*, but it prefers the American jurisprudence, and the Canadian decisions that follow American courts without any justification (para. 11). It relies on a number of American decisions on the unavailability of compensation for inconvenience or mental anguish under Article 17 of the *Warsaw Convention, 1929*. However, it fails to give effect to the preamble of the *Montreal Convention* and to recognize the difference between the *Warsaw Convention* and the *Montreal Convention*. It also fails to recognize the difference between the language of Article 17(1) ("bodily injury" in the context of an accident) and Article 19 ("damage" in the context of delay). It also cites *Plourde* and *Ehrlich*, both of which concerned Article 17(1), and not Article 19.

***Thibodeau v Air Canada*, 2011 FC 876** This case concerned an application under the *Official Languages Act*, R.S.C. 1985, c. 31 against Air Canada's failure to provide passengers with services in English. It cites *Plourde*, and other Canadian authorities that rely exclusively on American jurisprudence on Article 17 of the old *Warsaw Convention, 1929*. The issue of availability of damages for mental injury in the case of delay (Article 19) was not considered.

***Fares v. Air Canada*, 2012 NSSC 71** This decision concerns a passenger whose Air Canada flight was cancelled due to mechanical failure, and who then proceeded to purchase a first class ticket for flights on another airline. It contains a serious error of law at paragraph 33, by claiming that "Article 19 does not impose strict liability upon the carrier." This obvious error clearly indicates that the learned judge misapprehended Article 19 of the *Montreal Convention*. This decision cites portions from *Lukács v. United Airlines Inc.*, 2009 MBQB 29 that cite *Ehrlich* and *Plourde*; both of these were concerned with mental injury under Article 17(1) (bodily injury), and not under Article 19 (delay). It should also be noted that this case turned on findings of fact concerning the lack of reasonableness of the expenses claimed and the appellant's failure to mitigate his damages.

***Gontcharov v. CanJet*, 2012 ONSC 2279** This case concerned the arrest and removal of an innocent passenger by police at the request of certain crew members. The passenger sought general, aggravated and punitive damages for pain and suffering and infliction of mental distress, and damages for forcible confinement and false imprisonment. The decision contains two blatant errors of law. The first error is found at paragraph 18: "The Convention is intended to bring predictability to all claims advanced relating to international carriers" (emphasis added). The *Montreal Conven-*

[17] See *Bensimon c. Agence de voyages Travelocity.ca*, 2008 QCCQ 12778, paras. 69-70, and *Yalaoui c. Air Algérie*, 2012 QCCS 1393, para. 114.

tion was never intended to govern all claims related to international carriers; for example, non-performance was not intended to be covered by it.[18] A second, even more significant, albeit far less obvious error is the failure of the court to recognize that this was a case within the scope of the *Tokyo Convention*[19] rather than the *Montreal Convention*. Finally, it is apparent on the face of the decision that it had nothing to do with Article 19 of the *Montreal Convention* (see para. 17).

It is the Applicant's understanding that an appeal from this decision is currently pending before the Ontario Court of Appeal. (Notice of Appeal was filed on or around July 4, 2012.)

Conclusion

There are a number of features common to these decisions: First, they ignore authorities from the non-English-speaking majority of the world. Second, they repeat and perpetuate the errors of *Ehrlich* and *Plourde*. Third, they purport to draw conclusions about the interpretation of Article 19 based on the interpretation of Article 17(1). And finally, all but one of them predates the decision of the Quebec Superior Court in *Yalaoui c. Air Algérie*, 2012 QCCS 1393.

United fails to explain in its submissions why *Plourde* is more persuasive than *Yalaoui*. Indeed, both decisions concerned certification of a class action, but *Yalaoui* is more recent, it considers *Plourde*, and rejects the applicability of *Plourde* to damages under Article 19 (delay) of the *Montreal Convention*. The Applicant submits that significant weight ought to be attributed to *Yalaoui* due to its recognizing the distinction between Articles 17(1) and 19, and its acknowledgment of the landmark decision of the European Court of Justice in *Walz c. Clickair*.

[18] *Lukács v. Air Canada*, Decision No. 250-C-A-2012, paras. 31-33.

[19] *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (14 September 1963), Can. T. 1970 No. 5.

C. The approach of the rest of the world to mental injury

Damages for mental injury have been sought under various headings, such as stress, mental anguish, disturbance, loss of enjoyment, and general damages. While the names given to the heading may differ from case to case, the underlying damage is the same: non-pecuniary damages.

(a) France

Concerning the availability of damages for mental injury in the case of accidents under the old *Warsaw Convention, 1929*, the delegate of France at the drafting conference of the *Montreal Convention* confirmed that:[20]

> "lesion corporelle" did indeed cover both physical and mental injury, there was always coverage of the problem as a whole.

Since French is the authentic language of the *Warsaw Convention, 1929*, this settles the question of the intended meaning of "bodily injury" in the *Warsaw Convention, 1929*.

As the Applicant noted on page 8 of the application (June 19, 2012), the Supreme Court of France (Cour de cassation) has addressed the question of availability of compensation for mental injury under Article 19 of the *Montreal Convention* in *Air France c. M. X...*, 07-16102, and upheld the judgment of a trial court awarding such damages. The decision of the Court de cassation is consistent with the representations made by the French delegate at the drafting conference of the *Montreal Convention*.

