Gábor Lukács

Halifax, Nova Scotia

June 19, 2012

**VIA EMAIL**

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

Dear Madam Secretary:

**Re: Gábor Lukács v. United Air Lines**
**Complaint concerning United Air Lines' new Rule 28**
**and new "Damaged items" webpage**

Please accept this letter as a formal complaint against United Air Lines ("United") pursuant to ss. 111, 113, and 122 of the *Air Transportation Regulations*, S.O.R./88-58 (the "*ATR*") and s. 40 of the *Canadian Transportation Agency General Rules*, S.O.R./2005-35. The Applicant alleges that:

A. United's Contract of Carriage Rule 28(C)(2) is a provision tending to relieve United of liability or to fix a lower limit than that which is laid down in the *Montreal Convention*, thus it is null and void pursuant to Article 26 of the *Montreal Convention*. Consequently, Rule 28(C)(2) fails to be just and reasonable, contrary to s. 111(1) of the *ATR*.

B. United's Contract of Carriage Rule 28(C)(3) is a provision tending to relieve United of liability or to fix a lower limit than that which is laid down in the *Montreal Convention*, thus it is null and void pursuant to Article 26 of the *Montreal Convention*. Consequently, Rule 28(C)(3) fails to be just and reasonable, contrary to s. 111(1) of the *ATR*.

C. United's Contract of Carriage Rule 28(D)(4) is a provision tending to relieve United of liability or to fix a lower limit than that which is laid down in the *Montreal Convention*, thus it is null and void pursuant to Article 26 of the *Montreal Convention*. Consequently, Rule 28(D)(4) fails to be just and reasonable, contrary to s. 111(1) of the *ATR*.

D. United's new "Damaged Items" page on its various websites (such as http://www.united.com and http://www.united.ca) misrepresents United's obligations under the *Montreal Convention* contrary to s. 18(b) of the *ATR*, and Decision No. 182-C-A-2012 of the Agency.

## BACKGROUND

1. On April 10, 2011, the Applicant filed a formal complaint with the Agency concerning United's baggage liability policy and information displayed on United's website and on signage at its airport check-in counters.

2. On May 16, 2012, in Decision No. 182-C-A-2012, the Agency held that:

   (a) United displayed signage containing information that was false or misleading with respect to United's liability for baggage;

   (b) United displayed misleading information about its liability for baggage on its website;

   (c) United applied a policy not appearing in its tariff; and

   (d) United's tariff did not clearly state United's policy governing liability for baggage.

3. On May 16, 2012, in Decision No. 182-C-A-2012, the Agency ordered United to:

   (a) file amendments to its tariff that clearly reflect its policy respecting limits to and exclusions from liability relating to baggage and that also reflect the time limits in which to file a complaint pursuant to Article 31 of the *Montreal Convention*; and

   (b) ensure that its website reflect the findings made by the Agency and remove any language that is contrary to these findings.

4. On June 15, 2012, United provided the Agency and the Applicant, among other things, with a printout of its revised website and its Rule 28 of its Contract of Carriage.

5. The present complaint is based on the documents provided by United on June 15, 2012.

## ISSUES

## ARGUMENT

### I. Applicable legal principles

#### (a) The *Montreal Convention*

The *Montreal Convention* is an international treaty that has the force of law in Canada by virtue of the *Carriage by Air Act*, R.S.C. 1985, c. C-26. It governs, among other things, the liability of air carriers in case of delay of passengers and their baggage in international carriage.

An essential component of the *Montreal Convention* regime is Article 26, which prevents carriers from contracting out or altering the liability provisions of the *Montreal Convention* to the passengers' detriment:

> **Article 26 - Invalidity of contractual provisions**
>
> Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

#### (b) Tariff provisions must be just and reasonable: s. 111(1) of the *ATR*

Section 111(1) of the *ATR* provides that:

> All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

#### (c) Provisions that are inconsistent with the *Convention* cannot be just and reasonable

Article 26 of the *Montreal Convention* renders null and void any tariff provision tending to relieve a carrier of liability or to fix a lower limit than what is provided for by the Convention.

