

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

– and –

**CANADIAN TRANSPORTATION AGENCY and
BRITISH AIRWAYS PLC**

Respondents

APPEAL BOOK

Dated: September 10, 2014

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Halifax, NS

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Appellant

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Court File No.:

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DR. GÁBOR LUKÁCS

Appellant

– and –

**CANADIAN TRANSPORTATION AGENCY and
BRITISH AIRWAYS PLC**

Respondents

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Federal Court of Appeal at a time and place to be fixed by the Judicial Administrator. Unless the court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard in **Halifax, Nova Scotia**.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the judgment appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the court and other necessary information may be obtained on request to the Administrator of this court at Ottawa (telephone 613-996-6795) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: August 11, 2014

Issued by: _____

Address of

local office: Federal Court of Appeal
1801 Hollis Street, Suite 1720
Halifax, Nova Scotia, B3J 3N4

TO: **CANADIAN TRANSPORTATION AGENCY**

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**Counsel for the Respondent,
British Airways Plc**

APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from:

1. a decision made by the Canadian Transportation Agency (the “Agency”) dated May 26, 2014 and bearing decision no. 201-C-A-2014 (the “Final Decision”); and if and to the extent necessary,
2. decisions made by the Agency dated April 16, 2014 and bearing decision no. LET-C-A-25-2014, and dated May 2, 2014 and bearing decision no. LET-C-A-29-2014 (the “Procedural Decisions”).

THE APPELLANT ASKS that:

1. the Final Decision be set aside, and the matter be returned to the Agency for redetermination based on the existing record, by a differently constituted panel, with the direction that the Agency is to establish a tariff rule governing denied boarding compensation on all flights of British Airways;
2. the Procedural Decisions be set aside to the extent that they direct the Appellant to delete portions of his submissions to the Agency;
3. the Appellant be awarded a moderate allowance for the time and effort he devoted to preparing and presenting his case, and reasonable out-of-pocket expenses incurred in relation to the appeal; and
4. this Honourable Court grant such further and other relief as is just.

THE GROUNDS OF APPEAL are as follows:

1. The Agency erred in law and rendered an unreasonable decision.
 - (i) The Final Decision is inconsistent with the requirements set out in subsection 122(c)(iii) of the *Air Transportation Regulations* (the “*ATR*”), because:
 - (a) pursuant to subsection 122(c)(iii) of the *ATR*, carriers must clearly state their policies with respect to denied boarding compensation in their tariffs, and thus the tariff must address denied boarding compensation for departing:
 - (1) from Canada to destinations abroad; and
 - (2) from abroad to Canada;
 - (b) the Final Decision imposes on British Airways a tariff rule that is confined to denied boarding compensation on flights from Canada to the European Union, but it is silent about all other flights, including flights from the European Union to Canada.
 - (ii) The Final Decision creates a legal loophole that undermines the ability of passengers bumped from British Airways flights departing from abroad to Canada to commence an action for denied boarding compensation in Canada.
2. The Agency breached its duty to observe procedural fairness by making Procedural Decisions that ordered the Moving Party to delete the vast majority of his submissions to the Agency.

Statutes and regulations relied on

3. Sections 108, 110, 111, 113, and 122 of the *Air Transportation Regulations*, S.O.R./88-58.
4. Sections 41, 55, and 86 of the *Canada Transportation Act*, S.C. 1996, c. 10.
5. Such further and other grounds as the Appellant may advise and the Honourable Court permits.

August 11, 2014

DR. GÁBOR LUKÁCS

Halifax, Nova Scotia

lukacs@AirPassengerRights.ca

Appellant



DECISION NO. 201-C-A-2014

May 26, 2014

RESPONSE BY British Airways Plc carrying on business as British Airways to the show cause direction set out in Decision No. 10-C-A-2014.

File No. M4120-3/14-00909

BACKGROUND

- [1] In Decision No. 10-C-A-2014, the Canadian Transportation Agency (Agency), among other matters, directed British Airways Plc carrying on business as British Airways (British Airways) to show cause why the Agency should not require British Airways, with respect to the denied boarding compensation tendered to passengers under Rule 87(B)(3)(B), International Passenger Rules and Fares Tariff No. BA-1, NTA(A) No. 306 (Tariff), to apply either:
1. The regime applicable in the United States of America;
 2. The regime proposed by Gábor Lukács in the proceedings related to Decision No. 342-C-A-2013 (*Lukács v. Air Canada*);
 3. The regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013 (*Azar v. Air Canada*); or
 4. Any other regime that British Airways may wish to propose that the Agency may consider to be reasonable within the meaning of subsection 111(1) of the *Air Transportation Regulations*, SOR/88-58, as amended.
- [2] The Decision provided Mr. Lukács with the opportunity to comment on British Airways' submission.
- [3] On March 17, 2014, British Airways filed its answer, which includes a Proposed Rule, and on March 26, 2014, Mr. Lukács filed his reply.

ISSUE

- [4] Does British Airways' Proposed Rule comply with the show cause direction set out in Decision No. 10-C-A-2014?

POSITIONS OF THE PARTIES**British Airways**

[5] British Airways proposes to apply the regime proposed by Air Canada set out in Decision No. 442-C-A-2013, which provides for compensation in cash or the equivalent of CAD\$400 for delays of zero to four hours, and CAD\$800 for delays in excess of four hours, for travel from Canada to the European Union.

[6] British Airways proposes to amend Rule 87(B)(3)(B) of the Tariff to read:

Amount of compensation payable for flights from Canada to the United Kingdom

- (I) Subject to the provisions of paragraph (B)(3)(A) of this Rule, carrier will tender liquidated damages for delay at arrival at point of destination caused by involuntary denied boarding cash or equivalent in the amount of CAD 400 for delay of 0 to 4 hours and in the amount of CAD 800 for delay over 4 hours.
- (II) Said tender will be made by carrier on the day and at the place where the failure occurs, and if accepted will be receipted for by the passenger. Provided, however, that when carrier arranges for the passenger's convenience, alternate means of transportation which departs prior to the time such tender can be made to the passenger, tender shall be made by mail or other means within 24 hours after the time the failure occurs.

Mr. Lukács

[7] Mr. Lukács submits that the Agency held in Decision No. 227-C-A-2013 (*Lukács v. WestJet*) that:

The failure to establish conditions governing denied boarding compensation for flights to and from Canada is contrary to Decision No. 666-C-A-2001. Therefore, the Agency finds that if Proposed Tariff Rule 110(E) were to be filed with the Agency, it would be considered unreasonable. [Emphasis added by Mr. Lukács]

[8] Mr. Lukács contends that British Airways' Proposed Rule fails to establish conditions governing denied boarding compensation for flights to Canada, and from Canada to points within the "European Community" that are outside the United Kingdom, and requires British Airways to pay denied boarding compensation only "for flights from Canada to the United Kingdom." (Emphasis added by Mr. Lukács).

[9] Mr. Lukács concludes that based on the principles set out in Decision No. 227-C-A-2013, the Proposed Rule is unreasonable.

ANALYSIS AND FINDINGS

- [10] British Airways' Proposed Rule provides that cash or equivalent in the amount of CAD\$400 for delay of zero to four hours, and CAD\$800 for delay over 4 hours will be tendered as compensation for denied boarding. The Agency finds that this is consistent with the compensation proposed by Air Canada during the proceedings relating to Decision No. 227-C-A-2013.
- [11] With respect to the carriage to which British Airways' Proposed Rule applies, the Agency notes that the application of the Proposed Rule is restricted to flights from Canada to the United Kingdom. This application is inconsistent with what Air Canada proposed during the proceedings relating to Decision No. 227-C-A-2013, which proposal applied to travel from Canada to the European Union. Given this inconsistency, the Agency finds that British Airways' Proposed Rule is unreasonable, and that, therefore, British Airways has failed to show cause in respect of this matter.

ORDER

- [12] In light of the foregoing, the Agency orders British Airways, by no later than June 9, 2014, to file with the Agency the Proposed Rule, with the application of that Proposed Rule being for travel from Canada to the European Union, as reflected in the proposal made by Air Canada during the proceedings related to Decision No. 442-C-A-2013.

(signed)

Sam Barone
Member

(signed)

Geoffrey C. Hare
Member

Halifax, NS

lukacs@AirPassengerRights.ca



May 8, 2014

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Attention: Mr. Mike Redmond, Chief, Tariff Investigation

Dear Madam Secretary:

Re: Dr. Gábor Lukács v. British Airways
British Airways' response to show cause order in Decision No. 10-C-A-2014
File No.: M4120-3/14-00909
Decision No. LET-C-A-29-2014 – Notice of Protest

I acknowledge the receipt of Decision No. LET-C-A-29-2014 of the Agency, an interlocutory decision that orders me to delete almost the entire contents of my comments on British Airways' submissions of March 17, 2014.

Out of respect to the Agency, I am hereby complying with Decision No. LET-C-A-29-2014, and refiling said reply as ordered; however, I am doing so under protest. Please be advised that I reserve my right to challenge Decision No. LET-C-A-29-2014 as part of an appeal from the final decision of the Agency in the present file.

Dr. Gábor Lukács
Applicant

Cc: Ms. Carol E. McCall, counsel for British Airways

March 26, 2014

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Attention: Mr. Mike Redmond, Chief, Tariff Investigation

Dear Madam Secretary:

Re: Dr. Gábor Lukács v. British Airways
Reply to British Airways' submissions dated March 17, 2014 relating to the
Agency's show cause order with respect to denied boarding compensation amounts

Please accept the following submissions as a reply, pursuant to Decision No. 10-C-A-2014 of the Agency, to British Airways' submissions dated March 17, 2014, relating to denied boarding compensation amounts.

BACKGROUND

1. On January 17, 2014, in Decision No. 10-C-A-2014, the Agency held that British Airways' International Tariff Rule Rule 87(B)(3)(B), as it relates to the denied boarding compensation provided to passengers, may be unreasonable within the meaning of subsection 111(1) of the *Air Transportation Regulations*.

Thus, the Agency issued a show cause order, providing British Airways with an opportunity to demonstrate why the Agency should not substitute Rule 87(B)(3)(B) with another regime for determining the amount of compensation payable to victims of denied boarding.

2. On March 17, 2014, British Airways proposed a new denied boarding compensation policy (the "Proposed Rule") to replace the Existing Rule 87(B)(3)(B). As explained below, British Airways incorrectly claimed that the Proposed Rule is the same as the regime set out in Decision No. 442-C-A-2013.

ISSUES

I. Failure to establish conditions governing denied boarding compensation for flights to Canada and flights from Canada to points outside the United Kingdom. 3

II. [Deleted pursuant to Decision No. LET-C-A-29-2014]. 3

III. [Deleted pursuant to Decision No. LET-C-A-29-2014]. 4

(a) [Deleted pursuant to Decision No. LET-C-A-29-2014]. 4

(b) [Deleted pursuant to Decision No. LET-C-A-29-2014]. 5

(i) [Deleted pursuant to Decision No. LET-C-A-29-2014]. 5

(ii) [Deleted pursuant to Decision No. LET-C-A-29-2014]. 5

(iii) [Deleted pursuant to Decision No. LET-C-A-29-2014]. 6

(c) [Deleted pursuant to Decision No. LET-C-A-29-2014]. 6

(i) [Deleted pursuant to Decision No. LET-C-A-29-2014]. 6

(ii) [Deleted pursuant to Decision No. LET-C-A-29-2014]. 8

(d) [Deleted pursuant to Decision No. LET-C-A-29-2014]. 9

IV. [Deleted pursuant to Decision No. LET-C-A-29-2014]. 10

(a) [Deleted pursuant to Decision No. LET-C-A-29-2014]. 10

(b) [Deleted pursuant to Decision No. LET-C-A-29-2014]. 11

EXHIBITS

A. [Deleted pursuant to Decision No. LET-C-A-29-2014]. 13

B. [Deleted pursuant to Decision No. LET-C-A-29-2014]. 14

C. [Deleted pursuant to Decision No. LET-C-A-29-2014]. 20

D. [Deleted pursuant to Decision No. LET-C-A-29-2014]. 24

E. [Deleted pursuant to Decision No. LET-C-A-29-2014]. 28

F. [Deleted pursuant to Decision No. LET-C-A-29-2014]. 31

ARGUMENT

I. Failure to establish conditions governing denied boarding compensation for flights to Canada and flights from Canada to points outside the United Kingdom

The Agency held in *Lukács v. WestJet*, 227-C-A-2013 (at para. 39) that:

The failure to establish conditions governing denied boarding compensation for flights to and from Canada is contrary to Decision No. 666-C-A-2001. Therefore, the Agency finds that if Proposed Tariff Rule 110(E) were to be filed with the Agency, it would be considered unreasonable.

[Emphasis added.]

The Proposed Rule fails to establish conditions governing denied boarding compensation for flights to Canada. The Proposed Rule also fails to establish conditions governing denied boarding compensation for flights from Canada to points within the European Community that are outside the United Kingdom. Indeed, the Proposed Rule requires British Airways to pay denied boarding compensation only “for flights from Canada to the United Kingdom” (emphasis added).

Therefore, based on the principles set out in Decision No. 227-C-A-2013, the Proposed Rule is unreasonable.

II. [Deleted pursuant to Decision No. LET-C-A-29-2014]

III. [Deleted pursuant to Decision No. LET-C-A-29-2014]

(a) [Deleted pursuant to Decision No. LET-C-A-29-2014]

(b) [Deleted pursuant to Decision No. LET-C-A-29-2014]

(i) [Deleted pursuant to Decision No. LET-C-A-29-2014]

(ii) [Deleted pursuant to Decision No. LET-C-A-29-2014]

(iii) [Deleted pursuant to Decision No. LET-C-A-29-2014]

(c) [Deleted pursuant to Decision No. LET-C-A-29-2014]

(i) [Deleted pursuant to Decision No. LET-C-A-29-2014]

Revised and refiled on May 8, 2014
pursuant to Decision No. LET-C-A-29-2014

UNDER PROTEST

March 26, 2014
Page 7 of 34

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(ii) **[Deleted pursuant to Decision No. LET-C-A-29-2014]**

(d) **[Deleted pursuant to Decision No. LET-C-A-29-2014]**

IV. [Deleted pursuant to Decision No. LET-C-A-29-2014]

(a) [Deleted pursuant to Decision No. LET-C-A-29-2014]

(b) **[Deleted pursuant to Decision No. LET-C-A-29-2014]**

All of which is most respectfully submitted.

Dr. Gábor Lukács
Applicant

Cc: Ms. Carol E. McCall, counsel for British Airways

LIST OF AUTHORITIES

Legislation

1. *Air Transportation Regulations*, S.O.R./88-58.
2. *Canada Transportation Act*, S.C. 1996, c. 10.
3. *Carriage by Air Act*, R.S.C. 1985, c. C-26.

International instruments

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

Case law

5. *Air Canada v. Canadian Transportation Agency*, 2009 FCA 95.
6. *Anderson v. Air Canada*, Canadian Transportation Agency, 666-C-A-2001.
7. *Dr. Azar v. Air Canada*, Canadian Transportation Agency, 442-C-A-2013.
8. *Griffiths v. Air Canada*, Canadian Transportation Agency, 287-C-A-2009.
9. *Lukács v. Air Canada*, Canadian Transportation Agency, 291-C-A-2011.
10. *Lukács v. Air Canada*, Canadian Transportation Agency, 250-C-A-2012.
11. *Lukács v. Air Canada*, Canadian Transportation Agency, 251-C-A-2012.
12. *Lukács v. Air Canada*, Canadian Transportation Agency, 204-C-A-2013.
13. *Lukács v. WestJet*, Canadian Transportation Agency, 313-C-A-2010.
14. *Lukács v. WestJet*, Canadian Transportation Agency, 483-C-A-2010.
15. *Lukács v. WestJet*, Federal Court of Appeal, 10-A-42.
16. *Lukács v. WestJet*, Canadian Transportation Agency, 227-C-A-2013.
17. *Lukács v. Porter Airlines*, Canadian Transportation Agency, 344-C-A-2013.

This exhibit was deleted pursuant to
Decision No. LET-C-A-29-2014

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Decision No. LET-C-A-29-2014

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Decision No. LET-C-A-29-2014

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Decision No. LET-C-A-29-2014



May 2, 2014

File No. M4120-3/14-00909

BY E-MAIL: lukacs@AirPassengerRights.ca

Gábor Lukács

Halifax, Nova Scotia

Dear Sir,

Re: Motion regarding Decision No. LET-C-A-25-2014

This refers to your motion dated April 23, 2014, filed pursuant to section 32 of the *Canadian Transportation Agency General Rules*, requesting certain relief respecting Decision No. LET-C-A-25-2014 dated April 16, 2014.

In Decision No. LET-C-A-25-2014, the Canadian Transportation Agency (Agency) ordered you, in part, to refile your reply dated March 26, 2014, relating to the answer dated March 17, 2014 filed by British Airways Plc carrying on business as British Airways (British Airways) respecting Decision No. 10-C-A-2014 dated January 17, 2014, “with all submissions that are unrelated to the specific matter of the denied boarding compensation regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013 deleted.” In your motion, you request the Agency to reconsider Decision No. LET-C-A-25-2014, and rescind the order to delete portions of your reply, or alternatively, to clarify the Decision by confirming that you are required to delete only section IV of that reply.

Submissions

In support of your motion, you submit that the process relating to Decision No. LET-C-A-25-2014, in failing to provide you with the opportunity to make submissions regarding the portions of your reply that ought to be deleted, deprived you of your right to be heard. You maintain that you were entitled to file comments respecting British Airways’ answer to Decision No. LET-C-A-25-2014 in accordance with the principle of *audi alteram partem* and Decision No. 10-C-A-2014. You submit that your reply “falls squarely” within the scope of comments on British Airways’ answer, and responds directly to that answer, with the possible exception of section IV, in the following manner:

1. You were entitled to comment on British Airways’ choice of a denied boarding compensation regime, and properly exercised this right by making the submission that such choice was unreasonable for the reasons specified in your reply;

2. You were entitled to comment on the specific tariff wording proposed in British Airways' answer, and did so by objecting to that wording for the reasons specified in your reply;
3. Because you found both British Airways' choice of regime and proposed tariff wording to be unreasonable, you proceeded to propose an alternative denied boarding compensation regime as a means of also providing constructive comments.

You also submit that Decision No. LET-C-A-25-2014 is unclear and vague in that it does not explicitly identify the portions of your reply that the Agency ordered to be deleted.

Analysis

With respect to your submission that, as a right, you should have been provided with the opportunity to comment before the Agency issued Decision No. LET-C-A-25-2104, the Agency notes that the principle of *audi alteram partem* does not provide a party, who already has had the opportunity to make submissions on what is at issue, with the right to preview a decision that a decision-maker is about to make. In that sense, as is the case with any other decision-maker, the Agency is not obligated, once a party has had the opportunity to make submissions, to provide prior notice to a party before rendering a decision.

With regard to your right to make submissions on British Airways' answer to Decision No. LET-C-A-25-2014, and your assertion that your reply responds directly to that answer, British Airways proposed to adopt the denied boarding compensation regime proposed by Air Canada during the proceedings relating to Decision No. 442-C-A-2013. Air Canada's proposal provided for compensation of CAD\$400 for a delay of less than four hours, and CAD\$800, for delays in excess of four hours, for carriage from Canada to the European Union. Your reply should have been confined to that answer, yet as noted in Decision No. LET-C-A-25-2014, you elected to make submissions regarding carriage from the European Union to Canada, the denied boarding compensation regimes applied by Deutsche Lufthansa Aktiengesellschaft and Société Air France carrying on business as Air France, the U.S. regime, and a regime that you proposed that features higher levels of compensation prompted by a change in Canadian dollar – euro exchange rate since Air Canada advanced the aforementioned proposal. Your reply, therefore, exceeded the scope of British Airways' proposed adoption of the regime proposed by Air Canada's proposal during the proceedings respecting Decision No. 442-C-A-2013, and effectively, represented rearguments of determinations previously made by the Agency.

With respect to your submission that the Agency's order in Decision No. LET-C-A-25-2014 to delete certain text is unclear and vague, the Agency clearly stated in that Decision that you must delete all of the submissions in your reply that are "unrelated to the specific matter of the denied boarding compensation regime proposed by Air Canada during the course of proceedings related to Decision No. 442-C-A-2013." As noted above, Air Canada's proposal sets out specific amounts of compensation, and applied to carriage from Canada to the European Union.

The Agency finds that the only portion of your reply that is relevant to British Airways' answer is that respecting British Airways not establishing conditions for denied boarding compensation for flights from Canada beyond the United Kingdom (on page 3 of your reply, under Argument 1. Failure to establish conditions governing denied boarding compensation for flights to Canada and flights from Canada to points beyond the United Kingdom), and that the remainder of the reply should be deleted.

Your revised reply, with the appropriate deletions, must be filed with the Agency by no later than May 9, 2014.

BY THE AGENCY:

(signed)

Sam Barone
Member

(signed)

Geoffrey C. Hare
Member

c.c. British Airways
c/o Carol E. McCall
E-mail: cmccall@pmlaw.com

Halifax, NS

lukacs@AirPassengerRights.ca

April 23, 2014

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Attention: Mr. Mike Redmond, Chief, Tariff Investigation

Dear Madam Secretary:

Re: Dr. Gábor Lukács v. British Airways
British Airways' response to show cause order in Decision No. 10-C-A-2014
File No.: M4120-3/14-00909
Motion to reconsider Decision No. LET-C-A-25-2014

Please accept the following submissions as a motion, pursuant to section 32 of the Agency's *General Rules*, to reconsider Decision No. LET-C-A-25-2014 in part, with respect to the order requiring the Applicant to delete certain, albeit not explicitly identified, submissions from his March 26, 2014 reply.

PROCEDURAL HISTORY

1. On January 17, 2014, in Decision No. 10-C-A-2014, the Agency held that British Airways' International Tariff Rule Rule 87(B)(3)(B), as it relates to the denied boarding compensation provided to passengers, may be unreasonable within the meaning of subsection 111(1) of the *Air Transportation Regulations*.

Thus, the Agency issued a show cause order, providing British Airways with an opportunity to demonstrate why the Agency should not substitute Rule 87(B)(3)(B) with another regime for determining the amount of compensation payable to victims of denied boarding.

2. On January 21, 2014, the Agency issued an Erratum to Decision No. 10-C-A-2014, directing British Airways to serve on the Applicant its response to the show cause order, and allowed the Applicant 10 days "to file comments" (emphasis added).

3. On March 17, 2014, British Airways filed its response to the show cause order. The response consisted of two separate statements on two different pages of the same document:
 - (a) On page 1, British Airways stated that “British Airways proposes to apply the regime proposed by Air Canada as set out in Decision No.442-C-A-2014.” [sic]
 - (b) On page 2, British Airways proposed a tariff wording purporting to implement the aforementioned regime.
4. On March 26, 2014, the Applicant filed a reply with respect to British Airways’ submissions in which the Applicant submitted that:
 - (a) the tariff wording proposed on page 2 of British Airways’ March 17, 2014 submissions does not reflect the regime proposed by Air Canada, as set out in Decision No. 442-C-A-2014, and the wording is inconsistent with the obligation to provide denied boarding compensation on all flights to and from Canada;
 - (b) the regime proposed by Air Canada, as set out in Decision No. 442-C-A-2014, is not reasonable in the case of British Airways, because British Airways’ statutory and commercial obligations and environment substantially differ from Air Canada’s;
 - (c) there have been significant material changes since the proposal set out in Decision No. 442-C-A-2014 was put forward, and thus it would be unreasonable for British Airways to apply that regime.
5. On March 28, 2014, British Airways made additional submissions to the Agency, even though Decision No. 10-C-A-2014 did not invite such additional submissions.
6. On April 1, 2014, the Applicant asked the Agency to be allowed to respond to British Airways’ March 28, 2014 submissions.
7. On April 16, 2014, in Decision No. LET-C-A-25-2014, the Agency ordered that:
 - (a) British Airways’ additional submissions dated March 28, 2014 and the Applicant submissions of April 1, 2014 will not form part of the record; and
 - (b) the Applicant is to refile his reply of March 26, 2014 “with all submissions that are unrelated to the specific matter of the denied boarding compensation regime proposed by Air Canada during the course of proceedings related to Decision No. 442-C-A-2013 deleted.”
8. In the present motion, the Applicant is asking the Agency to reconsider part (b) of the aforementioned order contained in Decision No. LET-C-A-25-2014.

ARGUMENT

I. Lack of procedural fairness in making Decision No. LET-C-A-25-2014

In Decision No. LET-C-A-25-2014, the Agency effectively struck out certain, albeit not explicitly identified, portions of the Applicant's reply dated March 26, 2014. The Agency did so on its own motion; British Airways did not ask the Agency to strike out portions of the Applicant's reply.

The Agency gave no notice to the Applicant of its intention to strike out certain portions of the reply, and thus the Applicant had no opportunity to make submissions to the Agency concerning why portions of his reply ought not be struck out.

Therefore, it is submitted that the process in which Decision No. LET-C-A-25-2014 was made denied the Applicant his right to be heard.

II. Decision No. LET-C-A-25-2014 deprives the Applicant of his right to make submissions

The principle of *audi alteram partem* requires tribunals to allow both parties to a dispute to make submissions and lead evidence; without these two, a party cannot meaningfully participate in a proceeding. Depriving a party of the right to be heard, that is, to make submissions and lead evidence, amounts to denial of natural justice.

In the present case, the Applicant was entitled to "file comments" with respect to British Airways' response to the show cause order both pursuant to the principle of *audi alteram partem* and in accordance with Decision No. 10-C-A-2014 of the Agency.

As explained below, the Applicant's March 26, 2014 reply falls squarely within the scope of "comments" on British Airways' submissions that the Agency invited in Decision No. 10-C-A-2014; furthermore, with the possible exception of section IV, it does directly respond to British Airways' submissions:

1. British Airways proposed to apply the regime that was proposed by Air Canada during the proceeding leading to Decision No. 442-C-A-2013.

Consequently, the Applicant was entitled to comment on this choice of British Airways. The Applicant did properly exercise his right to comment on this choice of British Airways by making the submission that this choice was unreasonable for British Airways because:

- (a) British Airways' statutory and commercial obligations and environment substantially differ from Air Canada's (section III(b) of the Applicant's reply).
- (b) There have been significant material changes since the proposal set out in Decision No. 442-C-A-2014 was put forward, and these material changes render the regime in question unreasonable in the case of British Airways (section III(c) of the Applicant's reply).

It is impossible to address British Airways' statutory and commercial obligations and environment without mentioning British Airways' competitors, such as Lufthansa and Air France, and the compensation regimes adopted by these competitors.

Similarly, it is impossible to address the material changes that have occurred since the proposal set out in Decision No. 442-C-A-2014 was put forward without mentioning the compensation regime that most major Canadian airlines have adopted, which happens to be the US compensation regime, and the drastic changes in the exchange rates.

2. British Airways did not simply propose to adopt the regime of Air Canada, but also proposed specific tariff wording purporting to implement Air Canada's regime (page 2 of British Airways' March 17, 2014 submissions).

Consequently, the Applicant was entitled to comment on the specific tariff wording proposed by British Airways; and indeed, the Applicant did so, by objecting to the tariff wording proposed by British Airways on the grounds that:

- (a) British Airways' proposed wording does not adequately implement the regime proposed by Air Canada as set out in Decision No. 442-C-A-2013 (section II of the Applicant's reply).
 - (b) British Airways' proposed wording is inconsistent with the obligation (found in subsection 122(c)(iii) of the *Air Transportation Regulations*) to establish denied boarding compensation for flights both from and to Canada (section I of the Applicant's reply).
3. Given that the Applicant submits that both British Airways' choice of regime and proposed tariff wording are unreasonable, the Applicant went on to propose an alternative denied boarding compensation regime as a way of also providing constructive comments (section IV of the Applicant's reply).

While this portion of the Applicant's reply may go beyond a traditional reply, it must be remembered that the Agency invited "comments" from the Applicant and not simply a "reply" in Decision No. 10-C-A-2014. Thus, it is submitted that these submissions were also appropriate.

Therefore, all submissions found in sections I, II, and III of the Applicant's reply directly address either the regime proposed by British Airways or the actual tariff wording proposed by British Airways. Hence, the Applicant submits that deleting any portion of sections I, II, or III of his March 26, 2014 reply would deprive the Applicant of the opportunity to make a meaningful reply to British Airways' response to the show cause order, and would amount to denial of the Applicant's most fundamental procedural rights.

With respect to section IV of the reply, the Applicant submits that it falls within the reasonable limits of "comments" that were invited by the Agency, and that Decision No. 10-C-A-2014 created the legitimate expectation that such comments would be accepted by the Agency.

III. Decision No. LET-C-A-25-2014 is unclear and vague

The Applicant is struggling to understand what portions of sections I, II, and III of his March 26, 2014 reply are unrelated, in the Agency's opinion, to the March 17, 2014 response of British Airways. Indeed, as noted earlier, the Applicant sincerely believes that all his submissions in sections I, II, and III of his reply are directly related and respond to either the regime proposed by British Airways or the actual tariff wording proposed by British Airways.

Thus, the Applicant submits that Decision No. LET-C-A-25-2014 is unclear and vague in that it does not explicitly identify the portions of the Applicant's reply the Agency orders to have struck.

Therefore, the Applicant submits that although he can make a good faith effort to comply with the decision by deleting section IV of his reply, it is unclear whether this is what the Agency expects him to do.

IV. Relief sought

The Applicant is respectfully asking the Agency to reconsider its Decision No. LET-C-A-25-2014 in part, and rescind the order requiring the Applicant to delete portions from his reply.

In the alternative, the Applicant is asking the Agency to clarify Decision No. LET-C-A-25-2014 by confirming that the Applicant is required to delete only section IV of his reply.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Applicant

Cc: Ms. Carol E. McCall, counsel for British Airways



April 16, 2014

File No. M4120-3/14-00909

BY E-MAIL: cmccall@pmlaw.com

BY E-MAIL: lukacs@AirPassengerRights.ca

British Airways
c/o Paterson MacDougall Law
Barristers and Solicitors
1 Queen Street East Suite 900
Toronto, Ontario
M5C 2W5

Gábor Lukács

Halifax, Nova Scotia

Attention: Carol McCall

Dear Madam/Sir,

Re: British Airways' response to show cause order in Decision No. 10-C-A-2014

BACKGROUND

In Decision No. 10-C-A-2014 (*Lukács v. British Airways*) dated January 17, 2014, the Canadian Transportation Agency (Agency), among other matters, provided British Airways with the opportunity to show cause why the Agency should not require British Airways to tender denied boarding compensation using:

1. The regime applicable in the United States of America;
2. The regime proposed by Gábor Lukács in the proceedings related to Decision No. 342-C-A-2013;
3. The regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013 (*Azar v. Air Canada*); or
4. Any other regime that British Airways may wish to propose that the Agency may consider to be reasonable within the meaning of subsection 111(1) of the *Air Transportation Regulations* (ATR).

Mr. Lukács was also provided with an opportunity to reply to British Airways' submission.

In its response dated March 17, 2014, British Airways proposes to apply the same regime as that proposed by Air Canada in the course of the proceedings associated with Decision No. 442-C-A-2013, and British Airways provided a tariff amendment applicable to carriage from Canada to the United Kingdom.

Mr. Lukács, in his reply dated March 26, 2014, challenges British Airways' proposal, and puts forward alternative denied boarding compensation amounts.

British Airways subsequently filed an additional submission dated March 28, 2014, addressing Mr. Lukács' reply.

Mr. Lukács then filed a further submission dated April 1, 2014. He maintains that Decision No. 10-C-A-2014 did not provide British Airways with the right to reply to his submission, and requests that he be allowed to respond to British Airways' additional submission.

ISSUE

Should the Agency accept the portions of Mr. Lukács' reply that do not respond directly to the response of British Airways and the subsequent submissions dated March 28 and April 1, 2014 filed by British Airways and Mr. Lukács.

SUBMISSIONS

Mr. Lukács' reply dated March 26, 2014

Mr. Lukács submits that British Airways' proposed tariff provision is unreasonable because it fails to establish conditions governing flights to Canada, and from Canada to points within the European Union. He asserts that given that Air Canada had already incorporated into its tariff the European regulations governing denied boarding compensation, the issue addressed in Decision No. 442-C-A-2013 was not the compensation tendered by Air Canada for flights departing from the European Union, but the compensation offered for flights from Canada to the European Union. Mr. Lukács maintains that the purpose of Decision No. 442-C-A-2013 was not to relieve Air Canada from the obligation to tender denied boarding compensation for flights to Canada, as British Airways' proposed provision implicitly purports to do.

Mr. Lukács argues that British Airways' main competitors in the Canada – European Union market are Lufthansa and Air France, not Air Canada. He opines that if British Airways were permitted to adopt Air Canada's denied boarding compensation regime, British Airways would enjoy a competitive advantage relative to Lufthansa and Air France, which both provide denied boarding compensation of 300 or 600 euros, depending on the length of delay.

Mr. Lukács submits that given a change in the exchange rate between the Canadian dollar and euro since Air Canada's proposal was advanced during the proceedings relating to Decision No. 442-C-A-2013, the regime proposed by British Airways entails levels of compensation that are 11 percent lower than Deutsche Lufthansa Aktiengesellschaft (Lufthansa German Airlines) and Société Air France carrying on business as Air France, and the European Union, in general. He adds that as the evidence on file indicates that British Airways' practice has been to tender compensation in amounts equivalent to 300 or 600 euros, depending on the length of delay, for carriage from the United Kingdom to Canada, it would seem reasonable to require that British Airways compensate passengers who are denied boarding for flights from the European Union to Canada 300 euros for delays of less than 4 hours, and 600 euros for delays exceeding four hours, or the equivalent amounts in British pound sterling or local currency.

With respect to carriage from Canada to the European Union, Mr. Lukács contends that the most logical and simple regime would be one that is symmetric to that applied to travel from the European Union to Canada. He submits that should the Agency determine that denied boarding compensation be tendered in Canadian dollars, it is proposed that the amounts be \$450 for delays of less than 4 hours, and \$900 for delays of more than 4 hours.

Mr. Lukács suggests that, alternatively, in view of WestJet, Sunwing Airlines Inc. and Porter Airlines Inc.'s recent adoption of the denied boarding compensation regime in place in the United States, it may be appropriate to require British Airways to apply that regime.

British Airways' additional submission dated March 28, 2014

British Airways submits that in Decision No. 10-C-A-2014, the Agency decided that it would not require British Airways to incorporate by reference the European regulations relating to denied boarding compensation. British Airways argues that in his submission respecting British Airways' proposed denied boarding compensation regime, Mr. Lukács is attempting to accomplish the same result that he sought during proceedings relating to the Decision.

Mr. Lukács' submission dated April 1, 2014

Mr. Lukács maintains that Decision No. 10-C-A-2014 did not provide British Airways with the right to respond to his reply. He indicates that, normally, he would request that British Airways' response be struck; however, in this case, given the "gross" misstatements by British Airways respecting Decision No. 10-C-A-2014, he is seeking permission to reply to that response.

ANALYSIS

In Decision No. 10-C-A-2014, the Agency provided British Airways with an opportunity to choose from among four options the denied boarding compensation regime that British Airways wishes to apply. In its response, British Airways advises that it proposes to apply the regime proposed by Air Canada during the proceedings respecting Decision No. 442-C-A-2013, and filed a tariff amendment in that regard.

Mr. Lukács' reply dated March 26, 2014 not only addresses British Airways' proposal, but also includes submissions regarding carriage from the European Union to Canada, the denied boarding compensation regimes applied by Lufthansa and Air France, the U.S. regime, and a regime that he proposes that features higher levels of compensation prompted by a change in Canadian dollar – euro exchange rate since Air Canada advanced the aforementioned proposal.

The Agency, in its Decision provided Mr. Lukács with an opportunity to reply to British Airways' response. Mr. Lukács was not granted an opportunity to raise additional arguments unrelated to those raised by British Airways in its response. The Agency finds that parts of Mr. Lukács' reply submissions are unrelated to the specific matter of the denied boarding compensation regime proposed by Air Canada during the course of proceedings related to Decision No. 442-C-A-2013, and therefore will not accept those unrelated reply submissions. The Agency directs Mr. Lukács, by the close of business on April 23, 2014, to refile his reply dated March 26, 2014 with all submissions that are unrelated to the specific matter of the denied boarding compensation regime proposed by Air Canada during the course of proceedings related to Decision No. 442-C-A-2013 deleted.

British Airways' additional submission dated March 28, 2014, and the subsequent April 1, 2014 submission filed by Mr. Lukács will not form part of the record.

Should you have any questions, you may contact Mike Redmond by facsimile at 819-953-7910, or by e-mail at mike.redmond@otc-cta.gc.ca.

BY THE AGENCY:

(signed)

Sam Barone
Member

(signed)

Geoffrey C. Hare
Member

Halifax, NS

lukacs@AirPassengerRights.ca

April 1, 2014

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Attention: Mr. Mike Redmond, Chief, Tariff Investigation

Dear Madam Secretary:

Re: Dr. Gábor Lukács v. British Airways
British Airways' post-pleading submissions dated March 28, 2014

I am writing concerning British Airways' March 28, 2014 submissions, which were filed after the closing of pleadings relating to the show cause order. Decision No. 10-C-A-2014 of the Agency did not provide British Airways with the right to file a reply, and thus pleadings closed after the comments of the Applicant:

[145] British Airways' response to the show cause direction must also be served on Mr. Lukács, who will have 10 days from receipt of that response to file comments, if any, with a copy to British Airways.

Normally the appropriate remedy would be striking out British Airways' post-pleading submissions as per the Agency's *Requests for Additional Filings after the Close of Pleadings* practice.

In the present case, however, the Applicant is asking instead to be allowed to make submissions in response to British Airways' March 28, 2014 submissions, because British Airways grossly misstates Decision No. 10-C-A-2014.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Applicant

Cc: Ms. Carol E. McCall, counsel for British Airways



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March 28, 2014

Via E-mail: [mike.redmond @otc-cta.gc.ca](mailto:mike.redmond@otc-cta.gc.ca)

Canadian Transportation Agency
Ottawa, Ontario
K1A 0N9

Attention: Mike Redmond, Chief, Tariff Investigations

Dear Sirs/Mesdames:

**RE: Decision No. 10 –C-A-2014
Dr. Gabor Lukacs v. British Airways Plc
British Airways Plc. Reply to the Response filed
by Dr. Lukacs to British Airways Plc. Submissions
on Denied Boarding Compensation in answer to
the Show Cause order of the Agency**

On behalf of British Airways Plc. (British Airways), we are replying to the submissions in response filed by Dr. Lukacs by letter dated March 26, 2014. British Airways was provided with the opportunity to show cause why the Agency should not require British Airways, with respect to the denied boarding compensation tendered to passengers under Rule 87(B)(3)(B), apply either:

1. The regime applicable in the United States of America,
2. The regime proposed by the complainant as set out in Decision No. 342-C-A- 2013,
3. The regime proposed by Air Canada as set out in Decision No. 442-C-A-2013, or
4. Any other regime that British Airways may propose that the Agency may consider to be reasonable.

British Airways responded and proposed to apply the regime proposed by Air Canada as set out in Decision No.442-C-A-2014.

Proposed denied boarding compensation amounts for travel from Canada to the European Union	
Delay at arrival caused by involuntary denied boarding	Cash or equivalent
0-4 hours	CAD 400
Over 4 hours	CAD 800

In **Issue 8** of *Decision No.10-C-A-2014*, paragraphs numbered 95 to 113, the Agency dealt with the issue of whether British Airways was required to incorporate the provisions of Regulation (EC) No. 261/2004 into the British Airways' Canadian Tariff or to make any reference to that Regulation. The Agency decided, for the reasons set out in its decision, that it would not require British Airways to do so. Dr. Lukacs is seeking to accomplish the same result that he sought in his submissions that resulted in the initial Decision. Regulation (EC) No. 261/2004 provides denied boarding compensation for passengers departing from the United Kingdom to Canada. Because there is a regulatory scheme clearly applicable and with which British Airways complies, it is not necessary to have a contractual provision in the Canadian Tariffs of air carriers governed by Regulation (EC) No. 261/2004. In the event that the European regulations were repealed, the applicable British Airways Tariff Rule 87(B)(3)(B) could be changed at that time to add the words "to and" to the words "from Canada" in order to provide the same amount of denied boarding compensation to passengers carried in either direction.

Respectfully submitted,



Carol E. McCall

Solicitor for British Airways Plc

c.c Dr. Gabor Lukacs: email to Lukacs@AirPassengerRights.ca

Halifax, NS

lukacs@AirPassengerRights.ca

March 26, 2014

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Attention: Mr. Mike Redmond, Chief, Tariff Investigation

Dear Madam Secretary:

Re: Dr. Gábor Lukács v. British Airways
Reply to British Airways' submissions dated March 17, 2014 relating to the
Agency's show cause order with respect to denied boarding compensation amounts

Please accept the following submissions as a reply, pursuant to Decision No. 10-C-A-2014 of the Agency, to British Airways' submissions dated March 17, 2014, relating to denied boarding compensation amounts.

BACKGROUND

1. On January 17, 2014, in Decision No. 10-C-A-2014, the Agency held that British Airways' International Tariff Rule Rule 87(B)(3)(B), as it relates to the denied boarding compensation provided to passengers, may be unreasonable within the meaning of subsection 111(1) of the *Air Transportation Regulations*.

Thus, the Agency issued a show cause order, providing British Airways with an opportunity to demonstrate why the Agency should not substitute Rule 87(B)(3)(B) with another regime for determining the amount of compensation payable to victims of denied boarding.

2. On March 17, 2014, British Airways proposed a new denied boarding compensation policy (the "Proposed Rule") to replace the Existing Rule 87(B)(3)(B). As explained below, British Airways incorrectly claimed that the Proposed Rule is the same as the regime set out in Decision No. 442-C-A-2013.

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ARGUMENT

I. Failure to establish conditions governing denied boarding compensation for flights to Canada and flights from Canada to points outside the United Kingdom

The Agency held in *Lukács v. WestJet*, 227-C-A-2013 (at para. 39) that:

The failure to establish conditions governing denied boarding compensation for flights to and from Canada is contrary to Decision No. 666-C-A-2001. Therefore, the Agency finds that if Proposed Tariff Rule 110(E) were to be filed with the Agency, it would be considered unreasonable.

[Emphasis added.]

The Proposed Rule fails to establish conditions governing denied boarding compensation for flights to Canada. The Proposed Rule also fails to establish conditions governing denied boarding compensation for flights from Canada to points within the European Community that are outside the United Kingdom. Indeed, the Proposed Rule requires British Airways to pay denied boarding compensation only “for flights from Canada to the United Kingdom” (emphasis added).

Therefore, based on the principles set out in Decision No. 227-C-A-2013, the Proposed Rule is unreasonable.

II. Substantial difference compared to Air Canada’s denied boarding compensation policy and Decision No. 442-C-A-2013

Air Canada’s International Tariff Rule 90(A) incorporates by reference *Regulation (EC) 261/2004* as the rule governing the amount of denied boarding compensation tendered with respect to flights departing from the European Union and Switzerland to Canada (see Exhibit “A”). Consequently, Air Canada’s denied boarding compensation policy with respect to flights departing from the European Union to Canada was not an issue in Decision No. 442-C-A-2013.

Since Air Canada already had in place a reasonable policy with respect to flights departing from the European Community to Canada, the purpose and scope of Air Canada’s proposal in Decision No. 442-C-A-2013 was to address the rights of passengers on flights in the other direction, from Canada to the European Community. Its purpose was not to exempt Air Canada from the obligation to pay denied boarding compensation on flights to Canada, as British Airways’ Proposed Rule purports to do implicitly.

Thus, the Proposed Rule substantially differs from the purpose and scope of Air Canada’s proposal in Decision No. 442-C-A-2013.

III. Unreasonableness with respect to flights from Canada to the United Kingdom

(a) Applicable legal principles: no presumption of reasonableness

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.

Since neither the *Canada Transportation Act* (the “*CTA*”) nor the *Air Transportation Regulations* (the “*ATR*”) define the meaning of the phrase “unreasonable,” a term appearing both in s. 67.2(1) of the *CTA* and in s. 111(1) of the *ATR*, the Agency defined it in *Anderson v. Air Canada*, 666-C-A-2001, as follows:

The Agency is, therefore, of the opinion that, in order to determine whether a term or condition of carriage applied by a domestic carrier is “unreasonable” within the meaning of subsection 67.2(1) of the *CTA*, a balance must be struck between the rights of the passengers to be subject to reasonable terms and conditions of carriage, and the particular air carrier’s statutory, commercial and operational obligations.

The balancing test was strongly endorsed by the Federal Court of Appeal in *Air Canada v. Canadian Transportation Agency*, 2009 FCA 95. Application of the balancing test requires thorough analysis of the airline’s statutory, commercial, and operational obligations, as the Agency did, for example, in *Lukács v. Air Canada*, 250-C-A-2012 (paras. 66-89).

A key element of the balancing test is that tariffs are not presumed to be reasonable, because tariffs are established by airlines unilaterally, and not through free contractual negotiations with passengers. In *Griffiths v. Air Canada*, 287-C-A-2009, the Agency underscored this crucial element of the balancing test:

[25] The terms and conditions of carriage are set by an air carrier unilaterally without any input from future passengers. The air carrier sets its terms and conditions of carriage on the basis of its own interests, which may have their basis in statutory or purely commercial requirements. There is no presumption that a tariff is reasonable. Therefore, a mere declaration or submission by the carrier that a term or condition of carriage is preferable is not sufficient to lead to a determination that the term or condition of carriage is reasonable.

[Emphasis added.]

Since tariffs are not presumed to be reasonable, the failure of an airline to lead evidence to substantiate that amending its tariff would have negative financial consequences for the airline, or would

otherwise affect the airline's ability to meet its statutory, commercial, and operational obligations, will lead to a finding that the tariff or tariff provision is unreasonable (see, for example, *Lukács v. WestJet*, 313-C-A-2010, paras. 37-38).

The Agency applied these principles in *Lukács v. WestJet*, 483-C-A-2010 (leave to appeal denied by the Federal Court of Appeal; 10-A-42) and *Lukács v. Air Canada*, 291-C-A-2011, and more recently in *Lukács v. Air Canada*, 251-C-A-2012, *Lukács v. Air Canada*, 204-C-A-2013, *Lukács v. WestJet*, 227-C-A-2013, and *Lukács v. Porter Airlines*, 344-C-A-2013.

(b) British Airways' main competitors and their denied boarding compensation policies

(i) No submissions or evidence tendered by British Airways

British Airways has been fully aware of the Applicant's position that Air Canada is not British Airways' main competitor (para. 104 of Decision No. 10-C-A-2014). Nevertheless, British Airways has chosen to make no submissions nor to tender any evidence that would address the question of which airlines are British Airways' main competitors.

In particular, the record contains no evidence to support a finding that Air Canada is British Airways' main competitor.

(ii) British Airways admitted that it was a "European 'community carrier'"

In its February 27, 2014 submissions to the Agency, British Airways admitted that:

As you are aware, as a European 'community carrier', British Airways is required to comply with (EC) No. 261/2004 which in Articles 3, 4 and 7 deals with flights operated by community carriers departing from airports in Canada for airports in the UK.

Thus, British Airways' main competitors are other airlines who fall in the same category of "European 'community carrier'" and which are subject to the same regulatory constraints as British Airways.

The Applicant submits that comparing British Airways to Air Canada, which is not a European 'community carrier' and thus is not subject to the same regulatory constraints, would be unreasonable. Furthermore, doing so would provide British Airways with an unfair competitive advantage over its main competitors.

Therefore, it is submitted that British Airways' main competitors are large airlines that fall within the definition of a European 'community carrier,' such as Lufthansa and Air France.

(iii) British Airways ought not be given an unfair competitive advantage

British Airways' main competitors, Lufthansa and Air France, provide denied boarding compensation in the amount of 300.00 EUR or 600.00 EUR on flights between Canada and the European Community, depending on the length of the delay caused (see Exhibits "B" and "C").

As explained below, allowing British Airways to tender denied boarding compensation only in the amount of CAD\$400.00 or CAD\$800.00 (depending on the length of the delay caused) would give British Airways an unfair competitive advantage over its main competitors, Lufthansa and Air France.

The Applicant submits that providing British Airways with an unfair competitive advantage over its main competitors, or allowing British Airways to maintain such an unfair advantage, would be unreasonable.

There is no justification for British Airways to pay less compensation to victims of denied boarding than its main competitors, Lufthansa and Air France.

(c) Material changes since Air Canada's proposal in Decision No. 442-C-A-2013

The Applicant submits that there have been material changes since Air Canada's proposal was put forward in Decision No. 442-C-A-2013 that would make it unreasonable to apply the same denied boarding compensation amounts in the case of British Airways.

(i) Extreme changes in exchange rates

Air Canada made its proposal cited in Decision No. 442-C-A-2013 on September 18, 2013, at which time 1 EUR was equal to CAD\$1.3767. The submissions of the complainant in that case were made only 5 days later, on September 23, 2013, when 1 EUR was equal to CAD\$1.3874.

Thus, at the time the parties in that proceeding made their submissions, 300.00 EUR was equal to approximately CAD\$416.00 and 600.00 EUR was equal to approximately CAD\$832.00. Based on these exchange rates, the Agency made the following findings in Decision No. 442-C-A-2013:

[51] The Agency agrees with the parties that four hours is a reasonable division mark to determine the denied boarding compensation amounts for travel from Canada to the EU. The Agency finds that Air Canada's proposed denied boarding compensation amounts are reasonable, as they are of similar amounts to what is offered under Regulation (EC) No. 261/2004 for flights from the EU to Canada.

[52] The Agency disagrees with Dr. Azar's argument that the mere difference of CAD\$16 in terms of the "0-4 hours" time period and the difference of CAD\$32 regarding the "over 4 hours" time period (as a result of the exchange rate between the

European and Canadian currency) render Air Canada’s proposed denied boarding compensation amounts unreasonable.

[53] The Agency finds that it is not unreasonable for Air Canada to set the amounts of compensation in Canadian dollars and, furthermore, that the current exchange rate between the euro and the Canadian dollar results in an insignificant difference in the amounts of denied boarding compensation proposed by Air Canada, in comparison to what is offered in the EU. In addition, the Agency agrees with Air Canada that the proposed denied boarding compensation regime is understandable and would be easy to implement.

[Emphasis added.]

These findings of the Agency are important and relevant to the present case for two reasons. First, the Agency acknowledged the importance of offering “similar amounts to what is offered under Regulation (EC) No. 261/2004 for flights from the EU to Canada” as a basis for the finding that the amounts were reasonable. Second, the Agency recognized the relevance and importance of the exchange rates between the Euro and Canadian Dollars in determining the reasonableness of the denied boarding compensation amounts.

Since September 2013, the exchange rates have changed by more than 11%:

CAD per 1 EUR

18 Sep 2013 00:00 UTC - 25 Mar 2014 16:38 UTC

EUR/CAD close: **1.53984**, low: **1.38214**, high: **1.55797**



As of March 25, 2014, 1 EUR is equal to CAD\$1.5460. This means that 300.00 EUR is equal to CAD\$463.80 and 600.00 EUR is equal to CAD\$927.60.

This means that the difference between British Airways' Proposed Rule and the European amounts is CAD\$63.80 in the case of delay of less than 4 hours, and CAD\$127.60 in the case of delay of more than 4 hours.

As noted earlier, this is a difference of 11%. This begs the question of how big of a difference is "significant." The Applicant proposes to resort to the *Montreal Convention* as a persuasive authority for the proposition that a difference of 10% or more is significant.

Article 24 of the *Montreal Convention* contains provisions governing revisions of the liability limits set out in the convention. Article 24(2) of the *Montreal Convention* provides 10% as the threshold for revising limits of liability.

Thus, based on the revision mechanism established for the limits in the *Montreal Convention*, the Applicant submits that the 11% difference between the amounts proposed by British Airways and those offered in the EU is significant to the point that it renders the Proposed Rule unreasonable.

(ii) Most major Canadian airlines adopted the US compensation regime

Since September 2013, when Air Canada and the complainant made submissions to the Agency in the proceeding that resulted in Decision No 442-C-A-2013, most Canadian airlines have adopted the US compensation regime for determining the amount to be tendered to victims of denied boarding:

1. WestJet finalized its international tariff provisions governing denied boarding compensation, and has adopted the US regime (see Exhibit "D");
2. Sunwing finalized its international tariff provisions governing denied boarding compensation, and has adopted the US regime (see Exhibit "E");
3. Porter Airlines finalized its international tariff provisions governing denied boarding compensation, and has adopted the US regime (see Exhibit "F").

The Applicant submits that these changes in the Canadian competitive environment ought to be also taken into account in considering British Airways' Proposed Rule, which provides in most cases significantly lower denied boarding compensation amounts than the regimes adopted by WestJet, Sunwing, or Porter Airlines.

(d) Conclusions

British Airways has made no submissions nor tendered any evidence with respect to its competitors or the competitive environment in which it operates. It did admit, however, that it is a European ‘community carrier’. In these circumstances, British Airways’ main competitors are other large European ‘community carriers’ and not Air Canada.

The denied boarding compensation amounts proposed by British Airways with respect to flights from Canada to the United Kingdom are 11% lower than what is provided by British Airways’ main competitors, Lufthansa and Air France; they are also 11% lower than the amounts tendered in the European Community in general.

The 11% is a significant difference, which exceeds the 10% threshold for revising liability limits set out in Article 24(2) of the *Montreal Convention*.

There is no evidence on the record to support a finding that British Airways would suffer any disadvantage by tendering denied boarding compensation in the same amount as its main competitors, Lufthansa and Air France, do.

The recent changes in the Canadian competitive environment would also justify imposing the US compensation regime on British Airways.