The Applicant would like to emphasize that the Cour de cassation is a court of last resort of a party to the *Montreal Convention* as much as the Supreme Court of the United States is a court of last resort. There is no logical or legal basis for preferring one over the other, or ignoring this decision from France. (The Applicant also notes that United chose to not address this authority in its submissions.)

(b) Quebec

In addition to the cases from Quebec that the Applicant cited in the application (June 19, 2012), the Applicant would like to bring to the Agency's attention the following authorities. It is to be noted that decisions from the Small Claims Division are final, and are not appealable to any higher court in Quebec. (Theoretically, one could seek leave to appeal to the Supreme Court of Canada.)

In *Bensimon c. Agence de voyages Travelocity.ca*, 2008 QCCQ 12778, the passenger suffered several delays, and commenced an action against both his travel agent and Continental Airlines. The court was called upon to decide whether psychological damages were available in the case of

[20] 'Montreal Convention Minutes,' ICAO, Doc. 9775-DC/2 (2001), p. 68, para. 36.

delay under Article 19 of the *Montreal Convention*. After considering the decision of the Quebec Court of Appeal in *Plourde* concerning non-recovery of psychological damages in the case of an accident (that is, under Article 17(1)), the court distinguished Article 19 from Article 17(1) as follows:

> [74] Par contre, on pourrait argumenter que les délégués n'ont pas considéré la question sous cet angle, parce que la lésion corporelle n'est pas un préjudice qu'on associe généralement à un délai. Ils ont rédigé l'article 19 de façon plus générale que l'article 17.
>
> [76] Mais les deux articles sont bien distincts. La comparaison des deux sources de responsabilité incite à une réflexion additionnelle. Il est difficile de comparer des pommes à des oranges. Peut-on dire que les rédacteurs voulaient restreindre la portée de l'article 19 parce que la situation visée est moins grave que celle de l'article 17 ?
>
> [77] On peut imaginer des situations où un accident cause peu ou pas de préjudice, dans un cas par exemple où, malgré un sinistre lors d'un vol, les pilotes réussissent quant même à atterrir de façon sécuritaire sans que personne ne soit affectée.
>
> ⋮
>
> [79] La conséquence la plus directe d'un accident, c'est la lésion corporelle. La conséquence la plus directe d'un délai, c'est l'inconvénient et la perte partielle de bénéfice du voyage. On ne peut pas s'attendre à ce que des passagers passent de longs intervalles sans dormir, manger et se laver convenablement. [...]
>
> [80] [...] Tout en ayant un contenu mental ou psychologique, la perte de jouissance provient d'un dérangement de l'environnement temporel et spatial et des effets physiques sur l'individu de ce dérangement.
>
> ⋮
>
> [84] À ce stade-ci du développement jurisprudentiel, on ne peut affirmer avec certitude que tout dommage psychologique ou d'inconvénient est exclu du recours de l'article 19. [...]
>
> [Emphasis added.]

Finally, the court awarded to the passenger $750 in damages for overall physical and emotional manifestations due to the delay, not otherwise covered by monetary damages (para. 88).

Bensimon is important not only because it was followed in other cases in Quebec, but also because of its persuasive arguments on the need for distinguishing Article 19 ("damage" caused by delay) from Article 17(1) ("bodily injury" caused by accident).

In *Daoust c. Royal Jordanian Airline*, 2009 QCCQ 5934, passengers were delayed by two days due to mechanical failure. The court considered Article 19 of the *Montreal Convention* and applied *Bensimon* in concluding that damages for inconvenience were available (para. 23). Each passenger was awarded $250 for frustration, fatigue and inconvenience resulting from the delay (para. 25).

In *Neudorfer c. Swiss International Air Lines, s.a.*, 2011 QCCQ 8664, passengers were seeking damages for out-of-pocket expenses and psychological damages in relation to a delay causing the passengers to miss their connecting flight, and the airline subsequently refusing to reprotect them. The court awarded $1,800 to the passengers for inconvenience and hardship (para. 89), and endorsed the *Bensimon* decision concerning the distinction between Articles 19 and 17 of the *Montreal Convention*:

> [90] Le Tribunal précise que cette réclamation est traitée avant tout sous l'angle des troubles, ennuis et inconvénients qu'ils ont exposés. En cela, le Tribunal fait sienne la décision rendue par notre collègue le juge David Cameron [Footnote: *Bensimon c. Agence de voyages Travelocity.ca*, (C.Q., 2008-12-18), 2008 QCCQ 12778 (CanLII), 2008 QCCQ 12778, AZ-50532920, J.E. 2009-426], J.C.Q., à l'égard de la distinction devant être faite entre une réclamation de cette nature présentée en vertu de l'article 19 de la *Convention de Montréal* et une réclamation incluant une demande d'indemnité pour dommages psychologiques intentée suivant l'article 17 de la *Convention*.

Finally, it is to be noted that both *Bensimon* and *Daoust* were cited in *Yalaoui c. Air Algérie*, 2012 QCCS 1393 (at para. 111):

> [111] La Cour du Québec a également octroyé une compensation pour des retards de voyages pour compenser les inconvénients subis par les passagers.