In *McCabe v. Air Canada*, 227-C-A-2008, the Agency held (at para. 29) that a tariff provision that is null and void by Article 26 of the *Montreal Convention* is not just and reasonable as required by s. 111(1) of the *ATR*. This principle was applied by the Agency in *Lukács v. Air Canada*, 208-C-A-2009 (at paras. 38-39), and in *Lukács v. WestJet*, 477-C-A-2010 (at para. 43; leave to appeal denied by the Federal Court of Appeal; 10-A-41).

Therefore it is settled law that a tariff provision that is inconsistent with the legal principles of the *Montreal Convention* cannot be just and reasonable within the meaning of s. 111(1) of the *ATR*.

## 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) states that:

> Airport, air traffic control, security, and other facilities or personnel, whether public or private, not under the control and direction of the Carrier are not **servants** or **agents** of the Carrier, and the Carrier is not liable to the extent the delay is caused by these kinds of facilities or personnel.
>
> [Emphasis added.]

### (a) Overview

The Applicant submits that Rule 28(C)(2) is a provision tending to relieve United from liability laid down in the *Montreal Convention*, contrary to Article 26, for the following reasons:

(i) it purports to alter and narrow down the commonly accepted and intended meaning of the phrases "servants" and "agents" in Article 19 of the *Montreal Convention*;

(ii) even if a delay is entirely caused by the above-noted facilities or personnel, it is not sufficient, on its own, to exonerate United from liability for delay under Article 19 of the *Montreal Convention*.

Thus, it is submitted that Rule 28(C)(2) is null and void by Article 26. Therefore, Rule 28(C)(2) fails to be just and reasonable, contrary to s. 111(1) of the *ATR*.

### (b) The *Montreal Convention*

Article 19 of the *Montreal Convention* imposes strict liability on carriers for delay. It creates a presumption of liability, and places the burden of proof of the presence of extenuating circumstances on the carrier:

> **Article 19 - Delay**
>
> 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.]

**(c) Canadian case law**

Failure to discharge the duty, or the burden of proof imposed by Article 19 upon the carrier, resulted in a judgment against the carrier in *Zaor c. Air Canada*, 2006 QCCQ 1796, a case that involved delay due to mechanical failure (para. 5), passengers leaving the delayed aircraft (para. 7), and crew finishing its shift (para. 8). These circumstances did not relieve the carrier from the obligation to take steps to prevent damage to passengers, and failure to demonstrate that it took such steps was fatal to the carrier's attempt to exonerate itself from liability:

> [15] Malgré les efforts louables de sa représentante lors du procès, Air Canada n'a pas établi les faits nécessaires pour se disculper de toute responsabilitée. La défenderesse n'a fait entendre aucun témoin direct susceptible d'expliquer la nature des divers incidents survenus et surtout les moyens pris pour éviter les dommages causés aux passagers et pour démontrer la raisonnabilité de sa conduite le 4 décembre 2003.
>
> [Emphasis added.]

In *Berdugo c. British Airways*, 2009 QCCQ 5692, the entire Heathrow airport was closed due to concerns related the possibility of a terrorist attack, and the flight of the plaintiff passengers was cancelled. The passengers made several attempts to reach British Airways to rebook their travel, but in vain (para. 5); they eventually secured seats on an Air Canada flight (para. 9). Even though the delay was not caused by British Airways, it was nevertheless ordered to pay damages to the passengers, because it failed to demonstrate that it had taken all necessary measures to avoid the damage or that it was impossible to take such measures (at paras. 16-19).

The same principles were cited with approval and applied in *Lukács v. United Airlines*, 2009 MBQB 29 (leave to appeal denied; 2009 MBCA 111).