Hence, British Airways’ Proposed Rule fails to strike a balance between the rights of passengers to be subject to reasonable terms and conditions of carriage and British Airways’ statutory, commercial, and operational obligations. As such, the Proposed Rule is unreasonable.

IV. What should British Airways' new denied boarding compensation policy be?

The Proposed Rule contains no provisions at all governing the amount of denied boarding compensation on flights to Canada or flights from Canada to points in the European Community outside the United Kingdom, which renders it unreasonable. The Proposed Rule also provides for unreasonably low denied boarding compensation on flights from Canada to the United Kingdom.

These circumstances beg the question of how much denied boarding compensation British Airways should be required to tender.

The Applicant agrees with the Agency's findings in Decision No. 442-C-A-2013 at paragraph 51 that "four hours is a reasonable division mark to determine the denied boarding compensation amounts for travel from Canada to the EU."

Thus, the only questions are the amounts of denied boarding compensation for delays of less than 4 hours and for delays of 4 hours or more.

(a) Flights from the European Community to Canada: incorporate the existing practice into the tariff

In response to question Q2 directed to British Airways by the Applicant, British Airways provided a list of the amounts of denied boarding compensation it paid to passengers departing from the United Kingdom to Canada in the years 2010, 2011, and 2012. Although the amounts listed are in GBP, it is clear that in practice, British Airways has been paying denied boarding compensation in amounts that are equivalent to 300.00 EUR or 600.00 EUR, depending on the length of the delay.

British Airways' submissions (August 23, 2013), pp. 4-9

The Applicant submits that these amounts are reasonable, and that British Airways would not suffer any disadvantage by putting its current practice into writing, and incorporating it into its tariff.

Furthermore, it is submitted that it would be unreasonable and contrary to s. 122 of the *Air Transportation Regulations* to allow British Airways to maintain a tariff provision that does not match its actual policy and practice.

Therefore, the Applicant submits that British Airways' denied boarding compensation amounts for flights from the European Community to Canada ought to be:

- (i) 300.00 EUR for delays of less than 4 hours;
- (ii) 600.00 EUR for delays of 4 hours or more.

The Applicant further submits that in light of the policies of British Airways' competitors and British Airways' own admission that it is a European 'community carrier', these amounts ought to be set out in Euros (although British Airways ought to be entitled to pay them in GBP or any other local currency).

(b) Flights from Canada to the European Community

The most logical and simple regime would be a symmetric one: the same amounts of denied boarding compensation between Canada and the European Community, regardless of the direction of travel.

Thus, it would be the most logical and reasonable to require British Airways to tender denied boarding compensation on flights from Canada to the European Community as follows:

- (i) 300.00 EUR for delays of less than 4 hours;
- (ii) 600.00 EUR for delays of 4 hours or more.

In the alternative, if the Agency finds that the denied boarding compensation amounts ought to be set out in Canadian Dollars, then the Applicant proposes the following amounts:

- (i) CAD\$450.00 for delays of less than 4 hours;
- (ii) CAD\$900.00 for delays of 4 hours or more.

These amounts are consistent with the underlying principles articulated by the Agency in Decision No. 442-C-A-2013 at paragraphs 51-53, and they take into account minor fluctuations of the exchange rates between the Euro and Canadian Dollars.

In the further alternative, the Applicant submits that British Airways ought to be required to apply the US regime for calculation of the amount of denied boarding compensation, which has been adopted by most Canadian airlines.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Applicant

Cc: Ms. Carol E. McCall, counsel for British Airways

LIST OF AUTHORITIES

Legislation

1. *Air Transportation Regulations*, S.O.R./88-58.
2. *Canada Transportation Act*, S.C. 1996, c. 10.
3. *Carriage by Air Act*, R.S.C. 1985, c. C-26.

International instruments

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

Case law

5. *Air Canada v. Canadian Transportation Agency*, 2009 FCA 95.
6. *Anderson v. Air Canada*, Canadian Transportation Agency, 666-C-A-2001.
7. *Dr. Azar v. Air Canada*, Canadian Transportation Agency, 442-C-A-2013.
8. *Griffiths v. Air Canada*, Canadian Transportation Agency, 287-C-A-2009.
9. *Lukács v. Air Canada*, Canadian Transportation Agency, 291-C-A-2011.
10. *Lukács v. Air Canada*, Canadian Transportation Agency, 250-C-A-2012.
11. *Lukács v. Air Canada*, Canadian Transportation Agency, 251-C-A-2012.
12. *Lukács v. Air Canada*, Canadian Transportation Agency, 204-C-A-2013.
13. *Lukács v. WestJet*, Canadian Transportation Agency, 313-C-A-2010.
14. *Lukács v. WestJet*, Canadian Transportation Agency, 483-C-A-2010.
15. *Lukács v. WestJet*, Federal Court of Appeal, 10-A-42.
16. *Lukács v. WestJet*, Canadian Transportation Agency, 227-C-A-2013.
17. *Lukács v. Porter Airlines*, Canadian Transportation Agency, 344-C-A-2013.

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INTERNATIONAL PASSENGER RULES AND FARES TARIFF
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Cancels 16th Revised Page AC-19-A

RULE	AIR CANADA SECTION I - GENERAL RULES
90	<p><u>DENIED BOARDING</u></p> <p>(A) When AC is unable to provide previously confirmed space due to there being more passengers holding confirmed reservations and tickets than for which there are available seats on a flight, AC shall implement the provisions of this rule, except for employee and industry discounted travel, unless applicable local law provides otherwise. In particular, for flights departing from the following countries, Air Canada will apply the provisions of the following legislations: United States: US 14 CFR part 250; European Union and Switzerland: EC regulation No. 261/2004; Andean community countries: Decision 619; Argentina: Administrative Order PRE-CJU-002-05 (18 November 2004) Israel: Aviation Services Law (Compensation and Assistance for flight cancellation or change of conditions), 5772-2012. Turkey: Regulations on Air Passenger Rights (SHY-Passenger)</p> <p>(B) <u>REQUEST FOR VOLUNTEERS</u> (1) AC will request volunteers from among the confirmed passengers to relinquish their seats in exchange for compensation, the amount and form of which will be at Air Canada's discretion. (2) Once a passenger has voluntarily relinquished his seat, he will not later be involuntarily denied boarding unless he was advised at the time he volunteered of such possibility and the amount of compensation to which he would be entitled. (3) The request for volunteers and the selection of passengers to be denied boarding shall be in a manner solely determined by AC.</p> <p>(C) <u>BOARDING PRIORITIES</u> (1) If a flight is oversold, no passenger may be involuntarily denied boarding until AC has first requested volunteers to relinquish their seats. (2) In the event there are not enough volunteers, other passengers may be involuntarily denied boarding in accordance with AC boarding priority policy. Passengers with confirmed reservations, will be permitted to board in the following order until all available seats are occupied: (a) Disabled passengers, unaccompanied children under 12 years of age and others for whom, in AC'S assessment, failure to carry would cause severe hardship. (b) Passengers paying Executive (J cabin) or Premium Economy (O Cabin). (c) All other passengers, based on itinerary, fare paid status of loyalty program membership and the time in which the passenger presents herself for check in without advance seat assignment.</p> <p>(D) <u>TRANSPORTATION FOR PASSENGERS DENIED BOARDING</u> When A passenger has been denied boarding, either voluntarily or involuntarily, (1) A passenger will be considered to have been denied boarding when (a) The passenger presented himself for carriage in accordance with this tariff: Having complied fully with AC applicable reservation, ticketing, Immigration formalities, check-in and boarding within the time limits and at the location set out in Rule 70; and, (b) It must not have been possible to accommodate the passenger on the flight on which he held confirmed reservations and the flight must have departed without him. (2) In such instances, carrier will: (a) Carry the passenger on another of its passenger aircraft or class of service on which space is available without additional charge regardless of the class of service; or, at carrier's option; (b) Endorse to another air carrier with which Air Canada has an agreement for such transportation, the unused portion of the ticket for purposes of rerouting; or at carrier's option; (c) Reroute the passenger to the destination named on the ticket or applicable portion thereof by its own or other transportation services; and if the fare for the revised routing or class of service is higher than the refund value of the ticket or applicable portion thereof as determined from rule 90(D), carrier will require no additional payment from the passenger but will refund the difference if it is lower; or, (d) If the passenger chooses to no longer travel or if carrier is unable to perform the option stated in (a) thru (c) above within a reasonable amount of time, make involuntary refund in accordance with Rule 90(D), or upon request, for denied boardings within Air Canada's control, return passenger to point of origin and refund in accordance with Rule 90(D)(2)(a), as if no portion of the trip had been made (irrespective of applicable fare rules), or subject to passenger's agreement, offer a travel voucher for future travel in the same amount; or, (e) upon passenger's request, for denied boardings within Air Canada's control, if passenger provides credible verbal assurance to Air Canada of certain circumstances that require his/her arrival at destination earlier than options set out in subparagraph (a) thru (c) above, Air Canada will, if it is reasonable to do so, taking all circumstances known to it into account and subject to availability, buy passenger seat on another carrier whose flight is scheduled to arrive appreciably earlier than the options proposed in (a) thru (c) above.</p>

(Continued on next page)

For unexplained abbreviations, reference marks and symbols see IPGT-1, C.A.B. NO. 581, NTA(A) NO. 373.

ISSUED: October 17, 2013	EFFECTIVE: December 1, 2013
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CREDIT FOR FUTURE TRANSPORTATION ON LH IN LIEU OF MONETARY COMPENSATION. THE AMOUNT OF THE TRANSPORTATION CREDIT OFFERED SHALL BE EQUAL TO OR GREATER THAN THE MONETARY COMPENSATION DUE THE PASSENGER. THE CREDIT VOUCHER SHALL BE VALID FOR TRAVEL ON LH ONLY WITHIN 365 DAYS FROM THE DATE OF ISSUE, AND SHALL BE NON-REFUNDABLE AND NON-TRANSFERABLE.

(E) METHOD OF PAYMENT

THE AIRLINE WILL GIVE TO EACH PASSENGER, WHO QUALIFIES FOR DENIED BOARDING COMPENSATION, A PAYMENT BY CHECK, OR CASH, OR MCO, OR VOUCHER FOR THE AMOUNT SPECIFIED, ON THE DAY AND PLACE THE INVOLUNTARY DENIED BOARDING OCCURS. HOWEVER, IF THE AIRLINE ARRANGES ALTERNATE TRANSPORTATION FOR THE PASSENGER'S CONVENIENCE THAT DEPARTS BEFORE THE PAYMENT CAN BE MADE, THE PAYMENT WILL BE SENT TO THE PASSENGER WITHIN 24 HOURS. THE AIR CARRIER MAY OFFER FREE TICKETS IN PLACE OF THE CASH PAYMENT. THE PASSENGER, MAY, HOWEVER, INSIST ON THE CASH PAYMENT, OR REFUSE ALL COMPENSATION AND BRING PRIVATE LEGAL ACTION.

(F) PASSENGER'S OPTIONS

ACCEPTANCE OF THE COMPENSATION (BY ENDORSING THE CHECK OR DRAFT WITHIN 30 DAYS) RELIEVES THE CARRIER FROM ANY FURTHER LIABILITY TO THE PASSENGER CAUSED BY ITS FAILURE TO HONOR THE CONFIRMED RESERVATIONS. HOWEVER, THE PASSENGER MAY DECLINE THE PAYMENT AND SEEK TO RECOVER DAMAGES IN A COURT OF LAW OR IN SOME OTHER MANNER.

DENIED BOARDING COMPENSATION

APPLICABLE ONLY TO FLIGHTS OR PORTIONS OF FLIGHTS
ORIGINATING AND/OR TERMINATING IN CANADA

(A) APPLICABILITY

THE FOLLOWING RULES SHALL APPLY:

- (1) IN RESPECT OF FLIGHTS DEPARTING FROM AN AIRPORT IN THE EUROPEAN UNION (EU) AND FLIGHTS DEPARTING FROM AN AIRPORT IN A THIRD COUNTRY BOUND TO AN AIRPORT IN THE EU UNLESS PASSENGER RECEIVED BENEFITS OR COMPENSATION AND WERE GIVEN ASSISTANCE IN THAT THIRD COUNTRY;
- (2) ON CONDITION THAT PASSENGERS HAVE A CONFIRMED RESERVATION ON THE FLIGHT CONCERNED AND PRESENTS HIMSELF/HERSELF FOR CHECK-IN AT THE TIME INDICATED IN ADVANCE AND IN WRITING OR ELECTRONICALLY; OR; IF NO TIME IS INDICATED; NOT LATER THAN 60 MINUTES BEFORE THE PUBLISHED DEPARTURE TIME;
- (3) ONLY TO THE PASSENGER TRAVELING WITH A VALID TICKET INCLUDING TICKETS ISSUED UNDER A FREQUENT FLYER OR OTHER COMMERCIAL PROGRAMME WITH CONFIRMED

AREA: ZZ TARIFF: IPRG CXR: LH RULE: 0089

TITLE/APPLICATION - 70 (CONT)

RESERVATIONS AND

- (A) PRESENTS HIMSELF AT THE APPROPRIATE PLACE AND HAS OBSERVED PUBLISHED MINIMUM CHECK-IN TIMES
- (B) HAS COMPLIED WITH LUFTHANSA'S TICKETING AND RECONFIRMATION PROCEDURES
- (C) IS ACCEPTABLE FOR TRANSPORTATION UNDER THE CARRIER'S TARIFF AND THE FLIGHT FOR WHICH THE PASSENGER HOLDS CONFIRMED RESERVATIONS IS UNABLE TO ACCOMMODATE THE PASSENGER AND DEPARTS WITHOUT HIM/HER

(4) WHERE LH IS THE OPERATING CARRIER OF THE FLIGHT EXCEPTIONS:

THE FOLLOWING PASSENGERS WILL NOT BE ENTITLED TO COMPENSATION:

- (A) PASSENGERS TRAVELLING TO EU WHO HAVE RECEIVED BENEFITS OR COMPENSATION IN A THIRD COUNTRY
- (B) PASSENGERS TRAVELLING BETWEEN TWO AIRPORTS OUTSIDE THE EU UNLESS THE SECTOR IS PART OF A FLIGHT (SAME FLIGHT NUMBER) THAT ORIGINATED IN THE EU
- (C) PASSENGERS WITHOUT CONFIRMED RESERVATIONS
- (D) PASSENGERS WHO HAVE NOT PRESENTED THEMSELVES FOR CHECK-IN ON TIME
- (E) PASSENGERS ON FREE OR REDUCED FARES NOT DIRECTLY OR INDIRECTLY AVAILABLE TO THE PUBLIC, E.G. ID AND AD TICKETS

(5) THE PASSENGER IS ACCOMMODATED ON THE FLIGHT FOR WHICH HE/SHE HOLD'S CONFIRMED RESERVATIONS, BUT IS SEATED IN A COMPARTMENT OF THE AIRCRAFT OTHER THAN THAT RESERVED, PROVIDED THAT WHEN THE PASSENGER IS ACCOMMODATED IN A CLASS OF SERVICE FOR WHICH A LOWER FARE IS CHARGED, THE PASSENGER WILL BE ENTITLED TO THE APPROPRIATE REFUND.

(B) PASSENGER RIGHTS

(1) DENIED BOARDING

VOLUNTEERS

VOLUNTEERS HAVE THE RIGHT OF MUTUALLY AGREED BENEFITS PLUS THE RIGHT TO CHOOSE BETWEEN REIMBURSEMENT AND REROUTING WITH THE FOLLOWING OPTIONS:

- (A) REIMBURSEMENT WITHIN 7 DAYS OF COUPONS NOT USED OR
- (B) REROUTING TO FINAL DESTINATION AT THE EARLIEST OPPORTUNITY UNDER COMPARABLE TRANSPORT CONDITIONS OR
- (C) REROUTING TO FINAL DESTINATION AT A LATER DATE ACCORDING TO PASSENGER'S CONVENIENCE BUT SUBJECT TO AVAILABILITY OF SPACE. VOLUNTEERS ARE NOT ENTITLED TO CARE, SUCH AS PHONE CALLS, FOOD, ACCOMMODATION ETC.

(2) INVOLUNTARY DENIED BOARDING

IN CASE OF INVOLUNTARY DENIED BOARDING THE PASSENGERS ARE ENTITLED TO THE FOLLOWING:

- (A) RIGHT TO COMPENSATION ACCORDING TO PARAGRAOH
(C) AND
- (B) RIGHT TO CHOOSE BETWEEN
REIMBURSEMENT/REROUTING WITH THE SAME OPTIONS
AS MENTIONED UNDER (A)(1) ABOVE AND
- (C) RIGHT TO CARE INCLUDING
- MEALS AND REFRESHMENTS, REASONABLY RELATED
TO THE WAITING TIME
- 2 TELEPHONE CALLS OR TELEX, E-MAILS, FAX
- IF NECESSARY, HOTEL ACCOMODATION PLUS
TRANSFER BETWEEN AIRPORT AND HOTEL
- (3) AMOUNT OF COMPENSATION PAYABLE
- (A) THE AMOUNT OF COMPENSATION DEPENDS ON THE
DISTANCE OF THE SCHEDULED FLIGHT OR THE
ALTERNATIVE FLIGHT PROPOSED.
COMPENSATION AMOUNTS IN EUR/CAD:
- | FLIGHT KM BETWEEN AND | AMOUNT IN | |
|-----------------------|-----------|-----|
| EUR | EUR | CAD |
| 0-1500 | 250 | 400 |
| 1500 - 3500 | 400 | 645 |
| INTRA EU FLIGHTS OF | | |
| MORE THAN 1500 | 400 | 645 |
| GREATER THAN 3500 | 600 | 965 |
- (B) IF AN ALTERNATIVE FLIGHT IS OFFERED AND THE
NEW SCHEDULED ARRIVAL TIME DOES NOT EXCEED 2
HOURS VERSUS THE ORIGINALLY PLANNED, THE
COMPENSATION AMOUNTS SHOWN UNDER (1) ABOVE
CAN BE REDUCED BY 50 PERCENT:
- | FLIGHT KM BETWEEN AND | AMOUNT IN | |
|-----------------------|-----------|-----|
| | EUR | CAD |
| 0-1500 | 125 | 200 |
| 1500-3500 | 200 | 320 |
| INTRA EU FLIGHTS OF | | |
| MORE THAN 1500 | 200 | 320 |
| GREATER THAN 3500 | 300 | 485 |
- (C) IN LIEU OF CASH PAYMENT OF THE AMOUNTS MENTIONED
IN (B)(1) AND (B)(2) THE PASSENGER MAY CHOOSE
COMPENSATION IN THE FORM OF A VOUCHER VALID FOR
FURTHER TRAVEL ON THE SERVICES OF LUFTHANSA, THEN
THE COMPENSATION AMOUNT WILL BE 150 PERCENT OF THE
AMOUNT MENTIONED IN (B)(1) AND (B)(2). FOLLOWING
CONDITIONS SHALL APPLY TO SUCH VOUCHERS:
- VALIDITY IS 1 YEAR FROM THE DATE OF ISSUE
 - IF, AFTER ONE YEAR THE VOUCHER HAS NOT BEEN
USED, IT WILL BE REFUNDED BUT ONLY AT THE
CASH VALUES AS APPLICABLE IN (B)(1) AND
(B)(2).
 - LOST VOUCHERS WILL NOT BE REPLACED
 - A TICKET MAY ONLY BE ISSUED IN EXCHANGE FOR
THE VOUCHER IN THE SAME NAME AS THAT ON THE
VOUCHER
 - IF THE VALUE OF A DESIRED TICKET EXCEEDS THE
VALUE OF THE VOUCHER, THE PASSENGER SHALL PAY
THE APPLICABLE DIFFERENCE
 - IF THE VALUE OF THE VOUCHER EXCEEDS THE VALUE
OF A DESIRED TICKET, THE DIFFERENCE WILL NOT

- BE REFUNDED.
- (4) CANCELLATION OF FLIGHTS
- (A) IN CASE OF CANCELLATION OF A FLIGHT THE PASSENGERS WILL BE ENTITLED TO THE FOLLOWING:
- (1) RIGHT TO COMPENSATION ACCORDING TO PARAGRAPH (C) AND
 - (2) RIGHT TO CHOOSE BETWEEN REIMBURSEMENT/REROUTING WITH THE SAME OPTIONS AS MENTIONED UNDER (A)(1) ABOVE AND
 - (3) RIGHT TO CARE INCLUDING
 - MEALS AND REFRESHMENTS, REASONABLY RELATED TO THE WAITING TIME
 - 2 TELEPHONE CALLS OR TELEX, E-MAILS, FAX
 - IF NECESSARY, HOTEL ACCOMODATION PLUS TRANSFER BETWEEN AIRPORT AND HOTEL
- (B) AMOUNT OF COMPENSATION PAYABLE
- (1) THE AMOUNT OF COMPENSATION DEPENDS ON THE DISTANCE OF THE SCHEDULED FLIGHT OR THE ALTERNATIVE FLIGHT PROPOSED.
COMPENSATION AMOUNTS IN EUR/CAD:
- | FLIGHT KM BETWEEN AND | AMOUNT IN | |
|------------------------------------|-----------|-----|
| | EUR | CAD |
| 0-1500 | 250 | 400 |
| 1500 - 3500 | 400 | 645 |
| INTRA EU FLIGHTS OF MORE THAN 1500 | 400 | 645 |
| GREATER THAN 3500 | 600 | 965 |
- (2) IF AN ALTERNATIVE FLIGHT IS OFFERED AND THE NEW SCHEDULED ARRIVAL TIME DOES NOT EXCEED 2 HOURS VERSUS THE ORIGINALLY PLANNED, THE COMPENSATION AMOUNTS SHOWN UNDER (1) ABOVE CAN BE REDUCED BY 50 PERCENT:
- | FLIGHT KM BETWEEN AND | AMOUNT IN | |
|------------------------------------|-----------|-----|
| | EUR | CAD |
| 0-1500 | 125 | 200 |
| 1500-3500 | 200 | 320 |
| INTRA EU FLIGHTS OF MORE THAN 1500 | 200 | 320 |
| GREATER THAN 3500 | 300 | 485 |
- (3) IN LIEU OF CASH PAYMENT OF THE AMOUNTS MENTIONED IN (B)(1) AND (B)(2) THE PASSENGER MAY CHOOSE COMPENSATION IN THE FORM OF A VOUCHER VALID FOR FURTHER TRAVEL ON THE SERVICES OF LUFTHANSA, THEN THE COMPENSATION AMOUNT WILL BE 150 PERCENT OF THE AMOUNT MENTIONED IN (B)(1) AND (B)(2). FOLLOWING CONDITIONS SHALL APPLY TO SUCH VOUCHERS:
 - VALIDITY IS 1 YEAR FROM THE DATE OF ISSUE
 - IF, AFTER ONE YEAR THE VOUCHER HAS NOT BEEN USED, IT WILL BE REFUNDED BUT ONLY AT THE CASH VALUES AS APPLICABLE IN (B)(1) AND (B)(2).
 - LOST VOUCHERS WILL NOT BE REPLACED
 - A TICKET MAY ONLY BE ISSUED IN EXCHANGE FOR THE VOUCHER IN THE SAME NAME AS THAT ON THE VOUCHER
 - IF THE VALUE OF A DESIRED TICKET EXCEEDS THE VALUE OF THE VOUCHER, THE PASSENGER SHALL PAY

THE APPLICABLE DIFFERENCE

- IF THE VALUE OF THE VOUCHER EXCEEDS THE VALUE OF A DESIRED TICKET, THE DIFFERENCE WILL NOT BE REFUNDED.

(C) LONG DELAY

THIS RULE IS ONLY APPLICABLE WHEN A FLIGHT IS DELAYED AT DEPARTURE, NOT WHEN A FLIGHT LEAVES ON TIME AND IS SUBSEQUENTLY DELAYED. A LONG DELAY IS CONSIDERED A FLIGHT THAT IS DELAYED ACCORDING TO THE FOLLOWING PARAMETERS:

TRIPS LESS THAN 1,500 KM	MORE THAN 2 HOURS
TRIPS BETWEEN 1,500-3,500 KM & ALL INTRA EU FLIGHTS IN EXCESS OF 1,500 KM	MORE THAN 3 HOURS
TRIPS MORE THAN 3,500 KM (NON INTRA EU)	MORE THAN 4 HOURS

IN THIS CASE THE PASSENGERS ARE ENTITLED TO THE FOLLOWING

- (1) RIGHT TO CARE PROVIDED THIS DOES NOT RESULT IN A FURTHER DELAY OF THE FLIGHT INCLUDING
 - MEALS AND REFRESHMENTS, REASONABLY RELATED TO THE WAITING TIME
 - 2 TELEPHONE CALLS OR TELEX, E-MAILS, FAX
 - IF NECESSARY, HOTEL ACCOMODATION PLUS TRANSFER BETWEEN AIRPORT AND HOTEL; IN CASE THE FLIGHT IS DELAYED UNTIL THE NEXT DAY HOTEL ACCOMMODATION AND TRANSFER ARE MANDATORY.
- (2) IF FLIGHT IS DELAYED MORE THAN 5 HOURS RIGHT TO BE REIMBURSED WITHIN 7 DAYS:
 - (A) OUTBOUND PASSENGER: COST OF TICKET
 - (B) INBOUND PASSENGER: COST OF NON-USED COUPON
 - (C) TRANSIT PASSENGER: COST OF NON-USED COUPON, IF THE FLIGHT NO LONGER SERVES ANY PURPOSE; ALSO COST OF THE TICKETS FOR PARTS OF THE JOURNEY ALREADY MADE AND IF RELEVANT RETURN FLIGHT TO THE FIRST POINT OF DEPARTURE
 - (D) FOR PACKAGE TOUR PASSENGERS THE VALUE OF REIMBURSEMENT WILL HAVE TO BE ASSIGNED TO UNUSED FLIGHT COUPON(S)
- (3) DOWNGRADING OF PASSENGERS

IN CASE OF INVOLUNTARY DOWNGRADING TO A LOWER CLASS OF SERVICE PASSENGERS WILL BE ENTITLED TO THE FOLLOWING REIMBURSEMENT WITHIN 7 DAYS

 - (A) 30 PERCENT OF THE TICKET PRICE FOR TRIPS LESS THAN 1,500 KM
 - (B) 50 PERCENT OF THE TICKET PRICE FOR TRIPS BETWEEN 1,500 AND 3,500 KM & ALL INTRA EU FLIGHTS IN EXCESS OF 1,500 KM
 - (C) 75 PERCENT OF THE TICKET PRICE FOR ALL OTHER TRIPS MORE THAN 3,500 KM

NOTE:

IN ALL CASES THE RELEVANT DISTANCE IS UNDERSTOOD TO BE THE SECTOR ON WHICH THE PASSENGER IS DOWNGRADED. THE TICKET PRICE IS UNDERSTOOD TO BE THE ONEWAY COUPON VALUE FOR THE SECTOR ON WHICH THE PASSENGER IS

- DOWNGRADED.
- (D) BOARDING PRIORITY PASSENGERS HOLDING CONFIRMED RESERVATIONS WILL BE BOARDED BEFORE:
- (1) ANY PASSENGERS NOT HOLDING CONFIRMED RESERVATIONS.
 - (2) ANY WHO ARE NOT ENTITLED TO CONFIRMED RESERVATIONS.
- PASSENGERS HOLDING CONFIRMED RESERVATIONS AND A VALID TICKET FOR THE FLIGHT IN QUESTION WILL BE BOARDED IN THE SEQUENCE IN WHICH THEY HAVE PRESENTED THEMSELVES FOR CHECK-IN.
- EXCEPTIONS:
- THE FOLLOWING PASSENGERS CANNOT BE LEFT BEHIND:
- LUFTHANSA CREW MEMBERS TRAVELLING WITH CONFIRMED RESERVATIONS
 - LUFTHANSA EMPLOYEES ON DUTY TRAVEL HOLDING CONFIRMED RESERVATIONS
 - SICK AND/OR HANDICAPPED PASSENGERS
 - UNACCOMPANIED CHILDREN (12 YEARS AND UNDER)
 - HEADS OF STATE AND OTHER LEADING STATESMEN, OFFICIAL GOVERNMENT DELEGATIONS, DIPLOMATIC COURIERS
 - HARDSHIP CASES AS DETERMINED BY THE MANAGER ON DUTY

AREA: ZZ TARIFF: IPRG CXR: LH RULE: 0090

TITLE/APPLICATION - 70

REFUNDS

(A) GENERAL

- (1) IN CASE OF REFUND, WHETHER DUE TO FAILURE OF CARRIER TO PROVIDE THE ACCOMMODATION CALLED FOR BY THE TICKET, OR TO VOLUNTARY CHANGE OF ARRANGEMENTS BY THE PASSENGER, THE CONDITIONS AND AMOUNT OF REFUND WILL BE GOVERNED BY CARRIER'S TARIFFS.
- (2) EXCEPT AS OTHERWISE PROVIDED IN PARAGRAPH (F) OF THIS RULE, REFUND BY CARRIER FOR AN UNUSED TICKET OR PORTION THEREOF OR MISCELLANEOUS CHARGES ORDER WILL BE MADE TO THE PERSON NAMED AS THE PASSENGER IN SUCH TICKET OR MISCELLANEOUS CHARGES ORDER UNLESS AT THE TIME OF PURCHASE THE PURCHASER DESIGNATES ON THE TICKET OR MISCELLANEOUS CHARGES ORDER ANOTHER PERSON TO WHOM REFUND SHALL BE MADE IN WHICH EVENT REFUND WILL BE MADE TO PERSONS SO DESIGNATED, AND ONLY UPON DELIVERY OF THE PASSENGER COUPON AND ALL UNUSED FLIGHT COUPONS OF THE TICKET OF MISCELLANEOUS CHARGES ORDER. A REFUND MADE IN ACCORDANCE WITH THIS PROCEDURE TO A PERSON REPRESENTING HIM AS THE PERSON NAMED OR DESIGNATED IN THE TICKET OR MISCELLANEOUS CHARGES ORDER WILL BE CONSIDERED A VALID REFUND AND CARRIER WILL NOT BE LIABLE TO THE TRUE PASSENGER FOR ANOTHER REFUND.

EXCEPTION 1: REFUND IN ACCORDANCE WITH PARAGRAPH (E) BELOW OF TICKETS FOR TRANSPORTATION WHICH HAVE BEEN ISSUED AGAINST A CREDIT CARD WILL

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RULE SECTION I - GENERAL RULES

C87 †[C]PART II DENIED BOARDING COMPENSATION (Applicable to flights or portions to flight originating in Canada)

(A) **APPLICABILITY**
The following rules shall apply:

- (1) In respect of flights departing from an airport in the European Union (EU) and flights departing from an airport in a third country bound to an airport in the EU unless passenger received benefits or compensation and were given assistance in that third country;
- (2) On condition that passengers have a confirmed reservation on the flight concerned and presents himself/herself for check-in at the time indicated in advance and in writing or electronically; or; if no time is indicated; not later than 60 minutes before the published departure time;
- (3) Only to the passenger travelling with a valid ticket including tickets issued under a frequent flyer or other commercial programme with confirmed reservations and
 - (a) Presents himself at the appropriate place and has observed published minimum check-in times
 - (b) Has complied with Air France's ticketing and reconfirmation procedures
 - (c) Is acceptable for transportation under the carrier's tariff and the flight for which the passenger holds confirmed reservations is unable to accommodate the passenger and departs without him/her
- (4) Where AF is the operating carrier of the flight
EXCEPTIONS: The following passengers will not be entitled to compensations;
 - (a) Passengers travelling to EU who have received benefits or compensation in a third country.
 - (b) Passengers travelling between two airports outside the EU unless the sector is part of a flight (same flight number) that originated in the EU.
 - (c) Passengers without confirmed reservation.
 - (d) Passengers who have not presented themselves for check-in on time
 - (e) Passengers on free or reduced fares not directly or indirectly available to the public, e.g. ID and AD tickets
- (5) The passenger is accommodated on the flight for which he/she hold's confirmed reservations, but is seated in a compartment of the aircraft other than that reserved, provided that when the passenger is accommodated in a class of service for which a lower fare is charged, the passenger will be entitled to the appropriate refund.

(B) **PASSENGER RIGHTS**

- (1) **Denied Boarding**
Volunteers
Volunteers have the right of mutually agreed benefits plus the right to choose between reimbursement and rerouting with the following options:
 - (a) Reimbursement within 7 days of coupons not used or
 - (b) Rerouting to final destination at the earliest opportunity under comparable transport conditions or
 - (c) Rerouting to final destination at a later date according to passenger's convenience but subject to availability of space. Volunteers are not entitled to care, such as phone calls, foods, accommodation etc.
- (2) **Involuntary Denied Boarding**
In case of Involuntary Denied Boarding the passengers are entitled to the following:
 - (a) Right to compensation according to paragraph (C) and
 - (b) Right to choose between reimbursement/rerouting with the same options as mentioned under (A)(1) above and
 - (c) Right to care including
 - Meals and refreshments, reasonably related to the waiting time
 - 2 telephone calls or telex, e-mails, fax
 - if necessary, hotel accommodation plus transfer between airport and hotel
- (3) **Amount of Compensation Payable**
 - (a) The amount of compensation depends on the distance of the scheduled flight or the alternative flight proposed.
Compensation Amounts in EUR/CAD:

Flight KM between And	Amount in	
	EUR	CAD
0-1500	250	400
1500-3500	400	645
Intra EU flights of more than 1500	400	645
greater than 3500	600	965

(Continued on next page)

For unexplained abbreviations, reference marks and symbols see Pages 21 through 29.

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† - Effective April 6, 2007 and issued on not less than one (1) day's notice under NTA(A) Special Permission No. 23749.

NTA(A) No. 313 I.C.A.B. No. 516

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INTERNATIONAL PASSENGER RULES AND FARES TARIFF
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RULE SECTION I - GENERAL RULES

C87 †ICPART II DENIED BOARDING COMPENSATION (Continued)

(B) PASSENGER RIGHTS (Continued)

(3) Amount of Compensation Payable (Continued)

(b) If an alternative flight is offered and the new scheduled arrival time does not exceed 2 hours versus the originally planned, the compensation amounts shown under (1) above can be reduced by 50 percent:

	Amount in	
Flight KM between And	EUR	CAD
0-1500	125	200
1500-3500	200	320
Intra EU flights of more than 1500	200	320
greater than 3500	300	485

(c) In lieu of cash payment of the amount mentioned in (B)(1) and (B)(2) the passenger may choose compensation in the form of a voucher valid for further travel on the services of Air France, then the compensation amount will be 150 percent of the amount mentioned in (B)(1) and (B)(2). Following conditions shall apply to such vouchers:

- validity is 1 year from the date of issue
- if, after one year the voucher has not been used, it will be refunded but only at the cash values as applicable in (B)(1) and (B)(2).
- lost vouchers will not be replaced
- a ticket may only be issued in exchange for the voucher in the same name as that on the voucher
- if the value of a desired ticket exceeds the value of the voucher, the passenger shall pay the applicable difference
- if the value of the voucher exceeds the value of a desired ticket, the difference will not be refunded.

(4) Cancellation of Flights

(a) In case of cancellation of a flight the passengers will be entitled to the following:

- (1) Right to compensation according to paragraph (C) and
- (2) Right to choose between reimbursement/rerouting with the same options as mentioned under (A)(1) above and
- (3) Right to care including
 - Meals and refreshments, reasonably related to the waiting time
 - 2 telephone calls or telex, e-mails, fax
 - If necessary, hotel accommodation plus transfer between airport and hotel

(b) Amount of Compensation Payable

(1) The amount of compensation depends on the distance of the scheduled flight or the alternative flight proposed.

Compensation Amounts in EUR/CAD:

Flight KM between And	Amount in	
	EUR	CAD
0-1500	250	400
1500-3500	400	645
Intra EU flights of more than 1500	400	645
greater than 3500	600	965

(2) If an alternative flight is offered and the new scheduled arrival time does not exceed 2 hours versus the originally planned, the compensation amounts shown under (1) above can be reduced by 50 percent:

	Amount in	
Flight KM between And	EUR	CAD
0-1500	125	200
1500-3500	200	320
Intra EU flights of more than 1500	200	320
greater than 3500	300	485

(Continued on next page)

For unexplained abbreviations, reference marks and symbols see Pages 21 through 29.

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RULE	SECTION I - GENERAL RULES						
C87	<p>+ [C] PART II DENIED BOARDING COMPENSATION (Continued)</p> <p>(B) PASSENGER RIGHTS (Continued)</p> <p>(4) Cancellation of Flights (Continued)</p> <p>(b) Amount of Compensation Payable (Continued)</p> <p>(3) In lieu of cash payment of the amount mentioned in (B)(1) and (B)(2) the passenger may choose compensation in the form of a voucher valid for further travel on the services of Air France, then the compensation amount will be 150 percent of the amount mentioned in (B)(1) and (B)(2). Following conditions shall apply to such vouchers:</p> <ul style="list-style-type: none"> - validity is 1 year from the date of issue - if, after one year the voucher has not been used, it will be refunded but only at the cash values as applicable in (B)(1) and (B)(2). - lost vouchers will not be replaced - a ticket may only be issued in exchange for the voucher in the same name as that on the voucher - if the value of a desired ticket exceeds the value of the voucher, the passenger shall pay the applicable difference - if the value of the voucher exceeds the value of a desired ticket, the difference will not be refunded. <p>(C) LONG DELAY</p> <p>This rule is only applicable when a flight is delayed at departure, not when a flight leaves on time and is subsequently delayed. A long delay is considered a flight that is delayed according to the following parameters:</p> <table border="0"> <tr> <td>Trips less than 1,500 KM</td> <td>More than 2 hours</td> </tr> <tr> <td>Trips between 1,500-3,500 KM and all intra EU flights in excess of 1,500 KM</td> <td>More than 3 hours</td> </tr> <tr> <td>Trips more than 3,500 KM (non intra EU)</td> <td>More than 4 hours</td> </tr> </table> <p>In this case the passengers are entitled to the following</p> <p>(1) Right to care provided this does not result in a further delay of the flight including</p> <ul style="list-style-type: none"> - Meals and refreshments, reasonably related to the waiting time - 2 telephone calls or telex, e-mails, fax - If necessary, hotel accommodation plus transfer between airport and hotel; in case the flight is delayed until the next day hotel accommodation and transfer are mandatory. <p>(2) If flight is delayed more than 5 hours right to be reimbursed within 7 days:</p> <p>(a) Outbound passenger: Cost of ticket</p> <p>(b) Inbound passenger: Cost of Non-used coupon</p> <p>(c) Transit Passenger: Cost of Non-used coupon, if the flight no longer serves any purpose; also cost of the tickets for parts of the journey already made and if relevant return flight to the first point of departure</p> <p>(d) For package tour passengers the value of reimbursement will have to be assigned to unused flight coupon(s)</p> <p>(3) Downgrading of Passengers</p> <p>In case of involuntary downgrading to a lower class of service passengers will be entitled to the following reimbursement within 7 days</p> <p>(a) 30 percent of the ticket price for trips less than 1,500 KM</p> <p>(b) 50 percent of the ticket price for trips between 1,500 and 3,500 KM and all intra EU flights in excess of 1,500 KM</p> <p>(c) 75 percent of the ticket price for all other trips more than 3,500 KM</p> <p>NOTES: In all cases the relevant distance is understood to be the sector on which the passenger is downgraded. The ticket price is understood to be the one-way coupon value for the sector on which the passenger is downgraded.</p>	Trips less than 1,500 KM	More than 2 hours	Trips between 1,500-3,500 KM and all intra EU flights in excess of 1,500 KM	More than 3 hours	Trips more than 3,500 KM (non intra EU)	More than 4 hours
Trips less than 1,500 KM	More than 2 hours						
Trips between 1,500-3,500 KM and all intra EU flights in excess of 1,500 KM	More than 3 hours						
Trips more than 3,500 KM (non intra EU)	More than 4 hours						

(Continued on next page)

For unexplained abbreviations, reference marks and symbols see Pages 21 through 29.

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RULE	SECTION I - GENERAL RULES
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87 PART II DENIED BOARDING COMPENSATION (Continued)

- (D) BOARDING PRIORITY
- (1) Crew Members positioning in preparation for a flight and ground personnel needed for emergency repairs on an aircraft grounded at a station.
 - (2) Transit passengers continuing on the same flight
 - (3) Unaccompanied children (under +[C]15 years of age)
 - (4) Stretcher and wheelchair cases
 - (5) Hardship cases as determined by the manager on duty
 - (6) Transit passengers continuing on the same flight
 - (7) Connecting passengers
 - (8) Passengers holding confirmed reservations will be boarded before any passengers not holding confirmed reservations or any who are not entitled to confirmed reservations.
 - (9) Passengers holding confirmed reservations and a valid ticket for the flight
 - (10) Local passengers in the order their boarding card has been issued excluding passengers who volunteered for denied boarding.
 - (11) Passengers having volunteered for denied boarding compensation in the order they volunteered.
- (E) DEFINITIONS
For the purpose of this rule, except as otherwise specifically provided herein: the following definitions shall apply:
- Airport** means the airport at which the direct or connecting flight, on which the passenger holds confirmed reserved space, is planned to arrive or some other airport serving the same metropolitan area, provided that transportation to the other airport is accepted (i.e. used) by the passenger.
- Alternate Transportation** is air transportation provided by a carrier or other transportation used by the passenger which, at the time the arrangement are made, will provided for arrival at the passenger's destinations or next point of stopover, within four hours of his originally scheduled arrival time.
- Carrier** means an carrier, except a helicopter operator, holding a commercial air service licence authorizing the transportation of persons.
- Comparable Air Transportation** is provided by air carrier to the passengers at no extra cost.
- Confirmed Space (reservation)** is that which applies to a specific AF flight, date and fare type as requested by the passenger and which is verified in AF reservations system and is so noted on the ticket.
- Cancellation** means the non-operation of a flight which was previously planned and on which at least one place was reserved.
- Ticket** means a valid document giving entitlement to transport, or something equivalent in paperless form, including electronic form, issued or authorized by the air carrier or its authorized agents.
- Stopover** is a deliberate interruption of a journey requested by the passenger which is scheduled to exceed four hours at a place between the points of origin and destination.
- Oversold** is that condition which is the result of there being more passengers with confirmed reservations and tickets than there are seats available on a flight.
- Volunteer** means a person who responds to carrier's request for volunteers and who willingly accepts carrier's offer or compensation, in any amount, in exchange for relinquishing his confirmed reserved space. Any other passenger denied boarding is considered, for the purposes of this rule, to have been denied boarding involuntarily, even if he accepts denied boarding compensation.

For unexplained abbreviations, reference marks and symbols see IPGT1-1, C.A.B. NO. 581, NTA(A) NO. 373.

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AREA: ZZ TARIFF: IPRG CXR: WS RULE: 0105

TITLE/APPLICATION - 70 (CONT)

CANCELS THE RESERVATION, THE PASSENGER MAY NOT BE ENTITLED TO A REFUND, DEPENDING ON ANY REFUND CONDITION ATTACHED TO THE PARTICULAR FARE.

(B) INVOLUNTARY CANCELLATIONS

IN THE EVENT A REFUND IS REQUIRED BECAUSE OF THE CARRIER'S FAILURE TO OPERATE OR REFUSAL TO TRANSPORT, THE REFUND WILL BE MADE AS FOLLOWS:

IF THE TICKET IS TOTALLY OR PARTIALLY UNUSED, THE TOTAL FARE PAID FOR EACH UNUSED SEGMENT WILL BE REFUNDED.

AREA: ZZ TARIFF: IPRG CXR: WS RULE: 0110

TITLE/APPLICATION - 70

K * DENIED BOARDING COMPENSATION

- (A) IF A FLIGHT IS OVERBOOKED WITH THE RESULT THAT A TICKETED PASSENGER IS NOT TRANSPORTED ON A FLIGHT FOR WHICH THEY HELD CONFIRMED SPACE, THE CARRIER WILL DEFINE A REMEDY OR REMEDIES TO MITIGATE THE IMPACT OF THE OVERBOOKING OR CANCELLATION UPON THE PASSENGER. IN DEFINING THE REMEDY OR REMEDIES APPROPRIATE IN A PARTICULAR CASE, THE CARRIER WILL CONSIDER THE TRANSPORTATION NEEDS OF THE PASSENGER AND ANY DAMAGES THE PASSENGER MAY HAVE SUFFERED BY REASON OF THE OVERBOOKING. IN CASES WHERE THE PASSENGER IS OFFERED ALTERNATIVE REMEDIES, THE CHOICE AMONG THE ALTERNATIVES SHALL REST WITH THE PASSENGER. IN PARTICULAR, THE CARRIER WILL OFFER ONE OR MORE OF THE FOLLOWING REMEDIES:
- (1) TRANSPORTATION, WITHOUT FURTHER CHARGE AND WITHIN A REASONABLE TIME, TO THE PASSENGER'S INTENDED DESTINATION ON A TRANSPORTATION SERVICE WHICH SERVICE WILL BE IDENTIFIED BY THE CARRIER;
 - (2) TRANSPORTATION, WITHOUT FURTHER CHARGE AND WITHIN A REASONABLE TIME, TO THE PASSENGER'S POINT OF ORIGIN ON A TRANSPORTATION SERVICE WHICH SERVICE WILL BE IDENTIFIED BY THE CARRIER;
 - (3) A MONETARY PAYMENT IN AN AMOUNT TO BE DEFINED BY THE CARRIER WHICH SHALL IN NO CASE BE LESS THAN THE VALUE OF THE UNUSED PORTION OF THE PASSENGER'S TICKET;
 - (4) A CREDIT, TO BE DEFINED BY THE CARRIER, TOWARDS THE PURCHASE OF FUTURE TRANSPORTATION ON A SERVICE OPERATED BY THE CARRIER.
- (B) IN IDENTIFYING THE TRANSPORTATION SERVICE TO BE OFFERED TO THE PASSENGER, THE CARRIER WILL NOT LIMIT ITSELF TO CONSIDERING ITS OWN SERVICES OR THE SERVICES OF CARRIERS WITH WHICH IT HAS INTERLINE AGREEMENTS.
- (C) IN DEFINING THE ALTERNATIVE REMEDIES TO BE OFFERED, THE CARRIER WILL CONSIDER, TO THE EXTENT THEY ARE KNOWN TO THE CARRIER, THE CIRCUMSTANCES OF THE PASSENGER AFFECTED BY THE OVERBOOKING, INCLUDING ANY EXPENSES WHICH THE PASSENGER, ACTING REASONABLY,

- MAY HAVE INCURRED AS A RESULT OF THE OVERBOOKING OR CANCELLATION AS, FOR EXAMPLE, COSTS INCURRED FOR ACCOMMODATION, MEALS OR ADDITIONAL TRANSPORTATION.
- (D) IN DEFINING THE ALTERNATIVE REMEDIES TO BE OFFERED, THE CARRIER WILL MAKE A GOOD FAITH EFFORT TO FAIRLY RECOGNIZE, AND APPROPRIATELY MITIGATE THE IMPACT OF THE OVERBOOKING OR CANCELLATION UPON THE PASSENGER.
- (E) VOLUNTEERS AND BOARDING PRIORITIES
IF A FLIGHT IS OVERSOLD (MORE PASSENGERS HOLD CONFIRMED RESERVATIONS THAN THERE ARE SEATS AVAILABLE), NO ONE MAY BE DENIED BOARDING AGAINST HIS/HER WILL UNTIL AIRLINE PERSONNEL FIRST ASK FOR VOLUNTEERS WHO WILL GIVE UP THEIR RESERVATIONS WILLINGLY, IN EXCHANGE FOR A PAYMENT OF THE CARRIER'S CHOOSING. IF THERE ARE NOT ENOUGH VOLUNTEERS, OTHER PASSENGERS MAY BE DENIED BOARDING INVOLUNTARILY, IN ACCORDANCE WITH THE FOLLOWING

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GFS TEXT MENU RULE CATEGORY TEXT DISPLAY
IN EFFECT ON: 17MAY13

AREA: ZZ TARIFF: IPRG CXR: WS RULE: 0110

TITLE/APPLICATION - 70 (CONT)

- BOARDING PRIORITY OF THE CARRIER: THE LAST PASSENGER TO ARRIVE AT THE TICKET LIFT POINT WILL BE THE FIRST TO BE DENIED BOARDING, EXCEPT;
- PASSENGERS TRAVELLING DUE TO DEATH OR ILLNESS OF A MEMBER OF THE PASSENGER'S FAMILY, OR,
 - AGED PASSENGERS, OR
 - UNACCOMPANIED CHILDREN, OR
 - PASSENGERS WITH A DISABILITY
- (F) COMPENSATION FOR INVOLUNTARY DENIED BOARDING
IF YOU ARE DENIED BOARDING INVOLUNTARILY, YOU ARE ENTITLED TO A PAYMENT OF "DENIED BOARDING COMPENSATION" FROM THE CARRIER UNLESS:
- YOU HAVE NOT FULLY COMPLIED WITH THE CARRIER'S TICKETING, CHECK-IN REQUIREMENTS, OR YOU ARE NOT ACCEPTABLE FOR TRANSPORTATION UNDER THE AIRLINE'S USUAL RULES AND PRACTICES; OR
 - YOU ARE DENIED BOARDING BECAUSE THE FLIGHT IS CANCELLED; OR
 - YOU ARE DENIED BOARDING BECAUSE A SMALLER CAPACITY AIRCRAFT WAS SUBSTITUTED FOR SAFETY OR OPERATIONAL REASONS AND THE CARRIER TOOK ALL REASONABLE MEASURES TO AVOID THE SUBSTITUTION OR THAT IT WAS IMPOSSIBLE FOR THE CARRIER TO TAKE SUCH MEASURES;
; OR
 - YOU ARE OFFERED ACCOMMODATIONS IN A SECTION OF THE AIRCRAFT OTHER THAN SPECIFIED IN YOUR TICKET, AT NO EXTRA CHARGE, (A PASSENGER SEATED IN A SECTION FOR WHICH A LOWER FARE IS CHARGED MUST BE GIVEN AN APPROPRIATE REFUND); OR

THE CARRIER IS ABLE TO PLACE YOU ON ANOTHER FLIGHT OR
FLIGHTS THAT ARE PLANNED TO REACH YOUR FINAL

DESTINATION OR YOUR NEXT SCHEDULED STOPOVER WITHIN ONE HOUR OF THE SCHEDULED ARRIVAL OF YOUR ORIGINAL FLIGHT.

- (G) AMOUNT OF DENIED BOARDING COMPENSATION:
ELIGIBLE PASSENGERS, AS PER PARAGRAPH (F) ABOVE, WHO ARE DENIED BOARDING INVOLUNTARILY FROM AN OVERSOLD FLIGHT ARE ENTITLED TO:
- (1) NO COMPENSATION IF THE CARRIER OFFERS ALTERNATE TRANSPORTATION THAT IS PLANNED TO ARRIVE AT THE PASSENGER'S DESTINATION OR FIRST STOPOVER NOT LATER THAN ONE HOUR AFTER THE PLANNED ARRIVAL TIME OF THE PASSENGER'S ORIGINAL FLIGHT;
 - (2) 200% OF THE TOTAL PRICE TO THE PASSENGER'S DESTINATION OR FIRST STOPOVER, WITH A MAXIMUM OF \$650, IF THE CARRIER OFFERS ALTERNATE TRANSPORTATION THAT IS PLANNED TO ARRIVE AT THE PASSENGER'S DESTINATION OR FIRST STOPOVER MORE THAN ONE HOUR BUT LESS THAN FOUR HOURS AFTER THE PLANNED ARRIVAL TIME OF THE PASSENGER'S ORIGINAL FLIGHT; AND
 - (3) 400% OF THE TOTAL PRICE TO THE PASSENGER'S DESTINATION OR FIRST STOPOVER, WITH A MAXIMUM OF \$1,300, IF THE CARRIER DOES NOT OFFER ALTERNATE TRANSPORTATION THAT IS PLANNED TO ARRIVE AT THE AIRPORT OF THE PASSENGER'S DESTINATION OR FIRST STOPOVER LESS THAN FOUR HOURS AFTER THE PLANNED ARRIVAL TIME OF THE PASSENGER'S ORIGINAL FLIGHT.
 - (4) A TOTAL PRICE MEANS THE TOTAL OF THE AIR TRANSPORTATION CHARGES AND THIRD PARTY CHARGES THAT MUST BE PAID TO OBTAIN THE SERVICE.

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GFS TEXT MENU RULE CATEGORY TEXT DISPLAY
IN EFFECT ON: 17MAY13

AREA: ZZ TARIFF: IPRG CXR: WS RULE: 0110
Special Permission No. 91655.

TITLE/APPLICATION - 70 (CONT)

(H) METHOD OF PAYMENT

- (1) THE CARRIER MUST GIVE EACH PASSENGER WHO QUALIFIES FOR DENIED BOARDING COMPENSATION, A PAYMENT BY CASH OR CASH EQUIVALENT, CHEQUE OR DRAFT FOR THE AMOUNT SPECIFIED ABOVE, OR TRAVEL CREDITS ON THE DAY AND PLACE THE INVOLUNTARY DENIED BOARDING OCCURS. HOWEVER, IF THE CARRIER ARRANGES ALTERNATE TRANSPORTATION FOR THE PASSENGER'S CONVENIENCE THAT DEPARTS BEFORE THE PAYMENT CAN BE MADE, THE PAYMENT WILL BE SENT TO THE PASSENGER WITHIN 24 HOURS.
- (2) THE CARRIER WILL INFORM PASSENGERS OF THE AMOUNT OF CASH COMPENSATION THAT WOULD BE DUE AND THAT THE PASSENGER MAY DECLINE TRAVEL CREDITS AND RECEIVE CASH OR EQUIVALENT

(3) THE CARRIER WILL FULLY DISCLOSE ALL MATERIAL RESTRICTIONS BEFORE THE PASSENGER DECIDES TO GIVE UP THE CASH OR EQUIVALENT PAYMENT IN EXCHANGE FOR TRAVEL CREDIT.