(c) Israel

Israel signed the *Montreal Convention* on January 19, 2011, and thus the *Montreal Convention* came into effect on March 20, 2011 in Israel. Up until that time, Israel was a signatory to the *Warsaw Convention, 1929*, which was implemented by the Israeli *Carriage by Air Act of 1980*.

The appeal *Dr. Lorber and 57 others v. Iberia Spanish Airlines*, Haifa District Court, CA 05/001346 concerned the claims of 58 passengers for damages for mental injury caused by an extensive delay (17 hours). Haifa Magistrate Court, acting as the trial court, awarded 3,500 NIS (approximately $850) to each of the passengers as compensation for mental injury, and in the case of some individuals, even a higher compensation under this heading. The airline appealed from the trial court to the Haifa District Court, and particularly contested the awarding damages for mental injury and its amount (para. 2).

The appellate court cited Articles 19 and 20(1) of the *Warsaw Convention, 1929* (as amended by the *Hague Protocol*), and distinguished between Article 19 (concerning delay), Article 18 (damage to

cargo), and Article 17 (concerning damage sustained by death or bodily injury of the passenger). The appellate court observed that the *Warsaw Convention, 1929* does not specify the headings of damages that are available in the case of delay, and thus there is no reason for not awarding compensation for mental injury in cases were such damages are proven. Finally, the court upheld the trial judge's damages award for mental injury.

The appeal *Kerber v. Austrian Airlines*, Tel Aviv-Jaffa District Court, CA 10-07-26921 concerned the claim of two passengers in relation to delay caused by the mid-flight discovery of a crack on the aircraft's window, which forced a return to the point of departure. The Tel Aviv-Jaffa Magistrate Court, being the trial court, dismissed the claim, because the trial judge held that the delay was caused by an unexpected event. The passengers appealed from the trial court to the Tel Aviv-Jaffo District Court.

The appellate court applied the *Carriage by Air Act of 1980*, which implements the *Warsaw Convention, 1929* and its various protocols (para. 5), observed that the burden of proof to demonstrate the facts necessary for the defense under Article 20(1) is on the carrier, not on the passengers, and held that the airline failed to discharge this burden (paras. 7-8); consequently, the airline was held liable for the damage (para. 10). The appellate court chose not to remit the case to the trial court to assess damages, but rather awarded 3,800 NIS (approximately $940) as compensation for the "substantial delay" (para. 11). It is worth noting that the appellate court also expressed disapproval of the failure of the airline to compensate the passengers voluntarily, and ordered the airline to pay 20,000 NIS (approximately $5,000) to the passengers for legal costs.

(d) Italy

In *Lobianco Osso v. Iberia*,[21] an international passenger, travelling from Italy to Spain, sought compensation for replacement clothes and damages for stress, disturbance, and loss of enjoyment of the vacation trip in relation to a four-day delay in the delivery of baggage. The court held that the cap set out in Article 22(2) of the *Montreal Convention* applies to the sum of all damages awarded, and ordered the airline to compensate the passenger both for out-of-pocket expenses and moral damages.

The Applicant notes that since this was a default judgment, its value as an authority is somewhat limited. However, it clearly reflects the European judicial approach to availability of moral damages or mental injury under the *Montreal Convention*, and it is consistent with the subsequent decision of the European Court of Justice on the same question.

[21] *Lobianco Osso v. Iberia*, Tribunal of Paola, Judgment of June 26, 2008. Reported in G. N. Tompkins, 'The 1999 Montreal Convention: Alive, Well and Growing'. *Air and Space Law* 34, no. 6 (2009): 421-426.

(e) Spain

Both the Court of Appeal in Barcelona and in Valencia held that "moral damages" are compensable under the *Montreal Convention* in the case of loss of checked baggage.[22] The two appellate courts disagreed, however, on whether the limit of liability set out in Article 22(2) applies to each heading of damages separately, or to the sum of the damages together.

The question of the application of Article 22(2) of the *Montreal Convention* in Spain was the reason that the interpretation of "damage" in the *Montreal Convention* was reviewed by the European Court of Justice (see *Walz v. Clickair* at para. 15).

These cases show that Spanish courts agree about the availability of "moral damages" (i.e., damages for mental injury) under the *Montreal Convention*.

(f) The European Court of Justice: *Walz v. Clickair*

The landmark ruling of the European Court of Justice in *Axel Walz c. Clickair SA* arises in the context of litigation that involves the *Montreal Convention*, where as a matter of course, general damages were awarded. The court conducted a careful and well-reasoned analysis of the *Montreal Convention*, as follows:

> 21 Since the Montreal Convention does not contain any definition of the term 'damage', it must be emphasised at the outset that, in the light of the aim of that convention, which is to unify the rules for international carriage by air, that term must be given a uniform and autonomous interpretation, **notwithstanding** the different meanings given to that concept in the domestic laws of the States Parties to that convention.
>
> 22 In those circumstances, the term 'damage', contained in an international agreement, must be interpreted in accordance with the rules of interpretation of general international law, which are binding on the European Union.
>
> [Emphasis added.]

The court recognized the need for uniformity in the application of the *Montreal Convention* as well as the applicability of the *Vienna Convention* to interpreting it. Indeed, at paragraph 23, the court cited Article 31 of the *Vienna Convention*, and held that the word "damage" has to be given its "ordinary meaning".