**(d) Supreme Court of France (Cour de cassation) on the *Montreal Convention***

The *Air France c. M. X...*, 07-16102 appeal decided by the Supreme Court of France (Cour de cassation, the highest national court) on June 19, 2008, concerned a passenger whose flight from Roissy to Rome departed one hour late, resulting in him missing his connecting flight from Rome to Tel-Aviv, and arriving at his final destination with a 13-hour delay. The reason for the late departure from Roissy was congestion at the security screening (para. 3). The Supreme Court of France upheld the damage award of the trial judge of 750 EUR, and dismissed the appeal:

> Mais attendu que le juge du fond a relevé que le contrôle de sécurité des passagers relevait d'une action normale et qu'il appartenait à la compagnie aérienne d'organiser ses vols en conséquence, qu'il en a déduit que la société Air France n'apportait pas la preuve suffisante qu'elle n'a pu prendre les mesures nécessaires pour éviter le retard subi; que non tenu de répondre aux conclusions visées par les deux premières branches du moyen, rendues inopérantes par ces constatations, il a légalement justifié sa décision;

**(e) Application of the law to Rule 28(C)(2)**

It is well established that the only factor to be considered for the purpose of exoneration from liability under Article 19 of the *Montreal Convention* is the actions taken by the carrier, and its servants and agents. The cause of the delay is immaterial. The only relevant questions are whether the carrier and its servants and agents took all measures that could reasonably be required to avoid damage to passengers, and whether it was impossible for them to take such measures.

Thus, United cannot exonerate itself from liability for delay by blaming third parties who are not its servants or agents, because the notion of liability under Article 19 is not based on fault. Even if United has nothing to do with the cause of a delay, United and its servants and agents must take all measures that could reasonably be required to avoid damage to passengers if it wants to be exonerated from liability.

Therefore, the phrase "the Carrier is not liable to the extent the delay is caused by these kinds of facilities or personnel" in Rule 28(C)(2) is a provision tending to relieve United from liability under Article 19 of the *Montreal Convention*, and as such it is null and void pursuant to Article 26.

Rule 28(C)(2) also attempts to exclude certain facilities and personnel from the circle of United's servants and agents, whose conduct may be relevant for the purpose of determining whether United can exonerate itself from liability under Article 19 of the *Montreal Convention*. It is submitted that under Rule 28(C)(2) in its present form, United could argue that baggage handlers who transport baggage from the check-in counters to aircraft are not its servants or agents, even though they provide service in exchange for consideration to United. This absurd consequence clearly demonstrates that Rule 28(C)(2) purports to alter and narrow the intended meaning of the terms "servants" and "agents" in Article 19 of the *Montreal Convention*, and thus emasculate Article 19.

It is submitted that the question of who servants and agents of United are for the purpose of Article 19 of the *Montreal Convention* is a mixed question of fact and law that can be decided only on a case-by-case basis based on the evidence before a decision-maker.

It is further submitted that the artificial exclusion of certain facilities and personnel from the circle of United's servants and agents for the purpose of Article 19 of the *Montreal Convention* has the effect of relieving United from liability for the conduct of these facilities or personnel, and as such it is null and void pursuant to Article 26.

Hence, it is submitted that Rule 28(C)(3) fails to be just and reasonable, contrary to s. 111(1) of the *ATR*.

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

Rule 28(C)(3) of United's Contract of Carriage (revised June 15, 2012) states that:

> 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.
>
> [Emphasis added.]

### (a) Overview

The Applicant submits that Rule 28(C)(3) is a provision tending to relieve United from liability laid down in the *Montreal Convention*, contrary to Article 26, by excluding liability for mental injury occasioned by delay.

### (b) The *Montreal Convention*

Article 19 of the *Montreal Convention* establishes a regime of strict liability for carriers for damage occasioned by delay in transportation of passengers:

> **Article 19 - Delay**
>
> 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.]

### (c) Case law

The Applicant concedes that there are a number of Canadian and American authorities holding that general damages, such as mental injury damages, are not recoverable under Article 19 of the *Montreal Convention*, including *Lukács v. United Airlines*, 2009 MBQB 29 (leave to appeal denied; 2009 MBCA 111).