(4) THE CARRIER WILL OBTAIN A SIGNED AGREEMENT OF THE PASSENGER CONFIRMING THAT THE PASSENGER WAS PROVIDED WITH THE AFOREMENTIONED INFORMATION PRIOR TO PROVIDING THE TRAVEL CREDIT IN LIEU OF CASH OR CASH EQUIVALENT COMPENSATION.

(5) THE AMOUNT OF TRAVEL CREDIT WILL NOT BE LESS THAN 300% OF THE AMOUNT OF CASH COMPENSATION THAT WOULD BE DUE.

(6) PASSENGERS WILL BE ENTITLED TO EXCHANGE THE TRAVEL CREDITS TO CASH OR CASH EQUIVALENT AT THE RATE OF \$1 IN CASH BEING EQUIVALENT TO \$3 IN TRAVEL CREDITS WITHIN 1 MONTH OF RECEIPT, NOT TO EXCEED A CASH PAYOUT GREATER THAN THE MAXIMUM AMOUNT AS DEFINED BY THE LENGTH OF THE DELAY.

(7) THE RIGHTS OF A PASSENGER AGAINST THE CARRIER IN THE EVENT OF OVERBOOKING IS, IN MOST CASES OF INTERNATIONAL CARRIAGE, GOVERNED BY AN INTERNATIONAL CONVENTION KNOWN AS THE MONTREAL CONVENTION, 1999. ARTICLE 19 OF THAT CONVENTION PROVIDES THAT AN AIR CARRIER IS LIABLE FOR DAMAGE CAUSED BY DELAY IN THE CARRIAGE OF PASSENGERS AND GOODS UNLESS IT PROVES THAT IT DID EVERYTHING IT COULD BE REASONABLE EXPECTED TO DO TO AVOID THE DAMAGE. THERE ARE SOME EXCEPTIONAL CASES OF INTERNATIONAL CARRIAGE IN WHICH THE RIGHTS OF PASSENGERS ARE NOT GOVENED BY AN INTERNATIONAL CONVENTION. IN SUCH CASES ONLY A COURT OF COMPETENT JURISDICATION CAN DETERMINE WHICH SYSTEM OF LAWS MUST BE CONSULTED TO DETERMINE WHAT THOSE RIGHTS ARE.

AREA: ZZ TARIFF: IPRG CXR: WS RULE: 0115

TITLE/APPLICATION - 70

A CODE-SHARE AND INTERLINE TRAVEL
FOR TRAFVEL TO OR FROM THE UNITED STATES, WHEN TRAVELLING
WITH ONE OF THE CARRIER'S CODE-SHARE OR INTERLINE PARTNERS,
GUEST ARE ENCOURAGED TO FAMILIARIZE THEMSELVES WITH THE
BAGGAGE ALLOWANCES AND FEES OF THE CODE-SHARE OR INTERLINE

SUNWING AIRLINES INC.

CTA (A) No. 2
3rd Revised Page 38
Cancels 2nd Revised Page 38**SECTION VI - REFUNDS****RULE 18. REFUNDS****(a) Voluntary Cancellations**

If a passenger decides not to use the ticket and cancels the reservation, the passenger may not be entitled to a refund or compensation. (C)

(b) Involuntary Cancellations

In the event a refund is required because of the carrier's failure to operate or refusal to transport, the refund will be made as follows:

If the ticket is totally or partially unused, the total fare paid for each unused segment will be refunded.

(c) A passenger will not be eligible for compensation or refund under the following condition:

(i) The passenger checked-in or presents himself/herself at the boarding gate after the carrier's minimum check-in time or gate time [Rule 15 (2)] for any reason including being delayed in security or customs.

(d) Application for refund shall be made to the carrier or its duly authorized Agent.**RULE 19. DENIED BOARDING COMPENSATION (C)**

For the purposes of this Rule 19, "alternate transportation" means air transportation with a confirmed reservation at no additional charge (by a scheduled airline licensed by Canada or another appropriate country), or other transportation accepted and used by the passenger in the case of denied boarding.

(a) General. If a passenger has been denied a confirmed seat in the case of an oversold flight of the Carrier, the Carrier will offer the passenger the following options:

(1) refund the total fare paid for each unused segment; or

(2) arrange reasonable alternative transportation on its own services; or

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.
ISSUE DATE December 20, 2013
EFFECTIVE DATE December 23, 2013
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- (3) if reasonable alternate transportation on its own services is not available, the Carrier will make reasonable efforts to arrange transportation on the services of another carrier or combination of carriers on a confirmed basis in the comparable booking code.
- (b) **Volunteers and Boarding Priorities.** If a flight is oversold (more passengers hold confirmed reservations than there are seats available), no one may be denied boarding against his or her will until the Carrier's personnel first ask for volunteers who will give up their reservations willingly, in exchange for a payment of the Carrier's choosing. If there are not enough volunteers, other passengers may be denied boarding involuntarily, in accordance with the following boarding priority: the last passenger to arrive at the ticket lift point will be the first to be denied boarding, except:
- passengers travelling due to death or illness of a member of the passenger's family, or
 - unaccompanied minors, or
 - passengers who are disabled, or
 - elderly passengers.
- (c) **Compensation for Involuntary Denied Boarding.** If you are denied boarding involuntarily you are entitled to a payment of denied boarding compensation unless you have not fully complied with the Carrier's ticketing, check-in or reconfirmation requirements, or you are not acceptable for transportation under the Carrier's usual rules or practices, or you are denied boarding because a smaller capacity aircraft was substituted for safety or operational reasons and the Carrier took all reasonable measures to avoid the substitution or that it was impossible for the Carrier to take such measures, or you are offered accommodations in a section of the Aircraft other than specified in your ticket, at no extra charge, (a passenger seated in a section for which a lower fare is charged must be given an appropriate refund).
- (d) **Amount of Denied Boarding Compensation.** Passengers travelling with a reserved seat on an oversold flight of the Carrier who are denied boarding involuntarily from an oversold flight are entitled to:

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

ISSUE DATE	EFFECTIVE DATE
December 20, 2013	December 23, 2013
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- (i) No compensation if the Carrier offers alternate transportation that is planned to arrive at the passenger’s destination or first stopover not later than one hour after the scheduled arrival of the passenger’s original flight;
- (ii) 200% of the total fare to the passenger’s destination or first stopover, with a maximum of \$650 CDN if the Carrier is able to place the passenger on alternate transportation that is planned to arrive at the passenger’s destination or first stopover more than one hour but less than four hours after the scheduled arrival time of the passenger’s original flight; and
- (iii) 400% of the total fare to the passenger’s destination or first stopover, with a maximum of \$1,300 CDN, if the Carrier does not offer alternate transportation that is planned to arrive at the airport of the passenger’s destination or first stopover less than four hours after the scheduled arrival time.

0 to 1 hour delay	No compensation
1 to 4 hour arrival delay	200% of one-way fare (but no more than \$650 CDN)
Over 4 hours arrival delay	400% of one-way fare (but no more than \$1,300 CDN)

Passengers travelling with a reserved seat on an oversold flight of the Carrier, where the flight originates in the United States, who are denied boarding involuntarily from an oversold flight are entitled to the same compensation or lack of compensation provisions as set out above with the exception that all dollar amounts will be United States dollar amounts total rather than CDN.

For the purpose of calculating compensation under this Rule 20, the “total fare” is the one-way fare for the flight including the total of the air transportation charges and third party charges that must be paid to obtain a ticket, minus any applicable discounts.

- (f) **Method of Payment.** The Carrier must provide each passenger who qualifies for denied boarding compensation a payment by cheque or draft for the amount specified above, on the day and place the involuntary denied boarding occurs. However, if the Carrier arranges alternate transportation for the passenger’s convenience that departs before the payment can be made, the payment will be sent to the passenger within 24 hours.

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.
 ISSUE DATE December 20, 2013
 EFFECTIVE DATE December 23, 2013
 Per Decision No. 432-C-A-2013.

PORTER AIRLINES INC.

CTA (A) No. 1
3rd Revised Page 37 Cancels
2nd Revised Page 37

(b) **Involuntary Cancellations**

Refer to **Rule 15 Carrier Cancellation, Change and Refund Terms** for applicable terms and conditions.

RULE 20. DENIED BOARDING COMPENSATION

General

If a passenger has been involuntarily denied a reserved seat in case of an oversold flight on Porter Airlines, the Carrier will provide the passenger with:

- (a) a remedy or remedies in accordance with Rule 15 above; and
- (b) denied boarding compensation as set forth in this Rule 20 below.

Volunteers and Boarding Priorities

If a flight is oversold (more passengers hold confirmed reservations than there are seats available), no one may be denied boarding against his/her will until the Carrier's personnel first ask for volunteers who will give up their reservations willingly, in exchange for such compensation as the Carrier may choose to offer. If there are not enough volunteers, other passengers may be denied boarding involuntarily, in accordance with the Carrier's boarding priority.

In determining boarding priority, the Carrier will consider the following factors:

- whether a passenger is traveling due to death or illness of a member of the passenger's family, or
- age of a passenger, or
- whether a passenger is an unaccompanied minor, or
- whether a passenger is a person with a disability, or
- the fare class purchased and/or fare paid by a passenger

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

ISSUE DATE
March 20, 2014

EFFECTIVE DATE
March 21, 2014
Per SP No. 94823

PORTER AIRLINES INC.CTA (A) No. 1
2nd Revised Page 38 Cancels
1st Revised Page 38**Compensation for Involuntary Denied Boarding**

If you are denied boarding involuntarily on a flight, you are entitled to a payment of "denied boarding compensation" from Carrier unless:

- you have not fully complied with the Carrier's ticketing and check-in requirements, or you are not acceptable for transportation under the Carrier's usual rules and practices; or
- you are denied boarding because the flight is cancelled; or
- you are denied boarding because a smaller capacity aircraft was substituted for safety or operational reasons, and the events prompting such substitution were beyond the Carrier's control and the Carrier took all reasonable measures to avoid the substitution or it was impossible for the Carrier to take such measures; or
- you are offered accommodations in a section of the aircraft other than specified in your ticket, at no extra charge, (a passenger seated in a section for which a lower fare is charged must be given an appropriate refund); or
- Carrier is able to place you on another flight or flights that are planned to reach your final destination within one hour of the scheduled arrival of your original flight.

Amount of Denied Boarding Compensation

Passengers with a confirmed seat on Porter Airlines who are denied boarding involuntarily from an oversold flight are entitled to:

- (a) No compensation if the Carrier offers alternate transportation that is planned to arrive at the passenger's destination or first stopover not later than one hour after the planned arrival time of the passenger's original flight;
- (b) No less than 200% of the fare to the passenger's destination or first stopover, with a maximum of \$650 USD, if the Carrier offers alternate transportation that is planned to arrive at the passenger's destination or first stopover more than one hour but less than four hours after the planned arrival time of the passenger's original flight; and
- (c) No less than 400% of the fare to the passenger's destination or first stopover, with a maximum of \$1,300 USD, if the Carrier does not offer alternate transportation that is planned to arrive at the airport of the passenger's destination or first stopover less than four hours after the planned arrival time of the passenger's original flight.

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

ISSUE DATE
March 6, 2014EFFECTIVE DATE
March 7, 2014
Per SP No. 99014

PORTER AIRLINES INC.CTA (A) No. 1
2nd Revised Page 39 Cancels
1st Revised Page 39

0 to 1 hour arrival delay	No compensation.
1 to 4 hour arrival delay	At least 200% of one-way fare (but no more than \$650 USD).
Over 4 hours arrival delay	At least 400% of one-way fare (but no more than \$1,300 USD).

For the purpose of calculating compensation under this Rule 20, the "fare" is the one-way fare for the flight including any surcharge and air transportation tax, minus any applicable discounts. All flights, including connecting flights, to the passenger's destination or first 4-hour stopover are used to compute the compensation.

Method of Payment

Except as provided below, the Carrier must give each passenger who qualifies for denied boarding compensation a payment by cheque or draft for the amount specified above, on the day and place the involuntary denied boarding occurs. However, if the Carrier arranges alternate transportation for the passenger's convenience that departs before the payment can be made, the payment will be sent to the passenger within 24 hours. The Carrier may offer free or discounted transportation vouchers in place of cash or cheque payment, provided:

- (a) The Carrier has informed the passenger of the amount of cash compensation that would be due and that the passenger may decline travel vouchers, and receive cash or equivalent;
- (b) the value of such voucher(s) is no less than 300% of the value of the cash compensation to which the passenger would otherwise have been entitled;
- (c) the Carrier has disclosed to the passenger all material restrictions applicable to the use of such vouchers;
- (d) the Carrier obtains the signed agreement of the passenger, confirming that the passenger was provided with the aforementioned information, prior to providing travel vouchers in lieu of cash or equivalent compensation; and
- (e) The passenger may in any event refuse to accept such vouchers and insist on the cash/cheque payment, including that any passenger who accepts vouchers in lieu of cash or cheque payment at the time of involuntary denied boarding may, within 30 days, elect to exchange such vouchers for the cash or cheque payment she would have been entitled to receive had the passenger not accepted vouchers,

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

ISSUE DATE
March 6, 2014EFFECTIVE DATE
March 7, 2014
Per SP No. 99014

PORTER AIRLINES INC.

CTA (A) No. 1
4th Revised Page 40 Cancels
3rd Revised Page 40

provided that the vouchers have not been redeemed by the passenger in whole or in part.

RULE 21. CHECK-IN REQUIREMENTS

In addition to any other check in requirements set out in this tariff, the following check-in requirements must be complied with:

- (a) a passenger must have obtained his/her boarding pass and checked any baggage by the check-in deadline below and must be available for boarding at the boarding gate by the deadline shown below. Failure to meet these deadlines may result in the loss of the passenger's assigned seat or the cancellation of the passenger's reservation.

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

ISSUE DATE
March 12, 2014

EFFECTIVE DATE
March 13, 2014
Per SP No. 99314



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March 17, 2014

Via E-mail: mike.redmond @otc-cta.gc.ca

Canadian Transportation Agency
Ottawa, Ontario
K1A 0N9

Attention: Mike Redmond, Chief, Tariff Investigations

Dear Sirs/Mesdames:

**RE: Decision No. 10 –C-A-2014
Dr. Gabor Lukacs v. British Airways Plc
Submissions on Denied Boarding Compensation
in answer to the Show Cause order of the Agency**

On behalf of British Airways, we express its recognition of the accommodation made by the Canadian Transportation Agency in providing British Airways with the opportunity to show cause why the Agency should not require British Airways, with respect to the denied boarding compensation tendered to passengers under Rule 87(B)(3)(B), apply either:

1. The regime applicable in the United States of America,
2. The regime proposed by the complainant as set out in Decision No. 342-C-A- 2013,
3. The regime proposed by Air Canada as set out in Decision No. 442-C-A-2013, or
4. Any other regime that British Airways may propose that the Agency may consider to be reasonable.

British Airways proposes to apply the regime proposed by Air Canada as set out in Decision No.442-C-A-2014.

Proposed denied boarding compensation amounts for travel from Canada to the European Union	
Delay at arrival caused by involuntary denied boarding	Cash or equivalent
0-4 hours	CAD 400
Over 4 hours	CAD 800

British Airways proposes amending the text of its Rule 87(B)(3)(B) as follows:

RULE 87(B)(3)(B)

AMOUNT OF COMPENSATION PAYABLE FOR FLIGHTS FROM CANADA TO THE UNITED KINGDOM

(I) SUBJECT TO THE PROVISIONS OF PARAGRAPH (B)(3)(A) OF THIS RULE, CARRIER WILL

TENDER LIQUIDATED DAMAGES FOR DELAY AT ARRIVAL AT POINT OF DESTINATION CAUSED BY INVOLUNTARY DENIED BOARDING CASH OR EQUIVALENT IN THE AMOUNT OF CAD 400 FOR DELAY OF 0 TO 4 HOURS AND IN THE AMOUNT OF CAD 800 FOR DELAY OVER 4 HOURS.

(II) SAID TENDER WILL BE MADE BY CARRIER ON THE DAY AND AT THE PLACE WHERE THE FAILURE OCCURS, AND IF ACCEPTED WILL BE RECEIPTED FOR BY THE PASSENGER.

PROVIDED, HOWEVER, THAT WHEN CARRIER ARRANGES, FOR THE PASSENGER'S CONVENIENCE, ALTERNATE MEANS OF TRANSPORTATION WHICH DEPARTS PRIOR TO THE TIME SUCH TENDER CAN BE MADE TO THE PASSENGER, TENDER SHALL BE MADE BY MAIL OR OTHER MEANS WITHIN 24 HOURS AFTER THE TIME THE FAILURE OCCURS.

British Airways is fully committed to complying with the orders and directions of the Canadian Transportation Agency in as timely a manner as reasonably possible and to keeping the Agency informed with respect to timelines of implementation of the Denied Boarding Compensation regime set out above.

Respectfully submitted,



Carol E. McCall

Solicitor for British Airways Plc

c.c Dr. Gabor Lukacs: email to Lukacs@AirPassengerRights.ca



ERRATUM

January 21, 2014

**Decision No. 10-C-A-2014 dated January 17, 2014 – Gábor Lukács
against British Airways Plc carrying on business as British Airways.**

File No. M4120-3/13-00661

The following paragraph was inadvertently omitted from the above Decision and is now added after paragraph 144 of that Decision:

British Airways' response to the show cause direction must also be served on Mr. Lukács, who will have 10 days from receipt of that response to file comments, if any, with a copy to British Airways.

(signed)

Cathy Murphy
Secretary

Canada



DECISION NO. 10-C-A-2014

January 17, 2014

**COMPLAINT by Gábor Lukács against British Airways Plc carrying
on business as British Airways.**

File No. M4120-3/13-00661

INTRODUCTION

[1] Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) dated January 30, 2013 alleging that certain provisions relating to liability and denied boarding compensation appearing in the tariff applicable to British Airways Plc carrying on business as British Airways (British Airways), International Passenger Rules and Fares Tariff No. BA-1, NTA(A) No. 306 (Tariff), are unclear and/or unreasonable. Specifically, Mr. Lukács submits that:

- The introductory text to Rule 55(C) is unclear, contrary to paragraph 122(c) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR), and unreasonable within the meaning of subsection 111(1) of the ATR;
- Rule 55(C)(7) is inconsistent with the Convention for the Unification of Certain Rules for International Carriage by Air - Montreal Convention (Montreal Convention), and is therefore unreasonable within the meaning of subsection 111(1) of the ATR;
- Rule 55(C)(6) contradicts Article 22(5) of the Montreal Convention, and is therefore unreasonable within the meaning of subsection 111(1) of the ATR;
- Rule 55(C)(8) is inconsistent with the Montreal Convention, and is therefore unreasonable within the meaning of subsection 111(1) of the ATR;
- Rule 55(C)(10) and the portions of Rules 115(N) and 116(N) that govern liability are inconsistent with Articles 17(2) and 19 of the Montreal Convention, and with the *Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929* (Warsaw Convention), and are therefore unreasonable within the meaning of subsection 111(1) of the ATR;
- Rules 85(A) and 85(B)(2) are inconsistent with Article 19 of the Montreal Convention, and are therefore unreasonable within the meaning of subsection 111(1) of the ATR;
- Rule 87(B)(3)(B) is unreasonable within the meaning of subsection 111(1) of the ATR; and,
- Rules 115(H) and 116 (H) misstate the liability caps under the Montreal Convention and are unreasonable within the meaning of subsection 111(1) of the ATR.

[2] Mr. Lukács requests the Agency to:

- Disallow Rule 55(C), and in particular, Rules 55(C)(1), 55(C)(4), 55(C)(6), 55(C)(7), 55(C)(8) and 55(C)(10);
- Direct British Airways to amend Rules 115(H) and 116(H) to reflect the updated liability caps under the Montreal Convention;
- Disallow portions of Rules 115(N) and 116(N) that concern liability;
- Disallow Rules 85(A) and 85(B)(2), in part, and direct British Airways to incorporate into its rules the obligation to notify passengers about schedule changes; and
- Disallow Rule 87(B)(3)(B), and direct British Airways to incorporate into its rules the obligations set out in Regulation (EC) No. 261/2004.

PRELIMINARY MATTERS

[3] In his complaint, Mr. Lukács also alleges that Rule 55(C)(6) is misleading, contrary to paragraph 18(b) of the ATR; however, he did not make any arguments to that effect. British Airways did not address this matter in its answer. In the absence of any arguments respecting this issue, the Agency will not consider it.

[4] Further, in his complaint, Mr. Lukács requests the Agency to disallow Rule 55(C)(4). Mr. Lukács has neglected to file any submissions regarding this matter, and British Airways has not addressed it in its submissions. As such, the Agency will not consider the matter.

[5] Mr. Lukács' submissions of January 30, 2013 related to Rules 115 and 116 were based on information available to him at that time. The Agency notes that British Airways filed revisions to those Rules effective February 1, 2011 and January 13, 2012. Rule 116 was deleted and changes were made to Rule 115. However, British Airways did not, in its answer, advise Mr. Lukács that there had been revisions to its Tariff.

ISSUES

1. Is the introductory text to Rule 55(C) unclear, contrary to paragraph 122(c) of the ATR, and unreasonable within the meaning of subsection 111(1) of the ATR?
2. Is Rule 55(C)(6) inconsistent with Article 22(5) of the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?
3. Is Rule 55(C)(7) inconsistent with the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?
4. Is Rule 55(C)(8) inconsistent with the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?
5. Are Rule 55(C)(10) and the portion of Rule 115(N) that governs liability inconsistent with the Montreal Convention, and with the Warsaw Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?

6. Is Rule 115(H) inconsistent with Article 22(2) of the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?
7. Are Rules 85(A) and 85(B)(2) inconsistent with Article 19 of the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR? and,
8. Is Rule 87(B)(3)(B) unreasonable within the meaning of subsection 111(1) of the ATR?

RELEVANT STATUTORY AND TARIFF EXTRACTS

- [6] The legislation, Tariff provisions and provisions of the Montreal Convention relevant to this matter are set out in the Appendix.

CLARITY AND REASONABLENESS OF TARIFF PROVISIONS

Clarity

- [7] In Decision No. 2-C-A-2001 (*Mr. H. v. Air Canada*), the Agency formulated the test respecting the carrier's obligation of tariff clarity as follows:

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

Reasonableness

- [8] To assess whether a term or condition of carriage is "unreasonable," the Agency has traditionally applied a balancing test, which requires that a balance be struck between the rights of passengers to be subject to reasonable terms and conditions of carriage, and the particular air carrier's statutory, commercial and operational obligations. This test was first established in Decision No. 666-C-A-2001 (*Anderson v. Air Canada*) and was most recently applied in Decision No. 442-C-A-2013 (*Azar v. Air Canada*).
- [9] The terms and conditions of carriage are set out by an air carrier unilaterally without input from passengers. The air carrier sets its terms and conditions of carriage on the basis of its interests and commercial requirements.
- [10] When balancing the passengers' rights against the carrier's obligations, the Agency must consider the whole of the evidence and the submissions presented by both parties and make a determination on the reasonableness or unreasonableness of the term or condition of carriage based on which party has presented the more compelling and persuasive case.

ISSUES

Issue 1: Is the introductory text to Rule 55(C) unclear, contrary to paragraph 122(c) of the ATR, and unreasonable within the meaning of subsection 111(1) of the ATR?

Positions of the parties - Clarity of Rule 55(C)

Mr. Lukács

- [11] Mr. Lukács submits that the preamble to Rule 55(C), which states “[e]xcept as the convention or other applicable law may require,” is unclear because it suggests that the provisions are the general rule and only in exceptional circumstances do they not apply. He notes that in Decision No. LET-C-A-29-2011 (*Lukács v. Air Canada*), the Agency considered the phrase “Subject to the Convention, where applicable,” stating that:

The substantive wording of Rule 55(C)(7), on its face, indicates that Air Canada has no liability for loss, damage or delay of baggage and only in exceptional situations (i.e.. “Subject to the Convention”) will some other provisions concerning Air Canada liability apply and provide compensation rights to passengers. In fact, it is the reverse which applies, namely Air Canada does have liability for loss, damage or delay of baggage and only in exceptional circumstances is Air Canada able to raise a defence to a claim for liability or invoke damage limitations. The wording of the existing and proposed Rule 55(C)(7) is more likely to confuse passengers, rather than clearly inform passengers, regarding the applicability of Air Canada’s limit of liability. Accordingly, the Agency finds that Rule 55(C)(7) in itself is unclear and that the phrase “Subject to the Convention where applicable” renders the application of Rule 55(C)(7) unclear.

- [12] Mr. Lukács also notes that in Decision No. 16-C-A-2013 (*Lukács v. Porter Airlines*), the Agency found that the phrase “[s]ubject to the Warsaw Convention or the Montreal Convention” was unclear and contrary to section 122 of the ATR.
- [13] Mr. Lukács asserts that the Agency’s findings in Decision Nos. LET-C-A-29-2011 and 16-C-A-2013 equally apply to Rule 55(C).

British Airways

- [14] British Airways submits that the intent of the preamble is to make it clear that British Airways will comply with the Montreal Convention, otherwise the general provisions of common law apply, and that the wording of the Rule is clear.

Mr. Lukács

- [15] Mr. Lukács points out that at least 152 states are parties to the Warsaw Convention, and over 100 states are parties to the Montreal Convention. He submits that in Decision Nos. 328-C-A-2007 (*Balakrishnan v. Aeroflot*) and 434-C-A-2007 (*Thakkar v. Aeroflot*), among others, the Agency found that the Montreal Convention applied to round-trip travel originating and ending in Canada. Mr. Lukács therefore contends that the Warsaw Convention or the Montreal Convention applies to a vast majority of carriage by air to and from Canada. Mr. Lukács maintains that the wording in Rule 55(C) suggests that the provisions are the general rule and only in exceptional circumstances do they not apply.
- [16] Mr. Lukács submits that the substantive wording of the Rule is substantially different from the liability regime of the Montreal Convention or the Warsaw Convention, and therefore, the Rule is misleading and confusing. He notes that British Airways did not provide any arguments as to why the Agency's conclusions in Decision Nos. LET-C-A-29-2011 and 16-C-A-2013 were incorrect.
- [17] Mr. Lukács submits that as per Decision No. 291-C-A-2011 (*Lukács v. Air Canada*), the Agency could address his concerns about clarity by replacing “[e]xcept as the convention or other applicable law may require” with “[f]or the exceptional international itineraries where no Convention applies.”

Analysis and findings

- [18] The Agency agrees with Mr. Lukács' submission that the wording at issue in Rule 55(C) provides a wrong impression that the application of the Warsaw Convention or the Montreal Convention to air travel is the exception, and that such wording is equivalent to that considered by the Agency in Decision Nos. LET-C-A-29-2011 and 16-C-A-2013. The Agency therefore concludes that the wording at issue “Except as the convention or other applicable law may otherwise require.” creates a reasonable doubt, ambiguity or uncertain meaning regarding the rights and obligations of both the carrier and the passengers, and that the introductory text to Rule 55(C) is unclear, contrary to paragraph 122(c) of the ATR.

Positions of the parties - Reasonableness of Rule 55(C)Mr. Lukács

- [19] Mr. Lukács submits that in Decision No. 291-C-A-2011, which dealt, in part, with a tariff provision that stated: “[s]ubject to the Convention, where applicable, carrier is not liable for loss, damage to, or delay in delivery of [...],” the Agency held that passengers ought to be afforded the same protection against loss, damage or delay of baggage as in the Montreal Convention, regardless of whether the Montreal Convention applies, and disallowed the provisions as unreasonable.

- [20] Mr. Lukács points out that Article 17(2) of the Montreal Convention provides that the carrier is liable for destruction or loss of, or damage to, checked baggage in the charge of the carrier except to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. He notes that Article 19 of the Montreal Convention provides that a carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo, except when the carrier can prove that it took all reasonably required measures to avoid the damage or that it was impossible to take such measures. Mr. Lukács further notes that Article 20 of the Montreal Convention deals with the carrier's ability to exonerate itself in the case where the damage was caused, or contributed to, by the person claiming compensation; however, the burden of proof is on the carrier.
- [21] Mr. Lukács contends that Rule 55(C) results in British Airways being excluded from damages when the Montreal Convention does not apply, and that the Rule exonerates British Airways from liabilities, except in the case when the damage is due to British Airways' negligence or wilful misconduct. He also argues that the Rule appears to be placing the burden of proof on the passenger, which is contrary to Article 20.
- [22] Mr. Lukács therefore concludes that Rule 55(C) is inconsistent with the principles in the Montreal Convention, and therefore is unreasonable.

British Airways

- [23] British Airways submits that the intent of the phrase at issue is to make it clear that British Airways will fully comply with the Montreal Convention, otherwise the general provisions of common law apply. British Airways maintains that the liability provisions of the Montreal Convention do not need to apply to all circumstances for the Rule to be reasonable, and that Parliament has not enacted that the provisions of the Montreal Convention be applicable to all international carriage by air.

Mr. Lukács

- [24] Mr. Lukács argues that Rule 55(C) does not set out the general provisions of common law, and that in fact, to a great extent, it is the Montreal Convention that does this. He submits that at common law, the carrier is responsible for the safety of the goods entrusted to it in all events, except for specific perils, such as acts of God and the Queen's enemies, and there does not need to be a contract for this to hold between the common carrier and the owner of goods.
- [25] Mr. Lukács notes that in Decision No. LET-C-A-29-2011, the Agency found that it is reasonable to apply the principles of the Montreal Convention to carriage where neither the Montreal Convention nor the Warsaw Convention applies, and that British Airways did not provide any arguments as to why the Agency's conclusions in that Decision were wrong. Mr. Lukács also submits that British Airways has not provided any arguments or evidence related to the commercial or operational factors that the Agency should take into account to offset the rights of passengers.

- [26] Mr. Lukács maintains that there is no reason why British Airways should not apply the liability principles of the Montreal Convention, even when it does not apply, and that British Airways does not need to apply the entire Montreal Convention on all international carriage; it should apply some of the principles related to liability.

Analysis and findings

- [27] The Agency finds that the submissions by Mr. Lukács respecting this matter are more compelling than those by British Airways.
- [28] In Decision No. 291-C-A-2011, the Agency, in addressing the question of whether it was reasonable for Air Canada to exempt itself from liability on itineraries to which neither the Montreal Convention nor Warsaw Convention applies, found that “the right of all international passengers to have an accepted international standard for baggage liability protection is reasonable.” The Agency remains of the same opinion, and is also of the opinion that applying the principles of the Montreal Convention to carriage that is not subject to the Montreal Convention or the Warsaw Convention achieves a balance between the rights of passengers to be subject to reasonable terms and conditions of carriage, and British Airways’ statutory, commercial and operational obligations. As such, the Agency concludes that the introductory text to Rule 55(C) is unreasonable within the meaning of subsection 111(1) of the ATR.

Issue 2: Is Rule 55(C)(6) inconsistent with Article 22(5) of the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?

Positions of the parties

Mr. Lukács

- [29] Mr. Lukács submits that Rule 55(C)(6) states that British Airways’ liability shall not exceed the limitation set out in the Montreal Convention, and that this Rule contradicts and/or misrepresents British Airways’ obligations under Article 22(5) of the Montreal Convention, which allows for exceeding the limit in certain cases. He contends that, as such, the Rule is unreasonable and should be disallowed.

British Airways

- [30] British Airways submits that Rule 55(C)(6) is not intended to overrule Article 22(5) of the Montreal Convention; it is intended to clarify that the liability of the carrier for delay shall be the liability provided for under the Montreal Convention and no more.

Mr. Lukács

- [31] Mr. Lukács maintains that the wording of Rule 55(C)(6), when read with Rule 55(C), does not clearly reflect British Airways’ submitted intentions. He submits that the Rule does not specify to which convention the Rule is referring, and that the Montreal Convention and Warsaw Convention differ substantially on liability caps.

- [32] Mr. Lukács concludes that Rule 55(C)(6) is not clear, and should be substituted with, “In any event, liability of Carrier for delay of passenger shall not exceed the limitation set forth in Article 22 of the *Montreal Convention*.”

Analysis and findings

- [33] Article 22(5) of the Montreal Convention provides that:

The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.

- [34] The Agency notes that Articles 22(1) and (2) set out, respectively, the limit of liability for the delay in the carriage of passengers, and for the destruction, loss, damage or delay in the carriage of baggage.

- [35] The Agency finds that the submissions respecting this matter by Mr. Lukács are more compelling than those by British Airways. The Agency agrees with Mr. Lukács’ submission that Rule 55(C)(6), when read in tandem with Rule 55(C), restricts British Airways’ liability in a manner that is inconsistent with Article 22(5) of the Montreal Convention. More particularly, the limits provided for in the Montreal Convention are not absolute as these can be excluded if it is proved that the damage resulted from an act or omission of the carrier, its servants and agents, with the intent to cause the damage or recklessly and with knowledge of what the result would be. As noted above, the Agency has determined in previous decisions that tariff provisions that relate to travel to which neither the Montreal Convention nor Warsaw Convention applies, and that are inconsistent with the principles of the Montreal Convention, are unreasonable.

- [36] Therefore, the Agency finds that Rule 55(C)(6) fails to strike a balance between the passengers’ rights to be subject to reasonable terms and conditions of carriage, and British Airways’ statutory, commercial and operational obligations.

- [37] The Agency finds that Rule 55(C)(6) is unreasonable within the meaning of subsection 111(1) of the ATR.

Issue 3: Is Rule 55(C)(7) inconsistent with the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?

Positions of the parties

Mr. Lukács

- [38] Mr. Lukács submits that Rule 55(C)(7) states that British Airways' limit of liability is \$20 per kg for checked baggage, and \$400 per passenger for unchecked baggage. He submits that these limits appear to reflect the limits set out in the Warsaw Convention, the predecessor of the Montreal Convention, and are inconsistent with the Montreal Convention because they are unreasonably low.

British Airways

- [39] British Airways submits that to the extent that Rule 55(C)(7) may no longer be applicable under the Montreal Convention, British Airways does not apply it in determining baggage claims under the Montreal Convention; however, it continues to apply it to international carriage governed by the Warsaw Convention. British Airways concludes that the Rule is clear and reasonable.

Mr. Lukács

- [40] Mr. Lukács argues that the liability caps, when applied to itineraries where neither the Montreal Convention nor Warsaw Convention applies, are unreasonably low. He notes that under Rule 55(C)(7), liability caps of CAD\$460 and \$640 would apply to baggage weighing 23 kg and 32 kg, respectively. Mr. Lukács submits that in Decision No. 483-C-A-2010 (*Lukács v. WestJet*), the Agency found that a liability cap of \$1,000 was unreasonable.
- [41] Mr. Lukács submits that British Airways has not justified why it applies these liability caps on carriage not subject to the Warsaw Convention, and did not provide evidence to demonstrate how altering this provision would impact its ability to meet its commercial obligations.
- [42] Mr. Lukács maintains that Rule 55(C)(7) is unreasonable, and should be disallowed and substituted with a rule that sets out liability caps identical to what is in the Montreal Convention on itineraries where no convention applies.

Analysis and findings

- [43] The Agency finds that Mr. Lukács' submissions respecting this matter are more compelling than those by British Airways. As correctly noted by Mr. Lukács, Rule 55(C)(7) sets out the limits of baggage liability established by the Warsaw Convention; however, for itineraries where neither the Warsaw Convention nor the Montreal Convention applies, this Rule is inconsistent with the Montreal Convention as it does not reflect the baggage liability under the Montreal Convention, and involves limits that are lower than those required under the Montreal Convention.

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- [44] Rule 55(C)(7) fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage, and British Airways' statutory, commercial and operational obligations.
- [45] The Agency finds that Rule 55(C)(7) is unreasonable within the meaning of subsection 111(1) of the ATR.

Issue 4: Is Rule 55(C)(8) inconsistent with the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?

Positions of the parties

Mr. Lukács

- [46] Mr. Lukács notes that Rule 55(C)(8) states that in the event where a part, but not all, of a passenger's checked baggage is delivered, British Airways' liability will be reduced proportionally on the basis of weight, notwithstanding the value of any part of the baggage or its contents. He submits that British Airways may be confusing the Articles in the Montreal Convention that apply to baggage with those that apply to cargo. Mr. Lukács observes that the limits of liability for baggage under the Montreal Convention are no longer based on weight but rather on liability per passenger.
- [47] Mr. Lukács concludes that Rule 55(C)(8) is inconsistent with the Montreal Convention, and is unreasonable and should be disallowed.

British Airways

- [48] British Airways submits that to the extent that Rule 55(C)(8) may no longer apply under the Montreal Convention, it is not applied in the determination of baggage claims under that Convention; however, the Rule applies to international carriage governed by the Warsaw Convention.
- [49] British Airways maintains that Rule 55(C)(8) is reasonable and clear.

Mr. Lukács

- [50] Mr. Lukács argues that the liability caps, when applied to itineraries where neither the Montreal Convention nor Warsaw Convention applies, are unreasonably low. He submits that British Airways has not submitted any reasons for applying the over 80-year old regime on itineraries where it is not applicable given that the Montreal Convention is considered the current standard, and that the value or importance of items need not be proportionate to their weight, which is reflected in the Montreal Convention.
- [51] Mr. Lukács asserts that Rule 55(C)(8) is unreasonable in cases where it applies to non-Warsaw Convention itineraries, and should be disallowed and/or substituted.

Analysis and findings

- [52] The Agency agrees with Mr. Lukács' submission that Rule 55(C)(8) does not set out the limits of baggage liability under the Montreal Convention, and that the limits established under the Rule are lower than those required by the Montreal Convention. With respect to the application of the principles of the Montreal Convention relating to baggage liability to itineraries to which the Warsaw Convention does not apply, the Agency has determined, as noted above, that passengers ought to be afforded the same protection against loss and damage or delay of baggage as in the Montreal Convention, regardless of whether that Convention applies.
- [53] The Agency finds that Mr. Lukács' submissions regarding this matter are more compelling than those by British Airways, and that Rule 55(C)(8) does not strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage, and British Airways' statutory, commercial and operational obligations. As such, the Agency finds that Rule 55(C)(8) is unreasonable within the meaning of subsection 111(1) of the ATR.

Issue 5: Are Rule 55(C)(10) and the portion of Rule 115(N) that governs liability inconsistent with the Montreal Convention, and the Warsaw Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?

Positions of the partiesMr. Lukács

- [54] Mr. Lukács submits that Rule 55(C)(10) states that British Airways is not liable for loss, damage or delay of items in the passenger's checked baggage. He notes that these items include: fragile or perishable items, money, jewelry, silverware, negotiable papers, securities or other valuables, business documents or samples. Mr. Lukács further notes that Rule 115(N) states that these types of items must not be included in checked baggage, and if they are, British Airways will not be liable for loss of or damage to them.

Loss

- [55] Mr. Lukács submits that Article 17(2) of the Montreal Convention does not relieve the carrier from liability, except in the case when damage results from the "inherent defect, quality or vice of the baggage." He also submits that Article 17(3) of the Montreal Convention provides that once the loss of baggage is established, the passenger is entitled to "enforce against the carrier the rights which flow from the contract of carriage."
- [56] Mr. Lukács maintains that the carrier's liability for loss of checked baggage is absolute, and the carrier cannot exonerate itself from that liability.

Destruction and damage

- [57] Mr. Lukács notes that Article 17(2) of the Montreal Convention also provides that in order for the carrier to exonerate itself from liability for damage, that carrier must prove that the baggage had a particular inherent defect, quality or vice, and that such defect was the cause of the damage.

Delay

- [58] Mr. Lukács submits that Article 19 of the Montreal Convention provides that the carrier is liable for damage due to delay except if the carrier can prove that it took all reasonably required measures to avoid the damages or that those measures were impossible. He asserts that the burden of proof resides with the carrier, and the fact that baggage contains excluded items is not relevant to the matter of liability due to delay; what is relevant is if the carrier took all reasonably required measures to avoid the delay.
- [59] Mr. Lukács submits that in Decision No. 227-C-A-2008 (*McCabe v. Air Canada*), the Agency found that if a carrier accepts checked baggage, and that baggage is under the care and control of the carrier, then the carrier assumes liability for that baggage in the event of loss and damage, notwithstanding the baggage contains items the carrier has not agreed to carry. He notes that in Decision No. 208-C-A-2009 (*Lukács v. Air Canada*), the Agency found that, to exempt a carrier for damage under Article 17(2) of the Montreal Convention, there must be a causal relationship between the damage and an inherent defect, quality or vice of the baggage. Mr. Lukács submits that this principle was reaffirmed in Decision Nos. 309-C-A-2010 (*Kipper v. WestJet*), 477-C-A-2010 (*Lukács v. WestJet*) and 99-C-A-2011 (*Kouznetchik v. American Airlines*).
- [60] Mr. Lukács argues that Rules 55(C)(10), 115(N) and 116(N) are blanket exclusions from liability based solely on whether the baggage contains excluded items, and not based on any causal relationship between the damage and any inherent defects, quality or vice of the baggage. He submits that these Rules are inconsistent with the Montreal Convention, are therefore unreasonable, and should be disallowed.

British Airways

- [61] British Airways submits that Rules 55(C)(10) and 115(N) apply to non-Montreal Convention international carriage, and are clear and reasonable.

Mr. Lukács

- [62] Mr. Lukács submits that the legal principles related to baggage liability in the Montreal Convention are the same as those in the Warsaw Convention. Therefore, Rules 55(C)(10) and 115(N) are also unreasonable when applied to itineraries subject to the Warsaw Convention. He further notes that, in Decision Nos. LET-C-A-29-2011 and 291-C-A-2011, the Agency found that tariff provisions like Rules 55(C)(10) and 115(N) on itineraries where no convention applies do not provide passengers with reasonable liability coverage.

- [63] Mr. Lukács submits that British Airways has not provided arguments as to why the same conclusions should not be made in the present case, and further, that as British Airways' primary competitor, Air Canada, was ordered to substitute its rule with language that reflects the principles of the Montreal Convention, British Airways will not suffer a competitive disadvantage if required to do the same.
- [64] Mr. Lukács concludes that Rule 55(C)(10), and the portion of Rule 115(N) that governs liability should be disallowed and substituted, as in the case with Air Canada.

Analysis and findings

- [65] The Agency agrees with Mr. Lukács' submission that Rule 55(C)(10) is inconsistent with Articles 17(2) and 19 of the Montreal Convention because that Rule excludes British Airways from liability, irrespective of whether the damage to baggage was related to the inherent defect, quality or vice of that baggage, or in respect of delay, all reasonable measures were taken to avoid that delay.
- [66] The Agency notes that Rule 115(N) was revised effective January 13, 2012, prior to Mr. Lukács' complaint dated January 30, 2013, to provide, in part:
- In accordance with the British Airways conditions of carriage, items that are fragile, perishable or of special value must not be included in checked baggage. If any of these items, or any other items forbidden under the British Airways conditions of carriage, are included in checked baggage, British Airways will not be liable for any loss or damage to them except as provided for by the Montreal Convention. [...]
- [67] The Agency finds that Rule 115(N), as currently filed, is consistent with Articles 17(2) and 19 of the Montreal Convention.
- [68] With respect to travel to which the Warsaw Convention applies, the Agency agrees with Mr. Lukács' submission that Rules 55(C)(10) and 115(N) are inconsistent with that Convention.
- [69] Concerning the application of the principles of Articles 17(2) and 19 to carriage where neither the Montreal Convention nor Warsaw Convention applies, in Decision Nos. LET-C-A-29-2011 and 291-C-A-2011, the Agency found that tariff provisions similar to Rules 55(C)(10) and 115(N) on itineraries where no convention applies do not provide passengers with reasonable liability coverage, and that it is reasonable for the principles related to baggage liability established by the Montreal Convention for international carriage to be applied to an itinerary where neither the Montreal Convention nor the Warsaw Convention applies.

- [70] The Agency finds that Mr. Lukács' submissions regarding this matter are more compelling than those by British Airways, and that Rules 55(C)(10) and 115(N) fail to strike a balance between the passenger's rights to be subject to reasonable terms and conditions of carriage, and British Airways' statutory, commercial and operational obligations. The Agency therefore finds that Rule 55(C)(10), and the portion of Rules 115(N) that governs liability are unreasonable within the meaning of subsection 111(1) of the ATR.

Issue 6: Is Rule 115(H) inconsistent with Article 22(2) of the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR)?

Positions of the parties

Mr. Lukács

- [71] Mr. Lukács submits that Rule 115(H) provides that British Airways' liability limit is set at 1,000 Special Drawing Rights (SDR) for destruction, loss, damage or delay of baggage. He notes that the current limit of liability is actually 1,131 SDR, and that Rule 115(H) therefore misstates British Airways' obligation under the Montreal Convention.

British Airways

- [72] British Airways submits that Rule 115(H) sets out the original limit of liability of 1,000 SDR for baggage under the Montreal Convention, and that British Airways complies with the current applicable limit.

Mr. Lukács

- [73] Mr. Lukács maintains that there is no reason for retaining an outdated liability limit, and that British Airways should be directed to revise the Rules to reflect the current baggage liability limit set out in the Montreal Convention.

Analysis and findings

- [74] Mr. Lukács argues that Rule 115(H) does not reflect the current limit of baggage liability established by the Montreal Convention.
- [75] British Airways submits that it complies with the liability limit set by the Montreal Convention.
- [76] The Agency notes that British Airways revised Rule 115(H) prior to Mr. Lukács' complaint dated January 30, 2013, to provide, in part, that "[t]he Montreal Convention limits British Airways' liability for lost, damaged or delayed baggage to 1,131 Special Drawing Rights (SDRS)." The Agency finds, therefore, that Rule 115(H) is consistent with Article 22(2) of the Montreal Convention, and is reasonable within the meaning of subsection 111(1) of the ATR.

Issue 7: Are Rules 85(A) and 85(B)(2) inconsistent with Article 19 of the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?

Positions of the parties

Mr. Lukács

- [77] Mr. Lukács notes that Rules 85(A) and 85(B)(2) state, among other things, that schedules are subject to change without notice. British Airways assumes no responsibility for making connections, and the carrier is not liable except to refund, in accordance with British Airways' Tariff, the fare and baggage charges for any unused portion of the ticket when a passenger is delayed.

Notice of schedule change

- [78] Mr. Lukács submits that in Decision No. 16-C-A-2013, the Agency found that it is reasonable for carriers to have tariff provisions that provide that passengers have a right to information on flight times and schedule changes, and that carriers must make reasonable efforts to inform passengers of delays and schedule changes and the reasons for them.
- [79] Mr. Lukács argues that the words "without notice" should be removed from Rule 85(A), and substituted with a provision requiring British Airways to provide passengers with notice about schedule changes.

Liability for delay

- [80] Mr. Lukács points out that in Decision No. 16-C-A-2013, the Agency provided its interpretation of Article 19 of the Montreal Convention, which was that the carrier is liable for delay, and that the liability can be avoided when the carrier has proved that all reasonably required measures were taken to avoid damages or that it was impossible to take such measures. He further notes that the Agency stated that, in terms of avoiding liability for delay, the issue is not who caused the delay but how the carrier reacts to the delay, that is, did the carrier take all reasonable required measures.
- [81] Mr. Lukács maintains that by limiting liability to a refund of the unused portion of the ticket in certain cases, regardless of the manner in which British Airways reacts to the delay caused, and whether British Airways took all measures that could be reasonably required to avoid the damage, Rule 85(B)(2) lowers British Airways' liability or exonerates British Airways of its liability under Article 19 of the Montreal Convention.
- [82] Mr. Lukács concludes that Rule 85(B)(2) is therefore unreasonable, and should be disallowed.

Making connections

- [83] Mr. Lukács submits that the most obvious and immediate result of missing a connection is delay, for which British Airways is liable under Article 19 of the Montreal Convention. He notes that in Decision No.16-C-A-2013, the Agency found that a similar provision was unreasonable because it was silent on the carrier's liability when the carrier is unable to provide the proof required under Article 19 of the Montreal Convention to relieve the carrier of liability for delay.
- [84] Mr. Lukács argues that the same reasons apply to Rule 85(A), and that although British Airways may exonerate itself from liability under Article 19 of the Montreal Convention, it does not mean that British Airways can exonerate itself from liability for delay due to missing a connection in every case. He further submits that the question is about whether passengers suffered a delay, whereas a missed connection is just a possible cause of a delay.
- [85] Mr. Lukács submits that the words, "carrier assumes no responsibility for making connections," appearing in Rule 85(A), should be disallowed.

British Airways

- [86] British Airways maintains that Rules 85(A) and 85(B)(2) are clear and reasonable, and are virtually the same wording that is in Air Canada's Rules 85(A) and 85(B)(2).

Mr. Lukács

- [87] Mr. Lukács submits that Air Canada's Rules have not been challenged before the Agency and deemed reasonable, and that in fact, Air Canada's Rules are equally unreasonable.
- [88] He asserts that based on Decision Nos. 16-C-A-2013 and 344-C-A-2013 (*Lukács v. Porter*), where the Agency found, respectively, that the words "without notice" and "carrier assumes no responsibility for making connections" should be disallowed in Rule 85(A) and the phrase "without liability except to refund" should be disallowed in Rule 85(B)(2).

Analysis and findings

- [89] With respect to the provision in Rule 85(A) that British Airways' schedules may be changed without notice, in Decision No. 16-C-A-2013, the Agency noted that some Canadian carriers, including Air Canada, have tariff provisions that provide that passengers have a right to information on flight times and schedule changes, and that reasonable efforts must be made to inform passengers of delays and schedule changes, and the reasons for them. The Agency found that such provisions are reasonable, and that, in this matter, the rights of passengers to be subject to reasonable terms and conditions of carriage outweigh the carrier's statutory, commercial or operational obligations. This finding was affirmed in Decision No. 344-C-A-2013. The Agency is of the opinion that the same reasoning applies here.

- [90] As for the provision in Rule 85(A) that provides that British Airways assumes no responsibility for the passenger making connections, the Agency agrees with Mr. Lukács' submission that that provision is inconsistent with Article 19 of the Montreal Convention to the extent that the Rule does not set out British Airways' liability when British Airways is unable to provide the proof required under Article 19 to escape liability for delay.
- [91] Rule 85(B)(2) provides, in part, that British Airways may, without notice, delay any flight without any liability except to refund the fare and baggage charges for any unused portion(s) of the ticket, in accordance with British Airways' Tariff. Article 19 of the Montreal Convention states that the carrier is liable for damage due to delay unless the carrier can prove that it took all reasonable measures to avoid the damage or that those measures were impossible to take.
- [92] In Decision No. 16-C-A-2013, the Agency considered a provision appearing in Porter Airlines' international scheduled service tariff, which stated that subject to the Montreal Convention and Warsaw Convention, Porter Airlines will not provide or reimburse passengers for expenses incurred due to delays or cancellations of flights. The Agency found that, consistent with its finding in Decision No. 291-C-A-2011 on baggage liability, the provision created a blanket exclusion of liability and therefore the provision was inconsistent with the principles of the Montreal Convention; thus the Rule was unreasonable within the meaning of subsection 111(1) of the ATR.
- [93] Similarly, the Agency finds that Rule 85(B)(2) represents a blanket exclusion of liability and is inconsistent with Article 19 of the Montreal Convention.
- [94] The Agency finds that the submissions by Mr. Lukács respecting this matter are more compelling than those by British Airways, and that Rules 85(A) and 85(B)(2) fail to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage, and British Airways' statutory, commercial and operational obligations. The Agency therefore finds that Rules 85(A) and 85(B)(2) are unreasonable within the meaning of subsection 111(1) of the ATR.

Issue 8: Is Rule 87(B)(3)(B) unreasonable within the meaning of subsection 111(1) of the ATR?

Regulation (EC) No. 261/2004

Mr. Lukács

- [95] Mr. Lukács argues that British Airways' Tariff should reflect British Airways' legal obligation under Regulation (EC) No. 261/2004.
- [96] Mr. Lukács submits that one of the three factors in the balancing test used by the Agency to determine if a tariff provision is reasonable is the carrier's ability to meet its commercial obligations. As such, he claims that the policies of British Airways' competitors "may be of some relevance."

- [97] Mr. Lukács notes that Regulation (EC) No. 261/2004 applies to every flight departing from an airport in the United Kingdom, and every flight operated by European Union carriers with a destination in the United Kingdom. He further notes that Société Air France carrying on business as Air France, and Deutsche Lufthansa Aktiengesellschaft's tariff rules are consistent with the regulation, and that both carriers remain profitable.
- [98] Mr. Lukács argues that Rule 87(B)(3)(B) should be replaced with a provision similar to Air France and Lufthansa's, which therefore would not adversely affect British Airways' ability to meet its commercial obligations.

British Airways

- [99] British Airways asserts that it is inappropriate for the Agency to enforce foreign laws, either directly or indirectly, by requiring carriers to include provisions of a European regulation in the carriers' Canadian contract of carriage. British Airways submits that by requiring the incorporation of the rights in Regulation (EC) No. 261/2004 as terms in British Airways' contract of carriage, it changes the very nature of the effect of the regulation by creating contractual rights, and therefore contractual remedies that can be exercised before the courts. British Airways maintains that this would, in a way, change the effect of foreign law in a manner that does not respect the European Parliament, and that if it had intended the rights set out in Regulation (EC) No. 261/2004 to be contractual rights, it would have so legislated.
- [100] British Airways maintains that the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA), does not grant the Agency power to enforce foreign laws, and that it is a general principle of law that what is not permissible directly cannot be done indirectly. British Airways argues that the Agency therefore cannot enforce foreign statutes by requiring carriers to incorporate the statutes into their tariffs based on the Agency's jurisdiction to receive and decide on consumers' complaints, and does not have jurisdiction to require a carrier to include any reference, directly or indirectly, to the regulation in the carrier's tariff rules.
- [101] British Airways submits that member states of the European Union are responsible for the enforcement of Regulation (EC) No. 261/2004, and that the regulation does not provide passengers with any contractual rights and does not provide for the enforcement of those rights under the regulation by legal proceedings before the general courts of law.
- [102] British Airways notes that it complies with Regulation (EC) No. 261/2004.