At paragraph 27, the court relied on Article 31(2) of the *Responsibility of States for International Wrongful Acts of the International Law Commission of the United Nations*, noted in Resolution

[22] Court of Appeal in Barcelona: Section 15, rolls 645/07 2a Judgment 270. Court of Appeal in Valencia: Section 9, Rec. 182/08; 22 May 08; [EDJ 2008/117346]. Reported in G. N. Tompkins, 'The 1999 Montreal Convention: Alive, Well and Growing'. *Air and Space Law* 34, no. 6 (2009): 421-426.

56/83 of the General Assembly of the United Nations, which provides that:

> ...[i]njury includes any damage, whether material or moral...

In paragraph 28, the court relied on Article 31(3)(c) of the *Vienna Convention*[23] to justify resorting to the aforementioned United Nations document:

> Therefore, the concept of damage, as arising under general international law, remains applicable in the relations between the parties to the Montreal Convention, in accordance with Article 31(3)(c) of the Convention on the Law of Treaties, cited above.

Based on these considerations, the court finally concluded that:

> It follows that the term 'damage', referred to in Chapter III of the Montreal Convention, must be construed as including both material and non-material damage.

The reasoning of the European Court of Justice is impeccable, and they are consistent with the *Vienna Convention*. Should the Agency accept United's position that this decision has no precedential value, the Applicant asks that the Agency consider these reasons as the Applicant's own submissions.

Since Article 19 appears in Chapter III of the *Montreal Convention*, and uses the word "damage," it is clear that both material and non-material damages are recoverable under Article 19 according to the reasons of the European Court of Justice.

(g) *Yalaoui c. Air Algérie*: Aftermath of *Walz v. Clickair*

In *Yalaoui c. Air Algérie*, 2012 QCCS 1393, the Quebec Superior Court considered the question of whether to certify a class action seeking moral damages from an airline in relation to flight delay. The test for certification is articulated at paragraph 66 of the decision, which cites ss. 1002 and 1003 of the *Code of Civil Procedure, RSQ, c C-25*. According to s. 1003(b), a party seeking certification of a class action must satisfy the court that "the facts alleged seem to justify the conclusions sought." This provision is in the same vein as the condition that the statement of claim "disclose a cause of action." In other words, the court will not certify an issue for class action if the law is settled, and thus the claim fails to disclose a cause of action.

The court in *Yalaoui* ruled that the question of availability of moral damages in the case of delay under Article 19 of the *Montreal Convention* is debatable (i.e., arguable):

> [112] Cette question sérieuse à l'effet de déterminer si les dommages moraux sont exclus ou non à l'article 19 de la Convention de Montréal, doit être débattue lors

[23] Article 31(3)(c): "There shall be taken into account, together with the context: ... (c) any relevant rules of international law applicable in the relations between the parties."

> de l'audition au fond pour permettre un débat avec toute la preuve et tous les arguments possibles. Il serait nécessaire d'analyser si l'arrêt *Floyd* a été interprétée et appliquée correctement ou pas.

In particular, the *Yalaoui* court was not persuaded by *Plourde* that the law was settled about unavailability of general damages under Article 19.

Therefore, it is submitted that by certifying an action seeking moral damages under Article 19 of the *Montreal Convention*, the *Yalaoui* court clearly conveyed its opinion that the law is not settled, and as such the issue warrants being heard on its merits.

D. Application of the law to Rule 28(C)(3)

The decision of the European Court of Justice in *Waltz* leaves no doubt that general damages (moral damages) are available in the case of delay under Article 19 of the *Montreal Convention* in all 27 parties to the *Montreal Convention* that are members of the European Union. This decision is consistent with the interpretation of Article 19 by national courts in these states, as well as in Israel.

There are also a number of decisions, primarily from the United States, but also from Canada, which hold to the contrary, and claim that moral damages are not available under Article 19 of the *Montreal Convention*. These cases were wrongly decided, and are flawed for either failing to give effect to the preamble of the *Montreal Convention*, or for confusing Article 19 (delay) with Article 17(1) (accident).

In Canada, Quebec courts have regularly awarded general damages in the case of delay under Article 19 of the *Montreal Convention*, although there are decisions to the contrary. The current state of the law is articulated in *Yalaoui*, which states (at para. 116) that this remains an open question.

While United is free to raise its arguments against awarding general damages (moral damages) in the case of delay under Article 19 of the *Montreal Convention* in each and every individual action that it is defending, it is submitted that United cannot force a controversial interpretation of the *Montreal Convention* upon passengers by a contractual stipulation, and it is up to the court seized with a case to rule on that question in accordance with the state of the law at the time.

Article 26 of the *Montreal Convention* does not require a contractual provision to actually relieve a carrier from liability under the convention in order to render the provision null and void; it uses the phrase "tending" to clarify that the threshold is much lower.

It is submitted that the impugned part of Rule 28(C)(3) is a provision *tending* to relieve United from liability under Article 19 of the *Montreal Convention*, and as such it is null and void; consequently, it ought to be disallowed.

IV. Rule 28(D)(4): Carrier's liability for checked baggage

Rule 28(D)(4) of United's Contract of Carriage (revised June 15, 2012) contains two provisions that are tending to relieve United from liability under Article 17(2) of the *Montreal Convention*. For greater clarity, these provisions are discussed independently below.