However, given the rapid development and change of international law (which is much faster than national law guided by a court of final recourse), these authorities no longer reflect the current state of the law as far as availability of general damages under the *Montreal Convention* is concerned.

***(i) European courts***

In 2007, in *Air France c. M. X...*, 07-16102, the Supreme Court of France (Cour de cassation) upheld an award of 750 EUR for general damages to a passenger who was delayed 13 hours to his final destination. The court rejected the carrier's argument that Article 19 of the *Montreal Convention* requires only compensating passengers for pecuniary damages (para. 4), and held that it was without merit.

The European Court of Justice is the court of last resort of the European Union, whose decisions are binding on all national courts of member states. In *Axel Walz c. Clickair SA*, [2010] All E.R. 53 (Case C-63/09), the European Court of Justice, analysed in great detail the meaning of the word "damage" in Chapter III of the *Montreal Convention* (which contains Article 19), and held that:

> 29 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.

***(ii) Quebec small claims court***

In *Carzunel c. Air France*, 2011 QCCQ 6648, the baggage of two passengers was delayed, and they were deprived of their belongings during almost the entire trip (para. 11). The court considered the availability of moral damages, and compensation for loss of time and trouble and inconvenience:

> [16] Le Tribunal est d'avis que l'article 29 de la *Convention de Montréal* constitue une clause de non-responsabilité uniquement en ce qui concerne les dommages-intérêts punitifs ou exemplaires. Or, en l'espèce, les demandeurs réclament compensation pour dommages moraux, perte de temps et troubles et inconvénients et non à titre de dommages punitifs ou exemplaires.

The court applied Article 19 of the *Montreal Convention*, and both of the passengers were awarded $350 for moral damages, loss of time and trouble and inconvenience (para. 19-23).

In *Bleau c. IMP Group Ltd. (Canjet Airlines)*, 2011 QCCQ 11789, the baggage of the passenger was delayed, and was delivered to him only after his return to Canada. The court considered the *Montreal Convention*, and awarded damages in the amount of $631.66 for trouble and inconvenience (para. 14).

In *Orsini c. Central Associatour inc. (Touristour)*, 2011 QCCQ 12576, both the outbound and the return flights of passengers were delayed by three hours, and the carrier (Sunwing) was unable to explain the reasons for the delay. The court considered Article 19 of the *Montreal Convention*, and awarded $75 compensation to each passenger for general damages (para. 27-28).

In *Elharradji c. National airline Royal Air Morocco*, 2012 QCCQ 11, the flight of a family with two little children was delayed by over four (4) hours, and members of the family were forced to spend a "hellish night" (sic!) at Montreal Airport (para. 4-5). The court applied the *Montreal Convention*, and awarded the family $1,000 in compensation for general damages.

***(iii) Quebec Superior Court***

The question of availability of moral damages for trouble and inconvenience under Article 19 of the *Montreal Convention* was recently considered in an application for certification of class proceedings by the Quebec Superior Court in *Yalaoui c. Air Algérie*, 2012 QCCS 1393. The court reviewed a number of North American authorities holding that such damages are not available under the *Montreal Convention*, but also recognized the aforementioned decision of the European Court of Justice in *Axel Walz c. Clickair SA* (para. 115), and concluded that:

> [116] Le fait qu'il y a des jugements contradictoires quant au droit de recouvrer des dommages moraux pour des troubles et inconvénients dus à des retards de vol, indique qu'il y a matière à débattre. Le moment approprié pour débattre cette question importante n'est pas au stade de l'autorisation mais plutôt au mérite.

**(d) Application of the law to Rule 28(C)(3)**

It is clear from *Yalaoui* that the law concerning the availability of general damages such as moral damages, mental injury, and inconvenience under Article 19 of the *Montreal Convention* is not settled, and is still evolving.

The Applicant submits that the European Court of Justice and the aforementioned decisions from Quebec small claims court interpret the *Montreal Convention* correctly by allowing recovery for general damages such as moral damages, mental injury, and inconvenience; the decision of the Quebec Superior Court in *Yalaoui* indicates a change also in the jurisprudence of Canadian superior courts.