Mr. Lukács

- [103] With respect to British Airways' submission that Air Canada is British Airways' main competitor on Canada – United Kingdom routes, Mr. Lukács notes that, during proceedings relating to Decision No. 264-C-A-2013 (*Azar v. Air Canada*), Air Canada indicated that it intends to adopt denied boarding compensation amounts similar to what it is in Regulation (EC) No. 261/2004. He submits, therefore, that any competitive disadvantage will disappear when the Agency renders its decision on that case.

- [104] Mr. Lukács also argues that there is no evidence to support the claim that Air Canada is British Airways' primary competitor. He maintains that British Airways' competitors are Lufthansa and Air France (via their hubs), both of which pay denied boarding compensation for passengers departing from Canada and arriving in Europe according to Regulation (EC) No. 261/2004. Mr. Lukács submits that British Airways has not argued that it would suffer a competitive disadvantage in relation to Lufthansa and Air France if it substituted its Rule to match the amounts in Regulation (EC) No. 261/2004.
- [105] Mr. Lukács also contends that based on information submitted by British Airways relating to denied boarding compensation actually tendered to passengers by British Airways, it will not suffer any disadvantage if it were to amend Rule 87(B)(3)(B) to reflect Regulation (EC) No. 261/2004.
- [106] With regard to the Agency's jurisdiction, Mr. Lukács points out that section 113 of the ATR empowers the Agency to disallow and/or establish and substitute any tariff provision that the Agency finds to be contrary to subsection 111(1) of the ATR. He adds that the Agency's power to substitute and establish tariff provisions is broad and unrestricted, and that the Agency can impose any provision it finds appropriate.
- [107] Mr. Lukács submits that among the matters listed in paragraph 122(c) of the ATR that a carrier must set out in its tariff is compensation for denial of boarding. He therefore maintains that the Agency has jurisdiction over denied boarding compensation with respect to section 110 and subsections 111(1) and 113 of the ATR, and that denied boarding compensation is subject to the Agency's review, disallowance, and substitution powers.
- [108] Mr. Lukács asserts that in determining if a provision is reasonable and what is an appropriate substitute provision, the Agency may consider not only Canadian legislation but foreign legislation and international instruments. He observes that the Agency has done so in the past, such as in Decision No. 483-C-A-2010, where the Agency applied the Montreal Convention to domestic carriage, and Decision No. 204-C-A-2013, where the Agency considered the denied boarding compensation regime in the European Union and the United States. Mr. Lukács submits that the Agency's consideration of foreign legislation does not result in enforcing that legislation, but only using it as a source of inspiration with respect to what is reasonable.
- [109] Mr. Lukács provided submissions related to judgments of foreign courts in support of his position.
- [110] Mr. Lukács acknowledges that British Airways is complying with section 1(a) of Article 3 of Regulation (EC) No. 261/2004 relating to denied boarding compensation that must be tendered to passengers travelling from the United Kingdom to Canada, but notes that British Airways did not comment on its failure to comply with section 1(b) of Article 3 respecting compensation provided to passengers carried from Canada to the United Kingdom. He maintains that British Airways has failed to comply with its obligation, as a European Union carrier, to pay denied boarding compensation to passengers departing from Canada and arriving in the United Kingdom, according to Regulation (EC) No. 261/2004.

- [111] Mr. Lukács submits that the Agency is not being asked to enforce Regulation (EC) No. 261/2004, but to consider the obligations in determining the reasonableness of Rule 87(B)(3)(B) and an appropriate substitute.

Analysis and findings

- [112] In Decision No. 432-C-A-2013, the Agency addressed a submission that Sunwing's tariff neglected to reflect Sunwing's obligations relating to denied boarding as imposed by Regulation (EC) No. 261/2004. In that Decision, the Agency stated:

[103] As to the reasonableness of carriers' tariffs filed with the Agency, the Agency makes determinations on provisions relating to legislation or regulations that the Agency is able to enforce. Legislation or regulations promulgated by a foreign authority, such as the European Union's Regulation (EC) 261/2004, do not satisfy this criterion. If a carrier feels compelled or has been instructed by a foreign authority to include a reference in its tariff to that authority's law, the carrier is permitted to do so, but it is not a requirement imposed by the Agency.

- [113] The Agency will not require British Airways to incorporate the provisions of Regulation (EC) No. 261/2004 into British Airways' Tariff, or make reference to that Regulation.

Positions of the parties - Denied boarding compensation set out in Rule 87(B)(3)(B)

Mr. Lukács

- [114] Mr. Lukács notes that Rule 87(B)(3)(B), which governs denied boarding compensation with respect to flights between points in Canada and points in the United Kingdom, states that if a passenger is denied boarding, then the carrier will pay 100 percent of the value of the passenger's remaining ticket to the passenger's next stopover, but not less than \$50 and not more than \$200. He submits that the rule is inconsistent with the principle of a flat rate of denied boarding compensation, which is equal for all passengers, regardless of the fare paid.
- [115] Mr. Lukács argues that Rule 87(B)(3)(B) is inconsistent with the principle of a flat rate of denied boarding compensation.
- [116] Mr. Lukács submits that in response to a question he posed, British Airways filed a list of the denied boarding compensation amounts tendered to passengers departing from Canada to the United Kingdom during the years 2010, 2011 and 2012, and that this list confirms that British Airways paid GBP125 or GBP250 to each passenger. He further submits that such compensation is more than double the maximum amount of CAD\$200 stipulated in Rule 87(B)(3)(B), and that, therefore, Rule 87(B)(3)(B) does not reflect British Airways' current practices related to denied boarding compensation.
- [117] Mr. Lukács contends that British Airways did not provide any explanation or rationale how denied boarding compensation amounts of GBP125 or GBP250 were established, and made no submissions as to why these amounts are reasonable within the meaning of the ATR.

- [118] Mr. Lukács requests the Agency to make a finding that Rule 87(B)(3)(B) is unreasonable as the Agency did in Decision No. 204-C-A-2013 (*Lukács v. Air Canada*) respecting Air Canada's denied boarding compensation tariff provisions, and in Decision No. 227-C-A-2013 (*Lukács v. WestJet*). He also requests the Agency to impose on British Airways a new, reasonable denied boarding compensation policy in the same fashion, albeit with different parameters, as the Agency did in Decision No. 342-C-A-2013 (*Lukács v. Air Canada*).

British Airways

- [119] British Airways notes that Air Canada is British Airways' sole competitor on Canada – United Kingdom routes, and that Air Canada only pays \$200 cash or \$500 voucher for passengers departing from Canada to the United Kingdom. British Airways submits, therefore, that it would suffer a competitive disadvantage if required to replace Rule 87(B)(3)(B) with the provisions set out in Regulation (EC) No. 261/2004.
- [120] British Airways submits that Rule 87(B)(3)(B) only relates to denied boarding compensation to which Regulation (EC) No. 261/2004 does not apply, and that the Rule is clear and reasonable.

Analysis and findings

- [121] With respect to the current levels of denied boarding compensation appearing in British Airways' Tariff, the Agency notes that British Airways did not make any submissions on those levels, other than declaring that they are reasonable. There is no presumption that a tariff is reasonable. A mere statement by a carrier that a tariff provision is reasonable does not render that provision so.
- [122] In Decision No. 204-C-A-2013, the Agency determined that Air Canada's amounts for denied boarding compensation of \$100 cash or \$200 voucher for domestic carriage were unreasonable. Following this, the Agency determined in Decision No. 342-C-A-2013, that both the denied boarding regime existing in the United States of America, and that proposed by Mr. Lukács during the course of proceedings relating to that Decision, were reasonable. The Agency, in considering which of the two regimes the Agency would require Air Canada to apply, concluded that the regime proposed by Mr. Lukács was the preferable option, and consequently ordered Air Canada to incorporate into its tariff that regime.
- [123] The Agency also notes that in Decision No. 442-C-A-2013, the Agency determined that the existing denied boarding compensation amounts of \$200 cash or \$500 voucher were unreasonable. The Agency also determined that a denied boarding compensation regime proposed by Air Canada for international carriage of \$400 or \$800 depending on the delay on arrival at destination, was reasonable.
- [124] In both situations, Air Canada had not demonstrated how it would be at a competitive disadvantage if it were to raise the amounts of denied boarding compensation and amend its tariff rules accordingly.

[125] The Agency finds that Mr. Lukács' submissions respecting this matter are more compelling than those by British Airways. British Airways has not demonstrated that it would suffer a competitive disadvantage if it were to raise the amounts of denied boarding compensation, and amend Rule 87(B)(3)(B). It has simply argued that Air Canada only pays denied boarding compensation of \$200 in cash, or \$500 in voucher, for passengers departing from Canada to the United Kingdom, which is no longer the case, as mentioned above, and that it would suffer a competitive disadvantage if required to replace Rule 87(B)(3)(B) with the provisions set out in Regulation (EC) No. 261/2004. Accordingly, Rule 87(B)(3)(B), as it relates to the denied boarding compensation tendered by British Airways, fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage, and British Airways' statutory, commercial and operational obligations. As such, Rule 87(B)(3)(B), as it relates to the denied boarding compensation provided to passengers, may be unreasonable within the meaning of subsection 111(1) of the ATR.

Positions of the parties - Sole remedy

Mr. Lukács

[126] Mr. Lukács observes that Rule 87(B)(3)(B) purports to pre-empt the rights of passengers who accept denied boarding compensation to seek damages under any other law, including the Montreal Convention. He points out that the Rule refers to "full compensation for all actual or anticipatory damages." He submits that in Decision No. 249-C-A-2012 (*Lukács v. WestJet*), the Agency found that a tariff provision with the identical effect as Rule 87(B)(3)(B) was unreasonable as it does not provide passengers with a reasonable opportunity to fully assess their options, and that in such situations, the rights of a passenger established by the Montreal Convention should remain available.

[127] Mr. Lukács also asserts that this finding is consistent with Article 12 of Regulation (EC) No. 261/2004, which states that the regulation shall apply without prejudice to a passenger's rights to further compensation.

British Airways

[128] British Airways did not address this issue in its submission.

Analysis and findings

[129] As correctly noted by Mr. Lukács, the Agency, in Decision No. 249-C-A-2012, found that a rule similar to that of Rule 87(B)(3)(B) was unreasonable for failing to provide passengers with a reasonable opportunity to fully assess their options, and that in such situations, the rights of a passenger established by the Montreal Convention should remain available. The Agency finds that the same finding applies to the present matter, and that Rule 87(B)(3)(B) does not strike a balance between the rights of passengers to be subject to reasonable terms and conditions of carriage, and British Airways' statutory, commercial and operational obligations.

[130] The Agency finds that Rule 87(B)(3)(B), insofar as it relates to the issue of sole remedy, is unreasonable within the meaning of subsection 111(1) of the ATR.

SUMMARY OF CONCLUSIONS

Issue 1

[131] The introductory text to Rule 55(C) is unclear contrary to paragraph 122(c) of the ATR and unreasonable within the meaning of subsection 111(1) of the ATR.

Issue 2

[132] Rule 55(C)(6) is unreasonable within the meaning of subsection 111(1) of the ATR.

Issue 3

[133] Rule 55(C)(7) is unreasonable within the meaning of subsection 111(1) of the ATR.

Issue 4

[134] Rule 55(C)(8) is unreasonable within the meaning of subsection 111(1) of the ATR.

Issue 5

[135] Rules 55(C)(10), and the portion of Rule 115(N) that governs liability are unreasonable within the meaning of subsection 111(1) of the ATR.

Issue 6

[136] Rule 115(H) is consistent with Article 22(2) of the Montreal Convention and is reasonable within the meaning of subsection 111(1) of the ATR.

Issue 7

[137] Rules 85(A) and 85(B)2 are unreasonable within the meaning of subsection 111(1) of the ATR.

Issue 8

[138] Rule 87(B)(3)(B) is unreasonable within the meaning of subsection 111(1) of the ATR.

[139] The Agency will not require British Airways to incorporate the provisions of Regulation (EC) No. 261/2004 into British Airways' Tariff, or make reference to that Regulation.

[140] Rule 87(B)(3)(B), as it relates to the denied boarding compensation provided to passengers, may be unreasonable within the meaning of subsection 111(1) of the ATR.

[141] Rule 87(B)(3)(B), insofar as it relates to the issue of sole remedy, is unreasonable within the meaning of subsection 111(1) of the ATR.

ORDER

[142] The Agency, pursuant to paragraph 113(a) of the ATR, disallows the following provisions of British Airways' Tariff:

- The introductory text to Rule 55(C);
- Rule 55(C)(6);
- Rule 55(C)(7);
- Rule 55(C)(8);
- Rule 55(C)(10) and the portion of Rule 115(N) that governs liability;
- Rules 85(A) and 85(B)2; and
- Rule 87(B)(3)(B) in respect of sole remedy.

[143] The Agency orders British Airways, by no later than February 17, 2014, to amend its Tariff and conform to this Order and the Agency's findings set out in this Decision.

[144] Further, the Agency provides British Airways with the opportunity to show cause, by no later than February 17, 2014, why the Agency should not require British Airways, with respect to the denied boarding compensation tendered to passengers under Rule 87(B)(3)(B), apply either:

1. The regime applicable in the United States of America;
2. The regime proposed by Mr. Lukács in the proceedings related to Decision No. 342-C-A-2013;
3. The regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013; or
4. Any other regime that British Airways may wish to propose that the Agency may consider to be reasonable within the meaning of subsection 111(1) of the ATR.

[145] Pursuant to paragraph 28(1)(b) of the CTA, the disallowance of the above Rules shall come into force when British Airways complies with the above or on February 17, 2014, whichever is sooner.

(signed)

Geoffrey C. Hare

Member

(signed)

Sam Barone

Member

**British Airways' International Passenger Rules and Fares Tariff No. BA-1, NTA(A)
No. 306**

Rule 55

[...]

(C) LIMITATION OF LIABILITY

Except as the convention or other applicable law may otherwise require:

[...]

- (6) In any event liability of carrier for delay of passenger shall not exceed the limitation set forth in the convention.
- (7) Any liability of carrier is limited to 250 French gold francs, USD 20.00, CAD 20.00, per kilogram in the case of checked baggage, and 5,000 French gold francs, USD 400.00, CAD 400.00, per passenger in the case of unchecked baggage or other property, unless higher value is declared in advance and additional charges are paid pursuant to carrier's tariff. In that event, the liability of carrier shall be limited to such higher declared value. In no case shall the carrier's liability exceed the actual loss suffered by the passenger. All claims are subject to proof of amount of loss.
- (8) In the event of delivery to the passenger of part but not all of his checked baggage (or in the event of damage to part but not all of such baggage) the liability of the carrier with respect to the not delivered (or damaged) portion shall be reduced proportionately on the basis of weight, notwithstanding the value of any part of the baggage or contents thereof.

[..]

(10) LIABILITY FOR FRAGILE, IRREPLACEABLE OR PERISHABLE ARTICLES

Carrier is not liable for loss, damage to or delay in the delivery of fragile or perishable articles, money, jewelry, silverware, negotiable papers, securities or other valuables, business documents or samples which are included in the passengers' checked baggage, whether with or without the knowledge of carrier.

Rule 85

SCHEDULES, DELAYS AND CANCELLATIONS

(A) SCHEDULES

The times shown in timetables or elsewhere are approximate and not guaranteed, and form no part of the contract of carriage. Schedules are subject to change without notice and carrier assumes no responsibility for making connections. Carrier will not be responsible for errors or omissions either in timetables or other representations of schedules. No employee, agent or representative of carrier is authorized to bind carrier as to the dates or times of departure or arrival or the operation of any flight.

(B) CANCELLATIONS

[...]

(2) Carrier may, without notice cancel, terminate, divert, postpone or delay any flight or the further right of carriage or reservation of traffic accommodations and determine if any departure or landing should be made, without any liability except to refund in accordance with its tariffs the fare and baggage charges for any unused portion of the ticket if it would be advisable to do so:

- (A) Because of any fact beyond its control (including, but without limitation, meteorological conditions, acts of God, force majeure, strikes, riots, civil commotions, embargoes, wars, hostilities, disturbances, or unsettled international conditions) actual, threatened or reported or because of delay demand conditions circumstance or requirement due, directly or indirectly, to such fact; or
 - (B) Because of any fact not to be foreseen, anticipated or predicted; or
 - (C) Because of any government regulation, demand or requirement; or
 - (D) Because of shortage of labor, fuel or facilities, or labor difficulties of carrier or others.
- (3) Carrier will cancel the right or further right of carriage of the passenger and his baggage upon the refusal of the passenger, after demand by carrier, to pay the fare or the portion thereof so demanded, or to pay any charge so demanded and assessable with respect to the baggage of the passenger without being subject to any liability therefore except to refund, in accordance herewith, the unused portion of the fare and baggage charge(s) previously paid, if any.

[...]

Rule 87

DENIED BOARDING COMPENSATION

[...]

(B) APPLICABLE BETWEEN POINTS IN CANADA AND POINTS IN THE UNITED KINGDOM SERVED BY BRITISH AIRWAYS

When carrier is unable to provide previously confirmed space due to more passengers holding confirmed reservations and tickets on flight than there are available seats on that flight, such carrier will:

- (1) Transport persons who are denied confirmed reserved space, whether voluntarily or involuntarily, on its next flight on which space is available, at no additional cost to the passenger regardless of class of service, or;
- (2) If the carrier causing such delay is unable to provide onward transportation acceptable to the passenger, the carrier will provide such transportation on the service of any other carrier or combination of carriers in the same class of service as passenger's outbound flight or in different class of service at no additional cost to the passenger and subject to the availability of space and acceptability of the passenger providing such flights will be used without stopover and will provide an earlier arrival time at the passenger's destination or next point of stopover or transfer points; and
- (3) Carrier causing such delay will compensate such passenger for carrier's failure to provide confirmed space as follows:

(A) CONDITIONS FOR PAYMENT OF COMPENSATION

Subject to the exceptions in this subparagraph, carrier will tender to the passenger the amount of compensation specified in subparagraph (B) when:

(I) Passenger holding ticket for confirmed reserved space presents himself for carriage at the appropriate time and place, having complied fully with the carrier's requirements as to ticketing, check-in and reconfirmation procedure, and being acceptable for transportation under carrier's tariff; and

(II) The flight for which the passenger holds confirmed reserved space is unable to accommodate the passenger and departs without him.

Exception 1: The passenger will not be eligible for compensation if the flight on which the passenger holds confirmed reserved space is unable to accommodate him because of:

(AA) Government requisition of space, or

(BB) Substitution of equipment of lesser capacity when required by operational or safety reasons.

Exception 2: The passenger will not be eligible for compensation if he is offered accommodations or is seated in section of the aircraft other than that specified on his ticket at no extra charge, except that passenger seated in section for which lower fare applies shall be entitled to an appropriate refund.

(B) AMOUNT OF COMPENSATION PAYABLE

(I) Subject to the provisions of paragraph (B)(3)(A) of this rule, carrier will tender liquidated damages in the amount of 100 percent of the sum of the values of the passenger's remaining flight coupons of the ticket to the passenger's next stopover, or if none to his destination, but not less than \$50.00 and not more than \$200.00 provided that if the passenger is denied boarding in the United Kingdom, the amount of compensation in this subparagraph will read not less than UKL 10.00 nor more than UKL 100.00. Such tender if accepted by the passenger and paid by carrier, will constitute full compensation for all actual or anticipatory damages incurred or to be incurred by the passenger as result of carrier's failure to provide passenger with confirmed reserved space.

(II) For the purpose of this rule, the value of the remaining flight coupons of the ticket shall be the sum of the applicable one-way fares or fifty percent of the applicable round trip fares, as the case may be, including any surcharges and air transportation taxes, less any applicable discount.

(III) Said tender will be made by carrier on the day and at the place where the failure occurs, and if accepted will be receipted for by the passenger. Provided, however, that when carrier arranges, for the passenger's convenience, alternate means of transportation which departs prior to the time such tender can be made to the passenger, tender shall be made by mail or other means within 24 hours after the time the failure occurs.

Rule 115

[...]

(H) SPECIAL DECLARATION AND EXCESS VALUE CHARGE

The Montreal Convention limits British Airways' liability for lost, damaged or delayed baggage to 1,131 Special Drawing Rights (SDRs). If the passenger has more valuable baggage, the passenger can make special declaration of interest and pay supplementary charge to have the limit of British Airways' liability raised up to 2,000 SDRs. This

charge is known as the “Excess Value Charge” or “Special Declaration Charge”. This charge is not an insurance premium since the airline will meet claims only if legally liable under the Montreal Convention. This excess value charge relates to the additional costs involved in transporting and insuring the baggage concerned over and above those for baggage valued at or below the liability limit. The tariff shall be made available to passengers on request.

[...]

(N) EXCLUDED ITEMS

In accordance with the British Airways conditions of carriage, items that are fragile, perishable or of special value must not be included in checked baggage. If any of these items, or any other items forbidden under the British Airways conditions of carriage, are included in checked baggage, British Airways will not be liable for any loss or damage to them except as provided for by the Montreal Convention. These items include money, jewellery, precious metals, computers, personal electronic devices, share certificate, bonds and other valuable documents, business documents or passports and other identification documents. In the event of any claim for damage, delay or loss, British Airways may avail itself of all defenses, including the defense of contributory negligence, specified in Article 20 of the Convention.

Air Transportation Regulations, SOR/88-58, as amended

111(1) 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.

122. Every tariff shall contain

[...]

(c) the terms and conditions of carriage, clearly stating the air carrier’s policy in respect of at least the following matters, namely,

- (i) the carriage of persons with disabilities,
- (ii) acceptance of children for travel,
- (iii) compensation for denial of boarding as a result of overbooking,
- (iv) passenger re-routing,

- (v) failure to operate the service or failure to operate on schedule,
- (vi) refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,
- (vii) ticket reservation, cancellation, confirmation, validity and loss,
- (viii) refusal to transport passengers or goods,
- (ix) method of calculation of charges not specifically set out in the tariff,
- (x) limits of liability respecting passengers and goods,
- (xi) exclusions from liability respecting passengers and goods, and
- (xii) procedures to be followed, and time limitations, respecting claims.

Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention

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. [...]

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.

Article 20 – Exoneration

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. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its

liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21.

Article 22 - Limits of liability in relation to delay, baggage and cargo

1. In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4,150 Special Drawing Rights.

2. In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1,000 Special Drawing Rights for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at destination.

[...]

5. The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.

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.

Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929 (Warsaw Convention)

Article 19

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage, or cargo.

Article 20

The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.



Halifax, NS
lukacs@AirPassengerRights.ca

October 20, 2013

VIA EMAIL

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

Attention: Mr. Mike Redmond, Chief, Tariff Investigation

Dear Madam Secretary:

Re: Dr. Gábor Lukács v. British Airways
Complaint about rules governing liability and denied boarding compensation
File No.: M 4120/13-00661
Reply to British Airways' answer of March 22, 2013

Please accept the following submissions in relation to the above-noted matter as a reply, as per Rule 44 and Decision No. LET-C-A-114-2013, to British Airways' answer dated March 22, 2013.

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I. Applicable legal principles

(a) Powers of the Agency

By enacting section 86 of the *Canada Transportation Act* (the “CTA”), Parliament conferred upon the Agency very broad regulatory and regulation-making powers with respect to carriage by air to and from Canada, which include:

86. (1) The Agency may make regulations

⋮

(h) respecting traffic and tariffs, fares, rates, charges and terms and conditions of carriage for international service and

(i) providing for the disallowance or suspension by the Agency of any tariff, fare, rate or charge,

(ii) providing for the establishment and substitution by the Agency of any tariff, fare, rate or charge disallowed by the Agency,

(iii) authorizing the Agency to direct a licensee or carrier to take corrective measures that the Agency considers appropriate and to pay compensation for any expense incurred by a person adversely affected by the licensee’s or carrier’s failure to apply the fares, rates, charges or terms or conditions of carriage applicable to the service it offers that were set out in its tariffs, and

(iv) requiring a licensee or carrier to display the terms and conditions of carriage for its international service on its Internet site, if the site is used for selling the international service of the licensee or carrier;

Section 113 of the *Air Transportation Regulations* (the “ATR”), promulgated in accordance with these powers, confers upon the Agency equally broad powers to regulate the contents of tariffs for international service:

113. The Agency may

(a) suspend any tariff or portion of a tariff that appears not to conform with subsections 110(3) to (5) or section 111 or 112, or disallow any tariff or portion of a tariff that does not conform with any of those provisions; and

(b) establish and substitute another tariff or portion thereof for any tariff or portion thereof disallowed under paragraph (a).

The *CTA*, and the *ATR* promulgated pursuant to it, do not merely create a mechanism for enforcing the rights of individual passengers; rather, Parliament intended to establish a regulatory scheme: Carriers must set and publish their tariffs, which must be clear and applied to all passengers. Under the *ATR*, the Agency has a dual role: To review, disallow, suspend, and substitute tariff provisions on the one hand, and to enforce tariff provisions by ordering carriers to take corrective measures.

The purpose of having a regulatory scheme in place is not merely to enforce the general common law, but also to promote adequate protection of consumers, and protect passengers from terms and conditions that are unreasonable within the context of carriage of passengers and baggage.

Thus, the *CTA* and the *ATR* do confer upon the Agency jurisdiction to disallow unreasonable terms and conditions for international service, and to substitute them with reasonable ones that the Agency finds appropriate. In particular, in carrying out its mandate, the Agency can impose and has imposed various obligations and liabilities upon carriers by ordering the carriers to amend their tariffs accordingly (see *Pinksen v. Air Canada*, 181-C-A-2007; *Lukács v. WestJet*, 483-C-A-2010; *Lukács v. Air Canada*, 291-C-A-2011; and *Lukács v. Air Canada*, 251-C-A-2012).

The Federal Court of Appeal dismissed WestJet's motion for leave to appeal that challenged the Agency's jurisdiction to impose such obligations and liabilities upon carriers (see FCA File No.: 10-A-42).

Therefore, contrary to British Airways' position, the current state of the law is that the Agency does have jurisdiction to impose terms and conditions upon carriers that carriers must include in their tariffs even if these provisions may impose obligations and liabilities beyond the general common law of contract and tort liability.

(b) Provisions that are inconsistent with the legal principles of the *Montreal Convention* cannot be just and reasonable

British Airways claims that a tariff provision that is inconsistent with the legal principles of liability underlying the *Montreal Convention* can be reasonable within the meaning of the *ATR*. The Applicant respectfully disagrees, and notes that British Airways has provided not even a single authority in support of its position, and which would contradict the authorities cited by the Applicant.

Indeed, in *Lukács v. Air Canada*, LET-C-A-29-2011, the Agency (at para. 33) held that:

In striking the balance between passengers' rights and the statutory, commercial obligations of Air Canada, the Agency, applying the precedents noted above, is of the preliminary opinion that it is reasonable to apply the principles of the *Montreal Convention* to carriage involving itineraries to which neither the *Montreal Convention* nor *Warsaw Convention* applies. [...] it is important that passengers have the right, and are able, to rely on general consumer protection principles, irrespective of the passengers' itineraries. [...]

The Agency went on and noted that, as in the present case, the airline:

[...] has not provided any evidence or arguments as to commercial or operational factors that it believes should be taken into account by the Agency to offset the fundamental right of passengers to some form of baggage liability protection on all flights.

As explained in *Lukács v. Air Canada*, 291-C-A-2011 (at para. 42), which upheld the preliminary findings made in Decision No. LET-C-A-29-2011, requiring a carrier to include certain tariff provisions that reflect the principles of the *Montreal Convention* does not amount to imposing the entire Convention upon the carrier, and neither amounts to nor requires any legislative change:

[...] the Agency is not asking or requiring that Air Canada implement the entire scheme of the Montreal Convention, but rather that certain of Air Canada's tariff provisions reflect some of the principles set out in the Montreal Convention relating to liability which the Agency has determined are reasonable.

In *Lukács v. Air Canada*, LET-C-A-129-2011, the Agency conducted a very careful and detailed analysis of the applicability of the principles of the *Montreal Convention* to a domestic tariff provision, reviewed a wealth of authorities on this point (paras. 30-45), and concluded that:

[43] Accordingly, it is clear that the Agency is, and has been, of the view that the Convention is a useful interpretive tool to which the Agency may refer when applying its "reasonableness" test and striking the balance between passengers' rights and the statutory, commercial and operational obligations of a carrier. In doing so the Agency takes into account the principles of the Convention rather than applying the Convention itself.

[44] The Agency is of the view that passengers should expect and be entitled to consistency in treatment irrespective of whether they are on a domestic or international flight. To that end, the principles set out in the Convention provide insight into what is reasonable to apply in a domestic context.

[Emphasis added.]

These findings of the Agency were upheld in *Lukács v. Air Canada*, 251-C-A-2012:

[20] In light of the foregoing, the Agency concludes that the principles of Article 19 of the Convention are equally applicable to domestic carriage.

Therefore, the Applicant submits that the principles of the *Montreal Convention* governing liability for loss and damage to baggage, and delay of passengers and baggage, are equally applicable to international carriage to which neither the *Montreal Convention* nor the *Warsaw Convention* applies, and that the Agency ought to take into account these principles in deciding the reasonableness of the impugned provisions.

(c) The tariff must reflect British Airways' policies and obligations

Pursuant to s. 122(c) of the *ATR*, the tariff of every carrier must clearly address a basic list of topics, and the carrier must state its policy with respect to these core matters:

122. Every tariff shall contain

⋮

(c) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,

⋮

(iii) compensation for denial of boarding as a result of overbooking,

(iv) passenger re-routing,

(v) failure to operate the service or failure to operate on schedule,

(vi) refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,

⋮

(x) limits of liability respecting passengers and goods,

(xi) exclusions from liability respecting passengers and goods, and

(xii) procedures to be followed, and time limitations, respecting claims.

Thus, tariffs are meant to be comprehensive stand-alone documents that describe the rights and obligations in relation to carriage. In particular, the tariff should not contradict any convention referenced in the tariff. Indeed, in *Lukács v. Air Canada*, 208-C-A-2009, the Agency held that:

[18] Pursuant to paragraph 122(a) of the *ATR*, an air carrier must clearly state its terms and conditions in a tariff, and pursuant to subsection 110(4) of the *ATR*, an air carrier must apply the terms and conditions of carriage specified in its tariff. The Agency is therefore of the opinion that, to the extent possible, an air carrier's tariff should be a stand-alone document, requiring no reference to other documents to determine the rights and obligations associated with carriage. 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.

[Emphasis added.]

II. Rule 55(C) is unclear and unreasonable

(a) Clarity

At least 152 states are parties to the *Warsaw Convention*, while over 100 states are parties to the *Montreal Convention*. Moreover, the Agency has held on numerous occasions that the *Montreal Convention* applies to round-trip travel originating and ending in Canada (for example, *Balakrishnan v. Aeroflot*, 328-C-A-2007, para. 19 and *Thakkar v. Aeroflot*, 434-C-A-2007, para. 20).

Thus, the *Montreal Convention* or the *Warsaw Convention* apply to the vast majority of carriage by air to and from Canada, and itineraries on which neither of the conventions apply are rare and exceptional.

However, the wording of British Airways Tariff Rule 55(C) suggests quite the opposite, and creates the impression that the provisions set out in 55(C) are the general rule, and they are not applicable only in exceptional situations.

The substantive wording of Rule 55(C)(1) purports to relieve British Airways from every liability except when the passenger can prove negligence or willful misconduct, which is substantially different than the liability regime of the *Montreal Convention* or the *Warsaw Convention*.

Therefore, British Airways Tariff Rule 55(C) and 55(C)(1) in particular is misleading and confusing about the rights of passengers in that it indicates as the general rule a liability regime that is substantially different than what is set out in the conventions.

In *Lukács v. Air Canada*, LET-C-A-29-2011 (para. 65), and more recently, in *Lukács v. Porter*, 16-C-A-2013 (para. 62), the Agency held that a phrase such as “Subject to the Warsaw Convention or the Montreal Convention” renders tariff provisions unclear, contrary to s. 122 of the *ATR*.

British Airways has failed to address these authorities in its submissions, nor did it provide any arguments why the Agency’s conclusions in these past decisions were incorrect.

In light of the Agency’s findings in *Lukács v. Air Canada*, 291-C-A-2011 (paras. 50-52), it is submitted that the Applicant’s concerns about the clarity of Rule 55(C) could be addressed by replacing the phrase “Except as the convention or other applicable law may require” with “For the exceptional international itineraries where no Convention applies.”

(b) Reasonableness

The Applicant respectfully disagrees with British Airways’ submission that Rule 55(C)(1) sets out the general provisions of the common law. On the contrary, to a great extent, it is the *Montreal Convention* that accomplishes this. Indeed, at common law, the common carrier is responsible for the safety of the goods entrusted to it in all events, except for certain specific perils, such as acts of God and the Queen’s enemies, and it is not necessary to prove the existence of a contract between

the common carrier and the owner of the goods. This principle, and the comparison between the *Montreal Convention* and the common law, are eloquently explained in *Foord v. United Air Lines Inc.*, 2006 ABPC 103 (para. 33):

The common law duty and liability of a common carrier is described in 4 *Halsbury's Laws*, 3rd edition, page 141 and page 142.

“The common carrier is an insurer of the safety of the goods against everything extraneous which may cause loss or injury except the act of God or the Queen’s enemies. This responsibility as an insurer is imposed upon a common carrier by the custom of realm, and it is not necessary to prove a contract between him and the owner of the good in order to establish liability. Failure on the part of the carrier to deliver the goods safely is a breach of a duty placed upon him by the common law; and therefore an action in tort lies against him for such breach, the owner not being bound to prove any contract. Where, however, there is a contract, liability may arise either at common law or under the contract, and the contract may limit the carrier’s responsibility.”

What the Montreal Convention does is confirm the common law liability of the international carrier and then it goes on to permit the international air carrier to limit its liability in a way which is consistent world-wide.

As the Agency held in *Lukács v. Air Canada*, LET-C-A-29-2011 (at para. 33), it is important that passengers have the right and are able to rely on general consumer protection principles in a consistent manner, irrespective of their itineraries, and it is reasonable to apply the principle of the *Montreal Convention* to carriage involving itineraries whether neither of the conventions themselves apply. The same conclusion was reached by the Agency in *Lukács v. Air Canada*, LET-C-A-129-2011 (paras. 30-45).

British Airways has not provided any evidence or arguments as to commercial or operational factors that it believes should be taken into account by the Agency to offset the fundamental right of passengers to some form of protection on all flights. Nor did British Airways provide any arguments as to why the Agency’s conclusions in the aforementioned decisions were wrong.

Therefore, it is submitted that there is no reason for British Airways to not apply the liability principles of the *Montreal Convention* even on those exceptional itineraries where the conventions themselves do not apply. The Applicant is not suggesting to impose the entire *Montreal Convention* upon all international carriage by air, but rather imposing on British Airways tariff provisions that reflect some of the principles set out in the *Montreal Convention* relating to liability (see *Lukács v. Air Canada*, 291-C-A-2011, para. 42). By enacting s. 86(1)(h)(ii) of the *CTA*, Parliament did certainly confer jurisdiction upon the Agency to do so.

III. Liability caps: Rules 115(H), 116(H), and 55(C)(6)-(8)

(a) Rules 115(H) and 116(H) misstate the liability caps under the *Montreal Convention*

In November 2009, the Agency published a “Notification to Air Carriers of Upward Revision of the Limits of Liability for International Transportation Governed by the Montreal Convention,” which stated that:

The *Air Transportation Regulations* SOR/88-58, as amended (ATR), require air carriers to set out their policy with respect to limitations of liability in their respective tariffs. As a result of the change to the limits set out in the Montreal Convention, these revised levels must be updated in carriers’ tariffs and carriers must apply the new limits as of December 30, 2009. Air carriers are therefore requested to amend their tariffs on file with the Canadian Transportation Agency (Agency) accordingly on or before December 29, 2009 for effect on December 30, 2009.

The Applicant notes that to this date, British Airways has failed to comply with this directive.

The parties agree that the current liability cap for destruction, loss, damage or delay of baggage under the *Montreal Convention* is 1,131 SDR. Moreover, British Airways submitted that it complies with the baggage liability limitation currently applicable.

Thus, the parties agree that Rules 115(H) and 116(H) do not reflect British Airways’ obligations under the *Montreal Convention*, nor do they reflect British Airways’ actual practice and policy on baggage liability.

In particular, Rules 115(H) and 116(H) are unreasonable in that they purport to set a lower limit of liability than what is set out in the *Montreal Convention*.

Therefore, there is no reason for keeping the outdated liability caps in British Airways’ Tariff, and British Airways ought to be directed to update Rules 115(H) and 116(H) to reflect the current liability caps of the *Montreal Convention*.

(b) Rule 55(C)(7) is unreasonable

The parties agree that Rule 55(C)(7) sets out the liability caps of the *Warsaw Convention*. The parties also agree that British Airways may apply these caps on itineraries where the *Warsaw Convention* applies. Furthermore, the parties agree that British Airways cannot apply these caps on itineraries where the *Montreal Convention* is applicable.

The Applicant, however, disputes the reasonableness of the liability caps set out in Rule 55(C)(7) on itineraries where neither the *Warsaw Convention* nor the *Montreal Convention* applies, which amount to a liability cap of CAD\$460.00 for a 23 kg suitcase or \$640.00 for a 32 kg suitcase.

The Applicant submits that these liability caps are unreasonably low. Indeed, in *Lukács v. WestJet*, 483-C-A-2010, the Agency held that WestJet's proposed liability cap of CAD\$1,000 was unreasonable (leave to appeal denied by the Federal Court of Appeal; 10-A-42).

The Applicant notes that British Airways has provided no justification for applying these liability caps on itineraries that are not subject to the *Warsaw Convention*, nor did it provide any evidence to demonstrate how altering this provision would affect its ability to meet its commercial obligations.

Therefore, it is submitted that Rule 55(C)(7) provides unreasonably low liability caps for British Airways, and it ought to be disallowed. It is further submitted that Rule 55(C)(7) ought to be substituted with a provision that provides for liability caps identical to what is set out in the *Montreal Convention* on itineraries where no convention is applicable.

(c) Rule 55(C)(6) is unreasonable or unclear

British Airways' answer to this issue states that:

BA Tariff Rule 55(C)(6) is not intended to overrule the provisions of Article 22(5) of the *Montreal Convention*. It is intended to clarify that the liability of the carrier for delay shall be the liability provided for under the *Convention* and no more.

While the Applicant does not object to this stated intention of Rule 55(C)(6), it is submitted that the wording of Rule 55(C)(6), when read together with Rule 55(C), does not clearly reflect this intention:

EXCEPT AS THE CONVENTION OR OTHER APPLICABLE LAW MAY OTHERWISE REQUIRE:

⋮

(6) IN ANY EVENT LIABILITY OF CARRIER FOR DELAY OF PASSENGER SHALL NOT EXCEED THE LIMITATION SET FORTH IN THE CONVENTION.

Furthermore, Rule 55(C)(6) fails to clearly specify which convention it refers to, the *Montreal Convention* or the *Warsaw Convention*. In spite of the similarity in the legal principles, the liability caps set out in the two conventions substantially differ.

Thus, it is submitted that Rule 55(C)(6), at the very least, fails to be clear, and ought to be substituted with the following:

In any event, liability of Carrier for delay of passenger shall not exceed the limitation set forth in Article 22 of the *Montreal Convention*.

(d) Rule 55(C)(8) is unreasonable

The parties agree that Rule 55(C)(8) sets out the liability regime of the *Warsaw Convention*. The parties also agree that British Airways may apply these caps on itineraries where the *Warsaw Convention* applies. Furthermore, the parties agree that British Airways cannot apply these caps on itineraries where the *Montreal Convention* is applicable.

The Applicant, however, disputes the reasonableness of Rule 55(C)(8) on itineraries where neither the *Warsaw Convention* nor the *Montreal Convention* applies. British Airways has provided no reasons for applying an over 80-year-old liability regime on itineraries where it is not applicable, and given that the *Montreal Convention* is considered the current standard in this area, with over 100 states being parties to it.

The value or importance of items need not be proportionate to their weight, and thus the modern liability regime of the *Montreal Convention* is no longer based on the weight of the checked baggage. The price of clothing items is far from being proportionate to their weight.

For example a businessman, a lawyer, or an accountant travelling to an important meeting may be required to purchase or rent a suit if her or his baggage containing the usual business attire is delayed. Similarly, a passenger travelling to a wedding or a funeral cannot appear in a T-shirt and jeans, and thus may be required to purchase or rent a tuxedo or other attire that is socially expected at a particular type of event. This common knowledge and experience was recognized by the Agency in *Shetty v. Air Canada*, 353-C-A-2012, where it was held that the passenger was entitled to compensation in the amount of \$800.52 in relation to a 14-hour delay of baggage in domestic carriage.

Therefore, it is submitted that Rule 55(C)(8) is unreasonable insofar as it applies to itineraries where the *Warsaw Convention* is not applicable, and hence it ought to be disallowed and/or substituted.

IV. Blanket exclusions of liability for baggage: Rules 55(C)(10), 115(N), and 116(N) are unreasonable

British Airways has failed to address in its answer any of the Applicant's arguments with respect to the unreasonableness of Rules 55(C)(10), 115(N), and 116(N), and it devoted only two lines to this issue:

BA Tariff Rules 55(C)(10), 115(N) and 116(N) continue to apply to non *Montreal Convention* international carriage and are clear and reasonable.

As a preliminary matter, it is not sufficient for a carrier to simply state that it believes that certain provisions are reasonable. Indeed, in *Griffiths v. Air Canada*, 287-C-A-2009, the Agency held that:

[25] The terms and conditions of carriage are set by an air carrier unilaterally without any input from future passengers. The air carrier sets its terms and conditions of carriage on the basis of its own interests, which may have their basis in statutory or purely commercial requirements. There is no presumption that a tariff is reasonable. Therefore, a mere declaration or submission by the carrier that a term or condition of carriage is preferable is not sufficient to lead to a determination that the term or condition of carriage is reasonable.

[Emphasis added.]

The basic legal principles of the *Montreal Convention* with respect to baggage liability are identical to those of the *Warsaw Convention*. Thus, it is equally unreasonable to apply British Airways Tariff Rules 55(C)(10), 115(N) and 116(N) to itineraries that are subject to the *Warsaw Convention*. Furthermore, the reasonableness of tariff provisions such as Rules 55(C)(10), 115(N) and 116(N) on itineraries where no convention is applicable was carefully analyzed in great detail in *Lukács v. Air Canada*, LET-C-A-29-2011 (paras. 23-54), where the Agency concluded that:

[54] As noted above, as a basic principle, consumers should be afforded protection against lost, damaged or delayed baggage irrespective of the itinerary that applies to their travel. Accordingly, the Agency is of the preliminary opinion that existing and proposed Rule 55(C)(7) do not provide passengers with reasonable liability coverage.

These conclusions were confirmed by the Agency in *Lukács v. Air Canada*, 291-C-A-2011. British Airways has provided no arguments as to why the same conclusions are not applicable to the impugned provisions. Since British Airways' alleged "primary competitor," Air Canada, was ordered by the Agency to substitute its Rule 55(C)(7) with a language that does reflect the principles of the *Montreal Convention*, British Airways will suffer no competitive disadvantage as a result of being directed to do the same.

Hence, it is submitted that British Airways Tariff Rule 55(C)(10), and the portions of Rules 115(N) and 116(N) that govern liability, ought to be disallowed and substituted as in the case of Air Canada.

V. Blanket exclusions of liability for delay of passengers: Rules 85(A) and 85(B)(2) are unreasonable

British Airways has failed to address in its answer any of the Applicant's arguments with respect to the unreasonableness of Rules 85(A) and 85(B)(2), and it devoted only two lines to this issue:

BA Tariff Rules 85(A) and 85(B)(2) are clear and reasonable and are virtually the same wording as that contained in Air Canada's Tariff Rules 85(A)(A) and 85(B)(2).

While British Airways is correct in observing the similarity between the impugned tariff provisions and Air Canada's Tariff Rules 85(A) and 85(B)(2), the latter have never been challenged before the Agency, and so the Agency never ruled on their reasonableness. (In Decision No. 250-C-A-2012, the Agency reviewed Rule 80(C) of Air Canada, but did not consider Rule 85 at all.) Indeed, Air Canada's Tariff Rules 85(A) and 85(B)(2) are as unreasonable as the corresponding provisions in British Airways' Tariff.

As the Agency noted in *Lukács v. Air Canada*, in Decisions No. LET-C-A-129-2011 (para. 154) and No. 251-C-A-2012 (para. 75), "an industry practice does not, in itself, mean that the practice is reasonable." In other words, two wrongs do not make a right, and the fact that Air Canada's Tariff contains unreasonable provisions does not justify the same unreasonable provisions in British Airways' Tariff.

Therefore, based on the Agency's findings in *Lukács v. Porter*, 16-C-A-2013, which were recently reaffirmed by the Agency in *Lukács v. Porter*, 344-C-A-2013, it is submitted that the words "without notice" and "carrier assumes no responsibility for making connections" ought to be disallowed in Rule 85(A), and the phrase "without any liability except to refund.... ..of the ticket" ought to be disallowed in Rule 85(B)(2).

VI. Denied boarding compensation: Rule 87(B)(3)(B) is unreasonable

The Applicant is challenging the reasonableness of British Airways' International Tariff Rule 87(B)(3)(B), which governs denied boarding compensation with respect to flights between points in Canada and points in the United Kingdom.

Complaint of Dr. Lukács (January 30, 2013), pp. 37-38, Exhibit "C"

The Applicant is asking the Agency to make a finding that Rule 87(B)(3)(B) is unreasonable, as the Agency did with respect to denied boarding compensation rules in *Lukács v. Air Canada*, 204-C-A-2013 and *Lukács v. WestJet*, 227-C-A-2013. The Applicant is also asking the Agency to impose a new, reasonable denied boarding compensation policy upon British Airways, in the same fashion, albeit with different parameters, as the Agency did in *Lukács v. Air Canada*, 342-C-A-2013.

(a) Jurisdiction of the Agency

British Airways is vehemently challenging the Agency's jurisdiction to impose provisions upon British Airways that govern denied boarding compensation. The Applicant respectfully disagrees, and submits that British Airways misstates the issue.

Pursuant to the *Canada Transportation Act* and the *Air Transportation Regulations* (the "ATR"), carriage by air is regulated in Canada, and that regulatory body is the Agency. The regulation encompasses not only matters related to licensing, but also the terms and conditions that passengers are subjected to by airlines.

Section 110 of the *ATR* requires carriers to establish and file a tariff with the Agency, while subsection 111(1) of the *ATR* requires the tariff to be "just and reasonable."

Section 113 of the *ATR*, which implements s. 86(1)(h)(i)-(ii) of the *Canada Transportation Act*, confers upon the Agency the power to disallow and/or establish and substitute any tariff provision that fails to be "just and reasonable" contrary to subsection 111(1). The power to substitute tariff provisions is a vital tool in the hands of the Agency to enforce s. 111(1), and allows the Agency to use its expertise in the area of air transportation to establish tariff provisions that in its opinion meet the requirements of s. 111(1).

Thus, the Agency's power to establish and substitute tariff provisions is a broad and unrestricted one, and the Agency may impose any tariff or tariff provision upon a carrier if the Agency finds it appropriate to do so.

Section 122(c) of the *ATR* requires carriers, including British Airways, to set out their terms and conditions, clearly setting out the carrier's policy at least with respect to a prescribed list of matters, including compensation of passengers who are denied boarding (s. 122(c)(iii)). This brings the matter of denied boarding compensation within the Agency's jurisdiction over the contents of tariffs pursuant to ss. 110, 111(1), and 113 of the *ATR*.

Therefore, British Airways is not free to set its denied boarding compensation policy as it sees fit, but rather the policy must be “just and reasonable,” and it is subject to the Agency’s review, disallowance, and substitution powers set out in s. 113 of the *ATR*. In particular, the Agency may disallow British Airways’ present denied boarding compensation policy, and impose a new denied boarding policy upon British Airways, as it did in *Lukács v. Air Canada*, 342-C-A-2013.

In determining whether a tariff provision is reasonable, and what may be an appropriate substitute tariff provision, the Agency is entitled to consider not only Canadian, but also foreign legislation, and international instruments. Indeed, the Agency has done so on a number of occasions.

In *Lukács v. WestJet*, 483-C-A-2010, the Agency considered the baggage liability limits of the *Montreal Convention* to determine the appropriate liability limit for WestJet with respect to domestic carriage of baggage. Although the *Montreal Convention* is not applicable as a matter of law to domestic carriage, the Agency found it a helpful tool in establishing WestJet’s new liability cap. The Agency’s jurisdiction to do so was upheld by the Federal Court of Appeal, which dismissed WestJet’s motion for leave to appeal (File No.: 10-A-42).

Recently, in *Lukács v. Air Canada*, 204-C-A-2013, the Agency considered the denied boarding compensation regimes of the European Union and the United States in the context of determining what may be the appropriate substitute for Air Canada’s denied boarding compensation policy, which the Agency found unreasonable. In its show-cause order, the Agency considered the possibility of imposing the amounts prescribed by the US regime upon Air Canada:

[81] Further, the Agency provides Air Canada with an opportunity to show cause, within 30 days from the date of this Decision, why:

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2. with respect to the disallowed Rule 245(E)(2), Air Canada should not apply either the denied boarding compensation regime in effect in the United States of America or the regime proposed by Mr. Lukács.

This demonstrates that there is nothing untoward in the Agency considering the denied boarding compensation regime of a foreign jurisdiction, and imposing its system on a carrier. For greater clarity, it is submitted that doing so does not amount to enforcing a foreign legislation, but rather to using the foreign legislation as a source of inspiration for what may be a reasonable system for compensating passengers affected by denied boarding.

Hence, it is submitted that the Agency is fully empowered to rule upon the reasonableness of Rule 87(B)(3)(B), to disallow it if it is found to be unreasonable, and to subsequently substitute it with a tariff provision that the Agency finds appropriate.

(b) British Airways grossly misstates the law with respect to Regulation (EC) No. 261/2004

In its March 22, 2013 answer, British Airways makes false and/or misleading statements with respect to the enforceability of the rights set out in *Regulation (EC) No. 261/2004*, and British Airways' compliance with Article 3(1).

(i) False statement: “does not provide for the enforcement [...] by legal proceedings before the general courts of law”

British Airways claims on page 3 of its March 22, 2013 answer and on page 2 of British Airways' submissions dated August 23, 2013 that:

The Regulation does not provide passengers with any contractual rights and does not provide for the enforcement of the rights under the Regulation by legal proceedings before the general courts of law.

[Emphasis added.]

The Applicant submits that this statement is simply false, and misrepresents the current state of the law. In *McDonagh v. Ryanair Ltd*, Case C-12/11 (Annex “A”), the European Court of Justice settled the question of recourse to national courts as follows:

- 23 Article 16 cannot be interpreted as allowing only national bodies responsible for the enforcement of Regulation No 261/2004 to sanction the failure of air carriers to comply with their obligation laid down in Articles 5(1)(b) and 9 of that regulation to provide care.
- 24 Consequently, it must be held that an air passenger may invoke before a national court the failure of an air carrier to comply with its obligation, laid down in Articles 5(1)(b) and 9 of Regulation No 261/2004, to provide care in order to obtain compensation from that air carrier for the costs which it should have borne under those provisions.

[Emphasis added.]

There has never been a doubt that the right to monetary compensation set out in Article 7 of *Regulation (EC) No. 261/2004* can be enforced before general courts of law, as confirmed by numerous rulings of the European Court of Justice that stemmed, by reference, from proceedings commenced by individual passengers before national courts:

- *Wallentin-Hermann v. Alitalia*, Case C-549/07 (Annex “B”), by reference from the Handelsgericht Wien (Austria);
- *Finnair v. Lassooy*, Case C-22/11 (Annex “C”), by reference from the Korkein oikeus (Supreme Court) of Finland;

- *Cachafeiro v. Iberia*, Case C-321/11 (Annex “D”), by reference from the Juzgado de lo Mercantil No 2, A Coruña (Spain).

Finally, it is worth nothing that in *M. X... Jean-Baptiste et Madame X... Pascale Marie-Françoise c. Air France* (Annex “E”), the carrier was ordered by a national court to pay compensation for out-of-pocket expenses pursuant to the *Montreal Convention* and to also pay denied boarding compensation as per *Regulation (EC) No. 261/2004*.

Therefore, contrary to British Airways’ claim, the rights conferred upon passengers by *Regulation (EC) No. 261/2004* related to denied boarding compensation have always been enforceable by way of claim before general courts of law. *McDonagh v. Ryanair Ltd* also confirms that even the rights for care (that is, meals, accommodation, etc.) are enforceable in this manner, and the national enforcement bodies do not have exclusive jurisdiction over such matters.

(ii) Misleading statement: “British Airways complies with *Regulation (EC) No 261/2004*”

On page 3 of its March 22, 2013 answer, British Airways makes the following false statement:

British Airways complies with *Regulation (EC) No 261/2004* that applies, pursuant to Article 3, section 1.

In its August 23, 2013 submissions, British Airways refined this outright false statement with one that is technically true, but grossly misleading:

British Airways complies with *Regulation (EC) No. 261/2004* that applies, pursuant to Article 3, section 1(a) ‘to passengers departing from an airport located in the territory of a Member State to which the Treaty applies’ and posts all notices and provides all rights set out therein.

This second statement is true. Indeed, the Applicant fully accepts British Airways’ evidence that it complies with the provisions of *Regulation (EC) No. 261/2004* with respect to flights departing from the United Kingdom to Canada.