A. Period of carriage under the *Montreal Convention*

This issue concerns the underlined portion of Rule 28(D)(4) below:

> The Carrier 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. 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.

Since this language purports to exclude United's liability both in the case of destruction, loss, and damage (governed by Article 17(2)) and delay (governed by Article 19), it is necessary to divide the discussion into these two categories.

(a) Delay

Delay is governed by Article 19 of the *Montreal Convention*, which imposes strict liability on United in the case of delay of checked baggage. In order to exonerate itself from liability, United must demonstrate the "all reasonable measures" defense. It is important to emphasize that liability under the *Montreal Convention* is not based on contract or on fault. Thus, this defense is focused on the actions of carrier's "servants or agents" and not on the cause of the delay.

Private businesses performing security inspections of passengers and baggage were held by US District Courts to be "servants or agents" of airlines.[24] 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. 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.

Thus, it is submitted that for the purpose of determining liability for delay, it is irrelevant what or who was the initial cause, and whether it was initially delayed by security inspections or measures not under the control and direction of the carrier. The only relevant question is how the "servants or agents" of the carrier conducted themselves, and whether there was any way for them to avoid or mitigate the delay.

[24] E. Giemulla & R. Schmid, et al, Montreal Convention (Wolters Kluwer: Netherlands, 2011) at Article 19, para. 72.

(b) Seizure of prohibited goods by public authorities

The Applicant never suggested that United would be liable for seizure of prohibited goods by the authorities; however, it is submitted 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 concerns contributory negligence:

> If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. [...]

Two important elements of Article 20 are that it places the burden of proof on the carrier, and the exoneration is only to the extent that the negligence or wrongful act or omission caused or contributed to the damage.

Thus, it is submitted that deleting the impugned provision would not render United liable for seizure of prohibited goods by public authorities.

(c) Under normal circumstances, United is not supposed to "deliver baggage to the custody and control of public authorities"

The Agency held in *Zimmermann v. Skyservice*, 211-C-A-2004 that (para. 24):

> 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.

With the exception of the extraordinary circumstances covered by Article 20, such as prohibited goods included in passenger's baggage, 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, 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."[25] In other words, the security inspection takes place, or could take place, in the presence of the carrier or one of its servants or agents.

There is nothing to prevent United from overseeing the security inspection of baggage, and having a recourse against the body performing the inspection (see Article 37 of the *Montreal Convention*) if the baggage is destroyed, damaged or lost by it.

[25] *Baker v. Lansdell Protective Agency*, 590 F.Supp. 165 (1984).

(d) *Montreal Convention* v. *Warsaw Convention* and Article 17(2) v. Article 18

In order to fully appreciate the meaning of "in the charge of the carrier" in Article 17(2) of the *Montreal Convention* and to interpret it according to the principles of the *Vienna Convention*, it is necessary to review the history of its development.

Under the old *Warsaw Convention, 1929* regime, liability for destruction, damage and loss of cargo and checked baggage was treated identically, in Article 18:

> (1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered baggage or any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air.
>
> (2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the baggage or cargo is in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.
>
> (3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

In 1975, the treatment of checked (registered) baggage and cargo was split by virtue of Article IV of the *Montreal Protocol No. 4*, and Article 18 was amended to read as follows:[26]

> 1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, any registered baggage, if the occurrence which caused the damage so sustained took place during the carriage by air.
>
> 2. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the occurrence which caused the damage so sustained took place during the carriage by air.
>
> 3. However, the carrier is not liable if he proves that the destruction, loss of, or damage to, the cargo resulted solely from one or more of the following:
>
> (a) inherent defect, quality or vice of that cargo;
>
> (b) defective packing of that cargo performed by a person other than the carrier or his servants or agents;

[26] *Montreal Protocol No.4 To Amend The Convention For The Unification Of Certain Rules Relating To International Carriage By Air, Signed At Warsaw On 12 October 1929, As Amended By The Protocol Done At The Hague On 28 September 1955*, Signed At Montreal On 25 September 1975. Schedule IV to the *Carriage by Air Act*.

> (c) an act of war or an armed conflict;
>
> (d) an act of public authority carried out in connexion with the entry, exit or transit of the cargo.
>
> 4. The carriage by air within the meaning of the preceding paragraphs of this Article comprises the period during which the baggage or cargo is in the charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.
>
> 5. The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.
>
> [Emphasis added.]

It is important to observe that the exclusions in Article 18(3) of the *Warsaw Convention, 1929* as amended by the *Montreal Protocol No. 4* refers only and exclusively to cargo. In particular, the defense of "act of public authority" under Article 18(3)(d) was available only for cargo, and not for registered baggage.

Why did drafters of the *Montreal Protocol No. 4* feel the need to exclude "act of public authority" from the carrier's liability? This is because they were of the opinion that the cargo remains in the charge of the carrier during this process. In other words, they considered the process of "carriage by air" a continuum with a start (acceptance of cargo by the carrier) and an end (delivery), and not an act that is interrupted by various events.

Thus, it is submitted that in light of Article 18(4), it is clear that the drafters were of the opinion that the baggage or cargo remains in the charge of the carrier *during* the act of public authority mentioned in Article 18(3)(d). Furthermore, the defenses under Article 18(3) apply only to cargo, and not to checked baggage.