Rule 28(C)(3) purports to force on passengers a narrow interpretation of "damage" in Article 19 even though there is nothing in the *Convention* itself to support such an interpretation, and it is not a settled law. Thus, it is a provision tending to relieve United from liability laid down in the *Montreal Convention*. As such, Rule 28(C)(3) is null and void pursuant to Article 26.

Hence, it is submitted that Rule 28(C)(3) fails to be just and reasonable, contrary to s. 111(1) of the *ATR*.

## 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) states that:

> 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.
>
> [Emphasis added.]

### (a) Overview

The Applicant submits that Rule 28(D)(4) is a provision tending to relieve United from liability laid down in the *Montreal Convention*, contrary to Article 26, for the following reasons:

(i) it purports to alter and narrow the intended meaning of the phrase "in the charge of the carrier" in Article 17(2) of the *Montreal Convention*;

(ii) it purports to exonerate United from liability for destruction, loss, damage, or delay of baggage for certain items, contrary to Articles 17(2), 19, and 36(3) of the *Montreal Convention*.

Thus, it is submitted that Rule 28(D)(4) is null and void by Article 26. Therefore, Rule 28(D)(4) fails to be just and reasonable, contrary to s. 111(1) of the *ATR*.

### (b) The *Montreal Convention*

Article 17(2) of the *Montreal Convention* establishes a regime of strict liability for carriers for loss, destruction and damage to checked baggage. The carrier can avoid liability only in the case and to the extent that the damage to the baggage resulted from the inherent defect, quality or vice of the baggage:

> **Article 17 - Death and injury of passengers - damage to baggage**
>
> 2. The carrier is 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. [...]
>
> [Emphasis added.]

Article 19 of the *Montreal Convention* establishes a regime of strict liability for carriers for delay of passengers and their baggage. The carrier can avoid liability only if it demonstrates that it has taken all measures that could reasonably be required to avoid the delay, or that it was impossible to take such measures:

> **Article 19 - Delay**
>
> 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.]

In the case of successive carriage by more than one carrier, Article 36(3) grants passengers a right of action against both the first carrier and the last carrier, and the carrier which performed the carriage during which the destruction, loss, damage, or delay took place. At the same time, Article 36(3) makes all these carriers jointly and severally liable for damages related to baggage.

> **Article 36 - Successive carriage**
>
> 1. In the case of carriage to be performed by various successive carriers and falling within the definition set out in paragraph 3 of Article 1, each carrier which accepts passengers, baggage or cargo is subject to the rules set out in this Convention and is deemed to be one of the parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under its supervision.
>
> 2. In the case of carriage of this nature, the passenger or any person entitled to compensation in respect of him or her can take action only against the carrier which performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.
>
> 3. As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier which performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.
>
> [Emphasis added.]

**(c) Case law**

In *Lukács v. Air Canada*, 208-C-A-2009, the Agency considered Rule 55 AC(C)(12), which excluded Air Canada's liability for the loss, damage, or delay in delivery of excluded items. Concerning liability for loss of baggage, the Agency held that Rule 55 AC(C)(12) was inconsistent with Article 17(2) of the *Montreal Convention*. As for liability for damage, the Agency held that:

> [25] The Agency finds that, to exempt a carrier from liability for damage to baggage under Article 17(2) of the Convention, there must be a causal relationship between the damage and an inherent defect, quality or vice of the baggage. As Rule 55(C)(12) is not formulated in a manner that establishes this relationship, the Agency finds that Rule 55(C)(12) of the Tariff, as it relates to liability for damage to baggage, is not consistent with the Convention.

On the issue of delay, the Agency also agreed with the Applicant, and held that Rule 55 AC(C)(12) was inconsistent with Article 19 of the *Montreal Convention*. Finally, based on the previous three findings, the Agency held that by Article 26 of the Convention, Rule 55 AC(C)(12) was null and void (para. 37).