The second statement is misleading, however, because it is silent about British Airways’ deliberate and calculated failure to comply with its obligations under Article 3(1)(b). Indeed, the scope of Article 3(1) is explained in *Emirates Airlines v. Schenkel*, Case C-173/07 by the European Court of Justice (Annex “F”):

30 It follows from Article 3(1) as a whole that the regulation applies to situations in which passengers use a flight either departing from an airport located in the territory of a Member State (indent (a)) or departing from an airport located in a non-member country and flying to an airport located in the territory of a Member State if the air carrier operating the flight concerned is a Community carrier (indent (b)).

[Emphasis added.]

There is no doubt that British Airways is a “Community carrier” within the meaning of *Regulation (EC) No. 261/2004*, and consequently it is supposed to also pay denied boarding compensation according to the rates set out in *Regulation (EC) No. 261/2004* to passengers departing from Canada to the United Kingdom.

Therefore, it is clear that British Airways is currently not complying with its obligations under *Regulation (EC) No. 261/2004* with respect to passengers departing from Canada to the United Kingdom.

The Applicant is not asking the Agency to enforce *Regulation (EC) No. 261/2004*, but rather to take into account the obligations that it imposes on British Airways in determining the reasonableness of Rule 87(B)(3)(B), and an appropriate substitute for it.

(c) Passengers departing from the United Kingdom to Canada

On July 16, 2013, the Applicant directed a number of questions to British Airways, including the following one:

Q7. Exhibit “A” to British Airways’ submissions is 4th Revised Page AC-22-B from Air Canada’s international tariff. Rule 80(G) on that page states that:

The rules set out in EU regulation no 261/2004 are fully incorporated herein and shall supersede and prevail over any provision of this tariff which may be inconsistent with those rules.

What competitive disadvantage would British Airways suffer, if any, by including an identical or similar provision in its International Tariff?

Motion of Lukács (July 16, 2013), p. 4

In response to this question, British Airways stated that:

The issue is not competitive advantage with respect to the position of Dr. Lukács that British Airways should be required by the Agency to incorporate *Regulation (EC) No. 261/2004* into British Airways’ Canadian International Tariff.

British Airways’ submissions (August 23, 2013), answer to Q7

The Applicant accepts the answer provided by British Airways as true, and submits that based on British Airways’ own admission, it would not suffer any competitive disadvantage by incorporating the provisions of *Regulation (EC) No. 261/2004* into its International Tariff.

In its August 23, 2013 submissions, British Airways then went on to state that:

British Airways complies with *Regulation (EC) No. 261/2004* that applies, pursuant to Article 3, section 1(a) ‘to passengers departing from an airport located in the territory of a Member State to which the Treaty applies’ and posts all notices and provides all rights set out therein.

British Airways’ submissions (August 23, 2013), answer to Q7

In response to question Q2, British Airways also provided a list of the amount of denied boarding compensation it paid to passengers departing from the United Kingdom to Canada in the years 2010, 2011, and 2012. Although the amounts listed are in GBP, the list corroborates British Airways’ evidence that it has been paying these passengers compensation in accordance with the rates set out in *Regulation (EC) No. 261/2004*, that is, 300 EUR/600 EUR per passenger.

British Airways’ submissions (August 23, 2013), pp. 4-9

Thus, Applicant accepts British Airways’ evidence that it has been paying denied boarding compensation to passengers departing from the United Kingdom to Canada in accordance with the rates set out *Regulation (EC) No. 261/2004*, that is, 300 EUR/600 EUR, depending on the length of the delay caused.

In particular, Rule 87(B)(3)(B) does not reflect British Airways’ policy with respect to denied boarding compensation, contrary to s. 122(c)(iii) of the *ATR*; indeed, British Airways paid denied boarding compensation that substantially exceeds the amount set out in Rule 87(B)(3)(B) (“NOR MORE THAN UKL 100.00”).

Complaint of Dr. Lukács (January 30, 2013), pp. 37-38, Exhibit “C”

Therefore, it will not affect British Airways’ ability to meet its statutory, commercial, and operational obligations in any way if British Airways amends Rule 87(B)(3)(B) to reflect British Airways’ current practice with respect to denied boarding compensation paid to passengers departing from the United Kingdom to Canada (300 EUR/600 EUR per passenger, depending on the length of the delay caused).

Hence, it is submitted that Rule 87(B)(3)(B) is unreasonable with respect to passengers departing from the United Kingdom to Canada, and it ought to be substituted with a provision that reflects British Airways’ current practice (300 EUR/600 EUR per passenger, depending on the length of the delay caused).

(d) Passengers departing from Canada to the United Kingdom

Rule 87 has two subrules marked with (B). The present complaint concerns the one labelled as “APPLICABLE BETWEEN POINTS IN CANADA AND POINTS IN THE UNITED KINGDOM SERVED BY BRITISH AIRWAYS,” and which contains Rule 87(B)(3)(B) that reads as follows:

SUBJECT TO THE PROVISIONS OF PARAGRAPH (B) (3) (A) OF THIS RULE, CARRIER WILL TENDER LIQUIDATED DAMAGES IN THE AMOUNT OF 100 PERCENT OF THE SUM OF THE VALUES OF THE PASSENGER’S REMAINING FLIGHT COUPONS OF THE TICKET TO THE PASSENGER’S NEXT STOPOVER, OR IF NONE TO HIS DESTINATION, BUT NOT LESS THAN \$50.00 AND NOT MORE THAN \$200.00 PROVIDED THAT IF THE PASSENGER IS DENIED BOARDING IN THE UNITED KINGDOM, THE AMOUNT OF COMPENSATION IN THIS SUBPARAGRAPH WILL READ NOT LESS THAN UKL 10.00 NOR MORE THAN UKL 100.00. SUCH TENDER IF ACCEPTED BY THE PASSENGER AND PAID BY CARRIER, WILL CONSTITUTE FULL COMPENSATION FOR ALL ACTUAL OR ANTICIPATORY DAMAGES INCURRED OR TO BE INCURRED BY THE PASSENGER AS RESULT OF CARRIER’S FAILURE TO PROVIDE PASSENGER WITH CONFIRMED RESERVED SPACE.

[Emphasis added.]

Complaint of Dr. Lukács (January 30, 2013), pp. 37-38, Exhibit “C”

(i) Rule 87(B)(3)(B) does not reflect British Airways’ current practices

On July 16, 2013, the Applicant directed a number of questions to British Airways, including the following one, which concerns British Airways’ current practices of denied boarding compensation with respect to passengers departing from Canada to the United Kingdom:

Q6. Exhibit “B” lists amounts ranging from \$375.00 to \$4,563.00. These amounts are substantially higher than what is set out in British Airways’ Rule 87(B)(3)(B).

What method did British Airways use to determine these amounts?

Motion of Lukács (July 16, 2013), p. 4

In response to this question, British Airways stated that:

For compensation for passengers rerouted to arrive at last destination not more than 4 hours after original STA, cash of GBP 125.00 is the amount. For compensation for passengers rerouted to arrive at last destination more than 4 hours after original STA, cash of GBP 250.00 is the amount.

British Airways’ submissions (August 23, 2013), answer to Q6

On September 5, 2013, British Airways filed the list of denied boarding compensation amounts it paid to passengers departing from Canada to the United Kingdom in the years 2010, 2011, and 2012. This list also confirms that British Airways has paid 125.00 GBP or 250.00 GBP per passenger to such passengers. The amount of 250.00 GBP is approximately CAD\$415.00, and it is more than double the maximum amount of denied boarding compensation stipulated by Rule 87(B)(3)(B).

Thus, Rule 87(B)(3)(B) does not reflect British Airways' current practices with respect to denied boarding compensation, and British Airways has been paying denied boarding compensation in amounts that are substantially higher than set out in Rule 87(B)(3)(B). In particular, British Airways will suffer no disadvantage (competitive, or otherwise) by amending its Rule 87(B)(3)(B) to reflect its current practices.

It is submitted that this in and on its own demonstrates that Rule 87(B)(3)(B) fails to strike the balance between the rights of passengers and the ability of British Airways to meet its statutory, commercial and operational obligations.

(ii) Lack of evidence about competitive disadvantage

British Airways provided no explanation or rationale as to how the denied boarding compensation amounts of 125.00 GBP or 250.00 GBP were established for passengers departing from Canada to the United Kingdom in the years 2010, 2011, and 2012, and British Airways made no submissions as to why these rates are reasonable within the meaning of the *ATR*.

British Airways stated on page 4 of its March 22, 2013 answer to the complaint that:

With respect to competitive disadvantage that British Airways would suffer if British Airways were required to replace RULE 87(B)(3)(B) with the amounts prescribed by *Regulation (EC) No 261/2004*, as its primary competitor on the Canada/U.K. routes is Air Canada, it would suffer a competitive disadvantage because Air Canada only as to pay compensation of cash CAD 200 or voucher CAD 500 by the terms of its Tariff Rule 89(E)(2) for passengers departing from Canada to the U.K.

The Applicant submits that there is not a scintilla of evidence to support British Airways' claim that its primary competitor is Air Canada. British Airways is a European airline, and as such, its main competitors are the major European airlines, such as Lufthansa or Air France. Even if one considers only itineraries between Canada and the United Kingdom, both Lufthansa and Air France offer a wealth of such itineraries, via one of their hub cities (such as Frankfurt, Munich, or Paris).

It is important to observe that both Lufthansa and Air France pay denied boarding compensation to passengers departing from Canada to the European Community in accordance with the amounts prescribed by *Regulation (EC) No 261/2004*, that is, 300 EUR/600 EUR per passenger.

Complaint of Dr. Lukács (January 30, 2013), pp. 51-60, Exhibits "I" and "J"

British Airways has provided no evidence to demonstrate that it would suffer any competitive disadvantage vis-à-vis Lufthansa or Air France by raising its denied boarding compensation amounts for passengers departing from Canada to the United Kingdom to match the amounts prescribed by *Regulation (EC) No 261/2004*.

Even if Air Canada were British Airways' main competitor (a claim that the Applicant disputes, because it is not supported by any evidence), British Airways' submissions with respect to Air Canada's denied boarding compensation amounts are misleading and outdated for the following reasons.

First, as the Agency noted in *Lukács v. Air Canada*, 204-C-A-2013 (at para. 70):

[T]he mere fact that a carrier's terms and conditions of carriage is comparable to that applicable to other carriers does not render that term and condition reasonable.

Indeed, as British Airways surely knows, the reasonableness of International Tariff Rule 89(E)(2) of Air Canada referenced by British Airways has been challenged before the Agency in *Azar v. Air Canada*, File No. M4120-3/12-02098.

Second, according to Air Canada's submissions to the Agency in the *Azar v. Air Canada* case, dated September 18, 2013 (Annex "G"), Air Canada intends to adopt denied boarding compensation amounts on flights between Canada and the European Union that are similar to the amounts prescribed by *Regulation (EC) No 261/2004*.

Thus, any alleged competitive disadvantage for British Airways will vanish as soon as the Agency renders its decision in *Azar v. Air Canada*, and Air Canada implements its new denied boarding compensation policy with respect to flights between Canada and the European Union.

Therefore, British Airways failed to demonstrate that raising its denied boarding compensation amounts for passengers departing from Canada to the United Kingdom to match the amounts prescribed by *Regulation (EC) No 261/2004* (300 EUR/600 EUR, depending on the length of the delay caused) would cause British Airways competitive disadvantage that would adversely affect its ability to meet its statutory, commercial and operational obligations.

Hence, Rule 87(B)(3)(B) fails to strike the balance between the rights of passengers and the statutory, commercial and operational obligations of British Airways. As such, Rule 87(B)(3)(B) is unreasonable, and ought to be disallowed.

(e) "Sole remedy" provision is unreasonable

On pages 24-25 of the Applicant's complaint of January 30, 2013, the Applicant submitted that the portion of Rule 87(B)(3)(B) that purports to extinguish the rights of passengers who accept denied boarding compensation is unreasonable.

British Airways chose not to address this aspect of the Applicant's complaint.

Therefore, it is submitted that the Agency ought to disallow this provision as unreasonable based on the arguments presented in the Applicant's complaint.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Applicant

Cc: Ms. Carol E. McCall, counsel for British Airways

LIST OF AUTHORITIES

Legislation

1. *Air Transportation Regulations*, S.O.R./88-58.
2. *Canada Transportation Act*, S.C. 1996, c. 10.
3. *Canadian Transportation Agency General Rules*, S.O.R./2005-35.
4. *Carriage by Air Act*, R.S.C. 1985, c. C-26.

International instruments

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

Case law

6. *Balakrishnan v. Aeroflot*, Canadian Transportation Agency, 328-C-A-2007.
7. *Cachafeiro v. Iberia*, Case C-321/11, European Court of Justice.
8. *Emirates Airlines v. Schenkel*, Case C-173-07, European Court of Justice.
9. *Finnair v. Lassooy*, Case C-22/11, European Court of Justice.
10. *Foord v. United Air Lines Inc.*, 2006 ABPC 103.
11. *Lukács v. Air Canada*, Canadian Transportation Agency, 208-C-A-2009.
12. *Lukács v. Air Canada*, Canadian Transportation Agency, LET-C-A-29-2011.
13. *Lukács v. Air Canada*, Canadian Transportation Agency, LET-C-A-129-2011.
14. *Lukács v. Air Canada*, Canadian Transportation Agency, 291-C-A-2011.
15. *Lukács v. Air Canada*, Canadian Transportation Agency, 251-C-A-2012.
16. *Lukács v. Air Canada*, Canadian Transportation Agency, 204-C-A-2013.
17. *Lukács v. Air Canada*, Canadian Transportation Agency, 342-C-A-2013.

18. *Lukács v. Porter*, Canadian Transportation Agency, 16-C-A-2013.
19. *Lukács v. Porter*, Canadian Transportation Agency, 344-C-A-2013.
20. *Lukács v. WestJet*, Canadian Transportation Agency, 483-C-A-2010.
21. *Lukács v. WestJet*, Federal Court of Appeal, 10-A-42.
22. *Lukács v. WestJet*, Canadian Transportation Agency, 227-C-A-2012.
23. *McDonagh v. Ryanair Ltd*, Case C-12/11, European Court of Justice.
24. *Pinksen v. Air Canada*, Canadian Transportation Agency, 181-C-A-2007.
25. *Shetty v. Air Canada*, Canadian Transportation Agency, 353-C-A-2012.
26. *Thakkar v. Aeroflot*, Canadian Transportation Agency, 434-C-A-2007.
27. *M. X... Jean-Baptiste et Madame X... Pascale Marie-Françoise c. Air France*, Tribunal d'instance d'Aulnay-sous-Bois, Audience civile 8 octobre 2007, N° de RG: 07/00145.
28. *Wallentin-Hermann v. Alitalia*, Case C-549/07, European Court of Justice.

JUDGMENT OF THE COURT (Third Chamber)

31 January 2013 (*)

(Air transport – Regulation (EC) No 261/2004 – Notion of ‘extraordinary circumstances’ – Obligation to provide assistance to passengers in the event of cancellation of a flight due to ‘extraordinary circumstances’ – Volcanic eruption leading to the closure of air space – Eruption of the Icelandic volcano Eyjafjallajökull)

In Case C-12/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Dublin Metropolitan District Court (Ireland), made by decision of 10 November 2010, received at the Court on 10 January 2011, in the proceedings

Denise McDonagh

v

Ryanair Ltd,

THE COURT (Third Chamber),

composed of K. Lenaerts, acting as President of the Third Chamber, E. Juhász, G. Arestis, T. von Danwitz and D. Šváby (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 9 February 2012,

after considering the observations submitted on behalf of:

- Ms McDonagh, by J. Hennessy, Solicitor,
- Ryanair Ltd, by G. Berrisch, Rechtsanwalt, M. Hayden, Senior Counsel, and R. Aylward, Barrister-at-Law,
- the German Government, by T. Henze and J. Kemper, acting as Agents,
- the French Government, by G. de Bergues and M. Perrot, acting as Agents,
- the Polish Government, by M. Szpunar, acting as Agent,
- the United Kingdom Government, by S. Ossowski, acting as Agent,
- the European Parliament, by L.G. Knudsen and A. Troupiotis, acting as Agents,

- the Council of the European Union, by E. Karlsson and A. De Elera, acting as Agents,
- the European Commission, by K. Simonsson and N. Yerrell, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 March 2012,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation and assessment of the validity of Articles 5(1)(b) and 9 of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).
- 2 The request has been made in proceedings between Ms McDonagh and Ryanair Ltd ('Ryanair') regarding the airline company's refusal to give Ms McDonagh the care provided for in Article 5(1)(b) of Regulation No 261/2004 after the eruption of the Icelandic volcano Eyjafjallajökull had caused the cancellation of her flight and, more generally, closure of part of European airspace.

Legal context

International law

- 3 The Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999, was signed by the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001 (OJ 2001 L 194, p. 38; 'the Montreal Convention').
- 4 The last paragraph of the preamble to the Montreal Convention states:

'Convinced that collective State action for further harmonisation and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests ...'
- 5 Article 29 of the Convention states:

'In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.'

European Union law

6 Recitals 1, 2, 14 and 15 in the preamble to Regulation No 261/2004 state:

‘(1) Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.

(2) Denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers.

...

(14) As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.

(15) Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.’

7 Article 5 of Regulation No 261/2004, headed ‘Cancellation’, states:

1. In case of cancellation of a flight, the passengers concerned shall:

(a) be offered assistance by the operating air carrier in accordance with Article 8; and

(b) be offered assistance by the operating air carrier in accordance with Article 9(1)(a) and 9(2), as well as, in event of re-routing when the reasonably expected time of departure of the new flight is at least the day after the departure as it was planned for the cancelled flight, the assistance specified in Article 9(1)(b) and 9(1)(c); and

(c) have the right to compensation by the operating air carrier in accordance with Article 7, unless:

(i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or

(ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four

hours after the scheduled time of arrival; or

- (iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

...

3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

...'

8 Article 8 of Regulation No 261/2004 defines the manner in which assistance is provided by air carriers to passengers as regards their right to reimbursement or re-routing.

9 Article 9 of Regulation No 261/2004, headed 'Right to care', is worded as follows:

'1. Where reference is made to this Article, passengers shall be offered free of charge:

- (a) meals and refreshments in a reasonable relation to the waiting time;
- (b) hotel accommodation in cases
 - where a stay of one or more nights becomes necessary, or
 - where a stay additional to that intended by the passenger becomes necessary;
- (c) transport between the airport and place of accommodation (hotel or other).

2. In addition, passengers shall be offered free of charge two telephone calls, telex or fax messages, or e-mails.

...'

10 Under the heading 'Further compensation', Article 12(1) of Regulation No 261/2004 provides that 'this Regulation shall apply without prejudice to a passenger's rights to further compensation. The compensation granted under this Regulation may be deducted from such compensation.'

11 Article 16 of Regulation No 261/2004, headed 'Infringements', reads as follows:

'1. Each Member State shall designate a body responsible for the enforcement of this Regulation as regards flights from airports situated on its territory and flights from a third country to such airports. Where appropriate, this body shall take the measures necessary to ensure that the rights of passengers

are respected. The Member States shall inform the Commission of the body that has been designated in accordance with this paragraph.

...

3. The sanctions laid down by Member States for infringements of this Regulation shall be effective, proportionate and dissuasive.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 On 11 February 2010, Ms McDonagh booked a flight with Ryanair from Faro (Portugal) to Dublin (Ireland) scheduled for 17 April 2010, for EUR 98. On 20 March 2010, the Eyjafjallajökull volcano in Iceland began to erupt. On 14 April 2010, it entered an explosive phase, casting a cloud of volcanic ash into the skies over Europe. On 15 April 2010, the competent air traffic authorities closed the airspace over a number of Member States because of the risks to aircraft.

13 On 17 April 2010, Ms McDonagh’s flight was cancelled following the closure of Irish airspace. Ryanair flights between continental Europe and Ireland resumed on 22 April 2010 and Ms McDonagh was not able to return to Dublin until 24 April 2010.

14 During the period between 17 and 24 April 2010, Ryanair did not provide Ms McDonagh with care in accordance with the detailed rules laid down in Article 9 of Regulation No 261/2004.

15 Ms McDonagh brought an action against Ryanair before the referring court for compensation in the amount of EUR 1 129.41, corresponding to the costs which she had incurred during that period on meals, refreshments, accommodation and transport.

16 Ryanair claims that the closure of part of European airspace following the eruption of the Eyjafjallajökull volcano does not constitute ‘extraordinary circumstances’ within the meaning of Regulation No 261/2004 but ‘super extraordinary circumstances’, releasing it not only from its obligation to pay compensation but also from its obligations to provide care under Articles 5 and 9 of that regulation.

17 In light of its doubts as to whether the obligation to provide that care may be subject to limitations in circumstances such as those at issue in the main proceedings and taking the view that the Court of Justice has not yet ruled on that matter, the Dublin Metropolitan District Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Do circumstances such as the closures of European airspace as a result of the eruption of the Eyjafjallajökull volcano in Iceland, which caused widespread and prolonged disruption to air travel, go beyond “extraordinary circumstances” within the meaning of Regulation No 261/2004?

(2) If the answer to Question 1 is yes, is liability for the duty to provide care

excluded under Articles 5 and 9 [of Regulation No 261/2004] in such circumstances?

- (3) If the answer to Question 2 is no, are Articles 5 and 9 [of Regulation No 261/2004] invalid in so far as they violate the principles of proportionality and non-discrimination, the principle of an “equitable balance of interests” enshrined in the Montreal Convention, and Articles 16 and 17 of the Charter of Fundamental Rights of the European Union [“the Charter”]?
- (4) Is the obligation in Articles 5 and 9 [of Regulation No 261/2004] to be interpreted as containing an implied limitation, such as a temporal and/or a monetary limit, to provide care in cases where cancellation is caused by “extraordinary circumstances”?
- (5) If the answer to Question 4 is no, are Articles 5 and 9 [of Regulation No 261/2004] invalid in so far as they violate the principles of proportionality and non-discrimination, the principle of an “equitable balance of interests” enshrined in the Montreal Convention, and Articles 16 and 17 of the [Charter]?’

Consideration of the questions referred

Admissibility

- 18 The Council of the European Union claims, in essence, that the questions are inadmissible on the basis that they are not relevant to the dispute in the main proceedings, since, in the event of cancellation of a flight and regardless of the cause of that cancellation, air passengers cannot invoke before a national court failure of an air carrier to comply with its obligation, laid down in Articles 5(1)(b) and 9 of Regulation No 261/2004, to provide care in order to obtain compensation from that air carrier.
- 19 It is to be recalled that, under Article 5(1)(b) of Regulation No 261/2004, in the event of cancellation of a flight the passengers concerned are to be offered assistance by the air carrier, under the conditions laid down in that subparagraph, meeting the costs of meals, accommodation and communication as provided for in Article 9 of that regulation.
- 20 The Court has already had occasion to explain that, when an air carrier fails to fulfil its obligations under Article 9 of Regulation No 261/2004, an air passenger is justified in claiming a right to compensation on the basis of the factors set out in those provisions (see, to that effect, Case C-83/10 *Sousa Rodríguez and Others* [2011] ECR I-0000, paragraph 44) and that such a claim cannot be understood as seeking damages, by way of redress on an individual basis, for the harm resulting from the cancellation of the flight concerned in the conditions laid down, inter alia, in Article 22 of the Montreal Convention (see, to that effect, *Sousa Rodríguez and Others*, paragraph 38).
- 21 A claim such as that at issue in the main proceedings seeks to obtain, from the air carrier, equivalent compliance with its obligation to provide care arising from Articles 5(1)(b) and 9 of Regulation No 261/2004, an obligation which, it should be recalled, operates at an earlier stage than the system laid down by the

Montreal Convention (see Case C-549/07 *Wallentin-Hermann* [2008] ECR I-11061, paragraph 32, and Joined Cases C-581/10 and C-629/10 *Nelson and Others* [2012] ECR I-0000, paragraph 57).

- 22 The fact, noted in this connection by the Council, that each Member State designates a body responsible for the enforcement of Regulation No 261/2004 which, where appropriate, takes the measures necessary to ensure that the rights of passengers are respected and which each passenger may complain to about an alleged infringement of that regulation, in accordance with Article 16 of the regulation, is not such as to affect the right of a passenger to such reimbursement.
- 23 Article 16 cannot be interpreted as allowing only national bodies responsible for the enforcement of Regulation No 261/2004 to sanction the failure of air carriers to comply with their obligation laid down in Articles 5(1)(b) and 9 of that regulation to provide care.
- 24 Consequently, it must be held that an air passenger may invoke before a national court the failure of an air carrier to comply with its obligation, laid down in Articles 5(1)(b) and 9 of Regulation No 261/2004, to provide care in order to obtain compensation from that air carrier for the costs which it should have borne under those provisions.
- 25 Since the questions are relevant to the outcome of the dispute, the request for a preliminary ruling is therefore admissible.

Substance

The first question

- 26 By its first question the referring court asks, in essence, whether Article 5 of Regulation No 261/2004 must be interpreted as meaning that circumstances such as the closure of part of European airspace as a result of the eruption of the Eyjafjallajökull volcano constitute ‘extraordinary circumstances’ within the meaning of that regulation which do not release air carriers from their obligation laid down in Articles 5(1)(b) and 9 of the regulation to provide care or, on the contrary and because of their particular scale, go beyond the scope of that notion, thus releasing air carriers from that obligation.
- 27 At the outset, it should be noted that the term ‘extraordinary circumstances’ is not defined in Article 2 of Regulation No 261/2004 or in the other provisions of that regulation, even though a non-exhaustive list of those circumstances can be derived from recitals 14 and 15 in the preamble to the regulation.
- 28 It is settled case-law that the meaning and scope of terms for which European Union law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part (*Wallentin-Hermann*, paragraph 17).
- 29 In accordance with everyday language, the words ‘extraordinary circumstances’ literally refer to circumstances which are ‘out of the ordinary’. In the context of air transport, they refer to an event which is not inherent in the normal exercise

of the activity of the carrier concerned and is beyond the actual control of that carrier on account of its nature or origin (*Wallentin-Hermann*, paragraph 23). In other words, as the Advocate General noted in point 34 of his Opinion, they relate to all circumstances which are beyond the control of the air carrier, whatever the nature of those circumstances or their gravity.

- 30 Regulation No 261/2004 contains nothing that would allow the conclusion to be drawn that it recognises a separate category of ‘particularly extraordinary’ events, beyond ‘extraordinary circumstances’ referred to in Article 5(3) of that regulation, which would lead to the air carrier being exempted from all its obligations, including those under Article 9 of the regulation.
- 31 Next, as for the context of and the aims pursued by Article 5 of Regulation No 261/2004, which prescribes the obligations of an air carrier in the event of cancellation of a flight, it must be noted, first, that when exceptional circumstances arise, Article 5(3) exempts the air carrier only from its obligation to pay compensation under Article 7 of that regulation. The European Union legislature thus took the view that the obligation on the air carrier to provide care under Article 9 of that regulation is necessary whatever the event which has given rise to the cancellation of the flight. Second, it is clear from recitals 1 and 2 of Regulation No 261/2004 that the regulation aims at ensuring a high level of protection for passengers and takes account of the requirements of consumer protection in general, inasmuch as cancellation of flights causes serious inconvenience to passengers (*Wallentin-Hermann*, paragraph 18, and *Nelson and Others*, paragraph 72).
- 32 If circumstances such as those at issue in the main proceedings went beyond the scope of ‘extraordinary circumstances’ within the meaning of Regulation No 261/2004 due in particular to their origin and scale, such an interpretation would go against not only the meaning of that notion in everyday language but also the objectives of that regulation.
- 33 Such an interpretation would in fact mean that air carriers would be required to provide care pursuant to Article 9 of Regulation No 261/2004 to air passengers who find themselves, due to cancellation of a flight, in a situation causing limited inconvenience, whereas passengers, such as the plaintiff in the main proceedings, who find themselves in a particularly vulnerable state in that they are forced to remain at an airport for several days would be denied that care.
- 34 In the light of the foregoing, the answer to the first question is that Article 5 of Regulation No 261/2004 must be interpreted as meaning that circumstances such as the closure of part of European airspace as a result of the eruption of the Eyjafjallajökull volcano constitute ‘extraordinary circumstances’ within the meaning of that regulation which do not release air carriers from their obligation laid down in Articles 5(1)(b) and 9 of the regulation to provide care.
- 35 It follows from the answer given to the first question that there is no need to answer the second and third questions.

The fourth and fifth questions

- 36 By its fourth and fifth questions, which should be examined together, the

referring court asks, in essence, whether Articles 5(1)(b) and 9 of Regulation No 261/2004 must be interpreted as meaning that, in the event of cancellation of a flight due to ‘extraordinary circumstances’ such as those at issue in the main proceedings, the obligation to provide care to passengers laid down in those provisions is limited in temporal or monetary terms and, if not, whether those provisions thus interpreted are invalid in the light of the principles of proportionality and non-discrimination, the principle of an ‘equitable balance of interests’ referred to in the Montreal Convention or Articles 16 and 17 of the Charter.

37 It should be noted that, in the case of cancellation of a flight on account of ‘extraordinary circumstances’, the European Union legislature sought to modify the obligations of air carriers laid down in Article 5(1) of Regulation No 261/2004.

38 Under recital 15 and Article 5(3) of Regulation No 261/2004, by way of derogation from the provisions of Article 5(1), the air carrier is thus exempted from its obligation to compensate passengers under Article 7 of that regulation if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances which are beyond the air carrier’s actual control (*Nelson and Others*, paragraph 39).

39 In that regard, the Court has held that, in such circumstances, the air carrier is only released from its obligation to provide compensation under Article 7 of Regulation No 261/2004 and that, consequently, its obligation to provide care in accordance with Article 9 of that regulation remains (see, to that effect, Case C-294/10 *Eglītis and Ratnieks* [2011] ECR I-0000, paragraphs 23 and 24).

40 Furthermore, no limitation, whether temporal or monetary, of the obligation to provide care to passengers in extraordinary circumstances such as those at issue in the main proceedings is apparent from the wording of Regulation No 261/2004.

41 It follows from Article 9 of Regulation No 261/2004 that all the obligations to provide care to passengers whose flight is cancelled are imposed, in their entirety, on the air carrier for the whole period during which the passengers concerned must await their re-routing. To that effect, it is clear from Article 9(1)(b) that hotel accommodation is to be offered free of charge by the air carrier during the ‘necessary’ period.

42 Moreover, any interpretation seeking the recognition of limits, whether temporal or monetary, on the obligation of the air carrier to provide care to passengers whose flight has been cancelled would have the effect of jeopardising the aims pursued by Regulation No 261/2004 recalled in paragraph 31 of this judgment, in that, beyond the limitation adopted, passengers would be deprived of all care and thus left to themselves. As the Advocate General noted in point 52 of his Opinion, the provision of care to such passengers is particularly important in the case of extraordinary circumstances which persist over a long time and it is precisely in situations where the waiting period occasioned by the cancellation of a flight is particularly lengthy that it is necessary to ensure that an air passenger whose flight has been cancelled can have access to essential goods and services throughout that period.

- 43 Consequently, and contrary to what Ryanair claims, it cannot be deduced from Regulation No 261/2004 that, in circumstances such as those at issue in the main proceedings, the obligation referred to in Articles 5 and 9 of that regulation to provide care to passengers must be subject to a temporal or monetary limitation.
- 44 However, it is necessary to ensure that the interpretation in the preceding paragraph does not conflict with the principles of proportionality, of an ‘equitable balance of interests’ referred to in the Montreal Convention and of non-discrimination, or with Articles 16 and 17 of the Charter. Under a general principle of interpretation, a European Union measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole (Case C-149/10 *Chatzi* [2010] ECR I-8489, paragraph 43).
- 45 As regards, first, the principle of proportionality, it must be noted that the Court has already had occasion to find, in Case C-344/04 *IATA and ELFAA* [2010] ECR I-403, paragraphs 78 to 92, that Articles 5 to 7 of Regulation No 261/2004 are not invalid by reason of infringement of the principle of proportionality.
- 46 There is nothing to justify, even on the basis of the lack of a temporal or monetary limit on the obligation to provide care in circumstances such as those at issue in the main proceedings, the finding of validity made by the Court in that case being called into question.
- 47 The fact that the obligation defined in Article 9 of Regulation No 261/2004 to provide care entails, as Ryanair claims, undoubted financial consequences for air carriers is not such as to invalidate that finding, since those consequences cannot be considered disproportionate to the aim of ensuring a high level of protection for passengers.
- 48 The importance of the objective of consumer protection, which includes the protection of air passengers, may justify even substantial negative economic consequences for certain economic operators (*Nelson and Others*, paragraph 81 and the case-law cited).
- 49 In addition, as the Advocate General noted in points 58 and 60 of his Opinion, air carriers should, as experienced operators, foresee costs linked to the fulfilment, where relevant, of their obligation to provide care and, furthermore, may pass on the costs incurred as a result of that obligation to airline ticket prices.
- 50 It follows that Articles 5(1)(b) and 9 of Regulation No 261/2004 are not contrary to the principle of proportionality.
- 51 None the less, an air passenger may only obtain, by way of compensation for the failure of the air carrier to comply with its obligation referred to in Articles 5(1)(b) and 9 of Regulation No 261/2004 to provide care, reimbursement of the amounts which, in the light of the specific circumstances of each case, proved necessary, appropriate and reasonable to make up for the shortcomings of the air carrier in the provision of care to that passenger, a matter which is for the national court to assess.
- 52 As regards, second, the principle of an ‘equitable balance of interests’ referred

to in the last paragraph of the preamble to the Montreal Convention, suffice it to note that the standardised and immediate compensatory measures laid down by Regulation No 261/2004, which include the obligation to provide care to passengers whose flight has been cancelled, are not among those whose institution is governed by the Montreal Convention (see, to that effect, *Wallentin-Hermann*, paragraph 32 and the case-law cited).

53 Therefore, there is no need to assess the validity of the aforesaid provisions in the light of the principle of an ‘equitable balance of interests’ referred to in that Convention.

54 As regards, third, the general principle of non-discrimination or equal treatment, Ryanair claims that the obligation laid down in Articles 5(1)(b) and 9 of Regulation No 261/2004 to provide care in a situation such as that as issue in the main proceedings imposes obligations on air carriers which, in circumstances similar to those at issue in the main proceedings, do not fall upon other modes of transport governed by Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers’ rights and obligations (OJ 2007 L 315, p. 14), Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 (OJ 2010 L 334, p. 1) and Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 (OJ 2011 L 55, p. 1), even though passengers stranded by widespread and prolonged disruption of transport find themselves in an identical situation whatever their mode of transport.

55 In that respect, it should be noted that the Court has already held in *IATA and ELFAA*, paragraphs 93 to 99, that Articles 5 to 7 of Regulation No 261/2004 do not infringe the principle of equal treatment.

56 The situation of undertakings operating in the different transport sectors is not comparable since the different modes of transport, having regard to the manner in which they operate, the conditions governing their accessibility and the distribution of their networks, are not interchangeable as regards the conditions of their use (*IATA and ELFAA*, paragraph 96).

57 In those circumstances, the European Union legislature was able to establish rules providing for a level of customer protection that varied according to the transport sector concerned.

58 It follows that Articles 5(1)(b) and 9 of Regulation No 261/2004 do not infringe the principle of non-discrimination.

59 As regards, fourth, Articles 16 and 17 of the Charter, guaranteeing freedom to conduct a business and the right to property respectively, Ryanair claims that the obligation to provide care to passengers imposed on air carriers in circumstances such as those at issue in the main proceedings has the effect of depriving air carriers of part of the fruits of their labour and of their investments.

60 In that regard, it must be noted, first, that freedom to conduct a business and

the right to property are not absolute rights but must be considered in relation to their social function (see, to that effect, Case C-544/10 *Deutsches Weintor* [2012] ECR I-0000, paragraph 54 and the case-law cited).

- 61 Next, Article 52(1) of the Charter accepts that limitations may be imposed on the exercise of rights enshrined by it as long as the limitations are provided for by law, respect the essence of those rights and freedoms, and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.
- 62 Lastly, when several rights protected by the European Union legal order clash, such an assessment must be carried out in accordance with the need to reconcile the requirements of the protection of those various rights and striking a fair balance between them (see, to that effect, Case C-275/06 *Promusicae* [2008] ECR I-271, paragraphs 65 and 66, and *Deutsches Weintor*, paragraph 47).
- 63 In this case, the referring court mentions Articles 16 and 17 of the Charter. However, it is also necessary to take account of Article 38 thereof which, like Article 169 TFEU, seeks to ensure a high level of protection for consumers, including air passengers, in European Union policies. As has been noted in paragraph 31 of this judgment, protection of those passengers is among the principal aims of Regulation No 261/2004.
- 64 It follows from paragraphs 45 to 49 of this judgment relating to the principle of proportionality that Articles 5(1)(b) and 9 of Regulation No 261/2004, as interpreted in paragraph 43 of this judgment, must be considered to comply with the requirement intended to reconcile the various fundamental rights involved and strike a fair balance between them.
- 65 Therefore, those provisions do not breach Articles 16 and 17 of the Charter.
- 66 Consequently, the answer to the fourth and fifth questions is that Articles 5(1)(b) and 9 of Regulation No 261/2004 must be interpreted as meaning that, in the event of cancellation of a flight due to ‘extraordinary circumstances’ of a duration such as that in the main proceedings, the obligation to provide care to air passengers laid down in those provisions must be complied with, and the validity of those provisions is not affected.

However, an air passenger may only obtain, by way of compensation for the failure of the air carrier to comply with its obligation referred to in Articles 5(1)(b) and 9 of Regulation No 261/2004 to provide care, reimbursement of the amounts which, in the light of the specific circumstances of each case, proved necessary, appropriate and reasonable to make up for the shortcomings of the air carrier in the provision of care to that passenger, a matter which is for the national court to assess.

Costs

- 67 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the

costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 5 of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, must be interpreted as meaning that circumstances such as the closure of part of European airspace as a result of the eruption of the Eyjafjallajökull volcano constitute ‘extraordinary circumstances’ within the meaning of that regulation which do not release air carriers from their obligation laid down in Articles 5(1)(b) and 9 of the regulation to provide care.**
2. **Articles 5(1)(b) and 9 of Regulation No 261/2004 must be interpreted as meaning that, in the event of cancellation of a flight due to ‘extraordinary circumstances’ of a duration such as that in the main proceedings, the obligation to provide care to air passengers laid down in those provisions must be complied with, and the validity of those provisions is not affected.**

However, an air passenger may only obtain, by way of compensation for the failure of the air carrier to comply with its obligation referred to in Articles 5(1)(b) and 9 of Regulation No 261/2004 to provide care, reimbursement of the amounts which, in the light of the specific circumstances of each case, proved necessary, appropriate and reasonable to make up for the shortcomings of the air carrier in the provision of care to that passenger, a matter which is for the national court to assess.

[Signatures]

* Language of the case: English.

JUDGMENT OF THE COURT (Fourth Chamber)

22 December 2008 (*)

(Carriage by air – Regulation (EC) No 261/2004 – Article 5 – Compensation and assistance to passengers in the event of cancellation of flights – Exemption from the obligation to pay compensation – Cancellation due to extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken)

In Case C-549/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Handelsgericht Wien (Austria), made by decision of 30 October 2007, received at the Court on 11 December 2007, in the proceedings

Friederike Wallentin-Hermann

v

Alitalia - Linee Aeree Italiane SpA,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, T. von Danwitz, E. Juhász, G. Arestis and J. Malenovský (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mrs Wallentin-Hermann, by herself, Rechtsanwältin,
- Alitalia - Linee Aeree Italiane SpA, by O. Borodajkewycz, Rechtsanwalt,
- the Austrian Government, by E. Riedl, acting as Agent,
- the Greek Government, by S. Chala and D. Tsagkaraki, acting as Agents,
- the Polish Government, by M. Dowgielewicz, acting as Agent,
- the Portuguese Government, by L. Fernandes, acting as Agent,
- the United Kingdom Government, by C. Gibbs, acting as Agent, and D. Beard, Barrister,
- the Commission of the European Communities, by R. Vidal Puig and M.

Vollkommer, acting as Agents,
having decided, after hearing the Advocate General, to proceed to judgment
without an Opinion,
gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 5(3) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).
- 2 The reference was made in the course of proceedings between Mrs Wallentin-Hermann and Alitalia - Linee Aeree Italiane SpA ('Alitalia') following Alitalia's refusal to pay compensation to the applicant in the main proceedings whose flight had been cancelled.

Legal context

International law

- 3 The Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999 ('the Montreal Convention'), was signed by the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001 (OJ 2001 L 194, p. 38). That convention entered into force so far as concerns the Community on 28 June 2004.
- 4 Articles 17 to 37 of the Montreal Convention comprise Chapter III thereof, headed 'Liability of the carrier and extent of compensation for damage'.
- 5 Article 19 of the Convention, headed 'Delay', provides:

'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.'

Community law

- 6 Regulation No 261/2004 includes, inter alia, the following recitals:

'(1) Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.'

(2) Denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers.

...

(12) The trouble and inconvenience to passengers caused by cancellation of flights should ... be reduced. This should be achieved by inducing carriers to inform passengers of cancellations before the scheduled time of departure and in addition to offer them reasonable re-routing, so that the passengers can make other arrangements. Air carriers should compensate passengers if they fail to do this, except when the cancellation occurs in extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

...

(14) As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.

(15) Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.'

7 Article 5 of Regulation No 261/2004, headed 'Cancellation', states:

'1. In case of cancellation of a flight, the passengers concerned shall:

(a) be offered assistance by the operating air carrier in accordance with Article 8; and

(b) be offered assistance by the operating air carrier in accordance with Article 9(1)(a) and 9(2), as well as, in event of re-routing when the reasonably expected time of departure of the new flight is at least the day after the departure as it was planned for the cancelled flight, the assistance specified in Article 9(1)(b) and 9(1)(c); and

(c) have the right to compensation by the operating air carrier in accordance with Article 7, unless:

(i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or

(ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing,

allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or

- (iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

...

3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

...'

8 Article 7(1) of Regulation No 261/2004, headed 'Right to compensation', provides:

'Where reference is made to this Article, passengers shall receive compensation amounting to:

- (a) EUR 250 for all flights of 1 500 kilometres or less;
- (b) EUR 400 for all intra-Community flights of more than 1 500 kilometres, and for all other flights between 1 500 and 3 500 kilometres;
- (c) EUR 600 for all flights not falling under (a) or (b).

...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 It is apparent from the order for reference that Mrs Wallentin-Hermann booked three seats on a flight with Alitalia from Vienna (Austria) to Brindisi (Italy) via Rome (Italy) for herself, her husband and her daughter. The flight was scheduled to depart from Vienna on 28 June 2005 at 6.45 a.m. and to arrive at Brindisi on the same day at 10.35 a.m.

10 After checking in, the three passengers were informed, five minutes before the scheduled departure time, that their flight had been cancelled. They were subsequently transferred to an Austrian Airlines flight to Rome, where they arrived at 9.40 a.m., that is 20 minutes after the time of departure of their connecting flight to Brindisi, which they therefore missed. Mrs Wallentin-Hermann and her family arrived at Brindisi at 2.15 p.m.

11 The cancellation of the Alitalia flight from Vienna resulted from a complex engine defect in the turbine which had been discovered the day before during a

check. Alitalia had been informed of the defect during the night preceding that flight, at 1.00 a.m. The repair of the aircraft, which necessitated the dispatch of spare parts and engineers, was completed on 8 July 2005.

- 12 Mrs Wallentin-Hermann requested that Alitalia pay her EUR 250 compensation pursuant to Articles 5(1)(c) and 7(1) of Regulation No 261/2004 due to the cancellation of her flight and also EUR 10 for telephone charges. Alitalia rejected that request.
- 13 In the judicial proceedings that Mrs Wallentin-Hermann then brought, the Bezirksgericht für Handelssachen Wien (District Commercial Court, Vienna) upheld her application for compensation, in particular on the ground that the technical defects which affected the aircraft concerned were not covered by the ‘extraordinary circumstances’ provided for in Article 5(3) of Regulation No 261/2004 which exempt from the obligation to pay compensation.
- 14 Alitalia lodged an appeal against that decision before the Handelsgericht Wien (Commercial Court, Vienna), which decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘(1) Are there extraordinary circumstances within the meaning of Article 5(3) of Regulation ... No 261/2004 ... , having regard to recital 14 in the preamble to the regulation, if a technical defect in the aeroplane, in particular damage to the engine, results in the cancellation of the flight, and must the grounds of excuse under Article 5(3) of [that] regulation be interpreted in accordance with the provisions of Article 19 of the Montreal Convention?
- (2) If the answer to the first question is in the affirmative, are there extraordinary circumstances within the meaning of Article 5(3) of Regulation [No 261/2004] where air carriers cite technical defects as a reason for flight cancellations with above average frequency, solely on the basis of their frequency?
- (3) If the answer to the first question is in the affirmative, has an air carrier taken all “reasonable measures” in accordance with Article 5(3) of Regulation [No 261/2004] if it establishes that the minimum legal requirements with regard to maintenance work on the aeroplane have been met and is that sufficient to relieve the air carrier of the obligation to pay compensation provided for by Article 5 in conjunction with Article 7 of [that] regulation?
- (4) If the answer to the first question is in the negative, are extraordinary circumstances within the meaning of Article 5(3) of Regulation [No 261/2004] cases of *force majeure* or natural disasters, which were not due to a technical defect and are thus unconnected with the air carrier?’

The questions referred for a preliminary ruling

The first and fourth questions

- 15 By its first and fourth questions, which it is appropriate to examine together, the referring court is essentially asking whether Article 5(3) of Regulation No

261/2004, read in the light of recital 14 in the preamble to that regulation, must be interpreted as meaning that a technical problem in an aircraft which leads to the cancellation of a flight is covered by the concept of ‘extraordinary circumstances’ within the meaning of that provision or whether, conversely, that concept covers situations of a different kind which are not due to technical problems. The referring court is also asking whether the grounds of exemption under that provision must be interpreted in accordance with the provisions of the Montreal Convention, in particular Article 19 thereof.

- 16 It must be stated that the concept of extraordinary circumstances is not amongst those which are defined in Article 2 of Regulation No 261/2004. Moreover, that concept is not defined in the other articles of that regulation.
- 17 It is settled case-law that the meaning and scope of terms for which Community law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part. Moreover, when those terms appear in a provision which constitutes a derogation from a principle or, more specifically, from Community rules for the protection of consumers, they must be read so that that provision can be interpreted strictly (see, to that effect, Case C-336/03 *easyCar* [2005] ECR I-1947, paragraph 21 and the case-law cited). Furthermore, the preamble to a Community measure may explain the latter’s content (see, to that effect, inter alia, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 76).
- 18 In this respect, the objectives pursued by Article 5 of Regulation No 261/2004, which lays down the obligations owed by an operating air carrier in the event of cancellation of a flight, are clear from recitals 1 and 2 in the preamble to the regulation, according to which action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers and take account of the requirements of consumer protection in general, inasmuch as cancellation of flights causes serious inconvenience to passengers (see, to that effect, *IATA and ELFAA*, paragraph 69).
- 19 As is apparent from recital 12 in the preamble to, and Article 5 of, Regulation No 261/2004, the Community legislature intended to reduce the trouble and inconvenience to passengers caused by cancellation of flights by inducing air carriers to announce cancellations in advance and, in certain circumstances, to offer re-routing meeting certain criteria. Where those measures could not be adopted by air carriers, the Community legislature intended that they should compensate passengers, except when the cancellation occurs in extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.
- 20 In that context, it is clear that, whilst Article 5(1)(c) of Regulation No 261/2004 lays down the principle that passengers have the right to compensation if their flight is cancelled, Article 5(3), which determines the circumstances in which the operating air carrier is not obliged to pay that compensation, must be regarded as derogating from that principle. Article 5(3) must therefore be interpreted strictly.
- 21 In this respect, the Community legislature indicated, as stated in recital 14 in

the preamble to Regulation No 261/2004, that such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an air carrier.

- 22 It is apparent from that statement in the preamble to Regulation No 261/2004 that the Community legislature did not mean that those events, the list of which is indeed only indicative, themselves constitute extraordinary circumstances, but only that they may produce such circumstances. It follows that all the circumstances surrounding such events are not necessarily grounds of exemption from the obligation to pay compensation provided for in Article 5(1)(c) of that regulation.
- 23 Although the Community legislature included in that list ‘unexpected flight safety shortcomings’ and although a technical problem in an aircraft may be amongst such shortcomings, the fact remains that the circumstances surrounding such an event can be characterised as ‘extraordinary’ within the meaning of Article 5(3) of Regulation No 261/2004 only if they relate to an event which, like those listed in recital 14 in the preamble to that regulation, is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin.
- 24 In the light of the specific conditions in which carriage by air takes place and the degree of technological sophistication of aircraft, it must be stated that air carriers are confronted as a matter of course in the exercise of their activity with various technical problems to which the operation of those aircraft inevitably gives rise. It is moreover in order to avoid such problems and to take precautions against incidents compromising flight safety that those aircraft are subject to regular checks which are particularly strict, and which are part and parcel of the standard operating conditions of air transport undertakings. The resolution of a technical problem caused by failure to maintain an aircraft must therefore be regarded as inherent in the normal exercise of an air carrier’s activity.
- 25 Consequently, technical problems which come to light during maintenance of aircraft or on account of failure to carry out such maintenance cannot constitute, in themselves, ‘extraordinary circumstances’ under Article 5(3) of Regulation No 261/2004.
- 26 However, it cannot be ruled out that technical problems are covered by those exceptional circumstances to the extent that they stem from events which are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control. That would be the case, for example, in the situation where it was revealed by the manufacturer of the aircraft comprising the fleet of the air carrier concerned, or by a competent authority, that those aircraft, although already in service, are affected by a hidden manufacturing defect which impinges on flight safety. The same would hold for damage to aircraft caused by acts of sabotage or terrorism.
- 27 It is therefore for the referring court to ascertain whether the technical problems cited by the air carrier involved in the case in the main proceedings stemmed from events which are not inherent in the normal exercise of the activity

of the air carrier concerned and were beyond its actual control.

- 28 As regards the question whether the ground of exemption set out in Article 5(3) of Regulation No 261/2004 must be interpreted in accordance with the provisions of the Montreal Convention, in particular Article 19 thereof, it must be stated that that convention forms an integral part of the Community legal order. Moreover, it is clear from Article 300(7) EC that the Community institutions are bound by agreements concluded by the Community and, consequently, that those agreements have primacy over secondary Community legislation (see Case C-173/07 *Emirates Airlines* [2008] ECR I-0000, paragraph 43).
- 29 Under Article 19 of the Montreal Convention, a carrier may be exempted from its liability 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’.
- 30 In this respect, it must be observed that Article 5(3) of Regulation No 261/2004 refers to the concept of ‘extraordinary circumstances’, whereas that concept does not appear in either Article 19 or any other provision of the Montreal Convention.
- 31 It should also be noted that that Article 19 relates to delays, whereas Article 5(3) of Regulation No 261/2004 deals with flight cancellations.
- 32 Moreover, as is clear from paragraphs 43 to 47 of *IATA and ELFAA*, Article 19 of the Montreal Convention and Article 5(3) of Regulation No 261/2004 relate to different contexts. Article 19 et seq. of that convention governs the conditions under which, if a flight has been delayed, the passengers concerned may bring actions for damages by way of redress on an individual basis. By contrast, Article 5 of Regulation No 261/2004 provides for standardised and immediate compensatory measures. Those measures, which are unconnected with those whose institution is governed by the Montreal Convention, thus intervene at an earlier stage than the convention. It follows that the carrier’s grounds of exemption from liability provided for in Article 19 of that convention cannot be transposed without distinction to Article 5(3) of Regulation No 261/2004.
- 33 In those circumstances, the Montreal Convention cannot determine the interpretation of the grounds of exemption under that Article 5(3).
- 34 In the light of the above, the answer to the first and fourth questions referred must be that Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that a technical problem in an aircraft which leads to the cancellation of a flight is not covered by the concept of ‘extraordinary circumstances’ within the meaning of that provision, unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control. The Montreal Convention is not decisive for the interpretation of the grounds of exemption under Article 5(3) of Regulation No 261/2004.

The second question

- 35 In the light of all the questions referred, it must be considered that, by this question, the referring court is essentially asking whether the frequency alone of

the technical problems precludes them from being covered by ‘extraordinary circumstances’ within the meaning of Article 5(3) of Regulation No 261/2004 where air carriers cite those problems as a reason for flight cancellations with above average frequency.

36 As was stated at paragraph 27 of this judgment, it is for the referring court to ascertain whether the technical problems cited by the air carrier in question in the main proceedings stem from events which are not inherent in the normal exercise of its activity and are beyond its actual control. It is apparent from this that the frequency of the technical problems experienced by an air carrier is not in itself a factor from which the presence or absence of ‘extraordinary circumstances’ within the meaning of Article 5(3) of Regulation No 261/2004 can be concluded.

37 In view of the foregoing, the answer to the second question referred must be that the frequency of the technical problems experienced by an air carrier is not in itself a factor from which the presence or absence of ‘extraordinary circumstances’ within the meaning of Article 5(3) of Regulation No 261/2004 can be concluded.

The third question

38 By its third question, the referring court is essentially asking whether it must be considered that an air carrier has taken ‘all reasonable measures’ within the meaning of Article 5(3) of Regulation No 261/2004 if it establishes that the minimum legal requirements with regard to maintenance work have been met on the aircraft the flight of which was cancelled and whether that evidence is sufficient to relieve that carrier of its obligation to pay compensation provided for by Articles 5(1)(c) and 7(1) of that regulation.

39 It must be observed that the Community legislature intended to confer exemption from the obligation to pay compensation to passengers in the event of cancellation of flights not in respect of all extraordinary circumstances, but only in respect of those which could not have been avoided even if all reasonable measures had been taken.

40 It follows that, since not all extraordinary circumstances confer exemption, the onus is on the party seeking to rely on them to establish, in addition, that they could not on any view have been avoided by measures appropriate to the situation, that is to say by measures which, at the time those extraordinary circumstances arise, meet, inter alia, conditions which are technically and economically viable for the air carrier concerned.