The drafters of the *Montreal Convention* chose to emphasize the delineation of liability rules for checked baggage from those applicable to cargo even further by including them in two separate articles. Article 17(2) of the *Montreal Convention* deals with liability for baggage:

> The carrier liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents.

Article 18 of the *Montreal Convention* concerns liability for cargo:

> 1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.
>
> 2. However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:
>
> (a) inherent defect, quality or vice of that cargo;
>
> (b) defective packing of that cargo performed by a person other than the carrier or its servants or agents;
>
> (c) an act of war or an armed conflict;
>
> (d) an act of public authority carried out in connection with the entry, exit or transit of the cargo.
>
> 3. The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.
>
> 4. The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

Article 17(2) of the *Montreal Convention* adopted only the defense under Article 18(3)(a) of the amended *Warsaw Convention* ("inherent defect, quality or vice") in the case of checked baggage, and incorporated Article 18(4) by avoiding reference to the phrase "carriage by air" and replacing it with "in the charge of the carrier".

At the same time, Article 18 of the *Montreal Convention* adopted Articles 18(1) and 18(3) of the amended *Warsaw Convention* entirely, with the exception of the word "solely" found only in Article 18(3) of the revised *Warsaw Convention*.

Thus, it is plain and clear that the drafters of the *Montreal Convention* did not intend to exclude the carrier's liability for checked baggage under Article 17(2) in the case of "an act of public authority," and they chose to permit this defense only for cargo. Furthermore, the fact that the drafters chose to include Article 18(2)(d) in the *Montreal Convention* proves that the phrase "in the charge of the carrier" (used both in Articles 17(2) and 18(3)) includes the duration of acts of public authorities.

(e) Meaning of "in the charge of the carrier" in Article 17(2) of the *Montreal Convention*

The key question for determining whether the first sentence of Rule 28(D)(4) is consistent with Article 17(2) of the *Montreal Convention* is the meaning of the phrase "in the charge of the carrier". As United conceded on page 14 of its July 20, 2012 submissions:

> The view that "in the charge of the carrier" extends from the period where baggage is accepted by the carrier until the carrier returns the baggage to the possession of the passenger is consistent with previous Agency decisions.

Indeed, in *Zimmermann v. Skyservice*, 211-C-A-2004, the Agency held that:

> [25] The passenger checking in baggage must prove that the checked baggage was handed over to the carrier in good order and condition. At most international airports, baggage is received and weighed by the carrier at the check-in counters. For this reason, it appears reasonable to define the start of the carriage of baggage as the moment when the baggage is put on the scales either by the passenger himself or by the carrier's representative. [...]
>
> [26] It is more difficult to determine the end of the transportation of baggage. The carrier's charge does not end just because the baggage is handed over to a third party (i.e., airport ground handlers). 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 passenger, is still part of the carriage by air (Elmar Giermulla et al., Warsaw Convention - Commentary, The Hague, The Netherlands, Kluwer Law International, 1998, Art. 18, at page 25 [Suppl. 15 (January 2002)], para. 35 [Reference to footnote No. 2 OLG Cologne, 1982, TranspR 43 and 1982 ZLW 167]).
>
> [27] At large international airports, the arriving passenger must go to the baggage claim area. After retrieving his or her baggage, the passenger departs the baggage claim area through an exit which, at international airports, leads directly to the customs area. In Berman v. TWA (Elmar Giermulla et al., Warsaw Convention - Commentary, The Hague, The Netherlands, Kluwer Law International, 1998, Art. 18, at page 30 [Suppl. 15 (January 2002)], Footnote No. 6 : 15 Avi 17,775 (NY City Civil Court - NY County)), the Court ruled that the carriage by air had already come to an end when the baggage was picked up by the passenger prior to undergoing Customs clearance. Leaving the baggage claim area following acceptance of the baggage constitutes the definite end of the carriage by air.

The Applicant agrees with these findings of the Agency, which fully reflect the state of the law,[27] and submits that the state that a baggage is "in the charge of the carrier" is a continuum, which

[27] E. Giemulla & R. Schmid, et al, Montreal Convention (Wolters Kluwer: Netherlands, 2011) at Article 17, paras. 133-141.

starts at the moment when the baggage is put on the scales either by the passenger himself or by the carrier's representative; it ends when the passenger leaves the baggage claim area together with the baggage. During this entire period, the baggage is continuously "in the charge of the carrier".

It appears that United is confusing the phrases "in the charge of the carrier" with "control and custody" and with "has access to". While during a security or customs inspection, the inspecting agency is granted access to the passengers' baggage, this does not mean that baggage is delivered to their custody, the same way that a passenger being questioned by customs agents is not held in custody. Furthermore, the notion of "in the charge of the carrier" is far broader than possession of the baggage by the carrier or its staff. Even in the event of an emergency landing outside an airport, the baggage remains in the care of the carrier.[28]

There is no support whatsoever for United's contentions about "intervening period where the baggage is under the lawful custody and control of a public authority or their designate." In the same way a passenger's baggage that had been already retrieved from the baggage claim area remains in the passenger's charge during inspection by customs (unless it is seized), a 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.

What distinguishes seizure of prohibited goods by public authorities from a mere inspection is that in the case of seizure, the item is not expected to be returned to the carrier or the passenger and a notice to that effect is provided to the passenger; this allows the passenger to take adequate steps to look after his property, and consequently it ceases to be "in the charge of the carrier."