In *Lukács v. WestJet*, 477-C-A-2010, the Agency considered Rule 17(a)(1) of WestJet's international tariff (as it was then), which relieved WestJet from liability for loss, damage or delay of certain items that the carrier does not agree to carry, such as fragile and perishable articles, and valuables. The Agency held that:

> [36] In Decision No. 208-C-A-2009, Lukács v. Air Canada, the Agency determined that to exempt a carrier from liability for damage to baggage under Article 17(2) of the Convention, there must be a causal relationship between the damage and an inherent defect, quality or vice of the baggage.
>
> [37] In Order No. 2006-A-88, Charter Tariff CTA(A) No. 7-Kelowna Flightcraft Air Charter Ltd., the Agency agreed that it was reasonable for a carrier to limit its liability for damage resulting from the inherent defect, quality or vice of baggage. However, in order for such a limitation of liability to be reasonable, there must be a link between the damage of the baggage and its inherent defect, quality or vice.
>
> [38] As existing Rule 17(a)(1) is not formulated in a manner that establishes this relationship, the Agency finds that Rule 17(a)(1) of the Tariff, as it relates to liability for damage to certain types of articles in baggage, is not consistent with Article 17(2) of the Convention.
>
> [39] Considering that existing Rule 17(1)(a) of the Tariff is not consistent with or does not accurately reflect the Convention with respect to all three of the above components, the Agency finds that existing Rule 17(1)(a) of the Tariff relieves or tends to relieve WestJet from liability in a manner which is contrary to Articles 17(2) and 19 of the Convention.

The Agency concluded pursuant to Article 26 that Rule 17(1)(a) was null and void. WestJet's application to the Federal Court of Appeal for leave to appeal was dismissed (10-A-41).

In *Kipper v. WestJet*, 309-C-A-2010, the Agency extended the causal-relationship principle also to domestic carriage of baggage:

> In Decision No. 208-C-A-2009 (Gábor Lukács v. Air Canada), the Agency found that "[...] to exempt a carrier from liability for damage to baggage under Article 17(2) of the Convention, there must be a causal relationship between the damage and an inherent defect, quality or vice of the baggage." The Agency finds that this principle is equally applicable to the present matter [...]
>
> [Emphasis added.]

**(d) Application of the law to Rule 28(D)(4)**

***(i) Delay***

Under Article 19 of the *Montreal Convention*, a carrier can relieve itself from liability for delay of baggage only if it proves that it (and its servants and agents) took all measures that could reasonably be required to avoid the delay or that it was impossible to take such measures.

Rule 28(D)(4) purports to relieve United from liability for delay of baggage without any reference to the "all measures that could reasonably be required" test.

Thus, Rule 28(D)(4) is a provision tending to relieve United from liability laid down in Article 19 of the *Montreal Convention*, and as such, it is null and void pursuant to Article 26.

***(ii) Destruction, loss, or damage***

Article 17(2) of the *Montreal Convention* imposes a regime of strict liability upon carriers for damage to checked baggage that is "in the charge of the carrier." Checked baggage is submitted by a passenger to the charge of the carrier at the time of check-in, and by Article 3(3) of the *Montreal Convention*, the carrier has to deliver to the passenger a baggage identification tag for each piece of checked baggage. Checked baggage remains in the charge of a carrier until it is delivered to the person entitled to delivery (see Article 31(1) of the *Montreal Convention*).

Rule 28(D)(4) purports to exclude the time when baggage undergoes security inspection or measures not under the control and direction of United from the period when checked baggage is "in the charge of" United, and relieves United from liability for destruction, loss, or damage to the baggage during that time.

It is submitted that this interpretation of the phrase "in the charge of the carrier" is woefully misguided and is inconsistent with the intention of the drafters of the *Montreal Convention*, because it would make it impossible to enforce any liability under Article 17(2). Indeed, while passengers

can prove that the destruction, loss, or damage of their baggage occurred between the time they checked it in and the time they were supposed to receive it back, it is impossible to prove the exact time when the destruction, loss, or damage occurred.