41 That party must establish that, even if it had deployed all its resources in terms of staff or equipment and the financial means at its disposal, it would clearly not have been able – unless it had made intolerable sacrifices in the light of the capacities of its undertaking at the relevant time – to prevent the extraordinary circumstances with which it was confronted from leading to the cancellation of the flight.

42 It is for the referring court to ascertain whether, in the circumstances of the case in the main proceedings, the air carrier concerned took measures

appropriate to the situation, that is to say measures which, at the time of the extraordinary circumstances whose existence the air carrier is to establish, met, inter alia, conditions which were technically and economically viable for that carrier.

- 43 In view of the foregoing, the answer to the third question referred must be that the fact that an air carrier has complied with the minimum rules on maintenance of an aircraft cannot in itself suffice to establish that that carrier has taken ‘all reasonable measures’ within the meaning of Article 5(3) of Regulation No 261/2004 and, therefore, to relieve that carrier of its obligation to pay compensation provided for by Articles 5(1)(c) and 7(1) of that regulation.

Costs

- 44 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

- 1. Article 5(3) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, must be interpreted as meaning that a technical problem in an aircraft which leads to the cancellation of a flight is not covered by the concept of ‘extraordinary circumstances’ within the meaning of that provision, unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control. The Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999, is not decisive for the interpretation of the grounds of exemption under Article 5(3) of Regulation No 261/2004.**
- 2. The frequency of the technical problems experienced by an air carrier is not in itself a factor from which the presence or absence of ‘extraordinary circumstances’ within the meaning of Article 5(3) of Regulation No 261/2004 can be concluded.**
- 3. The fact that an air carrier has complied with the minimum rules on maintenance of an aircraft cannot in itself suffice to establish that that carrier has taken ‘all reasonable measures’ within the meaning of Article 5(3) of Regulation No 261/2004 and, therefore, to relieve that carrier of its obligation to pay compensation provided for by Articles 5(1)(c) and 7(1) of that regulation.**

[Signatures]

* Language of the case: German.

JUDGMENT OF THE COURT (Third Chamber)

4 October 2012 (*)

(Air transport – Regulation (EC) No 261/2004 – Compensation for passengers in the event of denied boarding – Concept of ‘denied boarding’ – Exclusion from characterisation as ‘denied boarding’ – Cancellation of a flight caused by a strike at the airport of departure – Rescheduling of flights after the cancelled flight – Right to compensation of the passengers on those flights)

In Case C-22/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Korkein oikeus (Finland), made by decision of 13 January 2011, received at the Court on 17 January 2011, in the proceedings

Finnair Oyj

v

Timy Lassooy,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský, E. Juhász, T. von Danwitz and D. Šváby (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 1 March 2012,

after considering the observations submitted on behalf of:

- Finnair Oyj, by T. Väätäinen, asianajaja,
- Mr Lassooy, by M. Wilska, kuluttaja-asiamies, and P. Hannula and J. Suurla, lakimiehet,
- the Finnish Government, by H. Leppo, acting as Agent,
- the French Government, by G. de Bergues and M. Perrot, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and by G. Aiello, avvocato dello Stato,
- the Austrian Government, by A. Posch, acting as Agent,
- the Polish Government, by M. Szpunar, acting as Agent,

- the European Commission, by I. Koskinen and K. Simonsson, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 April 2012,
gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 2(j), 4 and 5 of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).
- 2 The reference has been made in proceedings between, on the one hand, the airline Finnair Oyj ('Finnair') and, on the other, Mr Lassooy, following Finnair's refusal to compensate Mr Lassooy for not allowing him to board a flight from Barcelona (Spain) to Helsinki (Finland) on 30 July 2006.

Legal framework

Regulation (EEC) No 295/91

- 3 Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport (OJ 1991 L 36, p. 5), which was in force until 16 February 2005, provided at Article 1:

'This Regulation establishes common minimum rules applicable where passengers are denied access to an overbooked scheduled flight for which they have a valid ticket and a confirmed reservation departing from an airport located in the territory of a Member State to which the [EC] Treaty applies, irrespective of the State where the air carrier is established, the nationality of the passenger and the point of destination.'

Regulation No 261/2004

- 4 Recitals 1, 3, 4, 9, 10, 14 and 15 in the preamble to Regulation No 261/2004 state:

'(1) Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.

...

- (3) While [Regulation No 295/91] created basic protection for passengers, the number of passengers denied boarding against their will remains too high, as

does that affected by cancellations without prior warning and that affected by long delays.

- (4) The Community should therefore raise the standards of protection set by that Regulation both to strengthen the rights of passengers and to ensure that air carriers operate under harmonised conditions in a liberalised market.

...

- (9) The number of passengers denied boarding against their will should be reduced by requiring air carriers to call for volunteers to surrender their reservations, in exchange for benefits, instead of denying passengers boarding, and by fully compensating those finally denied boarding.

- (10) Passengers denied boarding against their will should be able either to cancel their flights, with reimbursement of their tickets, or to continue them under satisfactory conditions, and should be adequately cared for while awaiting a later flight.

...

- (14) As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.

- (15) Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.'

5 Article 2 of Regulation No 261/2004, entitled 'Definitions', provides:

'For the purposes of this Regulation:

...

- (j) "denied boarding" means a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation;

...'

6 Article 3 of that regulation, entitled 'Scope', provides in paragraph 2:

‘Paragraph 1 shall apply on the condition that passengers:

- (a) have a confirmed reservation on the flight concerned and, except in the case of cancellation referred to in Article 5, present themselves for check-in:
 - as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorised travel agent,
 - or, if no time is indicated,
 - not later than 45 minutes before the published departure time; or
- ...’

7 Article 4 of Regulation No 261/2004, entitled ‘Denied boarding’, reads as follows:

‘1. When an operating air carrier reasonably expects to deny boarding on a flight, it shall first call for volunteers to surrender their reservations in exchange for benefits under conditions to be agreed between the passenger concerned and the operating air carrier. Volunteers shall be assisted in accordance with Article 8, such assistance being additional to the benefits mentioned in this paragraph.

2. If an insufficient number of volunteers comes forward to allow the remaining passengers with reservations to board the flight, the operating air carrier may then deny boarding to passengers against their will.

3. If boarding is denied to passengers against their will, the operating air carrier shall immediately compensate them in accordance with Article 7 and assist them in accordance with Articles 8 and 9.’

8 Article 5 of Regulation No 261/2004, entitled ‘Cancellation’, provides in paragraph 3:

‘An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.’

9 Article 7 of Regulation No 261/2004, entitled ‘Right to compensation’, provides in paragraph 1:

‘Where reference is made to this Article, passengers shall receive compensation amounting to:

...

- (b) EUR 400 for all intra-Community flights of more than 1500 kilometres, and for all other flights between 1500 and 3500 kilometres;

...’

10 Articles 8 and 9 of that regulation, read in conjunction with Article 4 thereof,

provide a right to reimbursement or re-routing and a right to care for passengers who are denied boarding.

11 Article 13 of Regulation No 261/2004, entitled ‘Right of redress’, provides:

‘In cases where an operating air carrier pays compensation or meets the other obligations incumbent on it under this Regulation, no provision of this Regulation may be interpreted as restricting its right to seek compensation from any person, including third parties, in accordance with the law applicable. In particular, this Regulation shall in no way restrict the operating air carrier’s right to seek reimbursement from a tour operator or another person with whom the operating air carrier has a contract. Similarly, no provision of this Regulation may be interpreted as restricting the right of a tour operator or a third party, other than a passenger, with whom an operating air carrier has a contract, to seek reimbursement or compensation from the operating air carrier in accordance with applicable relevant laws.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 Following a strike by staff at Barcelona Airport on 28 July 2006, the scheduled 11.40 flight from Barcelona to Helsinki operated by Finnair had to be cancelled. In order that the passengers on that flight should not have too long a waiting time, Finnair decided to reschedule subsequent flights.

13 Accordingly, those passengers from the flight in question were taken to Helsinki on the 11.40 flight the following day, 29 July 2006, and also on a specially arranged flight departing later that day at 21.40. The consequence of that rescheduling was that some of the passengers who had bought their tickets for the 11.40 flight on 29 July 2006 had to wait until 30 July 2006 to go to Helsinki on the scheduled 11.40 flight and on a 21.40 flight specially arranged for the occasion. Similarly, some passengers, like Mr Lassooy, who had bought their tickets for the 11.40 flight on 30 July 2006 and who had duly presented themselves for boarding, went to Helsinki on the special 21.40 flight later that day.

14 Taking the view that Finnair had for no valid reason denied him boarding, within the meaning of Article 4 of Regulation No 261/2004, Mr Lassooy brought an action before the Helsingin käräjäoikeus (Helsinki District Court) for an order against Finnair to pay him the compensation provided for in Article 7(1)(b) of that regulation. By decision of 19 December 2008, the Helsingin käräjäoikeus dismissed Mr Lassooy’s application for compensation on the ground that the regulation only concerned compensation where boarding is denied as a result of overbooking for economic reasons. That court held that Article 4 of Regulation No 261/2004 did not apply in this case, since the airline company had rescheduled its flights as a result of a strike at Barcelona airport and that strike amounted to an extraordinary circumstance in respect of which Finnair had taken all the measures that could be required of it.

15 By a judgment of 31 August 2009, the Helsingin hovioikeus (Helsinki Court of Appeal) set aside the judgment of the Helsingin käräjäoikeus and ordered Finnair to pay Mr Lassooy the sum of EUR 400. To that effect, the Helsingin hovioikeus

held that Regulation No 261/2004 applies not only to overbooking but also in some instances to operational reasons for denying boarding, and thus prevents an air carrier from being exempted, for reasons connected with a strike, from its obligation to pay compensation.

- 16 In the context of Finnair’s appeal to the Korkein oikeus (Supreme Court), that court relates its doubts concerning the scope of the obligation to compensate passengers who have been ‘denied boarding’, as referred to in Article 4 of Regulation No 261/2004, the grounds that may justify ‘denied boarding’ within the meaning of Article 2(j) of that regulation, and whether an air carrier may rely on the extraordinary circumstances referred to in Article 5(3) of that same regulation, with respect to flights after the flight which was cancelled because of those circumstances.
- 17 In that context, the Korkein oikeus decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
1. Is Regulation No 261/2004 and in particular Article 4 thereof to be interpreted as meaning that its application is limited only to cases where boarding is denied because of overbooking by [an] air carrier for economic reasons, or is [that] regulation applicable also to situations in which boarding is denied for other reasons, such as operational reasons?
 2. Is Article 2(j) of [Regulation No 261/2004] to be interpreted as meaning that the reasonable grounds laid down therein are limited only to factors relating to passengers, or may a denial of boarding be reasonable on other grounds? If the regulation is to be interpreted as meaning that a denial of boarding may be reasonable on grounds other than those relating to passengers, is it to be interpreted as meaning that such a denial may also be reasonable on the grounds of the rescheduling of flights as a result of the extraordinary circumstances mentioned in recitals 14 and 15?
 3. Is [Regulation No 261/2004] to be interpreted as meaning that an air carrier may be exempted from liability under Article 5(3) in extraordinary circumstances not only with respect to a flight which it cancelled, but also with respect to passengers on later flights, on the ground that by its actions it attempts to spread the negative effects of the extraordinary circumstances it encounters in its operations, such as a strike, among a wider class of passengers than the cancelled flight’s passengers by rescheduling its later flights so that no passenger’s journey was unreasonably delayed? In other words, may an air carrier rely on extraordinary circumstances also with respect to a passenger on a later flight whose journey was not directly affected by that factor? Does it make a significant difference whether the passenger’s situation and right to compensation are assessed in accordance with Article 4 of the regulation, which concerns denied boarding, or with Article 5, which relates to flight cancellation?’

Consideration of the questions referred

The first question

- 18 By its first question the referring court asks, in essence, whether the concept of

‘denied boarding’, within the meaning of Articles 2(j) and 4 of Regulation No 261/2004, must be interpreted as relating exclusively to cases where boarding is denied because of overbooking or whether it applies also to cases where boarding is denied on other grounds, such as operational reasons.

- 19 It should be noted that the wording of Article 2(j) of Regulation No 261/2004, which defines the concept of ‘denied boarding’, does not link that concept to an air carrier’s ‘overbooking’ the flight concerned for economic reasons.
- 20 As regards the context of that provision and the objectives pursued by the legislation of which it is part, it is apparent not only from recitals 3, 4, 9 and 10 of Regulation No 261/2004, but also from the *travaux préparatoires* for that regulation – and in particular from the Proposal for a regulation of the European Parliament and of the Council establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights, presented by the Commission of the European Communities on 21 December 2001 (COM(2001) 784 final) – that the European Union (‘EU’) legislature sought, by the adoption of that regulation, to reduce the number of passengers denied boarding against their will, which was too high at that time. This would be achieved by filling the gaps in Regulation No 295/91 which confined itself to establishing, in accordance with Article 1 thereof, common minimum rules applicable where passengers are denied access to an overbooked scheduled flight.
- 21 It is in that context that by means of Article 2(j) of Regulation No 261/2004 the EU legislature removed from the definition of ‘denied boarding’ any reference to the ground on which an air carrier refuses to carry a passenger.
- 22 In so doing, the EU legislature expanded the scope of the definition of ‘denied boarding’ beyond merely situations where boarding is denied on account of overbooking referred to previously in Article 1 of Regulation No 295/91, and construed ‘denied boarding’ broadly as covering all circumstances in which an air carrier might refuse to carry a passenger.
- 23 That interpretation is supported by the finding that limiting the scope of ‘denied boarding’ exclusively to cases of overbooking would have the practical effect of substantially reducing the protection afforded to passengers under Regulation No 261/2004 and would therefore be contrary to the aim of that regulation – referred to in recital 1 in the preamble thereto – of ensuring a high level of protection for passengers. Consequently, a broad interpretation of the rights granted to passengers is justified (see, to that effect, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 69, and C-549/07 *Wallentin-Hermann* [2008] ECR I-11061, paragraph 18).
- 24 As the Advocate General observed in point 37 of his Opinion, to accept that only situations of overbooking are covered by the concept of ‘denied boarding’ would have the effect of denying all protection to passengers who, like the applicant in the main proceedings, find themselves in a situation for which, as in the case of overbooking for economic reasons, they are not responsible, by precluding them from relying on Article 4 of Regulation No 261/2004; paragraph 3 of that article refers to the provisions of that regulation relating to rights to compensation, reimbursement or re-routing and to care, as laid down in Articles 7 to 9 of that

regulation.

- 25 Consequently, an air carrier’s refusal to allow the boarding of a passenger who has presented himself for boarding in accordance with the conditions laid down in Article 3(2) of Regulation No 261/2004, on the basis that the flights arranged by that carrier have been rescheduled, must be characterised as ‘denied boarding’ within the meaning of Article 2(j) of that regulation.
- 26 In the light of the foregoing, the answer to the first question is that the concept of ‘denied boarding’, within the meaning of Articles 2(j) and 4 of Regulation No 261/2004, must be interpreted as relating not only to cases where boarding is denied because of overbooking but also to those where boarding is denied on other grounds, such as operational reasons.

The second and third questions

- 27 By its second and third questions, which should be examined together, the referring court asks, in essence, whether the occurrence of ‘extraordinary circumstances’ resulting in an air carrier rescheduling flights after those circumstances occurred can give grounds for denying boarding to a passenger on one of those later flights and for exempting that carrier from its obligation, under Article 4(3) of Regulation No 261/2004, to compensate a passenger to whom it denies boarding on such a flight.
- 28 In the first place, the referring court seeks to establish whether characterisation as ‘denied boarding’, within the meaning of Article 2(j) of Regulation No 261/2004, may be precluded solely on grounds relating to passengers as such, or whether grounds unrelated to them and, in particular, relating to an air carrier’s rescheduling of its flights as a result of ‘extraordinary circumstances’ which affected it, may also preclude such characterisation.
- 29 In that connection, it should be noted that the wording of Article 2(j) of Regulation No 261/2004 precludes characterisation as ‘denied boarding’ on two sets of grounds. The first relates to the failure of the passenger presenting himself for boarding to comply with the conditions laid down in Article 3(2) of that regulation. The second concerns cases where there are reasonable grounds to deny boarding ‘such as reasons of health, safety or security, or inadequate travel documentation’.
- 30 The first set of grounds does not apply to the case in the main proceedings. As regards the second set of grounds, it must be noted that none of the reasons specifically referred to in Article 2(j) is relevant to the main proceedings. However, in using the expression ‘such as’, the EU legislature intended to provide a non-exhaustive list of the situations in which there are reasonable grounds for denying boarding.
- 31 None the less, it cannot be inferred from such wording that there are reasonable grounds to deny boarding on the basis of an operational reason such as that in question in the main proceedings.
- 32 The situation in question in the main proceedings is comparable to cases where boarding is denied because of ‘initial’ overbooking, since the air carrier had reallocated the applicant’s seat in order to transport other passengers, and it

therefore chose itself between several passengers to be transported.

- 33 Admittedly, that reallocation was done in order to avoid the passengers affected by flights cancelled on account of extraordinary circumstances having excessively long waiting times. However, that ground is not comparable to those specifically mentioned in Article 2(j) of Regulation No 261/2004, since it is in no way attributable to the passenger to whom boarding is denied.
- 34 It cannot be accepted that an air carrier may, relying on the interest of other passengers in being transported within a reasonable time, increase considerably the situations in which it would have reasonable grounds for denying a passenger boarding. That would necessarily have the consequence of depriving such a passenger of all protection, which would be contrary to the objective of Regulation No 261/2004 which seeks to ensure a high level of protection for passengers by means of a broad interpretation of the rights granted to them.
- 35 In the second place, the referring court asks the Court of Justice whether an air carrier may be exempted from its obligation to compensate a passenger for ‘denied boarding’, laid down in Articles 4(3) and 7 of Regulation No 261/2004, on the ground that boarding is denied due to the rescheduling of that carrier’s flights as a result of ‘extraordinary circumstances’.
- 36 In that connection, it is to be noted that, unlike Article 5(3) of Regulation No 261/2004, Articles 2(j) and 4 of that regulation do not provide that, in the event of ‘denied boarding’ owing to ‘extraordinary circumstances’ which could not have been avoided even if all reasonable measures had been taken, an air carrier is exempted from its obligation to compensate passengers denied boarding against their will (see, by analogy, *IATA and ELFAA*, paragraph 37). It follows that the EU legislature did not intend that compensation may be precluded on grounds relating to the occurrence of ‘extraordinary circumstances’.
- 37 In addition, it is apparent from recital 15 in the preamble to Regulation No 261/2004 that ‘extraordinary circumstances’ may relate only to ‘a particular aircraft on a particular day’, which cannot apply to a passenger denied boarding because of the rescheduling of flights as a result of extraordinary circumstances affecting an earlier flight. The concept of ‘extraordinary circumstances’ is intended to limit the obligations of an air carrier – or even exempt it from those obligations – when the event in question could not have been avoided even if all reasonable measures had been taken. As the Advocate General observed in point 53 of his Opinion, if such a carrier is obliged to cancel a scheduled flight on the day of a strike by airport staff and then takes the decision to reschedule its later flights, that carrier cannot in any way be considered to be constrained by that strike to deny boarding to a passenger who has duly presented himself for boarding two days after the flight’s cancellation.
- 38 Consequently, having regard to the requirement to interpret strictly the derogations from provisions granting rights to passengers, which follows from the settled case-law of the Court (see, to that effect, *Wallentin-Hermann*, paragraph 17 and the case-law cited), an air carrier cannot be exempted from its obligation to pay compensation in the event of ‘denied boarding’ on the ground that its flights were rescheduled as a result of ‘extraordinary circumstances’.

39 Furthermore, it must be reiterated that the discharge of obligations by air carriers pursuant to Regulation No 261/2004 is without prejudice to their rights to seek compensation from any person who has caused the ‘denied boarding’, including third parties, as Article 13 of the regulation provides. Such compensation accordingly may reduce or even remove the financial burden borne by the air carriers in consequence of those obligations (*IATA and ELFAA*, paragraph 90).

40 In the light of the foregoing considerations, the answer to the second and third questions is that Articles 2(j) and 4(3) of Regulation No 261/2004 must be interpreted as meaning that the occurrence of ‘extraordinary circumstances’ resulting in an air carrier rescheduling flights after those circumstances arose cannot give grounds for denying boarding on those later flights or for exempting that carrier from its obligation, under Article 4(3) of that regulation, to compensate a passenger to whom it denies boarding on such a flight.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

- 1. The concept of ‘denied boarding’, within the meaning of Articles 2(j) and 4 of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, must be interpreted as relating not only to cases where boarding is denied because of overbooking but also to those where boarding is denied on other grounds, such as operational reasons.**
- 2. Articles 2(j) and 4(3) of Regulation No 261/2004 must be interpreted as meaning that the occurrence of ‘extraordinary circumstances’ resulting in an air carrier rescheduling flights after those circumstances arose cannot give grounds for denying boarding on those later flights or for exempting that carrier from its obligation, under Article 4(3) of that regulation, to compensate a passenger to whom it denies boarding on such a flight.**

[Signatures]

* Language of the case: Finnish.

JUDGMENT OF THE COURT (Third Chamber)

4 October 2012 (*)

(Air transport - Regulation (EC) No 261/2004 - Compensation for passengers in the event of denied boarding - Concept of ‘denied boarding’ - Cancellation of a passenger’s boarding card by an air carrier because of the anticipated delay to an earlier flight also operated by it which included check-in for the flight concerned)

In Case C-321/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Mercantil No 2, A Coruña (Spain), made by decision of 29 March 2011, received at the Court on 28 June 2011, in the proceedings

Germán Rodríguez Cachafeiro,

María de los Reyes Martínez-Reboredo Varela-Villamor

v

Iberia, Líneas Aéreas de España SA,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský, E. Juhász, T. von Danwitz and D. Šváby (Rapporteur), Judges,

Advocate General: V. Trstenjak,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Iberia, Líneas Aéreas de España SA, by J. Bejerano Fernández, procurador,
- the French Government, by G. de Bergues and M. Perrot, acting as Agents,
- the Finnish Government, by H. Leppo, acting as Agent,
- the European Commission, by K. Simonsson and R. Vidal Puig, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 2(j), 3(2) and 4(3) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).

2 The reference has been made in proceedings between, on the one hand, Mr Rodríguez Cachafeiro and Ms Martínez-Reboredo Varela-Villamor and, on the other, the airline Iberia, Líneas Aéreas de España SA (‘Iberia’), following Iberia’s refusal to compensate them for not allowing them to board a flight from Madrid (Spain) to Santo Domingo (Dominican Republic).

Legal framework

Regulation (EEC) No 295/91

3 Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport (OJ 1991 L 36, p. 5), which was in force until 16 February 2005, provided at Article 1:

‘This Regulation establishes common minimum rules applicable where passengers are denied access to an overbooked scheduled flight for which they have a valid ticket and a confirmed reservation departing from an airport located in the territory of a Member State to which the [EC] Treaty applies, irrespective of the State where the air carrier is established, the nationality of the passenger and the point of destination.’

Regulation No 261/2004

4 Recitals 1, 3, 4, 9 and 10 in the preamble to Regulation No 261/2004 state:

‘(1) Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.

...

(3) While [Regulation No 295/91] created basic protection for passengers, the number of passengers denied boarding against their will remains too high, as does that affected by cancellations without prior warning and that affected by long delays.

(4) The Community should therefore raise the standards of protection set by that Regulation both to strengthen the rights of passengers and to ensure that air carriers operate under harmonised conditions in a liberalised market.

...

(9) The number of passengers denied boarding against their will should be reduced by requiring air carriers to call for volunteers to surrender their reservations, in exchange for benefits, instead of denying passengers boarding, and by fully compensating those finally denied boarding.

(10) Passengers denied boarding against their will should be able either to cancel their flights, with reimbursement of their tickets, or to continue them under satisfactory conditions, and should be adequately cared for while awaiting a later flight.'

5 Article 2 of Regulation No 261/2004, entitled 'Definitions', provides:

'For the purposes of this Regulation:

...

(j) "denied boarding" means a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation;

...'

6 Article 3 of that regulation, entitled 'Scope', provides in paragraph 2:

'Paragraph 1 shall apply on the condition that passengers:

(a) have a confirmed reservation on the flight concerned and, except in the case of cancellation referred to in Article 5, present themselves for check-in:

- as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorised travel agent,

or, if no time is indicated,

- not later than 45 minutes before the published departure time; or

...'

7 Article 4 of Regulation No 261/2004, entitled 'Denied boarding', reads as follows:

1. When an operating air carrier reasonably expects to deny boarding on a flight, it shall first call for volunteers to surrender their reservations in exchange for benefits under conditions to be agreed between the passenger concerned and the operating air carrier. Volunteers shall be assisted in accordance with Article 8, such assistance being additional to the benefits mentioned in this paragraph.

2. If an insufficient number of volunteers comes forward to allow the

remaining passengers with reservations to board the flight, the operating air carrier may then deny boarding to passengers against their will.

3. If boarding is denied to passengers against their will, the operating air carrier shall immediately compensate them in accordance with Article 7 and assist them in accordance with Articles 8 and 9.’

8 Article 7 of that regulation, entitled ‘Right to compensation’, provides in paragraph 1:

‘Where reference is made to this Article, passengers shall receive compensation amounting to:

(a) EUR 250 for all flights of 1 500 kilometres or less;

(b) EUR 400 for all intra-Community flights of more than 1 500 kilometres, and for all other flights between 1 500 and 3 500 kilometres;

(c) EUR 600 for all flights not falling under (a) or (b).

...’

9 Articles 8 and 9 of that regulation, read in conjunction with Article 4 thereof, provide a right to reimbursement or re-routing and a right to care for passengers who are denied boarding.

The dispute in the main proceedings and the question referred for a preliminary ruling

10 The applicants in the main proceedings, Mr Rodríguez Cachafeiro and Ms Martínez-Reboredo Varela-Villamor (or ‘the applicants’), both bought airline tickets from Iberia for the journey from Corunna (Spain) to Santo Domingo. That ticket comprised two flights: flight IB 513 Corunna-Madrid on 4 December 2009 (from 13.30 to 14.40), and flight IB 6501 Madrid-Santo Domingo the same day (from 16.05 to 19.55).

11 At the Iberia check-in counter at Corunna airport, the applicants checked their luggage in - direct to their final destination - in accordance with the conditions laid down in Article 3(2) of Regulation No 261/2004, and were given two boarding cards for the two successive flights.

12 The first flight was delayed by 1 hour and 25 minutes. In anticipation that that delay would result in the two passengers missing their connection in Madrid, at 15.17 Iberia cancelled their boarding cards for the second flight scheduled for 16.05. The referring court notes that, on arrival in Madrid, the applicants presented themselves at the departure gate in the final boarding call to passengers. The Iberia staff did not, however, allow them to board on the grounds that their boarding cards had been cancelled and their seats allocated to other passengers.

13 The applicants waited until the following day in order to be taken to Santo Domingo on another flight and they reached their final destination 27 hours late.

- 14 On 23 February 2010, Mr Rodríguez Cachafeiro and Ms Martínez-Reboredo Varela-Villamor brought an action before the Juzgado de lo Mercantil No 2, A Coruña (Commercial Court No 2, Corunna), seeking a decision ordering Iberia to pay them the sum of EUR 600 each by way of compensation for ‘denied boarding’, pursuant to Articles 4(3) and 7(1)(c) of Regulation No 261/2004. Iberia disputed those claims, contending that the facts on the basis of which the action had been brought before that court did not amount to a case of ‘denied boarding’, but should rather be construed as a missed connection, since the decision to deny the applicants boarding was not attributable to overbooking, but was caused by the delay to the earlier flight.
- 15 The referring court also notes that Iberia paid the compensation provided for under Articles 4(3) and 7 of Regulation No 261/2004 to seven passengers for denied boarding on the Madrid-Santo Domingo flight in question.
- 16 In that context, the referring court seeks to ascertain whether the concept of ‘denied boarding’ refers exclusively to situations in which flights have been overbooked initially or whether that concept may be extended to cover other situations such as that of the applicants.
- 17 In those circumstances the Juzgado de lo Mercantil No 2, A Coruña, decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘May the concept of “denied boarding” contained in Article 2(j), in conjunction with Articles 3(2) and 4(3), of [Regulation No 261/2004], be regarded as including a situation in which an airline refuses to allow boarding because the first flight included in the ticket is subject to a delay attributable to the airline and the latter mistakenly expects the passengers not to arrive in time to catch the second flight, and so allows their seats to be taken by other passengers?’

The question referred for a preliminary ruling

- 18 By its question, the referring court asks, in essence, whether Article 2(j) of Regulation No 261/2004, read in conjunction with Article 3(2) of that regulation, must be interpreted as meaning that the concept of ‘denied boarding’ includes a situation where, in the context of a single contract of carriage involving a number of reservations on immediately connecting flights and a single check-in, an air carrier denies some passengers boarding on the ground that the first flight included in their reservation has been subject to a delay attributable to that carrier and the latter mistakenly expected those passengers not to arrive in time to board the second flight.
- 19 In that regard, it is to be noted that, pursuant to Article 2(j) of Regulation No 261/2004, characterisation as ‘denied boarding’ presupposes that an air carrier refuses to carry a passenger on a flight for which he had a reservation and presented himself for boarding in accordance with the conditions laid down in Article 3(2) of that regulation, unless there are reasonable grounds for denying that passenger boarding, such as the reasons mentioned in Article 2(j).
- 20 In the main proceedings, the question raised by the referring court is based on

the premiss that the applicants presented themselves for boarding on the Madrid-Santo Domingo flight in accordance with the conditions laid down in Article 3(2) of Regulation No 261/2004. In addition, it is apparent from the file that the applicants were prevented from boarding that flight not because of an alleged failure to comply with those conditions, but because their reservations had been cancelled as a result of the delay on the earlier Corunna-Madrid flight.

- 21 Without prejudging the possible consequences of the fact that, as a result of that delay, the applicants reached their final destination (Santo Domingo) 27 hours after the scheduled arrival time indicated when they reserved their travel, the Court observes that, as regards the reasons for a carrier denying boarding to a passenger who holds a reservation and has duly presented himself for boarding, the wording of Article 2(j) of Regulation No 261/2004 does not link ‘denied boarding’ to a carrier’s ‘overbooking’ the flight concerned for economic reasons.
- 22 As regards the context of that provision and the objectives pursued by the legislation of which it is part, it is apparent not only from recitals 3, 4, 9 and 10 of Regulation No 261/2004, but also from the *travaux préparatoires* for that regulation – and in particular from the Proposal for a regulation of the European Parliament and of the Council establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights, presented by the Commission of the European Communities on 21 December 2001 (COM(2001) 784 final) – that the European Union (‘EU’) legislature sought, by the adoption of that regulation, to reduce the number of passengers denied boarding against their will, which was too high at that time. This would be achieved by filling the gaps in Regulation No 295/91 which confined itself to establishing, in accordance with Article 1 thereof, common minimum rules applicable where passengers are denied access to an overbooked scheduled flight.
- 23 It is in that context that by means of Article 2(j) of Regulation No 261/2004 the EU legislature removed from the definition of ‘denied boarding’ any reference to the ground on which an air carrier refuses to carry a passenger.
- 24 In so doing, the EU legislature expanded the scope of the definition of ‘denied boarding’ beyond merely situations where boarding is denied on account of overbooking referred to previously in Article 1 of Regulation No 295/91, and construed ‘denied boarding’ broadly as covering all circumstances in which an air carrier may refuse to carry a passenger.
- 25 That interpretation is supported by the finding that limiting the scope of ‘denied boarding’ exclusively to cases of overbooking would have the practical effect of substantially reducing the protection afforded to passengers under Regulation No 261/2004 and would therefore be contrary to the aim of that regulation – referred to in recital 1 in the preamble thereto – of ensuring a high level of protection for passengers. Consequently, a broad interpretation of the rights granted to passengers is justified (see, to that effect, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 69, and Case C-549/07 *Wallentin-Hermann* [2008] ECR I-11061, paragraph 18).
- 26 Accordingly, to accept that only situations of overbooking are covered by the

concept of ‘denied boarding’ would have the effect of denying all protection to passengers who find themselves in a situation such as that of the applicants, by precluding them from relying on Article 4 of Regulation No 261/2004, paragraph 3 of which refers to the provisions of that regulation relating to rights to compensation, reimbursement or re-routing and to care, as laid down in Articles 7 to 9 of that regulation.

- 27 In the light of the foregoing, denial of boarding by an air carrier in circumstances such as those of the main proceedings must, in principle, be included in the concept of ‘denied boarding’ within the meaning of Article 2(j) of Regulation No 261/2004.
- 28 Nevertheless, it must be confirmed that, as laid down in that provision, there are not reasonable grounds to deny boarding, ‘such as reasons of health, safety or security, or inadequate travel documentation’.
- 29 In that regard, it is to be noted that, in using the expression ‘such as’, the EU legislature intended to provide a non-exhaustive list of the situations in which there are reasonable grounds for denying boarding.
- 30 None the less, it cannot be inferred from such wording that there are reasonable grounds to deny boarding on the basis of an operational reason such as that in question in the main proceedings.
- 31 The referring court states that, in the context of a single contract of carriage involving a number of reservations on two immediately connected flights and a single check-in, the first of those flights was subject to a delay attributable to the carrier in question, that the latter mistakenly expected the passengers in question not to arrive in time to board the second flight and that, as a consequence, it allowed other passengers to take the seats on that second flight which were to have been occupied by the passengers to whom boarding was denied.
- 32 However, such a reason for denying boarding is not comparable to those specifically mentioned in Article 2(j) of Regulation No 261/2004, since it is in no way attributable to the passenger to whom boarding is denied.
- 33 In addition, it cannot be accepted that an air carrier may increase considerably the situations in which it would have reasonable grounds for denying a passenger boarding. That would necessarily have the consequence of depriving such a passenger of all protection, which would be contrary to the objective of Regulation No 261/2004 which seeks to ensure a high level of protection for passengers by means of a broad interpretation of the rights granted to them.
- 34 In a situation such as that in the main proceedings, that would, moreover, result in the passengers concerned suffering the serious trouble and inconvenience inherent in a denial of boarding, even though that denial is attributable, in any event, to the carrier alone, which either caused the delay to the first flight operated by it, mistakenly considered that the passengers concerned would not be able to present themselves in time to board the following flight or sold tickets for successive flights for which the time available for catching the following flight was insufficient.

35 Consequently, there are no reasonable grounds for a denial of boarding such as that at issue in the main proceedings which must therefore be characterised as ‘denied boarding’ within the meaning of Article 2(j) of Regulation No 261/2004.

36 In the light of the foregoing, the answer to the question referred is that Article 2(j) of Regulation No 261/2004, read in conjunction with Article 3(2) of that regulation, must be interpreted as meaning that the concept of ‘denied boarding’ includes a situation where, in the context of a single contract of carriage involving a number of reservations on immediately connecting flights and a single check-in, an air carrier denies boarding to some passengers on the ground that the first flight included in their reservation has been subject to a delay attributable to that carrier and the latter mistakenly expected those passengers not to arrive in time to board the second flight.

Costs

37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 2(j) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, read in conjunction with Article 3(2) of Regulation No 261/2004, must be interpreted as meaning that the concept of ‘denied boarding’ includes a situation where, in the context of a single contract of carriage involving a number of reservations on immediately connecting flights and a single check-in, an air carrier denies boarding to some passengers on the ground that the first flight included in their reservation has been subject to a delay attributable to that carrier and the latter mistakenly expected those passengers not to arrive in time to board the second flight.

[Signatures]

* Language of the case: Spanish.

Tribunal d'instance d'Aulnay-sous-Bois
ct0367
Audience publique du 8 octobre 2007
N° de RG: 07/00145

REPUBLIQUE FRANCAISE
AU NOM DU PEUPLE FRANCAIS

JURIDICTION DE PROXIMITE

...

93600 AULNAY-SOUS-BOIS

Tél : 01.48.66.09.08

RG N 91-07-000145

Minute :

SL

Monsieur X... Jean-Baptiste
Madame X... Pascale Marie-Francoise

C/

S.A. AIR FRANCE

Exécutoire, copie, dossier

délivrés à :

SCPA BUISSON et ASSOCIES

Copie, dossier délivrés à :

Me PRADON Fabrice

le :

AUDIENCE CIVILE

Jugement rendu et mis à disposition au Greffe de la Juridiction de Proximité en date du HUIT
OCTOBRE DEUX MILLE SEPT

par Monsieur CORBU Jean, Juge de Proximité,

Assisté de Madame MARTIN Esther, Adjoint Administratif Assermenté faisant fonction de Greffier

Après débats à l'audience publique du 10 Septembre 2007

tenue sous la Présidence de Monsieur CORBU Jean, Juge de Proximité,

Assisté de Madame LENART Sonia, Greffier audencier

ENTRE DEMANDEURS :

Monsieur X... Jean-Baptiste demeurant ...,

Madame X... Pascale Marie-Francoise née Z... demeurant ...,
représentés par la SCPA BUISSON et ASSOCIES, avocats au barreau de PONTOISE domiciliés 29
rue Pierre Butin 95300 PONTOISE

D'UNE PART

ET DEFENDERESSE :

S.A. AIR FRANCE dont le siège social est 45 rue de Paris, 95747 ROISSY CDG CEDEX, agissant
poursuites et diligences de son représentant légal domicilié en cette qualité audit siège
représentée par Maître PRADON Fabrice, avocat au barreau de PARIS domicilié 4 rue de
Castellane, 75008 PARIS,

D'AUTRE PART

.../...

FAITS ET PROCEDURE :

Par acte d'huissier en date du 17 avril 2007, Monsieur Jean Baptiste X... et Madame Pascale Marie-
Françoise Z... épouse X... sollicitent la condamnation de la Société Air France (RCS Bobigny
B420495178) à devoir leur payer les sommes de:

1288 euro au titre de l'article 1142 du Code Civil,

1000 euro en application de l'article 1147 du Code Civil,

500 euro au titre de l'article 700 du NCPC.

Il est demandé que soit prononcée l'exécution provisoire de la présente décision et la condamnation
de la société AIR FRANCE aux entiers dépens sur le fondement de l'article 696 du NCPC.

La société AIR FRANCE conclue au débouté des demandes et sollicite 1000 euro au titre de
l'article 700 du NCPC et la condamnation des demandeurs aux entiers dépens.

A l'audience du 10 septembre 2007, les demandeurs précisent que les 1288 euro demandés
correspondent à 125 euro de remboursement de taxi, 1143 pour l'achat rendu nécessaires de
nouveau billets le 30/12/06 et 20 euro pour le véhicule ayant dû être réservé en Ecosse.

Ils réitèrent également leurs autres demandes susvisées.

La Société AIR FRANCE renouvelle sa demande reconventionnelle de 1000 euro au titre de
l'article 700 du NCPC.

MOYENS ET PRETENTIONS :

Les époux X... indiquent avoir réservé et payé le 25 novembre 2005, quatre billets aller-retour Paris/Edimbourg sur le site de la compagnie AIR France pour un montant total de 1100,24 euro, pour eux et leurs deux filles.

Ils précisent que les dates étaient le 29/12/06 à 7H20 pour le départ et au 1er janvier pour le retour.

Ils ajoutent avoir enregistré leurs bagages au comptoir AIR FRANCE le 29/12 vers 06H30, pour un embarquement prévu à 06H45.

Ils allèguent que la présence d'un groupe d'adolescent au passage du contrôle de police les a retardé alors qu'ils tentaient de se rendre vers la salle d'embarquement et qu'ils se trouvaient contraints de laisser passer ledit groupe sur ordre des forces de l'ordre.

Ils affirment avoir pu regagner la salle d'embarquement peu après 07H00 et soulignent qu'aucun personnel de la compagnie AIR France n'était présent et une personne employée par la société ADP les a alors avertis que l'embarquement était fermé.

Ils ajoutent s'être vus refuser l'accès à bord alors même que ce vol n'avait fait l'objet d'aucun appel pour l'embarquement et que l'avion était toujours sur le tarmac.

Ils allèguent que la compagnie AIR FRANCE à préféré décharger leurs bagages déjà placés dans la soute de l'avion ainsi que ceux de dix huit clients se trouvant dans la même situation qu'eux, c'est-à-dire dans la salle d'embarquement.

Ils soulignent qu'à l'instar des dix huit autres personnes, ils ont été contraints de payer une nouvelle fois d'autres billets, soit 1143 euro pour partir le 30 décembre 2005 à 07H20, sans remboursement du 1er vol. Ils ajoutent avoir du faire face à des frais supplémentaires d'aller-retour en taxi pour rentrer chez eux et revenir le lendemain à hauteur de 125 euro et 20 euro de supplément sur la location d'une voiture en Ecosse d'une catégorie supérieure, celle initialement prévue n'étant plus disponible.

Les époux X... rappellent que selon l'article L322-1 du Code de l'aviation civile : « le contrat de transport des passagers doit être constaté par la délivrance d'un billet. » Ils se considèrent à ce titre contractuellement liés avec la compagnie AIR France et versent aux débats leurs quatre billets aller-retour.

Ils considèrent que la société défenderesse n'a pas respecté ses obligations contractuelles et a fait montre d'une désorganisation interne ne pouvant leur être préjudiciable.

Ils allèguent que la société AIR FRANCE à reconnu sa responsabilité dans une lettre du 30 janvier 2006 où elle écrit : « je vous remercie d'avoir pris la peine de nous écrire et vous présente au nom d'AIR FRANCE, mes excuses pour les dérangements que vous avez connus. Toutefois, dans le cas que vous évoquez, je suis au regret de vous informer qu'il n'est pas prévu de compensation. Je tiens néanmoins à vous assurer que les remarques que vous avez bien voulu faire ont été portées à la connaissance des responsables concernés, ainsi que de nos correspondants chargés du suivi de la qualité du service... »

Les demandeurs font également état de courriers de la défenderesse en date du 07 avril 2006 dans lesquels ils indiquent que cette dernière précise ne pouvoir être tenue pour responsable de longueurs excessives des contrôles de sécurité mettant ensuite les passagers en difficulté pour embarquer. Les demandeurs considèrent qu’il s’agit d’un argument de mauvaise foi et qu’il appartient à la société de faire concorder les horaires d’enregistrement des bagages et ceux des passagers et non d’imputer ses propres dysfonctionnements aux différents contrôles de Police.

Les époux X... produisent une lettre adressée le 16/02/07 par la défenderesse à une autre passagère, Madame B..., lequel, affirment-ils, indique que s’il y a eu effectivement 17 autres annulations, il s’agissait de passagers en correspondance n’ayant pu embarquer suite à un retard du vol d’apport, ce qu’ils considèrent comme mensonger puisque eux-mêmes, soit quatre passagers, ne pouvaient faire partie des passagers prétendus en correspondance.

Ils soulignent que leur séjour, visant à faire oublier la maladie dont est atteinte Madame X... a été réduit d’un tiers et considèrent que la compagnie AIR FRANCE, malgré sa notoriété, est condamnable au titre de sa non-réactivité.

La compagnie AIR FRANCE réplique que les billets dont il s’agit étaient non remboursables et non échangeables. Elle rappelle que les demandeurs ont été enregistrés à 6H31 et que l’article 6 des conditions générales de transport, qu’elle produit en pièce No 5, précise en son alinéa 4 : « le passager doit être présent à la porte d’embarquement au plus tard à l’heure indiquée lors de l’enregistrement. Le transporteur pourra annuler la réservation du passager si celui-ci ne s’est pas présenté à la porte d’embarquement à l’heure indiquée, sans aucune responsabilité envers le passager.

Elle rappelle que sur chaque carte d’accès à bord figurait l’information de devoir être présent à 6H45, porte F43, pour un départ au plus tard prévu à 07H20.

Elle souligne que les demandeurs indiquent s’être présentés à la porte d’embarquement peu après 07H00 et qu’à cette heure le vol était clôturé.

Elle souligne également n’être pas propriétaire des infrastructures de l’aéroport, ni responsable des contrôle de police, de sorte que le retard de la famille X... ne peut lui être imputée.

Elle indique que d’autres passagers ayant procédé à leur enregistrement à 06H48, ont pu néanmoins prendre place dans l’avion, compte tenu de quelques minutes supplémentaires dégagés par l’embarquement de tous les autres passagers. Elle illustre son propos par le client de la place 5A (pièce No6) et 4F (pièce No7) dont elle soutient que malgré un enregistrement 17 minutes après les demandeurs, soit à 06H48, ceux-ci n’ont eu aucune difficulté pour se présenter à temps à la porte F43 pour embarquer sur le vol AF5050 dont il s’agit.

Elle rappelle que les bagages des demandeurs ont été enregistrés à 06H31 et dirigés avec les autres bagages pour être placés dans les soutes de l’appareil. Elle ajoute que pour des raisons de sécurité, ceux-ci ont été automatiquement retirés pour être rendus aux demandeurs car ils n’étaient pas présents à l’embarquement.

La défenderesse conteste sa responsabilité et estime que si les demandeurs allèguent et prouvent que leur retard a bien pour origine le contrôle de police, il leur incombe alors de rechercher la responsabilité de l’Etat pour les défaillances commises éventuellement par ses services ou ses délégués. Elle ajoute n’avoir nullement vocation à demander une quelconque garantie de l’Etat en l’espèce, d’autant que la juridiction judiciaire est incompétente pour en connaître.

Elle estime que ses conditions d'exploitations au regard des heures limites d'enregistrement et d'embarquement ne sont pas en cause.

L'affaire a été mise en délibéré au 08 octobre 2007.

EXPOSE DES MOTIFS :

Il est constant que la société AIR FRANCE a procédé à l'enregistrement de la famille X... à 06H31 sur le vol Paris-Edimbourg du 29 décembre 2006 de 07H20 et l'a invitée à se présenter à la porte d'embarquement 14 minutes plus tard, soit à 06H45.

La pièce No11 des demandeurs démontre que la compagnie AIR FRANCE admet par ce courrier du 16 février 2006, qu'il y a bien eu 18 annulations de passagers sur ce vol dont il s'agit. Elle démontre également que la société AIR FRANCE use d'une explication pour le moins erronée lorsqu'elle s'adresse à Madame B..., passager destinataire dudit courrier en ces termes : « effectivement, comme vous le dites dans votre lettre, il y a eu aussi 17 autres annulations mais de passagers en correspondances suite à un retard du vol d'apport, ce qui n'est pas votre cas. » Force est de constater que ce n'est également pas le cas des quatre membres de la famille X..., pourtant manifestement comptabilisés ici par la défenderesse parmi les 17 autres passagers prétendument en correspondance.

Il convient en outre de constater que la société AIR FRANCE ne produit pas la liste définitive, donc complète, des passagers ayant effectivement voyagés sur le vol en question, permettant dès lors de constater son occupation effective et la détermination des sièges occupés ou non. Ces indications nécessairement éclairantes pour la solution du présent litige, notamment au regard dudit courrier du 16 février 2006 précité, lequel n'a appelé aucune observation en défense, ne peuvent être compensées par la production par la société AIR FRANCE de documents partiels, masqués (pièces No6/7/8) ou pour l'essentiel incomplets, codifiés et ne présentant aucune garantie de précision, car ni circonstanciés, ni explicites (pièces No2/3/4/6/7).

Compte tenu du nombre anormalement important d'annulations avérées sur ce vol de fin d'année, n'ayant également appelé aucune réponse de la société AIR FRANCE en défense sur ce point, compte tenu du temps anormalement court imparti de 14 minutes entre les opérations d'enregistrement de toute la famille et le délai maximal accordé pour embarquer, compte tenu de la possibilité matérielle manifeste d'embarquer l'ensemble des passagers en attente mais de l'absence de Personnel de la compagnie pour ce faire, l'avion se trouvant visible à quelques mètres, encore immobile sur le tarmac peu après 07H00 et susceptible de décoller environ vingt minutes plus tard, il y a lieu de constater que les époux X... ne peuvent être tenus pour responsables de procédés nécessairement inhabituels et inattendus de la part de professionnels réputés compétents et diligents. Il convient enfin d'observer que la défenderesse tout en alléguant ne pouvoir faire monter à bord lesdits passagers pour des raisons d'horaires, prendra curieusement le temps nécessairement plus long de retrouver et décharger chaque bagage y afférent.

A la lumière des circonstances anormales ainsi observées et telles que démontrées par les explications et pièces produites par les demandeurs, il ne peut leur être sérieusement reproché de ne pas avoir été en mesure de respecter l'article 6 alinéa 4 des conditions générales de transport dont se prévaut la défenderesse.

La société AIR FRANCE ne pouvant ignorer avoir enregistré deux adultes et deux enfants ne pouvait sérieusement vingt minutes avant le départ les laisser ainsi en errance aux portes de l'appareil dans les circonstances susvisées. Il lui appartenait de mettre en œuvre tous moyens requis pour assurer dans les délais nécessaires et adaptés, eu égard notamment au contrôle de police, l'acheminement des demandeurs dans des conditions normales.

Le présent litige ne peut que s'analyser en un refus d'embarquement dommageable, et imputable à la société AIR France devant en répondre.

Le règlement Européen No261/2004 applicable en l'espèce dispose qu'en cas de refus d'embarquement involontaire,

le transporteur est tenu de verser une indemnisation dans les conditions établies dans l'article

7 dudit règlement,

D'assurer une prise en charge des passagers au titre de l'article 9 de ce même règlement,

D'assurer dans le cas où le passager ne renonce pas à son voyage, son re-acheminement vers sa destination finale dans les meilleurs délais et dans les conditions de transport comparables au titre de l'article 8 du présent règlement.

Il ne peut être retenu de circonstances extraordinaires exonératoires de responsabilité pour la société AIR France, laquelle en imposant un délai trop réduit entre l'enregistrement qu'elle accepte sans réserve et l'embarquement qu'elle refuse, tout en ne pouvant ignorer l'alea de temps que représentent les contrôles de police, a été directement à l'origine du dommage subi par la famille X....

L'article 7-1 du règlement précité prévoit une indemnisation de 250 euro par passager pour les vols inférieurs à 1500 Km, comme en l'espèce.

La société AIR France doit donc indemniser les demandeurs à hauteur de 1000 euro de ce chef.

L'article 12 du Règlement susvisé traite de l'indemnisation complémentaire.

Il indique en paragraphe 1 que « le présent règlement s'applique sans préjudice du droit d'un passager à une indemnisation complémentaire. L'indemnisation accordée en vertu du présent règlement peut être déduite d'une telle indemnisation ;

Le paragraphe 2 ajoute : « sans préjudice des principes et règles pertinents du droit national, y compris la jurisprudence, le paragraphe 1 ne s'applique pas aux passagers qui ont volontairement renoncé à leur réservation conformément à l'article 4, paragraphe 1. »

Les demandeurs n'ayant nullement renoncé à leur réservation mais s'étant vus contraints de ne pas embarquer peuvent se voir appliquer la disposition de cet article 12 susvisée. S'agissant d'un transport international, le droit applicable au présent litige sur ce second point est la Convention de Montréal, entrée en vigueur en France depuis le 28 juin 2004 par décret du 17 juin 2004.

(article 1er), et non les articles 1142 et 1147 du Code Civil, laquelle précise que : « en cas de dommage subi par des passagers résultant d’un retard, aux termes de l’article 19 (lequel précise que le transporteur est responsable du dommage résultant d’un retard dans le transport aérien des passagers, bagages ou marchandises), la responsabilité du transporteur est limitée à la somme de 4150 droits de tirage spéciaux par passager.

Il convient de constater que les époux X... ont subi du fait de ce retard, un préjudice spécial et particulièrement accru par le fait d’avoir dû, par leurs propres moyens et sans assistance, rentrer chez eux, réorganiser leur départ pour le lendemain et à leurs frais, se voir réduire leur séjour d’un tiers du temps prévu, changer la réservation, du véhicule de location initialement prévue. Ils doivent en être indemnisés à hauteur de 1431,90 droits de tirage spéciaux du fonds monétaire (au taux de change actuel de 0,899499 XDR pour un euro). Cette indemnisation s’ajoute donc à celle des 1000 euro précédemment indiquée.

Il n’est pas inéquitable de condamner la société AIR France à 500 euro en application de l’article 700 du NCPC.

La société AIR FRANCE, partie perdante, doit assumer les dépens en application de l’article 696 du NCPC.

PAR CES MOTIFS :

Statuant publiquement par jugement contradictoire rendu en dernier ressort :

Condamne la société AIR France à payer aux époux X... les sommes de :

1000 euro au titre du refus d’embarquement,

1431,90 droits de tirage spéciaux du fonds monétaire (au taux actuel de 0,899499 XDR pour un euro) au titre de l’indemnisation complémentaire du préjudice,

500 euro en application de l’article 700 du NCPC,

Condamne la Société AIR FRANCE aux dépens.

Ainsi jugé, prononcé par mise à disposition au greffe le 08 octobre 2007, la minute étant signée par :

Le Juge de Proximité Le Greffier

JUDGMENT OF THE COURT (Fourth Chamber)

10 July 2008 (*)

(Carriage by air – Regulation (EC) No 261/2004 – Compensation for passengers
in the event of cancellation of a flight – Scope – Article 3(1)(a) – Concept of
'flight')

In Case C-173/07,

REFERENCE for a preliminary ruling under Article 234 EC by the
Oberlandesgericht Frankfurt am Main (Germany), made by decision of 7 March
2007, received at the Court on 2 April 2007, in the proceedings

Emirates Airlines - Direktion für Deutschland

v

Diether Schenkel,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, G. Arestis, R. Silva de
Lapuerta, J. Malenovský (Rapporteur) and T. von Danwitz, Judges,

Advocate General: E. Sharpston,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Emirates Airlines - Direktion für Deutschland, by C. Leffers,
Rechtsanwältin,
- Dr Schenkel, by M. Scheffels, Rechtsanwalt,
- the Greek Government, by M. Apeessos, O. Patsopoulou and V. Karra, acting
as Agents,
- the French Government, by G. de Bergues and A. Hare, acting as Agents,
- the Polish Government, by E. Ośniecka-Tamecka, acting as Agent,
- the Swedish Government, by A. Falk, acting as Agent,
- the Commission of the European Communities, by R. Vidal Puig and G.
Braun, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 March

2008,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 3(1)(a) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).
- 2 The reference was made in the course of proceedings between the airline company Emirates Airlines – Direktion für Deutschland (‘Emirates’) and Dr Schenkel concerning Emirates’ refusal to compensate him following the cancellation of a flight departing from Manila (Philippines).