(f) Conclusions

United cannot exclude its liability for delay of baggage merely on the basis that it was caused by a third party. Thus, reference to "delay" in the first sentence of Rule 28(D)(4) is a provision tending to relieve United from liability under Article 19 of the *Montreal Convention*, and as such it is null and void by Article 26.

As the comparison of Article 17(2) with Article 18 and the history of the *Montreal Convention* show, the intended meaning of the phrase "in the charge of the carrier" is to include the entire period starting with the time the baggage is put on the scales either by the passenger or the airline's representative, and ending when the passenger leaves the baggage claim area together with the baggage (following acceptance of the baggage). This period is a continuum, which cannot be interrupted by "intervening periods," and the drafters clearly intended to include in this period the duration of acts of public authorities.

Therefore, the first sentence of Rule 28(D)(4) is a provision tending to relieve United from liability under Article 17(2) of the *Montreal Convention*, and as such it is null and void by Article 26.

[28] E. Giemulla & R. Schmid, et al, Montreal Convention (Wolters Kluwer: Netherlands, 2011) at Article 17, para. 135.

B. United cannot exclude its liability for "excluded items" in successive carriage

This issue concerns the underlined portion of Rule 28(D)(4) below:

> The Carrier 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. 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.

(a) Article 36(3) imposes joint and several liability

Liability for loss, destruction, and damage to checked baggage is governed by Article 17(2) of the *Montreal Convention*, while delay is governed by Article 19. The parties agree that pursuant to Article 36(3), in the case of loss, destruction, delay, or damage to checked baggage in successive carriage, there are three carriers whose liability is triggered:

(1) first carrier;
(2) last carrier;
(3) the carrier which performed the carriage during which the incident took place.

United stated on page 16 of its July 16, 2012 submissions that:

> the Rule 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.

However, United seems to fails to recognize that the liability under Article 36(3) of the *Montreal Convention* is described as "jointly and severally". Thus, 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*.

(b) The scope of "via" in Rule 28(D)(4)

United claims that the phrase "via" in the impugned provision ought to be interpreted as an indication that United is an intermediate carrier that is none of the above-mentioned three carriers listed as (1)-(3). The Applicant respectfully disagrees with this interpretation.

The scope of the phrase "via" is not only "UA" alone, but rather the entire phrase "UA and one more carriers that..." If United's interpretation were correct, then "one or more carriers that..." would also be intermediate carrier(s), which is none of the carriers listed as (1)-(3), which is absurd, because in each carriage, one of the carriers is the first and one is the last.

Thus, it is plain and clear that the common and ordinary meaning of the impugned provision refers to successive carriage, that is, transportation by air where an air carrier other than United is also involved, and it does so without specifying whether United is the first, last, or intermediate carrier, and whether the incident giving rise to a claim took place during carriage by United.

The common and ordinary meaning of the impugned provision is an exclusion of United's liability for checked baggage that contains items that are "excluded" by one of the other airlines participating in the carriage.

(c) What if the incident takes place during carriage by United?

On page 16 of its July 20, 2012 submissions, United claims that the impugned provision

> does not purport to relieve United of liability in circumstances [...] where it does damage to baggage [...].

The Applicant disputes this, because there is nothing in the impugned provision to exclude the case where the incident giving rise to the claim takes place during carriage by United. On the contrary, on page 16 of its July 20, 2012 submissions, United states 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, i.e. not the first or last carrier.

Thus, even if this interpretation of "via" is correct (which the Applicant also disputes), it does not resolve the Applicant's complaint concerning the liability of United in case (3), namely, where an incident giving rise to damage takes place during carriage by United.

(d) Conclusions

Under the *Montreal Convention*, liability of a carrier can be excluded only in specific circumstances as stipulated by Articles 17(2) and 19. Any other limitation of liability, which is tending to relieve the carrier from these liabilities or set a lower liability, is null and void by Article 26. The notion of "excluded items" is not recognized by the *Montreal Convention*, and thus United cannot refer to this notion in order to exclude its liability for items in checked baggage.

Regardless of the intent of United, the common and ordinary interpretation of the second part of Rule 28(D)(4) is an exclusion of 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 (first carrier, last carrier, or the carrier which performed the carriage during which the incident took place). As such, it is an exclusion of liability 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.

For greater clarity, the Applicant submits that the impugned provision purports to narrow United's liability, and excludes its liability even in cases where the *Montreal Convention* imposes liability on United.

Therefore, based on Article 26 of the *Montreal Convention* and the findings of the Agency in *Lukács v. WestJet*, 249-C-A-2012 (para. 103), it is submitted that the second part of Rule 28(D)(4) fails to be reasonable, and it ought to be disallowed.

V. United's "Damaged items" webpage

(a) United's position and its effect

In its July 20, 2012 submissions, United stated that:

1. Since the *Montreal Convention* does not address the question of proof, United can require passengers to provide proof of their damage within 7 days.

2. Its website 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.

3. Even if the website specifically required that passengers bring damaged baggage to an airport, this is not unreasonable.

As the Agency observed in *Lukács v. WestJet*, 477-C-A-2010 (para. 70; leave to appeal denied by the Federal Court of Appeal, 10-A-41), a provision whose *effect* is denial of a right under the *Montreal Convention* cannot be consistent with the *Montreal Convention*.