Therefore, it is submitted that Rule 28(D)(4) is a provision tending to relieve United from liability laid down in Article 17(2) of the *Montreal Convention*, and as such, it is null and void pursuant to Article 26.

***(iii) Successive carriage***

Liability for baggage in the case of successive carriage is governed by Article 36(3) of the *Montreal Convention*. If United is one of the three carriers described in Article 36(3), then it is jointly and severally liable to passengers for destruction, loss, damage, or delay of their baggage, and the liability regime of Articles 17(2) and 19 apply to United. In particular, United can exclude liability for damage to baggage only if there is a causal relationship between the damage and an inherent defect, quality or vice of the baggage.

Rule 28(D)(4) purports to relieve United from liability in the case of successive carriage (presumably in relation to destruction, loss, damage, or delay) for "excluded items," that is, items that one of the carriers do no allow in checked baggage. Rule 28(D)(4) makes no reference to the inherent defect, quality or vice of the baggage.

Thus, Rule 28(D)(4) is a provision tending to relieve United from liability laid down in Articles 17(2) and 36(3) of the *Montreal Convention*, and as such, it is null and void pursuant to Article 26.

***(iv) Conclusion***

Since Rule 28(D)(4) is null and void pursuant to Article 26, it fails to be just and reasonable, contrary to s. 111(1) of the *ATR*.

## V. Is United's "Damaged items" webpage misleading?

United's "Damaged items" webpage contains the following statement:

> Damaged items should be reported to and viewed by the airport Baggage Service Office immediately after the arrival of your flight, but must be viewed by and reported in writing to United Airlines no later than four hours after flight arrival for flights within or between the United States, Guam, Puerto Rico and the U.S. Virgin Islands, and no later than seven days after arrival for all other international flights.
>
> [Emphasis added.]

While Article 31(2) of the *Montreal Convention* requires damage checked baggage to be reported within seven (7) days, this deadline applies only to giving a notice of the complaint—not to presenting evidence (such as photographs of the damage) to substantiate the complaint:

> **Article 31 - Timely notice of complaints**
>
> 2. 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 [...]

There is nothing in the *Montreal Convention* or United's Contract of Carriage to require passengers to return to the airport in order to report damage to their baggage and have the damage inspected by a baggage agent. The only requirement is that of providing a notice to the carrier.

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

There is no doubt that United is entitled to proof of damage before it settles a claim. However, United has to provide a reasonable and accessible method for passengers, other than visiting an airport, to report damaged items and provide proof of damage.

Therefore, it is submitted that United's "Damaged items" webpage is misleading about United's liability for baggage, contrary to s. 18(b) of the *ATR*.

**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.

Gábor Lukács
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

### Legislation

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2. *Carriage by Air Act*, R.S.C. 1985, c. C-26.
3. *Canada Transportation Act*, S.C. 1996, c. 10.
4. *Canadian Transportation Agency General Rules*, S.O.R./2005-35.

### International instruments

5. *Montreal Convention: Convention for the Unification of Certain Rules for International Carriage by Air* (Montreal, 28 May 1999).

### Case law

6. *Air France c. M. X...*, France, Cour de cassation, Chambre civile 1, 19 juin 2008, 07-16102. http://www.juricaf.org/arret/FRANCE-COURDECASSATION-20080619-0716102
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9. *Bleau c. IMP Group Ltd. (Canjet Airlines)*, 2011 QCCQ 11789.
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12. *Kipper v. WestJet*, Canadian Transportation Agency, 309-C-A-2010.
13. *Lukács v. United Airlines*, 2009 MBQB 29.
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17. *McCabe v. Air Canada*, Canadian Transportation Agency, 227-C-A-2008.

18. *Orsini c. Central Associatour inc. (Touristour)*, 2011 QCCQ 12576.

19. *Yalaoui c. Air Algérie*, 2012 QCCS 1393.

20. *Zaor c. Air Canada*, 2006 QCCQ 1796.