Legal context

International law

- 3 The Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), concluded by the European Community, was approved by Council Decision 2001/539/EC of 5 April 2001 (OJ 2001 L 194, p. 38).
- 4 The Montreal Convention aims in particular to ensure protection of the interests of consumers in international carriage by air and equitable compensation based on the principle of restitution.
- 5 Article 1(2) and (3) of the convention, relating to its scope, provides:
 - ‘2. For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.
 3. Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.’

Community law

6 Article 2 of Regulation No 261/2004, ‘Definitions’, provides:

‘For the purposes of this Regulation:

...

(g) “reservation” means the fact that the passenger has a ticket, or other proof, which indicates that the reservation has been accepted and registered by the air carrier or tour operator;

(h) “final destination” means the destination on the ticket presented at the check-in counter or, in the case of directly connecting flights, the destination of the last flight; alternative connecting flights available shall not be taken into account if the original planned arrival time is respected;

...’

7 In accordance with Article 3 of the regulation, ‘Scope’:

‘1. This Regulation shall apply:

(a) to passengers departing from an airport located in the territory of a Member State to which the [EC] Treaty applies;

(b) to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier.

...’

8 Under Article 4 of Regulation No 261/2004, ‘Denied boarding’:

‘1. When an operating air carrier reasonably expects to deny boarding on a flight, it shall first call for volunteers to surrender their reservations in exchange for benefits under conditions to be agreed between the passenger concerned and the operating air carrier. Volunteers shall be assisted in accordance with Article 8, such assistance being additional to the benefits mentioned in this paragraph.

...’

9 Article 5 of Regulation No 261/2004, ‘Cancellation’, provides:

‘1. In case of cancellation of a flight, the passengers concerned shall:

...

(c) have the right to compensation by the operating air carrier in accordance with Article 7 ...

...’

10 Article 7 of Regulation No 261/2004, ‘Right to compensation’, provides:

‘1. Where reference is made to this Article, passengers shall receive compensation amounting to:

- (a) EUR 250 for all flights of 1 500 kilometres or less;
- (b) EUR 400 for all intra-Community flights of more than 1 500 kilometres, and for all other flights between 1 500 and 3 500 kilometres;
- (c) EUR 600 for all flights not falling under (a) or (b).

In determining the distance, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger’s arrival after the scheduled time.

...’

11 Article 8 of Regulation No 261/2004, ‘Right to reimbursement or re-routing’, provides:

‘1. Where reference is made to this Article, passengers shall be offered the choice between:

- (a) – reimbursement within seven days, by the means provided for in Article 7(3), of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger’s original travel plan, together with, when relevant,
 - a return flight to the first point of departure, at the earliest opportunity;
- (b) re-routing, under comparable transport conditions, to their final destination at the earliest opportunity; or
- (c) re-routing, under comparable transport conditions, to their final destination at a later date at the passenger’s convenience, subject to availability of seats.

2. Paragraph 1(a) shall also apply to passengers whose flights form part of a package, except for the right to reimbursement where such right arises under [Council] Directive 90/314/EEC [of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59)].

...’

12 Under Article 17 of Regulation No 261/2004, ‘Report’:

‘The Commission shall report to the European Parliament and the Council by 1 January 2007 on the operation and the results of this Regulation, in particular regarding:

- ...
- the possible extension of the scope of this Regulation to passengers having a contract with a Community carrier or holding a flight reservation which forms part of a “package tour” to which Directive 90/314/EEC applies and who depart from a third-country airport to an airport in a Member State, on flights not operated by Community air carriers,
- ...’

The main proceedings and the order for reference

- 13 Dr Schenkel booked in Germany, with Emirates, an outward and return journey from Düsseldorf (Germany) to Manila via Dubai (United Arab Emirates).
- 14 For the return journey Dr Schenkel had a reservation on the flight of 12 March 2006 from Manila. The flight was cancelled because of technical problems. Dr Schenkel eventually departed from Manila on 14 March 2006 and arrived at Düsseldorf on the same day.
- 15 Dr Schenkel brought an action against Emirates in the Amtsgericht Frankfurt am Main (Local Court, Frankfurt am Main), claiming compensation of EUR 600 in reliance on Articles 5(1)(c) and 7(1)(c) of Regulation No 261/2004.
- 16 He argued that the compensation provided for in those provisions in the event of the cancellation of a flight applied to him in the present case. He submitted that the outward and return flights were non-independent parts of a single flight. Since the point of departure of that single flight was Düsseldorf, he was thus a passenger ‘departing from an airport located in the territory of a Member State’ of the European Community within the meaning of Article 3(1)(a) of that regulation.
- 17 Emirates submitted that the outward and return flights were to be regarded as two separate flights. Furthermore, Emirates did not have a licence granted by a Member State in accordance with Article 2(c) of Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ 1992 L 240, p. 1).
- 18 It submitted that it was not therefore a ‘Community carrier’ referred to in Article 3(1)(b) of Regulation No 261/2004, and was not obliged to compensate Dr Schenkel for the cancelled flight.
- 19 The Amtsgericht Frankfurt am Main allowed Dr Schenkel’s claim. Emirates appealed to the Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main).
- 20 Although the Oberlandesgericht Frankfurt am Main is inclined to consider that a journey out and back constitutes a single flight for the purposes of Regulation No 261/2004, it is uncertain whether that interpretation of the concept of flight is correct.
- 21 In those circumstances the Oberlandesgericht Frankfurt am Main decided to stay the proceedings and refer the following question to the Court for a

preliminary ruling:

‘Is Article 3(1)(a) of [Regulation No 261/2004] to be interpreted as meaning that “a flight” includes the flight from the point of departure to the destination and back, at any rate where the outward and return flights are booked at the same time?’

The question referred for a preliminary ruling

- 22 The referring court asks essentially whether Article 3(1)(a) of Regulation No 261/2004 is to be interpreted as applying to the case of an outward and return journey in which passengers who have originally departed from an airport located in the territory of a Member State to which the Treaty applies travel back to that airport on a flight departing from an airport located in a non-member country. The referring court also asks whether the fact that the outward and return flights are the subject of a single booking affects the interpretation of that provision.
- 23 In its question the referring court uses the term ‘flight’ and refers to the concept of journey or travel which appears in Regulation No 261/2004, and asks whether a ‘flight’ includes a journey by air from the point of departure to the destination and back.
- 24 The concept of ‘flight’ is of decisive importance for answering the question put, despite the fact that, although it appears in the German language version of Article 3(1)(a) of Regulation No 261/2004, a clear majority of the other language versions of that provision do not refer to it or use a term derived from the word ‘flight’.
- 25 As the Advocate General observes in point 8 of her Opinion, passengers departing from an airport located in the territory of a Member State or in a non-member country are necessarily passengers embarking on a flight departing from such an airport. That divergence between the various language versions therefore has no effect on the actual meaning to be given to the provisions concerned, which determine the scope of the regulation.
- 26 Consequently, the Court must begin by interpreting the term ‘flight’.
- 27 It should be noted, in this respect, that that term is not among those defined in Regulation No 261/2004, in Article 2, headed ‘Definitions’. Nor is it defined in the other articles of the regulation.
- 28 In those circumstances, the term ‘flight’ must be interpreted in the light of the provisions of Regulation No 261/2004 as a whole and the objectives of that regulation.
- 29 Before undertaking that analysis, however, it should be observed that Article 3(1)(a) of Regulation No 261/2004, the provision to which the national court refers, must be read together with Article 3(1)(b) of the regulation.
- 30 It follows from Article 3(1) as a whole that the regulation applies to situations in which passengers use a flight either departing from an airport located in the

territory of a Member State (indent (a)) or departing from an airport located in a non-member country and flying to an airport located in the territory of a Member State if the air carrier operating the flight concerned is a Community carrier (indent (b)).

- 31 It follows that a situation in which passengers depart from an airport located in a non-member country cannot be regarded as a situation covered by Article 3(1)(a) of Regulation No 261/2004, and therefore falls within the scope of that regulation only subject to the condition in Article 3(1)(b), namely that the air carrier operating the flight is a Community carrier.
- 32 As regards, next, the interpretation of the relevant provisions of Regulation No 261/2004, it must be observed, first, that Article 8(2) of the regulation refers to a flight which forms part of a package, implying that a flight is not the same as a tour or journey, which may consist of several flights. Article 8(1) expressly refers to a ‘return flight’, thus pointing to the existence of an outward flight in the course of the same journey.
- 33 That is borne out by Article 2(h) of Regulation No 261/2004, which defines ‘final destination’ as the destination on the ticket presented at the check-in counter or, in the case of directly connecting flights, the destination of the last flight.
- 34 Next, Article 8(1) of Regulation No 261/2004 distinguishes between the first point of departure and the final destination of passengers, thus referring to two different places. If a ‘flight’ within the meaning of Article 3(1)(a) of the regulation were to be regarded as an outward and return journey, that would amount to considering that the final destination of a journey was the same as its first point of departure. In those circumstances, that provision would make no sense.
- 35 Finally, to regard a ‘flight’ within the meaning of Article 3(1)(a) of Regulation No 261/2004 as an outward and return journey would in fact have the effect of reducing the protection to be given to passengers under the regulation, which would be contrary to its objective of ensuring a high level of protection for passengers (see, to that effect, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 69).
- 36 In addition, first, Articles 4(1), 5(1) and 8(1) of Regulation No 261/2004 provide for redress for various kinds of damage that may occur in connection with a flight, but do not contemplate that one of those occasions of damage may occur several times during a single flight. In those circumstances, passengers departing originally from an airport located in a Member State could claim the benefit of that protection only once if they were to suffer the same damage on the outward and the return legs.
- 37 Second, to interpret Article 3(1)(a) of Regulation No 261/2004 in such a way that a flight includes an outward and return journey would further amount to depriving passengers of their rights in a situation in which the flight departing from an airport located in the territory of a Member State is not operated by a Community carrier.
- 38 Passengers on such a flight who had originally departed from an airport located

in a non-member country would not be able to enjoy the protection provided by Regulation No 261/2004. By contrast, passengers starting their journey on the same flight would be able to enjoy that protection, as they would be regarded as passengers departing from an airport located in the territory of a Member State. Passengers on the same flight whose protection in respect of harmful consequences must be the same would then be treated differently.

- 39 It is settled case-law, however, that the principle of equal treatment or non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see *IATA and ELFAA*, paragraph 95; Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, paragraph 57; and Case C-227/04 P *Lindorfer v Council* [2007] ECR I-6767, paragraph 63).
- 40 In the light of all the above considerations, the concept of ‘flight’ within the meaning of Regulation No 261/2004 must be interpreted as consisting essentially in an air transport operation, being as it were a ‘unit’ of such transport, performed by an air carrier which fixes its itinerary.
- 41 By contrast, the concept of ‘journey’ attaches to the person of the passenger, who chooses his destination and makes his way there by means of flights operated by air carriers. A journey, which normally comprises ‘outward’ and ‘return’ legs, is determined above all by the personal and individual purpose of travelling. Since the term ‘journey’ does not appear in the wording of Article 3(1)(a) of Regulation No 261/2004, it has in principle no effect on the interpretation of that provision.
- 42 In those circumstances, it must be ascertained whether other relevant legal instruments may affect the interpretation of the term ‘flight’. In this respect, it must be examined whether, as the referring court appears to have found, the Montreal Convention is decisive. That convention defines the obligations of air carriers towards passengers with whom they have concluded a contract for transport, and fixes in particular the terms on which passengers may obtain individualised compensation in the form of damages for losses arising from a delay.
- 43 It is true that the Montreal Convention forms an integral part of the Community legal order (see, to that effect, *IATA and ELFAA*, paragraphs 35 and 36). Moreover, it is clear from Article 300(7) EC that the Community institutions are bound by agreements concluded by the Community and, consequently, that those agreements have primacy over secondary Community legislation (see, to that effect, Case C-61/94 *Commission v Germany* [1996] ECR I-3989, paragraph 52).
- 44 However, the Montreal Convention does not in any way determine the extent of the obligations mentioned above by any reference to the concept of ‘flight’, a term which does not appear in the text of the convention.
- 45 Moreover, as the referring court rightly points out, successive carriage are regarded under the Montreal Convention as ‘one undivided carriage’, inter alia if they have been agreed upon in the form of a single contract. In so far as that concept of undivided carriage refers to a succession of several stages chosen by the passenger, it resembles rather the concept of ‘journey’ as defined in

paragraph 41 above.

- 46 The Montreal Convention is not therefore decisive for the interpretation of the concept of ‘flight’ within the meaning of Regulation No 261/2004.
- 47 It follows from paragraphs 32 to 41 above that a journey out and back cannot be regarded as a single flight. Consequently, Article 3(1)(a) of Regulation No 261/2004 cannot apply to the case of an outward and return journey such as that at issue in the main proceedings, in which passengers who have originally departed from an airport located in the territory of a Member State travel back to that airport on a flight departing from an airport located in a non-member country.
- 48 That interpretation is also supported by the second indent of Article 17 of Regulation No 261/2004, as seen in the light of recital 23 in the preamble to the regulation, in which the Community legislature envisages the possibility of extending the scope of the regulation in future to passengers on flights from a non-member country to a Member State not operated by Community carriers.
- 49 If Article 3(1)(a) of Regulation No 261/2004 referred also to the case of an outward and return journey in which passengers who originally departed from an airport located in the territory of a Member State embark on a flight departing from an airport located in a non-member country, the passengers referred to in the second indent of Article 17 of the regulation would already fall within its scope. That provision would therefore be pointless.
- 50 As to the question concerning the fact that the outward and return flights are the subject of a single booking, this has no effect on the conclusion stated in point 47 above.
- 51 There is nothing in the definition of ‘reservation’ in Article 2(g) of Regulation No 261/2004 which makes it possible to identify the scope of Article 3(1)(a) of that regulation. The fact that passengers make a single booking has no effect on the independent nature of the two flights.
- 52 Consequently, the method of reservation cannot be regarded as a relevant factor in determining the scope of Article 3(1)(a) of Regulation No 261/2004.
- 53 In the light of the above considerations, the answer to the question must be that Article 3(1)(a) of Regulation No 261/2004 must be interpreted as not applying to the case of an outward and return journey in which passengers who have originally departed from an airport located in the territory of a Member State to which the Treaty applies travel back to that airport on a flight from an airport located in a non-member country. The fact that the outward and return flights are the subject of a single booking has no effect on the interpretation of that provision.

Costs

- 54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the

costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 3(1)(a) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, must be interpreted as not applying to the case of an outward and return journey in which passengers who have originally departed from an airport located in the territory of a Member State to which the EC Treaty applies travel back to that airport on a flight from an airport located in a non-member country. The fact that the outward and return flights are the subject of a single booking has no effect on the interpretation of that provision.

[Signatures]

* Language of the case: German.



AIR CANADA

Julianna Fox
Counsel
Regulatory & Litigation

Air Canada Center
P.O. Box 7000, Station Airport
Dorval QC H4Y 1J2

By Email

September 18, 2013

The Secretary
CANADIAN TRANSPORTATION AGENCY
Complaints and Investigation Division
Air & Marine Investigations Directorate
15, Eddy Street, 19th Floor,
Hull/Ottawa, Canada
K1A 0N9

Attention: Ms. Alison Fraser

Re: Complaint by Dr. Rima Azar against Air Canada
CTA File No. M 4120-3/12-02098
Our file: 4402.0649

On September 11, 2013, we were notified by email that the Agency will pursue the portion of the present complaint dealing with involuntary denied boarding compensation amounts on flights between Canada and the E.U. Air Canada was afforded the opportunity to file additional submissions in light of the Agency's decision 342-C-A-2013 pertaining to involuntary denied boarding compensation for domestic travel onboard Air Canada. We thank the Agency for the opportunity to file additional submissions in this regard.

We note that on July 10, 2013, Air Canada informed the Agency that it had conducted a global review of its denied boarding amounts, including international denied boarding amounts for flights departing from Canada, which impacted denied boarding amounts for flights departing from Canada and going to the E.U. At this time and in light of decision 342-C-A-2013, Air Canada's changes to its international tariff regarding international denied boarding amounts is no longer feasible as such changes would no longer be comprehensive and cohesive or harmonious with the conditions set for flights within Canada. Furthermore, as the proposed international changes were percentage based, this would require significant IT development, the costs of which would no longer be commercially justifiable if applicable only to a portion of international flights (Air Canada will be implementing the amounts set out in decision 342-C-A-2013 for domestic flights as well as for international flights departing out of Canada to North American destinations as of September 18, 2013). As such, Air Canada requests that the denied boarding compensation amounts included in its submissions dated June 28 and July 10, 2013 not be considered by the Agency.

At this time, Air Canada proposes that the involuntary denied boarding compensation amounts for flights between Canada and the E.U. be established as follows:

Delay at arrival caused by involuntary denied boarding	Cash or equivalent
0-4 hours	CAD 400
Over 4 hours	CAD 800

Air Canada considers this proposal as reasonable for the following reasons:

- This proposal was established considering the amounts set out under EC Regulation 261/2004 as well as the amounts established by decision 342-C-A-2013.
- The proposal significantly streamlines the amounts already established for domestic travel.
- These denied boarding compensation amounts will be easily understood by passengers as denied boarding compensation amounts for all flights within or departing out of Canada will be significantly harmonized.
- These denied boarding compensation amounts will be egalitarian (as opposed to percentage based) in that all affected passengers will receive the same amount, a principle set out in the Agency's decision 666-C-A-2001 and which was upheld in decision 342-C-A-2013.
- Finally, we note that this proposal establishes denied boarding compensation amounts that closely resemble those established under EC Regulation 261/2004, which we understand to meet Dr. Azar's request as formulated on page 24 of her Main Reply filed on April 2, 2013.

The present in no way constitutes an admission by Air Canada that Dr. Azar's complaint was well founded. Rather, the present proposal is transmitted to the Agency in order to propose a compensation regime based on the principles set out in decision 342-C-A-2013 as well as to harmonize Air Canada's involuntary denied boarding compensation regime.

Although unrelated to the present matter, and without concession to enlarging the scope of the present file, please note that Air Canada intends on extending the application of the proposed amounts as involuntary denied boarding compensation for flights departing out of Canada to all other foreign destinations for which no other specific amount is established under the tariff.

Sincerely,


Julianna Fox
Counsel – Regulatory & Litigation



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March 22, 2013

Via E-mail: Judy.OHeare@otc-cta.gc.ca

Canadian Transportation Agency,
Air and Marine Investigations Division,
Air and Marine Disputes Directorate,
Disputes Resolution Branch
Ottawa, Ontario K1A 0N9

Attention: Judy O’Heare, Senior Analyst

Dear Sirs/Mesdames:

**RE: File No. M4120/13-00661
Dr. Gabor Lukacs and British Airways Plc.
LET-C-A-32-2013
Our File: 213036**

Submissions by British Airways Plc.

With respect to the ‘Applicable legal principles’ set out by Dr. Lukacs in section I of his letter of January 30, 2013, British Airways submits that it is not 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*. The *Montreal Convention*, an international treaty that has the force of law in Canada pursuant to the provisions of the *Carriage by Air Act*, R.S.C. 1985, c. C-26, applies to international contracts of carriage by air that come under the Act pursuant to the terms and conditions set out in the *Act*.

Article 26 of the *Montreal Convention*, which is *Schedule VI* to the *Act*, has been considered by the Agency in a number of its decisions referred to by Dr. Lukacs in his letter on the issue of whether tariff rules containing provisions which tend to relieve a carrier of liability or fix a lower limit than that provided in the *Convention* will be disallowed as unreasonable on the basis that they would be null and void under Article 26.

The Agency has also looked at the limits set out in the *Convention* as a measure in considering whether limits provided in carrier’s tariff rules are reasonable. The Agency has not determined that the provisions of the *Montreal Convention* should replace the general common law of contract and tort liability which governs the relationship between carriers and passengers in all circumstances and contracts of carriage which are not international carriage governed by the provisions of the *Montreal Convention*. Such a

determination is a matter for the legislature to decide by legislative change, not by the Agency in exercising its jurisdiction under the *Canada Transportation Act* and the *ATR*. The Agency has not and it is submitted should not make rulings that have the effect of making legislative changes when considering whether or not tariff rules are reasonable and just within the meaning of s. 111(1) of the *ATR*.

BA Tariff Rule 55(C)(1) is a Rule of general application containing the preamble "Except as the convention or other applicable law may require:" that is applicable to each subsection. The intent of the preamble is to make it clear that British Airways will fully comply with the provisions of the *Montreal Convention*. The balance of subsection (1) sets out the general provisions of the common law applicable in contract and tort in the absence of the regime of liability established under the *Montreal Convention* or a change to the common law that is the result of statutory and/or regulatory law provisions. It is not a blanket exclusion of liability. The Rule recognizes common law liability for damage caused by the carrier's negligence or wilful fault (the torts of negligence or intentional act or omission) of the carrier and excludes damage due to contributory negligence. The burden of proof is on the passenger as in any other tort or contract claim.

British Airways submits that the intent of the Rule 55(C)(1) is reasonable and that the liability provisions of the *Montreal Convention* do not need to apply to all circumstances in which loss or damage arises in the course of carriage by air in order for the Rule to be reasonable. The Parliament of Canada has not enacted that the provisions of the *Montreal Convention* be applicable to all international carriage by air. British Airways submits that the wording of the Rule is clear..

BA Tariff Rules 115(H) and 116(H) set out the original limit of liability for baggage under the *Montreal Convention* of 1,000 Special Drawing Rights, which has been subsequently revised as set out by Dr. Lukacs. British Airways complies with the baggage liability limitation currently applicable.

To the extent that the first sentence in BA Tariff Rule 55(C)(7) may be no longer applicable under the *Montreal Convention*, British Airways does not apply the sentence in determining baggage claims under the *Convention*. The sentence continues to apply to international carriage governed by the provisions of the *Warsaw Convention*. British Airways submits that the Rule is clear and reasonable.

BA Tariff Rule 55(C)(6) is not intended to overrule the provisions of Article 22(5) of the *Montreal Convention*. It is intended to clarify that the liability of the carrier for delay shall be the liability provided for under the *Convention* and no more.

To the extent that BA Tariff Rule 55(C)(8) may no longer be applicable under the *Montreal Convention*, it is not applied to the determination of baggage claims under the *Convention*.. The rule continues to apply to international carriage governed by the provisions of the *Warsaw Convention*. British Airways submits that the Rule is clear and reasonable.

BA Tariff Rules 55(C)(10), 115(N) and 116(N) continue to apply to non *Montreal Convention* international carriage and are clear and reasonable.

BA Tariff Rules 85(A) and 85(B)(2) are clear and reasonable and are virtually the same wording as that contained in Air Canada's Tariff Rules 85(A) and 85(B)(2).

BA Tariff Rule 87(B)(3)(B) applies only when British Airways is dealing with denied boarding compensation in circumstances when the *Regulation (EC) No 261/2004* regulatory scheme of the European Parliament and of the Council of 11 February 2004 is inapplicable according to the terms of the *Regulation*. As such it is clear and reasonable.

British Airways complies with *Regulation (EC) No 261/2004* that applies, pursuant to Article 3, section 1. *Regulation (EC) No 261/2004* was legislated by the European Parliament and provides rights to passengers under that law, and not pursuant to the provisions of a contract of carriage. The *Regulation* provides in Article 15 that the obligations pursuant to the Regulation may not be limited or waived by any clause in a contract of carriage. By Article 16, infringements of the *Regulation* are to be dealt with by bodies designated by each Member State that are to be responsible for enforcement of the *Regulation* and are to receive passenger complaints about infringement of the *Regulation* by air carriers. The *Regulation* does not provide passengers with any contractual rights and does not provide for the enforcement of the rights under the *Regulation* by legal proceedings before the general courts of law. Article 12 provides only that passengers' rights to further compensation are not prejudiced by the *Regulation*.

With respect to Dr. Lukacs's position that the British Airways' Tariff ought to reflect the legal obligations in accordance with *Regulation (EC) No 261/2004*, British Airways takes serious objection. What Dr. Lukacs is seeking is the assistance of the Agency in providing passengers with contractual rights that the *Regulation* itself does not provide to passengers. As noted above, *Regulation (EC) No 261/2004* is a regulatory scheme only and does not require the addition of any provisions to the passengers' contracts of carriage.

British Airways submits that it is inappropriate for the Agency to be enforcing foreign laws by requiring air carriers to include provisions of a European regulation in Canadian contracts of carriage. The jurisdiction of the Agency derives from the *Canada Transportation Act* and the *Air Transportation Regulations*, neither of which has any reference to the Agency being empowered or authorized to enforce of foreign laws. As the Agency has no authority or jurisdiction to enforce foreign laws directly, neither does it have the jurisdiction to enforce foreign laws indirectly by requiring air carriers to incorporate the rights granted under foreign laws as terms in their contracts of carriage by means of required tariff provisions. Further, by requiring the incorporation of the rights provided under foreign law in the case of the *EC Regulation*, the Agency changes the very nature of the effect of the *Regulation* by creating contractual rights and thereby contractual remedies that can be exercised by legal proceedings before the courts. In such a way, the Agency would change the effect of a foreign law in a manner that does not respect the European Parliament. Had the European Parliament intended the rights set out in *Regulation (EC) No 261/2004* to be contractual rights, it would have so legislated.

British Airways submits that the Agency has no jurisdiction to require it to include any reference, directly or indirectly, to *Regulation (EC) No 261/2004* in its Canadian Tariff Rules.

With respect to the questions to be answered by direction of the Agency, British Airways attaches a list of the amounts paid by British Airways for denied boarding compensation to individual passengers departing from Canada to the U.K. in the years 2010, 2011 and 2012. With respect to the list of the amounts of denied boarding compensation paid by British Airways to individual passengers departing the U.K. to Canada in the years 2010, 2011 and 2012, British Airways is unable to provide such a list because it does not record amounts paid with any reference to the destination of the passenger's flight. British Airways' information technology personnel are examining the electronic data on denied boarding compensation to determine whether there is any basis on which the data can be sorted and collated to identify the amounts paid to passengers departing the U.K. for Canada during the specified years.

With respect to competitive disadvantage that British Airways would suffer if British Airways were required to replace RULE 87(B)(3)(B) with the amounts prescribed by *Regulation (EC) No 261/2004*, as its primary competitor on the Canada/U.K. routes is Air Canada, it would suffer a competitive disadvantage because Air Canada only has to pay compensation of cash CAD 200 or voucher CAD 500 by the terms of its Tariff Rule 89(E)(2) for passengers departing from Canada to the U.K.

All of which is respectfully submitted.

Yours truly,



Carol E. McCall

Attachments Exhibits "A" and "B"

c.c Dr. Gabor Lukacs – by email: lukacs@AirPassengerRights.ca

Airline Tariff Publishing Company, Agent
 INTERNATIONAL PASSENGER RULES AND FARES TARIFF
 NO. AC-2

4th Revised Page AC-22-B
 Cancels 3rd Revised Page AC-22-B

**AIR CANADA
 SECTION I - GENERAL RULES**

80 REVISED ROUTINGS, FAILURE TO CARRY AND MISSED CONNECTIONS (Continued)

(D) MISSED CONNECTIONS
 In the event a passenger misses an onward connecting flight on which space has been reserved because the delivering carrier did not operate its flight according to schedule or changed the schedule of such flight, the delivering carrier will arrange for the carriage of the passenger or make involuntary refund in accordance with Rule 90.

(E) FREE BAGGAGE ALLOWANCE
 An involuntarily rerouted passenger shall be entitled to retain the free baggage allowance applicable for the type of service originally paid for. This provision shall apply even though the passenger may be transferred from one fare class to another.

(F) Time limits on cancellations and charges for late cancellations will be applicable to revised routings requested by passenger.

(G) The rules set out in EU regulation no. 261/2004 are fully incorporated herein and shall supersede and prevail over any provision of this tariff which may be inconsistent with those rules.

85 SCHEDULES, DELAYS AND CANCELLATION OF FLIGHTS

(A) SCHEDULES
 Times and aircraft type shown in timetables or elsewhere are approximate and not guaranteed, and form no part of the contract of carriage. Schedules are subject to change without notice and carrier assumes no responsibility for passenger making connections. Carrier will not be responsible for errors or omissions either in timetables or other representations of schedules. No employee, agent or representative of carrier is authorized to bind carrier by any statements or representation as to the dates or times of departure or arrival, or of the operation of any flight.

(B) CANCELLATIONS

(1) Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch, but no particular time is fixed for the commencement or completion of carriage. Subject thereto carrier may, without notice, substitute alternate carriers or aircraft and may alter the route, add stopovers or omit the stopping places shown on the face of the ticket in case of necessity.

(2) Carrier may, without notice, cancel, terminate, divert, postpone, or delay any flight or the further right of carriage or reservation of traffic accommodations and determine if any departure or landing should be made, without any liability except to refund in accordance with its tariffs the fare and baggage charges for any unused portion of the ticket, when it would be advisable to do so:

(a) because of any fact beyond its control (including, but without limitation, meteorological conditions, acts of God, force majeure, strikes, riots, civil commotions, embargoes, wars, hostilities, disturbances or unsettled international conditions), actual, threatened or reported or because of any delay, demand, condition, circumstances or requirement due, directly or indirectly, to such fact; or

(b) because of any fact not reasonably to be foreseen, anticipated, or predicted; or

(c) because of any government regulation, demand, or requirement; or

(d) because of shortage of labor, fuel, or facilities or labor difficulties of carrier or others.

(3) Carrier may cancel the right or further right of carriage of the passenger and his baggage upon refusal of the passenger, after demand by carrier, to pay the fare or portion thereof so demanded, or to pay any charge so demanded and assessable with respect to the baggage of the passenger, without being subject to any liability therefore except to refund, in accordance herewith, the unused portion of the fare and baggage charge(s) previously paid, if any.

F - Effective August 16 per CTA decision 250 - C - A - 2012

For unexplained abbreviations, reference marks and symbols see IPGT-1, C.A.B. NO. 581, NTA(A) NO. 373.

ISSUED: August 15, 2012 EFFECTIVE: September 29, 2012 (Except as Noted)

Exhibit "B" to Submissions of British Airways

DBOI

Station Code	Case Received Date	Airport Reason Desc	Settlement Type Code	Case ID	Claim Vlu (GBP)
YUL	02/10/2011	Denied Boarding Other-Involuntary	COMP CARD	9394397	1,500.00
YUL	25/02/2010	Denied Boarding Other-Involuntary	COMP CARD	8027292	750.00
YUL	26/02/2010	Denied Boarding Other-Involuntary	COMP CARD	8029917	750.00
YUL	26/02/2010	Denied Boarding Other-Involuntary	COMP CARD	8029919	750.00
YUL	26/02/2010	Denied Boarding Other-Involuntary	COMP CARD	8029921	750.00
YUL	11/04/2010	Denied Boarding Other-Involuntary	COMP CARD	8117307	750.00
YUL	11/04/2010	Denied Boarding Other-Involuntary	COMP CARD	8117315	750.00
YUL	11/04/2010	Denied Boarding Other-Involuntary	COMP CARD	8117317	750.00
YUL	23/09/2011	Denied Boarding Other-Involuntary	COMP CARD	9375777	750.00
YUL	02/10/2011	Denied Boarding Other-Involuntary	COMP CARD	9394390	750.00
YUL	02/10/2011	Denied Boarding Other-Involuntary	COMP CARD	9394395	750.00
YUL	02/10/2011	Denied Boarding Other-Involuntary	COMP CARD	9394397	750.00
YUL	02/10/2011	Denied Boarding Other-Involuntary	COMP CARD	9394411	750.00
YUL	04/03/2012	Denied Boarding Other-Involuntary	COMP CARD	9738719	750.00
YUL	22/04/2012	Denied Boarding Other-Involuntary	COMP CARD	9858173	750.00
YUL	15/10/2012	Denied Boarding Other-Involuntary	COMP CARD	10375684	750.00
YUL	15/10/2012	Denied Boarding Other-Involuntary	COMP CARD	10375693	750.00
YUL	15/10/2012	Denied Boarding Other-Involuntary	COMP CARD	10375696	750.00
YUL	15/10/2012	Denied Boarding Other-Involuntary	COMP CARD	10375699	750.00
YUL	15/10/2012	Denied Boarding Other-Involuntary	COMP CARD	10375758	750.00
YUL	31/10/2012	Denied Boarding Other-Involuntary	COMP CARD	10434366	750.00
YVR	26/07/2010	Denied Boarding Other-Involuntary	COMP CARD	8372288	1,521.00
YVR	23/12/2011	Denied Boarding Other-Involuntary	COMP CARD	9572902	1,515.00
YVR	01/07/2011	Denied Boarding Other-Involuntary	COMP CARD	9183156	1,500.00
YVR	25/04/2010	Denied Boarding Other-Involuntary	COMP CARD	8154741	750.00
YVR	25/07/2010	Denied Boarding Other-Involuntary	COMP CARD	8372050	750.00
YVR	26/07/2011	Denied Boarding Other-Involuntary	COMP CARD	9240340	750.00
YVR	12/08/2011	Denied Boarding Other-Involuntary	COMP CARD	9281025	750.00

WVR	16/12/2011	Denied Boarding Other-Involuntary	COMP CARD	9558285	750.00
WVR	14/03/2012	Denied Boarding Other-Involuntary	COMP CARD	9761812	750.00
WVR	14/03/2012	Denied Boarding Other-Involuntary	COMP CARD	9761813	750.00
WYC	08/08/2011	Denied Boarding Other-Involuntary	COMP CARD	9269671	750.00
WYC	09/04/2012	Denied Boarding Other-Involuntary	COMP CARD	9821656	750.00
WYC	30/06/2012	Denied Boarding Other-Involuntary	COMP CARD	10078239	750.00
WYC	30/09/2011	Denied Boarding Other-Involuntary	COMP CARD	9391114	375.00
WYZ	16/09/2010	Denied Boarding Other-Involuntary	COMP CARD	8488607	1,500.00
WYZ	16/06/2012	Denied Boarding Other-Involuntary	COMP CARD	10038450	1,500.00
WYZ	16/04/2012	Denied Boarding Other-Involuntary	COMP CARD	9838819	1,485.00
WYZ	24/12/2010	Denied Boarding Other-Involuntary	COMP CARD	8735646	750.00
WYZ	16/04/2012	Denied Boarding Other-Involuntary	COMP CARD	9838819	744.00
WYZ	17/09/2010	Denied Boarding Other-Involuntary	COMP CARD	8491018	375.00
WYZ	24/09/2010	Denied Boarding Other-Involuntary	COMP CARD	8507428	375.00
WYZ	10/06/2011	Denied Boarding Other-Involuntary	COMP CARD	9132325	375.00
WYZ	10/06/2011	Denied Boarding Other-Involuntary	COMP CARD	9132331	375.00
WYZ	10/06/2011	Denied Boarding Other-Involuntary	COMP CARD	9132341	375.00
WYZ	10/06/2011	Denied Boarding Other-Involuntary	COMP CARD	9132358	375.00
WYZ	30/06/2011	Denied Boarding Other-Involuntary	COMP CARD	9182936	375.00
WYZ	16/06/2012	Denied Boarding Other-Involuntary	COMP CARD	10038445	375.00
WYZ	13/08/2012	Denied Boarding Other-Involuntary	COMP CARD	10205937	375.00

DBSI

Station Code	Case Received Date	Airport Reason Desc	Settlement Type Code	Case ID	Claim Vlu (GBP)
YUL	02/10/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9394376	3,000.00
YUL	02/10/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9394376	2,250.00
YUL	17/09/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8488720	1,500.00
YUL	26/02/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8029919	750.00
YUL	09/03/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8053319	750.00
YUL	11/04/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8117270	750.00
YUL	11/04/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8117299	750.00
YUL	11/04/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8117301	750.00
YUL	11/04/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8117305	750.00
YUL	11/04/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8117312	750.00
YUL	17/09/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8488716	750.00
YUL	17/09/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8488779	750.00
YUL	01/10/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9394363	750.00
YUL	02/10/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9394377	750.00
YUL	02/10/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9394443	750.00
YUL	29/10/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9452113	750.00
YUL	29/10/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9452115	750.00
YUL	29/10/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9452129	750.00
YUL	18/12/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9562092	750.00
YUL	18/12/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9562093	750.00
YUL	04/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9738922	750.00
YUL	21/02/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8018560	375.00
YUL	28/10/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9452101	375.00
YUL	28/10/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9452102	375.00
YUL	03/11/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9465794	375.00
YUL	03/11/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9465799	375.00
YUL	03/11/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9465801	375.00

YUL	03/11/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9465803	375.00
YUL	03/11/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9465806	375.00
YUL	03/11/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9465807	375.00
YUL	03/11/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9465811	375.00
YUL	03/11/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9465819	375.00
YUL	03/11/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9465821	375.00
YUL	03/11/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9465825	375.00
YUL	03/11/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9465827	375.00
YUL	03/11/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9465828	375.00
YUL	03/11/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9465837	375.00
YUL	03/11/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9465851	375.00
YUL	03/11/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9465865	375.00
YVR	01/07/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9183154	3,000.00
YVR	26/07/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8372288	1,521.00
YVR	09/01/2010	Denied Boarding Oversales-Involuntary	COMP CARD	7905097	1,500.00
YVR	27/02/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8032541	1,500.00
YVR	24/04/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8154617	1,500.00
YVR	12/08/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9281058	1,500.00
YVR	15/12/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9558101	1,500.00
YVR	09/01/2010	Denied Boarding Oversales-Involuntary	COMP CARD	7905039	750.00
YVR	09/01/2010	Denied Boarding Oversales-Involuntary	COMP CARD	7905085	750.00
YVR	27/02/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8032546	750.00
YVR	27/02/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8032547	750.00
YVR	24/04/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8155793	750.00
YVR	25/04/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8154693	750.00
YVR	25/04/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8154740	750.00
YVR	14/09/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8480195	750.00
YVR	14/09/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8482877	750.00
YVR	14/09/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8482880	750.00
YVR	14/09/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8482891	750.00
YVR	12/08/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9281032	750.00
YVR	12/08/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9281054	750.00

YVR	12/08/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9281072	750.00
YVR	12/08/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9281075	750.00
YVR	16/12/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9558158	750.00
YVR	09/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9753328	750.00
YVR	10/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9753529	750.00
YVR	10/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9753530	750.00
YVR	10/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9753532	750.00
YVR	10/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9753533	750.00
YVR	10/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9753534	750.00
YVR	10/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9754319	750.00
YVR	12/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9755344	750.00
YVR	09/01/2010	Denied Boarding Oversales-Involuntary	COMP CARD	7905039	375.00
YVR	09/01/2010	Denied Boarding Oversales-Involuntary	COMP CARD	7905152	375.00
YVR	09/01/2010	Denied Boarding Oversales-Involuntary	COMP CARD	7905676	375.00
YVR	09/01/2010	Denied Boarding Oversales-Involuntary	COMP CARD	7905678	375.00
YVR	09/01/2010	Denied Boarding Oversales-Involuntary	COMP CARD	7905685	375.00
YVR	30/07/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9252155	375.00
YVR	23/12/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9572901	375.00
YVR	23/12/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9572902	375.00
YVC	15/04/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9837679	2,229.00
YVC	29/06/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9177533	1,500.00
YVC	29/06/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9177522	750.00
YVC	29/06/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9177527	750.00
YVC	30/09/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9391102	750.00
YVC	17/02/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9699684	750.00
YVC	15/04/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9837680	750.00
YVC	30/06/2012	Denied Boarding Oversales-Involuntary	COMP CARD	10078245	750.00
YVC	02/09/2012	Denied Boarding Oversales-Involuntary	COMP CARD	10256202	750.00
YVC	20/09/2012	Denied Boarding Oversales-Involuntary	COMP CARD	10304241	750.00
YVC	29/06/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9177497	375.00
YVC	29/06/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9177641	375.00
YVC	30/09/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9391114	375.00

YYC	29/01/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9650136	375.00
YYC	30/06/2012	Denied Boarding Oversales-Involuntary	COMP CARD	10078239	375.00
YYZ	02/10/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9394381	1,500.00
YYZ	12/03/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8058688	750.00
YYZ	10/03/2011	Denied Boarding Oversales-Involuntary	COMP CARD	8931174	750.00
YYZ	07/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9747738	750.00
YYZ	07/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9747742	750.00
YYZ	07/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9747746	750.00
YYZ	09/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9750750	750.00
YYZ	09/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9750767	750.00
YYZ	09/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9750777	750.00
YYZ	09/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9750837	750.00
YYZ	09/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9750847	750.00
YYZ	09/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9750854	750.00
YYZ	09/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9750906	750.00
YYZ	09/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9750974	750.00
YYZ	09/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9750977	750.00
YYZ	12/03/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8058660	375.00
YYZ	12/03/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8058664	375.00
YYZ	12/03/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8058688	375.00
YYZ	07/09/2010	Denied Boarding Oversales-Involuntary	COMP CARD	8468129	375.00
YYZ	09/03/2011	Denied Boarding Oversales-Involuntary	COMP CARD	8928276	375.00
YYZ	10/03/2011	Denied Boarding Oversales-Involuntary	COMP CARD	8931143	375.00
YYZ	10/03/2011	Denied Boarding Oversales-Involuntary	COMP CARD	8931148	375.00
YYZ	04/05/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9050126	375.00
YYZ	10/06/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9132358	375.00
YYZ	29/06/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9180268	375.00
YYZ	29/06/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9180452	375.00
YYZ	23/09/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9377835	375.00
YYZ	03/11/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9463453	375.00
YYZ	15/12/2011	Denied Boarding Oversales-Involuntary	COMP CARD	9558120	375.00
YYZ	07/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9747763	375.00

YYZ	07/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9747796	375.00
YYZ	08/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9750616	375.00
YYZ	09/03/2012	Denied Boarding Oversales-Involuntary	COMP CARD	9750889	375.00
YYZ	05/07/2012	Denied Boarding Oversales-Involuntary	COMP CARD	10093286	375.00
YYZ	14/10/2012	Denied Boarding Oversales-Involuntary	COMP CARD	10375508	375.00
YYZ	14/10/2012	Denied Boarding Oversales-Involuntary	COMP CARD	10375508	375.00

DBOV

Station Code	Case Received Date	Airport Reason Desc	Settlement Type Code	Case ID	Claim Vlu (GBP)
YUL	22/04/2012	Denied Boarding Other-Voluntary	COMP CARD	9858245	1,500.00
YUL	02/10/2011	Denied Boarding Other-Voluntary	COMP CARD	9394387	750.00
YUL	02/10/2011	Denied Boarding Other-Voluntary	COMP CARD	9394392	750.00
YUL	02/10/2011	Denied Boarding Other-Voluntary	COMP CARD	9394407	750.00
YUL	02/10/2011	Denied Boarding Other-Voluntary	COMP CARD	9394417	750.00
YUL	02/10/2011	Denied Boarding Other-Voluntary	COMP CARD	9394419	750.00
YUL	02/10/2011	Denied Boarding Other-Voluntary	COMP CARD	9394426	750.00
YUL	02/10/2011	Denied Boarding Other-Voluntary	COMP CARD	9394437	750.00
YUL	02/10/2011	Denied Boarding Other-Voluntary	COMP CARD	9394449	750.00
YUL	02/10/2011	Denied Boarding Other-Voluntary	COMP CARD	9394456	750.00
YUL	02/10/2011	Denied Boarding Other-Voluntary	COMP CARD	9394463	750.00
YUL	29/10/2011	Denied Boarding Other-Voluntary	COMP CARD	9452117	750.00
YUL	11/04/2010	Denied Boarding Other-Voluntary	COMP CARD	8117270	375.00
YVR	30/07/2011	Denied Boarding Other-Voluntary	COMP CARD	9252141	1,587.00
YVR	14/08/2012	Denied Boarding Other-Voluntary	COMP CARD	10209206	1,500.00
YVR	10/01/2010	Denied Boarding Other-Voluntary	COMP CARD	7908084	750.00
YVR	10/01/2010	Denied Boarding Other-Voluntary	COMP CARD	7908110	750.00
YVR	10/01/2010	Denied Boarding Other-Voluntary	COMP CARD	7908141	750.00
YVR	10/01/2010	Denied Boarding Other-Voluntary	COMP CARD	7908151	750.00
YVR	10/01/2010	Denied Boarding Other-Voluntary	COMP CARD	7908188	750.00
YVR	10/01/2010	Denied Boarding Other-Voluntary	COMP CARD	7908195	750.00
YVR	10/01/2010	Denied Boarding Other-Voluntary	COMP CARD	7908197	750.00
YVR	24/04/2010	Denied Boarding Other-Voluntary	COMP CARD	8155785	750.00
YVR	26/07/2011	Denied Boarding Other-Voluntary	COMP CARD	9240328	750.00
YVR	26/07/2011	Denied Boarding Other-Voluntary	COMP CARD	9240336	750.00
YYC	08/09/2010	Denied Boarding Other-Voluntary	COMP CARD	8468273	1,500.00
YYC	01/07/2011	Denied Boarding Other-Voluntary	COMP CARD	9183043	1,500.00

YYC	02/07/2011	Denied Boarding Other-Voluntary	COMP CARD	9185840	1,500.00
YYC	12/07/2012	Denied Boarding Other-Voluntary	COMP CARD	10115477	1,500.00
YYC	08/09/2010	Denied Boarding Other-Voluntary	COMP CARD	8468273	750.00
YYC	08/09/2010	Denied Boarding Other-Voluntary	COMP CARD	8468274	750.00
YYC	02/07/2011	Denied Boarding Other-Voluntary	COMP CARD	9186509	375.00
YYC	02/07/2011	Denied Boarding Other-Voluntary	COMP CARD	9186509	375.00
YYZ	14/09/2010	Denied Boarding Other-Voluntary	COMP CARD	8482937	750.00
YYZ	08/03/2012	Denied Boarding Other-Voluntary	COMP CARD	9750524	750.00
YYZ	11/03/2010	Denied Boarding Other-Voluntary	COMP CARD	8056603	375.00
YYZ	14/09/2010	Denied Boarding Other-Voluntary	COMP CARD	8483038	375.00
YYZ	15/09/2010	Denied Boarding Other-Voluntary	COMP CARD	8486138	375.00
YYZ	15/09/2010	Denied Boarding Other-Voluntary	COMP CARD	8486141	375.00
YYZ	15/09/2010	Denied Boarding Other-Voluntary	COMP CARD	8486144	375.00
YYZ	16/09/2010	Denied Boarding Other-Voluntary	COMP CARD	8486175	375.00
YYZ	16/09/2010	Denied Boarding Other-Voluntary	COMP CARD	8486180	375.00
YYZ	16/09/2010	Denied Boarding Other-Voluntary	COMP CARD	8486216	375.00
YYZ	14/10/2010	Denied Boarding Other-Voluntary	COMP CARD	8554192	375.00
YYZ	09/03/2011	Denied Boarding Other-Voluntary	COMP CARD	8928317	375.00
YYZ	16/06/2012	Denied Boarding Other-Voluntary	COMP CARD	10038442	375.00

DBSV

Station Code	Case Received Date	Airport Reason Desc	Settlement Type Code	Case ID	Claim Vlu (GBP)
YUL	11/04/2010	Denied Boarding Oversales-Voluntary	COMP CARD	8117304	1,500.00
YUL	22/04/2012	Denied Boarding Oversales-Voluntary	COMP CARD	9858258	1,500.00
YUL	22/04/2012	Denied Boarding Oversales-Voluntary	COMP CARD	9858260	1,500.00
YUL	22/04/2012	Denied Boarding Oversales-Voluntary	COMP CARD	9858262	1,500.00
YUL	11/04/2010	Denied Boarding Oversales-Voluntary	COMP CARD	8117277	750.00
YUL	11/04/2010	Denied Boarding Oversales-Voluntary	COMP CARD	8117293	750.00
YUL	11/04/2010	Denied Boarding Oversales-Voluntary	COMP CARD	8117293	750.00
YUL	11/04/2010	Denied Boarding Oversales-Voluntary	COMP CARD	8117301	750.00
YUL	11/04/2010	Denied Boarding Oversales-Voluntary	COMP CARD	8117303	750.00
YUL	11/04/2010	Denied Boarding Oversales-Voluntary	COMP CARD	8117309	750.00
YUL	11/04/2010	Denied Boarding Oversales-Voluntary	COMP CARD	8117316	750.00
YUL	22/04/2012	Denied Boarding Oversales-Voluntary	COMP CARD	9858132	750.00
YUL	22/04/2012	Denied Boarding Oversales-Voluntary	COMP CARD	9858132	750.00
YUL	22/04/2012	Denied Boarding Oversales-Voluntary	COMP CARD	9858132	750.00
YUL	22/04/2012	Denied Boarding Oversales-Voluntary	COMP CARD	9858163	750.00
YUL	22/04/2012	Denied Boarding Oversales-Voluntary	COMP CARD	9858201	750.00
YUL	22/04/2012	Denied Boarding Oversales-Voluntary	COMP CARD	9858247	750.00
YUL	22/04/2012	Denied Boarding Oversales-Voluntary	COMP CARD	9858249	750.00
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YUL	22/04/2012	Denied Boarding Oversales-Voluntary	COMP CARD	9858261	750.00
YUL	22/04/2012	Denied Boarding Oversales-Voluntary	COMP CARD	9858263	750.00
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YUL	29/08/2012	Denied Boarding Oversales-Voluntary	COMP CARD	10245398	375.00
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YVR	26/07/2010	Denied Boarding Oversales-Voluntary	COMP CARD	8372361	1,500.00
YVR	26/07/2010	Denied Boarding Oversales-Voluntary	COMP CARD	8372368	1,500.00
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YVR	15/08/2011	Denied Boarding Oversales-Voluntary	COMP CARD	9285566	1,500.00
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YCC	12/07/2011	Denied Boarding Oversales-Voluntary	COMP CARD	9207032	3,000.00
YCC	24/07/2011	Denied Boarding Oversales-Voluntary	COMP CARD	9236432	2,250.00
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YCC	07/03/2010	Denied Boarding Oversales-Voluntary	COMP CARD	8048816	1,500.00
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YCC	17/09/2010	Denied Boarding Oversales-Voluntary	COMP CARD	8488681	1,500.00
YCC	18/09/2010	Denied Boarding Oversales-Voluntary	COMP CARD	8491131	1,500.00
YCC	20/02/2011	Denied Boarding Oversales-Voluntary	COMP CARD	8888552	1,500.00
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YCC	17/02/2012	Denied Boarding Oversales-Voluntary	COMP CARD	9699694	1,500.00
YCC	06/04/2012	Denied Boarding Oversales-Voluntary	COMP CARD	9818114	1,500.00
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YYZ	07/11/2012	Denied Boarding Oversales-Voluntary	COMP CARD	10452395	375.00

Dr. Gábor Lukács

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January 30, 2013

VIA EMAIL

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

Dear Madam Secretary:

**Re: Gábor Lukács v. British Airways
Complaint about rules governing liability and denied boarding compensation**

Please accept the following submissions as a formal complaint against British Airways for violations of ss. 18(b), 111, and 122 of the *Air Transportation Regulations*, SOR/88-58 (the “ATR”), pursuant to Rule 40 of the *Canadian Transportation Agency General Rules*.

The Applicant is asking the Agency to disallow and/or substitute certain tariff provisions of British Airways pursuant to s. 113 of the *ATR*.

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I. Applicable legal principles

(a) 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.

Since neither the *Canada Transportation Act*, S.C. 1996, c. 10 (the “*CTA*”) nor the *ATR* define the meaning of the phrase “unreasonable,” a term appearing both in s. 67.2(1) of the *CTA* and in s. 111(1) of the *ATR*, the Agency defined it in *Anderson v. Air Canada*, 666-C-A-2001, as follows:

The Agency is, therefore, of the opinion that, in order to determine whether a term or condition of carriage applied by a domestic carrier is “unreasonable” within the meaning of subsection 67.2(1) of the *CTA*, a balance must be struck between the rights of the passengers to be subject to reasonable terms and conditions of carriage, and the particular air carrier’s statutory, commercial and operational obligations.

The balancing test was strongly endorsed by the Federal Court of Appeal in *Air Canada v. Canadian Transportation Agency*, 2009 FCA 95. The test was applied in *Lukács v. WestJet*, 483-C-A-2010 (leave to appeal denied by the Federal Court of Appeal; 10-A-42), and more recently in *Lukács v. Air Canada*, 291-C-A-2011.

In *Griffiths v. Air Canada*, 287-C-A-2009, the Agency underscored the importance of applying the balancing test due to the unilateral nature of terms and conditions set by carriers, which often are based only on the carrier’s commercial interests:

[25] The terms and conditions of carriage are set by an air carrier unilaterally without any input from future passengers. The air carrier sets its terms and conditions of carriage on the basis of its own interests, which may have their basis in statutory or purely commercial requirements. There is no presumption that a tariff is reasonable. Therefore, a mere declaration or submission by the carrier that a term or condition of carriage is preferable is not sufficient to lead to a determination that the term or condition of carriage is reasonable.

The Agency applied this principle in *Lukács v. WestJet*, 483-C-A-2010 (leave to appeal denied by the Federal Court of Appeal; 10-A-42), and more recently in *Lukács v. Air Canada*, 291-C-A-2011 and *Lukács v. Air Canada*, 250-C-A-2012.

(b) Tariff provisions must be clear: s. 122(c) of the ATR

Section 122 of the *ATR* states that:

Every tariff shall contain

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(c) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,

[Emphasis added.]