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.

In what follows, the Applicant submits that both of these requirements are inconsistent with the *Montreal Convention*, and they are tending to relieve United from liability under the *Montreal Convention*. As such, they are null and void by Article 26.

(b) The claim process envisioned by the *Montreal Convention* in case of damage to baggage

Article 17(2) of the *Montreal Convention* imposes strict liability on the carrier in case of damage to checked baggage. The first sentence of Article 31(2) of the *Montreal Convention* requires that passengers complain to the carrier about damage within 7 days from the receipt of their baggage:

> In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of checked baggage and fourteen days from the date of receipt in the case of cargo.

Article 31(3) of the *Montreal Convention* clearly states the method for making the complaint:

> Every complaint must be made in writing and given or dispatched within the times aforesaid.

In other words, the complaint can be made by email, fax, or mail, as long as it is dispatched (sent) within the 7-day period. Article 35(1) of the *Montreal Convention* provides a 2-year limitation period for enforcing the right to damages under the convention:

> The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

Thus, 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.

(c) Level of proof required

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.

In *MacGillivray v. Cubana*, 308-C-A-2010, the Agency specifically addressed the question of the level of proof that a party seeking compensation under the *Montreal Convention* is required to present:

> [30] The Agency is of the opinion that a party, in endeavoring to prove a fact, must do so by presenting the best evidence available in light of the nature and circumstances of the case. While the production of original receipts of purchase will generally adequately support proof of loss, circumstances may render it unreasonable to require this form of proof. In these situations, it may be unreasonable to expect that such proof is in an applicant's possession. Other methods such as a sworn affidavit, a declaration or the inherent reasonableness of the expenses claimed could, in some cases, assist in determining the validity of a claim. Furthermore, the Agency notes that Article 22(2) of the Montreal Convention does not require proof of loss in the form of receipts of purchase.

Similarly, in *Kipper v. WestJet*, 309-C-A-2010, the Agency stated that:

> [3] In its Decision No. LET-C-A-33-2010, the Agency directed Ms. Kipper to provide to the Agency and WestJet, along with witness statements, photographic evidence of the damage to her baggage to substantiate her claim, or alternatively to allow WestJet to inspect the baggage.
>
> [Emphasis added.]

Thus, it is submitted 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 is tending to relieve United from its obligations under Article 17(2) of the *Montreal Convention*.

It is further submitted that 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.

(d) It is unreasonable to expect passengers to bring damaged baggage to an airport

United's contention that its website does not require that individuals present themselves to United at an airport is grossly misleading, because United's Baggage Service Offices are all typically located at airports.

Thus, the question is can United require passengers to bring their damaged baggage to an airport as a pre-condition for compensating them for damage to their checked baggage?

In some cases, the damage is discovered right at the baggage claim area, and it is possible for the passenger to report it to the Baggage Service Office. But this is not always practical. For example, if a passenger's baggage is delayed, and he discovers upon delivery that the baggage was also damaged by the airline, United's requirement means that the passenger would need to make an extra trip to the airport to have the baggage "viewed" by United's Baggage Office.

In Canada, a number of airports are located at a fair distance from the city. For example, the Halifax airport is 37 kilometers away, and the one-way cab fare is $53.00. Thus, in order to comply with the aforementioned requirement, the passenger would have to spend about 2 hours of his personal time, and incur the expense of $106.00 just to allow United's Baggage Service Office to inspect a damaged bag.

Thus, the Applicant submits that this requirement is not only contrary to the *Montreal Convention*, but also patently unreasonable, and serves only the purpose of frustrating and discouraging passengers from making claims for damaged baggage.

The Applicant further submits that if United wishes to inspect the damaged baggage of its passengers, it has to do so at its own expense: 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.

(e) Conclusions

While United is entitled to a written notice of complaint concerning damaged baggage, it cannot require passengers to provide proof of their damage within 7 days. Under the *Montreal Convention*, passengers have 2 years to do so.

While United is entitled to *some* proof of damage (e.g., photographs or a report from a repair shop), it is not entitled to prescribe the form of the proof, and it cannot require physically inspecting damage baggage as a pre-condition for the compensation of passengers.

If United wishes to inspect the damaged baggage of passengers, it has to do so at its own cost, and it cannot expect passengers to incur extra expenses and waste substantial time on transporting the damaged baggage back to the airport for a physical inspection.

The information provided by United on its "Damaged items" webpage is misleading and misstates the rights of passengers and United's obligations under the *Montreal Convention*.

RELIEF SOUGHT

The Applicant prays the Agency that:

A. the Agency disallow United's Contract of Carriage Rule 28(C)(2);

B. the Agency order United to delete the phrase "and do not include mental injury damages" from Contract of Carriage Rule 28(C)(3);

C. the Agency disallow United's Contract of Carriage Rule 28(D)(4);

D. the Agency order United to remove all misleading information from its "Damaged items" webpage, and any other websites in its direct or indirect control displaying the same misleading information.

All of which is most respectfully submitted.

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Applicant

Cc: Mr. Jeff Wittig, Senior Counsel (Asia and Pacific), United Air Lines
Mr. Benjamin P. Bedard, Counsel for United Air Lines

LIST OF AUTHORITIES

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