The legal test for clarity has been established by the Agency in *H. v. Air Canada*, 2-C-A-2001, and has been applied most recently in *Lukács v. WestJet*, 418-C-A-2011:

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

(c) Provisions that are inconsistent with the legal principles of the *Montreal Convention* cannot be just and reasonable

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.

Article 26 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.

In *Lukács v. Air Canada*, 250-C-A-2012, the Agency explained the dual role of the *Montreal Convention* in determining the reasonableness of a tariff provision:

[23] [...] Past Agency decisions reflect the two distinct ways in which the Convention might be considered: by looking at whether a tariff is in direct contravention of the Convention, thereby rendering the provision null and void and unreasonable [Footnote: See for example: *Balakrishnan v. Aeroflot*, Decision No. 328-C-A-2007 at para. 20 and *Lukács v. WestJet*, Decision No. 477-C-A-2010 at paras.

39-40 (Leave to appeal to Federal Court of Appeal denied, FCA 10-A-41).]; or by referring to the principles of the Convention when considering the reasonableness of a tariff provision. [Footnote: See for example: *Lukács v. WestJet*, Decision No. 313-C-A-2010 and Decision No. LET-C-A-51-2010 .]

(i) Itineraries where the *Montreal Convention* applies

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).

Thus, 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) Itineraries where the *Montreal Convention* is not applicable

In *Pinksen v. Air Canada*, 181-C-A-2007, the Agency recognized that international instruments in general, and the *Montreal Convention* in particular, are persuasive authorities in interpreting domestic rules and determining their reasonableness. The same reasoning was affirmed by the Agency in *Kipper v. WestJet*, 309-C-A-2010.

In *Lukács v. WestJet*, 483-C-A-2010, the Agency used the *Montreal Convention* as a persuasive authority for determining the reasonableness of WestJet's domestic tariff provisions, and ordered WestJet to revise its tariff to provide for a limit of liability equivalent to that set out in the *Montreal Convention* (leave to appeal denied by the Federal Court of Appeal; 10-A-42).

In *Lukács v. Air Canada*, 291-C-A-2011, the Agency considered Air Canada's Rule 55(C)(7), which stated that "[s]ubject to the Convention, where applicable, carrier is not liable for loss, damage to, or delay in delivery of...". The Agency held that passengers ought to be afforded the same protection against loss, damage or delay of baggage as in the *Montreal Convention*, regardless of whether the convention applies, and disallowed the provision.

II. Rule 55(C) is unclear and unreasonable

A copy of the relevant parts of Tariff Rule 55 of British Airways is attached and marked as Exhibit "A". Rule 55(C) is found on page 30 of the present document. Rule 55(C) starts as follows

EXCEPT AS THE CONVENTION OR OTHER APPLICABLE LAW MAY OTHERWISE REQUIRE :

- (1) CARRIER IS NOT LIABLE FOR ANY LOSS OR CLAIM OF WHATSOEVER NATURE (HEREINAFTER IN THIS TARIFF COLLECTIVELY REFERRED TO AS "DAMAGE") ARISING OUT OF OR IN CONNECTION WITH CARRIAGE OR OTHER SERVICES PERFORMED BY CARRIER INCIDENTAL THERETO, UNLESS SUCH DAMAGE IS PROVED TO HAVE BEEN CAUSED BY THE NEGLIGENCE OR WILLFUL FAULT OF CARRIER AND THERE HAS BEEN NO CONTRIBUTORY NEGLIGENCE OF THE PASSENGER.

The Applicant submits that Rule 55(C) is unclear, and that it is unreasonable because it is a blanket exclusion of liability and it contradicts the legal principles of the *Montreal Convention*.

(a) Clarity

The Agency considered the phrase "Subject to the Convention, where Applicable" found in Air Canada's International Tariff Rule 55(C)(7), and in its Preliminary Decision No. LET-C-A-29-2011 held (at para. 65) that:

The substantive wording of Rule 55(C)(7), on its face, indicates that Air Canada has no liability for loss, damage or delay of baggage and only in exceptional situations (i.e., "Subject to the Convention") will some other provisions concerning Air Canada liability apply and provide compensation rights to passengers. In fact, it is the reverse which applies, namely Air Canada does have liability for loss, damage or delay of baggage and only in exceptional circumstances is Air Canada able to raise a defence to a claim for liability or invoke damage limitations. The wording of the existing and proposed Rule 55(C)(7) is more likely to confuse passengers, rather than clearly inform passengers, regarding the applicability of Air Canada's limit of liability. Accordingly, the Agency finds Rule 55(C)(7) in itself is unclear and that the phrase "Subject to the Convention where applicable" renders the application of Rule 55(C)(7) unclear.

Similarly, in *Lukács v. Porter*, 16-C-A-2013, the Agency held (at para. 62) that the phrase "Subject to the Warsaw Convention or the Montreal Convention" in Porter's International Tariff Rule 18(e) renders the rule unclear, contrary to s. 122 of the *ATR*.

It is submitted that these findings of the Agency equally apply to British Airways' Rule 55(C), and thus Rule 55(C) fails to be clear.

(b) Reasonableness

In *Lukács v. Air Canada*, 291-C-A-2011, the Agency considered Air Canada's Rule 55(C)(7), which stated that "[s]ubject to the Convention, where applicable, carrier is not liable for loss, damage to, or delay in delivery of...". The Agency held that passengers ought to be afforded the same protection against loss, damage or delay of baggage as in the *Montreal Convention* regardless of whether the convention applies, and disallowed the provision as unreasonable. The Agency reached the same conclusion in its recent decision in *Lukács v. Porter*, LET-C-A-2013 with respect to Porter's Rule 18(e).

(i) 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 took 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.

Article 19 creates a presumption of liability of the carrier, and places the burden of proof of the presence of extenuating circumstances on the carrier.

In the same vein, Article 20 allows the carrier to exonerate itself from liability in the context of contributory negligence, but only to the extent that the damage was caused by the contributory negligence:

Article 20 - Exoneration

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. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21.

[Emphasis added.]

Article 20 places the burden of proof upon the carrier to demonstrate the presence and extent of contributory negligence.

(ii) Application of the law to the present case

The effect of Rule 55(C) is to exclude British Airways' liability for a wide range of damages arising in a wide range of events, at least in cases where the *Montreal Convention* does not apply. Rule 55(C)(1) is of particular concern, because it purports to displace the strict liability regime of Articles 17(2) and 19 of the *Montreal Convention* (which presumes the airline's liability unless it is proven otherwise) with a blanket exclusion of liability, which exonerates British Airways from every liability unless it was caused by negligence or wilful misconduct of the carrier. Moreover, Rule 55(C)(1) appears to be placing the onus of demonstrating fault of the airline and the lack of contributory negligence of the passenger upon the passenger, contrary to Article 20.

Thus, it is submitted that Rule 55(C) reverses, to a great extent, the burden of proof prescribed by the *Montreal Convention*, and excludes British Airways' liability in a wide range of situations where the *Montreal Convention* imposes liability.

Therefore, it is submitted that Rule 55(C), and Rule 55(C)(1) in particular, is inconsistent with the principles of the *Montreal Convention*, and hence unreasonable.

III. Liability caps: Rules 115(H), 116(H), and 55(C)(6)-(8) are unreasonable

(a) Liability caps under the *Montreal Convention*

Articles 22(1) and 22(2) of the *Montreal Convention* govern the carrier's liability in the case of delay of passengers and destruction, loss, damage or delay of baggage:

Article 22 - Limits of liability in relation to delay, baggage and cargo

1. In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4,150 Special Drawing Rights.
2. In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1,000 Special Drawing Rights for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at destination.

Article 22(5) also provides that these liability limits are not absolute, but can be exceeded in the case of damage resulting from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result:

5. The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.

Article 24 of the *Montreal Convention* provides a mechanism to review and update these liability limits:

Article 24 - Review of limits

1. Without prejudice to the provisions of Article 25 of this Convention and subject to paragraph 2 below, the limits of liability prescribed in Articles 21, 22 and 23 shall be reviewed by the Depositary at five-year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, or if the Convention does not enter into force within five years of the date it is first open for signature, within the first year of its entry into force, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of

the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in paragraph 1 of Article 23.

2. If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 percent, the Depositary shall notify States Parties of a revision of the limits of liability. Any such revision shall become effective six months after its notification to the States Parties. If within three months after its notification to the States Parties a majority of the States Parties register their disapproval, the revision shall not become effective and the Depositary shall refer the matter to a meeting of the States Parties. The Depositary shall immediately notify all States Parties of the coming into force of any revision.

3. Notwithstanding paragraph 1 of this Article, the procedure referred to in paragraph 2 of this Article shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in paragraph 1 has exceeded 30 percent since the previous revision or since the date of entry into force of this Convention if there has been no previous revision. Subsequent reviews using the procedure described in paragraph 1 of this Article will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present paragraph.

In accordance with Article 24, in 2009, the International Civil Aviation Organization (ICAO) increased the liability limits set out in the *Montreal Convention* by 13.1%, bringing the liability under Article 22(1) to 1,131 SDR and under 22(2) to 4,694 SDR. (In November 2009, the Agency also published a notice entitled “Notification to Air Carriers of Upward Revision of the Limits of Liability for International Transportation Governed by the Montreal Convention,” advising carriers to amend their tariffs accordingly.)

(b) Rules 115(H) and 116(H) misstate the liability caps under the *Montreal Convention*

Tariff Rules 115(H) and 116(H) of British Airways, copies of which are attached and marked as Exhibits “D” and “F”, respectively, state (see pages 40 and 42):

THE MONTREAL CONVENTION LIMITS BRITISH AIRWAYS'
LIABILITY FOR COST, DAMAGED OR DELAYED BAGGAGE TO 1,000
SPECIAL DRAWING RIGHTS (SDRS). [...]

[Emphasis added.]

Since the current liability cap for destruction, loss, damage or delay of baggage is 1,131 SDR, it is submitted that Rules 115(H) and 116(H) misstate British Airways' obligations under the *Montreal Convention*, and as such they are unreasonable.

Thus, it is submitted that British Airways ought to amend Rules 115(H) and 116(H) to reflect the updated liability caps.

(c) 55(C)(7) misstates the liability caps under the *Montreal Convention*

Tariff Rule 55(C)(7) of British Airways, a copy of which is attached and marked as Exhibit “A”, states (see page 32):

ANY LIABILITY OF CARRIER IS LIMITED TO 250 FRENCH GOLD FRANCS, USD 20.00, CAD 20.00, PER KILOGRAM IN THE CASE OF CHECKED BAGGAGE, AND 5,000 FRENCH GOLD FRANCS, USD 400.00, CAD 400.00, PER PASSENGER IN THE CASE OF UNCHECKED BAGGAGE OR OTHER PROPERTY, UNLESS HIGHER VALUE IS DECLARED IN ADVANCE AND ADDITIONAL CHARGES ARE PAID PURSUANT TO CARRIER'S TARIFF. IN THAT EVENT, THE LIABILITY OF CARRIER SHALL BE LIMITED TO SUCH HIGHER DECLARED VALUE. IN NO CASE SHALL THE CARRIER'S LIABILITY EXCEED THE ACTUAL LOSS SUFFERED BY THE PASSENGER. ALL CLAIMS ARE SUBJECT TO PROOF OF AMOUNT OF LOSS.

These limits seem to reflect some incarnation of the *Warsaw Convention*, the predecessor of the *Montreal Convention*. It certainly does not reflect the liability caps set out by the *Montreal Convention*, and it is submitted that these liability caps are unreasonably low. Indeed, they result in a liability cap of CAD\$490.00 for a 23 kg suitcase or \$640.00 for a 32 kg suitcase.

At the same time, in *Lukács v. WestJet*, 483-C-A-2010, the Agency held that WestJet's proposed liability cap of CAD\$1,000 was unreasonable (leave to appeal denied by the Federal Court of Appeal; 10-A-42).

Therefore, it is submitted that Rule 55(C)(7) is inconsistent with the *Montreal Convention* and provides unreasonably low liability caps for British Airways.

Hence, it is submitted that Rule 55(C)(7) ought to be disallowed.

(d) Rule 55(C)(6) contradicts Article 22(5) of the *Montreal Convention* and is unreasonable

Tariff Rule 55(C)(6) of British Airways, a copy of which is attached and marked as Exhibit “A”, states (see page 32):

IN ANY EVENT LIABILITY OF CARRIER FOR DELAY OF PASSENGER SHALL NOT EXCEED THE LIMITATION SET FORTH IN THE CONVENTION.

It is submitted that Rule 55(C)(6) contradicts and/or misrepresents British Airways's obligations under Article 22(5) of the *Montreal Convention*, which explicitly permits "breaking" the liability caps set out in Articles 22(1) and 22(2) of the *Montreal Convention* in certain cases; for greater clarity, Article 22(5) allows for unlimited liability in these circumstances.

Thus, it is submitted that Rule 55(C)(6) is both unreasonable and misleading, contrary to s. 18(b) of the *ATR*.

Therefore, it is submitted that Rule 55(C)(6) ought to be disallowed.

(e) Rule 55(C)(8) is unreasonable

Tariff Rule 55(C)(8) of British Airways, a copy of which is attached and marked as Exhibit "A", states (see page 32):

IN THE EVENT OF DELIVERY TO THE PASSENGER OF PART BUT NOT ALL OF HIS CHECKED BAGGAGE (OR IN THE EVENT OF DAMAGE TO PART BUT NOT ALL OF SUCH BAGGAGE) THE LIABILITY OF THE CARRIER WITH RESPECT TO THE NOT DELIVERED (OR DAMAGED) PORTION SHALL BE REDUCED PROPORTIONATELY ON THE BASIS OF WEIGHT, NOTWITHSTANDING THE VALUE OF ANY PART OF THE BAGGAGE OR CONTENTS THEREOF .

British Airways appears to be confusing here the provisions of the *Montreal Convention* governing cargo with those governing checked baggage. (Indeed, this provision is very similar to Article 22(4).) However, liability under the *Montreal Convention* is no longer based on the weight of the checked baggage (as in the *Warsaw Convention*), but rather the liability cap applies to "per passenger," subject to proof of loss.

Thus, it is submitted that Rule 55(C)(8) is a provision tending to relieve British Airways from liability and/or set a lower liability limit for British Airways than what is prescribed by the *Montreal Convention*.

Therefore, Rule 55(C)(8) is inconsistent with the *Montreal Convention*, and is unreasonable.

Hence, it is submitted that Rule 55(C)(8) ought to be disallowed.

IV. Blanket exclusions of liability for baggage: Rules 55(C)(10), 115(N), and 116(N) are unreasonable

Tariff Rule 55(C)(10) of British Airways, a copy of which is attached and marked as Exhibit “A”, states (see page 32):

CARRIER IS NOT LIABLE FOR LOSS, DAMAGE TO OR DELAY IN THE DELIVERY OF FRAGILE OR PERISHABLE ARTICLES, MONEY, JEWELRY, SILVERWARE, NEGOTIABLE PAPERS, SECURITIES OR OTHER VALUABLES, BUSINESS DOCUMENTS OR SAMPLES WHICH ARE INCLUDED IN THE PASSENGERS' CHECKED BAGGAGE, WHETHER WITH OR WITHOUT THE KNOWLEDGE OF CARRIER.

Tariff Rules 115(N) and 116(N) of British Airways, a copy of which are attached and marked as Exhibits “E” and “G”, respectively, state (see pages 41 and 43):

IN ACCORDANCE WITH THE BRITISH AIRWAYS CONDITIONS OF CARRIAGE, ITEMS THAT ARE FRAGILE, PERISHABLE OR OF SPECIAL VALUE MUST NOT BE INCLUDED IN CHECKED BAGGAGE. IF ANY OF THESE ITEMS, OR ANY OTHER ITEMS FORBIDDEN UNDER THE BRITISH AIRWAYS CONDITIONS OF CARRIAGE, ARE INCLUDED IN CHECKED BAGGAGE, BRITISH AIRWAYS WILL NOT BE LIABLE FOR ANY LOSS OR DAMAGE TO THEM. THESE ITEMS INCLUDE MONEY, JEWELRY, PRECIOUS METALS, COMPUTERS, PERSONAL ELECTRONIC DEVICES, SHARE CERTIFICATE, BONDS AND OTHER VALUABLE DOCUMENTS, BUSINESS DOCUMENTS OR PASSPORTS AND OTHER IDENTIFICATION DOCUMENTS. THE PAYING OF THIS CHARGE INDICATES THAT THESE TERMS AND CONDITIONS HAVE BEEN ACCEPTED.

It is submitted that these provisions, insofar as they concern liability for the contents of checked baggage, are unreasonable.

(a) The *Montreal Convention*

(i) Loss of baggage - absolute liability

Loss of checked baggage is governed by Article 17(2) of the *Montreal Convention*:

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. 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.

[Emphasis added.]

Article 17(2) distinguishes between destruction or loss, and damage to checked baggage. While this article allows the carrier to relieve itself from liability for damage to baggage that is a result of "inherent defect, quality or vice of the baggage," Article 17(2) contains no provision to relieve a carrier from liability for the loss of such baggage. On the contrary, Article 17(3) of the *Montreal Convention* provides that once the loss of baggage is established, the passenger may enforce their rights under the contract of carriage against the air carrier:

If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage.

Therefore, the Applicant submits that the carrier's liability for loss of checked baggage is absolute, and the carrier cannot exonerate itself of that liability under any circumstance.

(ii) Destruction and damage to baggage - strict liability

Destruction and damage to checked baggage is also governed by Article 17(2) of the *Montreal Convention*. A carrier that wishes to exonerate itself from liability in the case of damage to a particular piece of baggage must prove that: (1) the baggage had a particular inherent defect, quality or vice, and; (2) the damage in question was a result of the demonstrated inherent defect, quality or vice.

Article 17(2) provides a defense (i.e., "shield") against claims, and thus it is up to the adjudicator or trial judge to determine whether a particular piece of baggage has an "inherent defect, quality or vice" that is relevant to Article 17(2). Any attempt of a carrier to contractually define this phrase in its tariffs would result in relieving the carrier of liability which is laid down in the *Montreal Convention*, and thus would be null and void by Article 26.

Therefore, the defense provided by Article 17(2) is not a blanket defense that can be applied to entire categories and classes of baggage, but rather a case-by-case one, which can be invoked only after a careful analysis of the nature of the damage and the characteristics of the baggage.

(iii) Delay of baggage - strict liability

Article 19 of the *Montreal Convention* states:

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.]

Article 19 creates a presumption of liability of the carrier, and places the burden of proof of the presence of extenuating circumstances on the carrier.

Thus, whether the baggage contains some “excluded items” is not relevant to the matter of liability in the case of delay. The relevant question is whether the carrier has taken all measures that could reasonably be required in order to avoid the delay, and whether such measures were available.

(b) Caselaw

(i) Canada

The question of liability for “excluded” items has long been settled by the Agency’s landmark decision in *McCabe v. Air Canada*, 227-C-A-2008, where the Agency ruled based on the *Montreal Convention* that:

[24] The Agency therefore is of the opinion that if a carrier accepts checked baggage for transportation and the checked baggage is under the care and control of the carrier, the carrier assumes liability for the baggage in the event of loss and damage, notwithstanding the carrier has not agreed to carry items and the items are contained in checked baggage with or without the carrier’s knowledge.

In *Lukács v. Air Canada*, 208-C-A-2009, 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.

The same principle was reiterated and extended by the Agency to domestic carriage in *Kipper v. WestJet*, 309-C-A-2010. In *Lukács v. WestJet*, 477-C-A-2010, the Agency reaffirmed the principle of “causal relationship” in the context of Article 17(2), and disallowed a disclaimer of liability with respect to “excluded items”. Leave to appeal was denied by the Federal Court of Appeal (File No.: 10-A-41).

The principles set out in *McCabe* were reaffirmed in *Kouznetchik v. American Airlines*, 99-C-A-2011, where the Agency disallowed Rule 55(C)(12) of American Airlines, which exonerated the carrier for liability for loss, damage or delay of excluded items.

(ii) **United States**

In April 2009, the Department of Transport of the United States published an advisory (74 Fed. Reg 14837-38) to address tariff provisions such as “certain specific items, including: * * * antiques, documents, electronic equipment, film, jewelry, keys, manuscripts, medication, money, paintings, photographs * * *.” The advisory states that:

Such exclusions, while not prohibited in domestic contracts of carriage, are in contravention of Article 17 of the Montreal Convention (Convention), as revised on May 28, 1999. Article 17 provides that carriers are liable for damaged or lost baggage if the “destruction, loss or damage” occurred while the checked baggage was within the custody of the carrier, except to the extent that the damage “resulted from the inherent defect, quality or vice of the baggage.” Article 19 provides that a carrier is liable for damage caused by delay in the carriage of baggage, except to the extent that it proves that it took all reasonable measures to prevent the damage or that it was impossible to take such measures. Although carriers may wish to have tariff terms that prohibit passengers from including certain items in checked baggage, once a carrier accepts checked baggage, whatever is contained in the checked baggage is protected, subject to the terms of the Convention, up to the limit of 1000 SDRs (Convention, Article 22, para. 2.). Carriers should review their filed tariffs on this matter and modify their tariffs and their baggage claim policies, if necessary, to conform to the terms of the Convention.

The *Muoneke v. Compagnie Nationale Air France*, 5th Cir. Tex. (May 12, 2009) case concerned a passenger whose checked baggage was lost during international carriage from Houston to Lagos in 2004. When the passenger changed planes in Paris for her onward flight to Lagos, Air France personnel forced her to check her carry-on bag. When the bag was returned to her in Lagos, it was missing \$900 in cash and a digital camera. The appellate court rejected Air France’s argument that the contract of carriage expressly disclaimed liability for the items in question:

Article 17 of the Montreal Convention provides for strict liability in the case of damage to or loss of baggage. If Air France could contract out of liability under Article 27 of the Montreal Convention, as it claims it did in its contract of carriage with Muoneke, then Articles 17 and 26 would be meaningless. Under Air France’s proffered reading, a contract of carriage providing that “no items in checked baggage are covered” could effectively eliminate all carrier liability for damage to baggage. Air France provides no limiting principle that would harmonize an expansively construed Article 27 with Articles 17 and 26. Its reading is therefore unpersuasive, and we decline to adopt it.

[Emphasis added.]

In 2010, Air France consented to a civil penalty of US\$100,000 for violating Article 17 of the *Montreal Convention* by denying liability for certain items in the checked baggage of passengers (see *Société Air France, Violation of Article 17 of the Montreal Convention and 49 U.S.C. §41712*, Docket OST 20110-0005).

(c) Application of the law to the case at bar

Rules 55(C)(10), 115(N), and 116(N) are blanket exclusions of liability, which purport to relieve British Airways from liability for the loss, damage or delay of a broad class of items included in checked baggage.

The exclusion of liability is based solely on whether the item is “excluded,” and is related neither to the “inherent defect, quality or vice” of the baggage in the context of damage nor to the measures taken by British Airways to avoid delay. In particular, the exclusion of liability is not based on any “causal relationship” between the damage and the contents of the baggage.

Rules 55(C)(10), 115(N), and 116(N) are similar in wording and are identical in their effect to:

1. Rule 230(B)(2) of Air Canada, which was disallowed by the Agency in *McCabe v. Air Canada*, 227-C-A-2008;
2. Rule 17(a)(1) of WestJet, which was disallowed (in part) by the Agency in *Lukács v. WestJet*, 477-C-A-2010 (leave to appeal denied by the Federal Court of Appeal; 10-A-41);
3. Rule 55(C)(12) of American Airlines, which was disallowed by the Agency in *Kouznetchik v. American Airlines*, 99-C-A-2011; and
4. Rule 55(C)(7) of Air Canada, which was disallowed by the Agency in *Lukács v. Air Canada*, 291-C-A-2011.

Therefore, it is submitted that Rules 55(C)(10), 115(N), and 116(N) (insofar as they concern liability) are unreasonable, because they are inconsistent with Articles 17(2) and 19 of the *Montreal Convention* in that they are tending to exonerate British Airways from liability pursuant to these articles, and as such they are null and void by Article 26.

Hence, it is submitted that Rule 55(C)(10), and the portions of Rules 115(N) and 116(N) that govern liability, ought to be disallowed.

V. Blanket exclusions of liability for delay of passengers: Rules 85(A) and 85(B)(2) are unreasonable

Tariff Rules 85(A) and 85(B)(2) of British Airways, copies of which are attached and marked as Exhibit “B”, state (see page 34):

THE TIMES SHOWN IN TIMETABLES OR ELSEWHERE ARE APPROXIMATE AND NOT GUARANTEED, AND FORM NO PART OF THE CONTRACT OF CARRIAGE. SCHEDULES ARE SUBJECT TO CHANGE WITHOUT NOTICE AND CARRIER ASSUMES NO RESPONSIBILITY FOR MAKING CONNECTIONS. CARRIER WILL NOT BE RESPONSIBLE FOR ERRORS OR OMISSIONS EITHER IN TIMETABLES OR OTHER REPRESENTATIONS OF SCHEDULES. NO EMPLOYEE, AGENT OR REPRESENTATIVE OF CARRIER IS AUTHORIZED TO BIND CARRIER AS TO THE DATES OR TIMES OF DEPARTURE OR ARRIVAL OR OF THE OPERATION OF ANY FLIGHT.

⋮

CARRIER MAY, WITHOUT NOTICE CANCEL, TERMINATE, DIVERT, POSTPONE OR DELAY ANY FLIGHT OR THE FURTHER RIGHT OF CARRIAGE OR RESERVATION OF TRAFFIC ACCOMMODATIONS AND DETERMINE IF ANY DEPARTURE OR LANDING SHOULD BE MADE, WITHOUT ANY LIABILITY EXCEPT TO REFUND IN ACCORDANCE WITH ITS TARIFFS THE FARE AND BAGGAGE CHARGES FOR ANY UNUSED PORTION OF THE TICKET IF IT WOULD BE ADVISABLE TO DO SO: [...]

[Emphasis added.]

The Applicant submits that the underlined portions of these rules are unreasonable, and ought to be disallowed.

(a) Passengers are entitled to notice of schedule change

In *Lukács v. Porter*, 16-C-A-2013, the Agency held (at para. 87):

In this regard, the Agency notes that some Canadian carriers, including Air Canada, have tariff provisions that provide that passengers have a right to information on flight times and schedule changes, and that carriers must make reasonable efforts to inform passengers of delays and schedule changes, and the reasons for them. The Agency finds that such provisions are reasonable, and that, in this regard, the rights of passengers to be subject to reasonable terms and conditions of carriage

outweigh any of the carrier's statutory, commercial or operational obligations. The Agency therefore finds that the absence of similar provisions in Porter's Existing Tariff Rules would render Proposed Tariff Rule 18(a) unreasonable, if filed with the Agency.

[Emphasis added.]

Thus, based on the Agency's decision in *Lukács v. Porter*, it is submitted that the words "without notice" ought to be deleted from Rule 85(A), and substituted with a provision requiring British Airways to provide passengers notice about schedule changes.

(b) Liability for delay of passengers depends on how the carrier reacts to a delay

In *Lukács v. Porter*, 16-C-A-2013, the Agency explained the correct interpretation of Article 19 of the *Montreal Convention* as follows:

[104] [...] In short, the first sentence of Article 19 states clearly that the carrier is liable for delay. Article 19 only brings the carrier's servants and agents into play in terms of avoidance of liability when it has proved that these personnel took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

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

[Emphasis in the original.]

The underlined portion of Rule 85(B)(2) purports to limit the liability of British Airways to refund of the unused portion of the ticket in certain cases, regardless of how British Airways reacts to the delay caused, and regardless of whether British Airways has taken all measures that could reasonably be required to avoid the damage.

Thus, it is submitted that the underlined portion of Rule 85(B)(2) purports to lower the liability and/or exonerate British Airways from liability under Article 19 of the *Montreal Convention*. Therefore, the impugned portion of Rule 85(B)(2) is null and void under Article 26; hence, it is unreasonable, and ought to be disallowed.

(c) Carrier cannot exclude liability for making connections

Rule 85(A) also purports to exclude liability for making connections. The most obvious and immediate result of missing a connecting flight is delay, for which British Airways is liable under Article 19 of the *Montreal Convention*, unless it is able to demonstrate the presence of the affirmative defence set out in Article 19.

The Agency considered a similar blanket exclusion of liability in *Lukács v. Porter*, 16-C-A-2013, where the Agency considered the following provision of Porter’s Rule 18(c):

The carrier is not responsible or liable for failure to make connections, or for failure to operate any flight according to schedule, or for a change to the schedule of any flight.

The Agency held that this provision was unreasonable, because it was silent as to the airline’s liability in case it is unable to provide the proof required by Article 19 of the *Montreal Convention* to relieve itself of liability for delay (para. 51 of *Lukács v. Porter*).

It is submitted that the same reasons are applicable to the impugned portion of Rule 85(A). While British Airways may exonerate itself from liability under Article 19 of the *Montreal Convention* in some cases, it does not mean that British Airways can exonerate itself from liability for delay arising from missing a connection in every case.

Moreover, connecting flights are simply the means of transportation; they are not the ends. Thus, the question, for the purpose of liability under Article 19, is not about making or missing connecting flights, but rather whether passengers suffered a delay in reaching their destinations.

Therefore, it is submitted that the words “carrier assumes no responsibility for making connections” ought to be disallowed and deleted from Rule 85(A).

VI. Denied boarding compensation: Rule 87(B)(3)(B) is unreasonable

Rule 87 of British Airways governs denied boarding compensation. Rule 87 has two subrules marked with (B). The present complaint concerns the one labelled as “APPLICABLE BETWEEN POINTS IN CANADA AND POINTS IN THE UNITED KINGDOM SERVED BY BRITISH AIRWAYS”. A copy of the relevant portions of Rule 87 is attached and marked as Exhibit “C”.

In the present complaint, the Applicant challenges the reasonableness of Rule 87(B)(3)(B) that governs the amount of denied boarding compensation payable, which states (see page 37):

SUBJECT TO THE PROVISIONS OF PARAGRAPH (B) (3) (A) OF THIS RULE, CARRIER WILL TENDER LIQUIDATED DAMAGES IN THE AMOUNT OF 100 PERCENT OF THE SUM OF THE VALUES OF THE PASSENGER'S REMAINING FLIGHT COUPONS OF THE TICKET TO THE PASSENGER'S NEXT STOPOVER, OR IF NONE TO HIS DESTINATION, BUT NOT LESS THAN \$50.00 AND NOT MORE THAN \$200.00 PROVIDED THAT IF THE PASSENGER IS DENIED BOARDING IN THE UNITED KINGDOM, THE AMOUNT OF COMPENSATION IN THIS SUBPARAGRAPH WILL READ NOT LESS THAN UKL 10.00 NOR MORE THAN UKL 100.00. SUCH TENDER IF ACCEPTED BY THE PASSENGER AND PAID BY CARRIER, WILL CONSTITUTE FULL COMPENSATION FOR ALL ACTUAL OR ANTICIPATORY DAMAGES INCURRED OR TO BE INCURRED BY THE PASSENGER AS RESULT OF CARRIER'S FAILURE TO PROVIDE PASSENGER WITH CONFIRMED RESERVED SPACE.

It is further submitted that the Tariff of British Airways ought to reflect its legal obligations to provide denied boarding compensation in accordance with *Regulation (EC) 261/2004*.

(a) Rule 87(B)(3)(B) is inconsistent with the Agency's decision in *Anderson v. Air Canada*

The amount of denied boarding compensation set out by Rule 87(B)(3)(B) of British Airways is proportionate to the fare paid by the passenger. While a similar compensation scheme is used in the United States, in *Anderson v. Air Canada*, 666-C-A-2001, the Agency dismissed a challenge to Air Canada's denied boarding compensation policy that was seeking to introduce such a “proportionate” compensation scheme. Indeed, in *Anderson*, the Agency held that:

Contrary to an air carrier's policies on refunds for services purchased but not used, whereby the fare paid by a passenger is inherently linked to the design and implementation of the compensation, the fare paid by a passenger is unrelated to the amount of compensation that the passenger is entitled to receive upon being denied boarding. Further, any passenger who is denied boarding is entitled to compensation; evidence of specific damages suffered need not be provided.

Thus, it is submitted that Rule 87(B)(3)(B) is inconsistent with the principle of a flat rate of denied boarding compensation, which is equal for all passengers, regardless of the fare they paid.

(b) Competitors of British Airways apply Regulation (EC) 261/2004

One of the three factors in the balancing test for reasonableness of tariff provisions is the ability of the carrier to meet its commercial obligations. In this context, the policies of competitors may be of some relevance (although it is not a determinative factor, because one carrier's unreasonable policy does not justify another carrier's unreasonable policy).

A copy of *Regulation (EC) 261/2004* is attached and marked as Exhibit "H". *Regulation (EC) 261/2004* applies to every flight departing from an airport in the United Kingdom, regardless of the destination and carrier. Furthermore, it also applies to every flight operated by Community carriers departing from an airport outside the European Community to an airport in the United Kingdom.

For example, a copy of Part II of Rule 87 of Air France, which governs denied boarding compensation for flights to and from Canada, is attached and marked as Exhibit "I"; and a copy of Lufthansa's tariff rules governing denied boarding compensation for flights to and from Canada is attached and marked as Exhibit "J".

Both Air France and Lufthansa are large European airlines, well comparable to British Airways. As Exhibits "I" and "J" show, these airlines have been consistently applying the provisions of *Regulation (EC) 261/2004* for determining the amount of denied boarding compensation, and they were able to remain as profitable as other airlines.

Therefore, it is submitted that replacing Rule 87(B)(3)(B) of British Airways with provisions similar to those found in Exhibits "I" and "J" would not adversely affect the ability of British Airways to meet its commercial obligations.

(c) Current practice of British Airways

British Airways is a Community carrier within the meaning of *Regulation (EC) 261/2004*, and thus it is subject to the regulations of the European Community governing denied boarding compensation. Unless it is proven to the contrary, it is more probable than not that British Airways complies with such statutory obligations. Consequently, it is more probable that the compensation amounts set out in Rule 87(B)(3)(B) are simply outdated, and do not reflect the current practice of British Airways than that British Airways breaches its obligations under *Regulation (EC) 261/2004* on a regular basis.

Thus, it is submitted that the very first step in determining whether Rule 87(B)(3)(B) is reasonable is inquiring about the denied boarding compensations paid by British Airways to passengers departing from Canada to the United Kingdom and from the United Kingdom to Canada.

Therefore, pursuant to Rules 16 and 19 of the Agency's General Rules, the Applicant directs the following questions to British Airways:

- Q1. Provide the list of the amounts of denied boarding compensation paid by British Airways to individual passengers departing from Canada to the United Kingdom in the years 2010, 2011, and 2012.
- Q2. Provide the list of the amounts of denied boarding compensation paid by British Airways to individual passengers departing from the United Kingdom to Canada in the years 2010, 2011, and 2012.
- Q3. What competitive disadvantage will British Airways suffer if Rule 87(B)(3)(B) is replaced by the amounts prescribed by *Regulation (EC) 261/2004* and/or a language similar to Exhibits "I" and "J"?

Relevance: These questions are relevant to the balancing test in order to establish that changing Rule 87(B)(3)(B) to reflect the denied boarding compensation amounts set out in *Regulation (EC) 261/2004* will not affect the ability of British Airways to meet its commercial obligations. Indeed, if British Airways already compensates passengers according to *Regulation (EC) 261/2004*, then making its tariff rules reflect the current practice cannot adversely affect it.

(d) "Sole remedy" provision is unreasonable

Rule 87(B)(3)(B) also purports to preempt the rights of passengers who accept denied boarding compensation to seek damages under any other law, including the *Montreal Convention*. Indeed, Rule 87(B)(3)(B) refers to "FULL COMPENSATION FOR ALL ACTUAL OR ANTICIPATORY DAMAGES".

In *Lukács v. WestJet*, 249-C-A-2012, the Agency has reviewed in great detail a tariff provision with the identical effect as Rule 87(B)(3)(B), and concluded that it was unreasonable:

[148] It is clear that by the terms unilaterally imposed by WestJet under Proposed Tariff Rule 15.6, a passenger must decide between two options when their flight has been overbooked or cancelled: either accept the carrier's alternative remedies and give up any rights they may have under the Convention or at law; or refuse the alternative remedies and be forced to find alternative travel on their own and incur any related expenses in order to retain their legal rights.

[149] The Agency is of the opinion that this Proposed Tariff Rule is unreasonable. Proposed Tariff Rule 15.6 does not provide the passenger with a reasonable opportunity to fully assess their options. Instead, the passenger must decide between two options as determined by the carrier, both of which have legal consequences on the passenger's rights without a reasonable period of time to assess the full potential of the impact of selecting one over another. In such situations, the rights of a passenger

should remain available as prescribed by the Convention.

[150] In addition, although WestJet might, in appropriate circumstances, in situations of delay give the passenger the option to choose among one or more remedies, this does not necessarily mean that the carrier will have met the requirements of Article 19. In effect, WestJet's Proposed Tariff Rule 15.6 is a predetermination by WestJet that the alternative measures offered by it are reasonable measures pursuant to Article 19, and that offering these measures relieves WestJet from liability under that Article.

[151] The Agency is of the opinion that WestJet is depriving the passenger of their rights under the law through a contract of adhesion which it has unilaterally developed and imposed on the passenger.

[152] The Proposed Tariff Rule leaves to WestJet the determination as to what is a reasonable remedy for delay, which might be appropriate for circumstance-focused determinations pursuant to that Proposed Tariff Rule, but might not be appropriate for the purposes of Article 19.

[153] WestJet has argued that there is nothing in the Convention or applicable jurisprudence that prevents a party who has suffered a loss from giving a release to the carrier after the loss has occurred. While WestJet argues that nothing in the authorities prevents it from obtaining such a release, WestJet has not directed the Agency to any authorities to support its position that Proposed Tariff Rule 15.6 does not tend to relieve it from liability under Article 26 of the Convention.

[154] WestJet has argued that obtaining a release, in itself, is permissible under the Convention. However, it has not demonstrated why unilaterally imposing the terms of a release in its tariff does not tend to relieve it from liability under Article 26 of the Convention. The Agency is therefore of the opinion that WestJet has not shown that Proposed Tariff Rule 15.6 is consistent with Article 26 of the Convention.

[155] Accordingly, the Agency finds that this provision would be considered unreasonable under the ATR if filed with the Agency.

The Agency's aforementioned decision is also consistent with *Regulation (EC) 261/2004*, whose Article 12 states that:

1. This Regulation shall apply without prejudice to a passenger's rights to further compensation. The compensation granted under this Regulation may be deducted from such compensation.

Therefore, it is submitted that Rule 87(B)(3)(B) is unreasonable.

(e) Conclusion

Passengers are entitled to a compensation if they are involuntarily denied boarding (provided they complied with the check-in and boarding requirements). The amount of denied boarding compensation profoundly affects passengers.

It is difficult to see how the denied boarding compensation policy of British Airways would affect its ability to meet its statutory and operational obligations. The only issue is the financial one, which affects the airline's ability to meet its commercial obligations.

Bringing the denied boarding compensation amounts of British Airways in line with those of other European airlines, which happen to be identical to what is prescribed by *Regulation (EC) 261/2004*, will not adversely affect the ability of British Airways to meet its commercial obligations; nor will it put British Airways at an unfair competitive disadvantage.

Hence, based on the balancing test developed by the Agency, it is submitted that Rule 87(B)(3)(B) is unreasonable, and ought to be disallowed and substituted.

VII. Relief sought

The Applicant prays the Agency that the Agency:

- A. disallow Rule 55(C), and in particular Rules 55(C)(1), 55(C)(4), 55(C)(6), 55(C)(7), 55(C)(8), and 55(C)(10);
- B. direct British Airways to amend Rules 115(H) and 116(H) to reflect the updated liability caps under the *Montreal Convention*;
- C. disallow the portions of Rules 115(N) and 116(N) that concern liability;
- D. disallow Rules 85(A) and 85(B)(2) in part, and direct British Airways to incorporate into its rules the obligation to notify passengers about schedule changes;
- E. disallow Rule 87(B)(3)(B), and direct British Airways to incorporate into its rules the obligations set out in *Regulation (EC) 261/2004*.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Applicant

Cc: Mr. James B. Blaney, Senior Counsel (Americas), British Airways Plc

LIST OF AUTHORITIES

Legislation

1. *Air Transportation Regulations*, S.O.R./88-58.
2. *Canada Transportation Act*, S.C. 1996, c. 10.
3. *Canadian Transportation Agency General Rules*, S.O.R./2005-35.
4. *Carriage by Air Act*, R.S.C. 1985, c. C-26.

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 Canada v. Canadian Transportation Agency*, 2009 FCA 95.
7. *Anderson v. Air Canada*, Canadian Transportation Agency, 666-C-A-2001.
8. *Griffiths v. Air Canada*, Canadian Transportation Agency, 287-C-A-2009.
9. *H. v. Air Canada*, Canadian Transportation Agency, 2-C-A-2001.
10. *Kipper v. WestJet*, Canadian Transportation Agency, 20-C-A-2011.
11. *Kouznetchik v. American Airlines*, Canadian Transportation Agency, 99-C-A-2011.
12. *Lukács v. Air Canada*, Canadian Transportation Agency, 208-C-A-2009.
13. *Lukács v. WestJet*, Canadian Transportation Agency, 477-C-A-2010.
14. *Lukács v. WestJet*, Federal Court of Appeal, 10-A-41.
15. *Lukács v. WestJet*, Canadian Transportation Agency, 483-C-A-2010.
16. *Lukács v. WestJet*, Federal Court of Appeal, 10-A-42.
17. *Lukács v. WestJet*, Canadian Transportation Agency, 418-C-A-2011.

18. *Lukács v. Air Canada*, Canadian Transportation Agency, LET-C-A-29-2011.
19. *Lukács v. Air Canada*, Canadian Transportation Agency, 291-C-A-2011.
20. *Lukács v. WestJet*, Canadian Transportation Agency, 249-C-A-2012.
21. *Lukács v. Air Canada*, Canadian Transportation Agency, 250-C-A-2012.
22. *Lukács v. Porter*, Canadian Transportation Agency, 16-C-A-2013.
23. *McCabe v. Air Canada*, Canadian Transportation Agency, 227-C-A-2008.
24. *Muoneke v. Compagnie Nationale Air France*, 5th Cir. Tex. (May 12, 2009).
25. *Pinksen v. Air Canada*, Canadian Transportation Agency, 181-C-A-2007.
26. *Société Air France, Violation of Article 17 of the Montreal Convention and 49 U.S.C. §41712*, Docket OST 20110-0005.

Foreign regulation

27. United States: *Guidance on Airline Baggage Liability and Responsibilities of Code-Share Partners Involving International Itineraries* issued by the Department of Transport, 74 Fed. Reg. 14837-38.

BA IS NOT LIABLE TO THE PASSENGER FOR LOSS OR EXPENSE DUE TO THE PASSENGER'S FAILURE TO COMPLY WITH THIS PROVISION.

- (2) SUBJECT TO APPLICABLE LAWS AND REGULATIONS, THE PASSENGER AGREES TO PAY THE APPLICABLE FARE WHENEVER BA ON GOVERNMENT ORDER IS REQUIRED TO RETURN PASSENGER TO HIS POINT OF ORIGIN OR ELSEWHERE DUE TO THE PASSENGER'S INADMISSIBILITY INTO COUNTRY, WHETHER OF TRANSIT OR OF DESTINATION. BA WILL APPLY TO THE PAYMENT OF SUCH FARES ANY FUNDS PAID BY THE PASSENGER TO BA FOR UNUSED CARRIAGE OR ANY FUNDS OF THE PASSENGER IN THE POSSESSION OF BA. THE FARE COLLECTED FOR CARRIAGE TO THE POINT OF REFUSAL OR DEPORTATION WILL NOT BE REFUNDED BY BA.

CUSTOMS INSPECTION - 72

- (C) CUSTOMS INSPECTION
IF REQUIRED, THE PASSENGER MUST ATTEND INSPECTION OF HIS BAGGAGE, CHECKED OR UNCHECKED BY CUSTOMS OR OTHER GOVERNMENT OFFICIALS. BA ACCEPTS NO RESPONSIBILITY TOWARD THE PASSENGER IF THE LATTER FAILS TO OBSERVE THIS CONDITION. IF DAMAGE IS CAUSED TO BA BECAUSE OF THE PASSENGER'S FAILURE TO OBSERVE THIS CONDITION THE PASSENGER SHALL INDEMNIFY BA THEREFOR.

GOVERNMENT REGULATION - 73

- (D) GOVERNMENT REGULATION
NO LIABILITY SHALL ATTACH TO BA IF BA IN GOOD FAITH DETERMINES THAT WHAT IT UNDERSTANDS TO BE APPLICABLE LAW, GOVERNMENT REGULATION, DEMAND, ORDER OR REQUIREMENT REQUIRES THAT IT REFUSE AND IT DOES REFUSE TO CARRY PASSENGER.

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LIABILITY OF CARRIERS

- (A) SUCCESSIVE CARRIERS
CARRIAGE TO BE PERFORMED UNDER ONE TICKET OR UNDER TICKET AND ANY CONJUNCTION TICKET ISSUED IN CONNECTION THEREWITH BY SEVERAL SUCCESSIVE CARRIERS IS REGARDED AS SINGLE OPERATION.

LAWS APPLICABLE - 71

- (B) LAWS AND PROVISIONS APPLICABLE
(1) CARRIAGE HEREUNDER IS SUBJECT TO THE RULES AND LIMITATIONS RELATING TO LIABILITY ESTABLISHED BY THE CONVENTION (SEE RULE 1--(DEFINITIONS), HEREIN) UNLESS SUCH CARRIAGE IS NOT "INTERNATIONAL CARRIAGE" AS DEFINED BY THE CONVENTION.
(2) TO THE EXTENT NOT IN CONFLICT WITH THE PROVISIONS OF PARAGRAPH (1) ABOVE, ALL CARRIAGE UNDER THIS TARIFF AND OTHER SERVICES PERFORMED BY EACH CARRIER ARE SUBJECT TO:
(A) APPLICABLE LAWS (INCLUDING NATIONAL LAWS IMPLEMENTING THE CONVENTION OR EXTENDING THE

- RULES OF THE CONVENTION TO CARRIAGE WHICH IS NOT "INTERNATIONAL CARRIAGE" AS DEFINED IN THE CONVENTION), GOVERNMENT REGULATIONS, ORDERS AND REQUIREMENTS,
- (B) PROVISIONS SET FORTH IN THE PASSENGER'S TICKET,
 - (C) APPLICABLE TARIFFS, AND
 - (D) EXCEPT IN TRANSPORTATION BETWEEN PLACE IN THE UNITED STATES AND ANY PLACE OUTSIDE THEREOF, AND ALSO BETWEEN PLACE IN CANADA AND ANY PLACE OUTSIDE THEREOF, CONDITIONS OF CARRIAGE, REGULATIONS AND TIMETABLES (BUT NOT THE TIMES OF DEPARTURE AND ARRIVAL THEREIN SPECIFIED) OF CARRIER, WHICH MAY BE INSPECTED AT ANY OF ITS OFFICES AND AT AIRPORTS FROM WHICH IT OPERATES REGULAR SERVICES.
- (3) CARRIER'S NAME MAY BE ABBREVIATED IN THE TICKET AND CARRIER'S ADDRESS SHALL BE THE AIRPORT OF DEPARTURE SHOWN OPPOSITE THE FIRST ABBREVIATION OF CARRIER'S NAME IN THE TICKET, AND FOR THE PURPOSE OF THE CONVENTION, THE AGREED STOPPING PLACES ARE THOSE PLACES, EXCEPT THE PLACE OF DEPARTURE AND THE PLACE OF DESTINATION SET FORTH IN THE TICKET AND ANY CONJUNCTION TICKET ISSUED THEREWITH OR AS SHOWN IN CARRIER'S TIMETABLE AS SCHEDULED STOPPING PLACES ON THE PASSENGER'S ROUTE. LIST GIVING THE FULL NAME, AND ITS ABBREVIATION OF EACH CARRIER CONCURRING IN THIS TARIFF IS SET FORTH IN THE LIST OF PARTICIPATING CARRIERS.

LIMITATION OF LIABILITY - 72

- (C) LIMITATION OF LIABILITY
EXCEPT AS THE CONVENTION OR OTHER APPLICABLE LAW MAY OTHERWISE REQUIRE:
- (1) CARRIER IS NOT LIABLE FOR ANY LOSS OR CLAIM OF WHATSOEVER NATURE (HEREINAFTER IN THIS TARIFF COLLECTIVELY REFERRED TO AS "DAMAGE") ARISING OUT OF OR IN CONNECTION WITH CARRIAGE OR OTHER SERVICES PERFORMED BY CARRIER INCIDENTAL THERETO, UNLESS SUCH DAMAGE IS PROVED TO HAVE BEEN CAUSED BY THE NEGLIGENCE OR WILLFUL FAULT OF CARRIER AND THERE HAS BEEN NO CONTRIBUTORY NEGLIGENCE OF THE PASSENGER.
 - (2) UNDER NO CIRCUMSTANCES WILL CARRIER BE LIABLE FOR DAMAGE TO UNCHECKED BAGGAGE NOT ATTRIBUTED TO NEGLIGENCE OF CARRIER. ASSISTANCE RENDERED THE PASSENGER BY CARRIER'S EMPLOYEES IN LOADING, UNLOADING OR TRANSSHIPPING UNCHECKED BAGGAGE SHALL BE CONSIDERED AS GRATUITOUS SERVICE TO THE PASSENGER.
 - (3) CARRIER IS NOT LIABLE FOR ANY DAMAGE DIRECTLY AND SOLELY ARISING OUT OF ITS COMPLIANCE WITH ANY LAWS OR WITH GOVERNMENTAL REGULATIONS, ORDERS OR REQUIREMENTS, OR FROM FAILURE OF THE PASSENGER TO COMPLY WITH SAME, OR OUT OF ANY CAUSE BEYOND THE CARRIER'S CONTROL.
 - (4) (NOT APPLICABLE TO BA)
THE CARRIER SHALL AVAIL ITSELF OF THE LIMITATION OF LIABILITY PROVIDED IN THE CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL CARRIAGE BY AIR SIGNED AT WARSAW, OCTOBER 12, 1929 OR PROVIDED IN THE SAID CONVENTION AS AMENDED BY THE PROTOCOL SIGNED AT THE HAGUE SEPTEMBER 28, 1955. IN ACCORDANCE WITH ARTICLE 22(L) OF SAID CONVENTION OR SAID CONVENTION AMENDED BY SAID PROTOCOL, CARRIER

AGREES THAT, AS TO ALL INTERNATIONAL TRANSPORTATION BY CARRIER AS DEFINED IN THE SAID CONVENTION OR SAID CONVENTION AS AMENDED BY SAID PROTOCOL, WHICH, ACCORDING TO THE CONTRACT OF CARRIAGE, INCLUDES POINT IN THE UNITED STATES OF AMERICA AS POINT OF ORIGIN, POINT OF DESTINATION, OR AGREED STOPPING PLACE.

- (A) THE LIMIT OF LIABILITY FOR EACH PASSENGER FOR DEATH, WOUNDING, OR OTHER BODILY INJURY SHALL BE THE THEN DOLLAR EQUIVALENT OF 130,000 SPECIAL DRAWING RIGHTS (USD 159,984.50 ON MARCH 26, 1981) INCLUSIVE OF LEGAL FEES AND COSTS, EXCEPT THAT, IN THE CASE OF CLAIM BROUGHT IN STATE WHERE PROVISION IS MADE FOR SEPARATE AWARD OF LEGAL FEES AND COSTS, THE LIMIT SHALL BE 100,000 SPECIAL DRAWING RIGHTS (USD 123,065.00 ON MARCH 26, 1981) EXCLUSIVE OF LEGAL FEES AND COSTS.
- (B) THE CARRIER SHALL NOT, WITH RESPECT TO ANY CLAIM ARISING OUT OF THE DEATH, WOUNDING OR OTHER BODILY INJURY OF PASSENGER, AVAIL ITSELF OF ANY DEFENSE UNDER ARTICLE 20(L) OF SAID CONVENTION OR SAID CONVENTION AS AMENDED BY SAID PROTOCOL. NOTHING HEREIN SHALL BE DEEMED TO AFFECT THE RIGHTS AND LIABILITIES OF THE CARRIER WITH REGARD TO ANY CLAIM BROUGHT BY, OR ON BEHALF OF OR IN RESPECT OF, ANY PERSON WHO HAS WILLFULLY CAUSED DAMAGE WHICH RESULTED IN DEATH, WOUNDING OR OTHER BODILY INJURY OF PASSENGER.
- (C) CARRIER SHALL AVAIL ITSELF OF THE LIMITATION OF LIABILITY TO PASSENGERS AS PROVIDED IN THE CONVENTION, AND IN THE INTERNATIONAL TRANSPORTATION OF PASSENGERS, EXCEPT AS PROVIDED IN (C) (4) (A) ABOVE, THE LIABILITY OF THE CARRIER FOR PERSONAL INJURY OR DEATH OF EACH PASSENGER SHALL BE LIMITED TO THE SUM OF 125,000 FRENCH GOLD FRANCS (USD 10,000.00) (CAD 10,000.00) OR 250,000 FRENCH GOLD FRANCS (USD 20,000.00) (CAD 20,000) IF THE HAGUE PROTOCOL AMENDMENT OF THE CONVENTION IS APPLICABLE.

EXCEPTION: AS TO ALL INTERNATIONAL TRANSPORTATION BY THE CARRIER TO WHICH THE WARSAW CONVENTION AMENDED BY THE HAGUE PROTOCOL IS APPLICABLE, EXCEPT AS PROVIDED IN (C) (4) (A) ABOVE, THE LIMITS OF LIABILITY FOR EACH PASSENGER FOR DEATH, WOUNDING OR OTHER BODILY INJURY SHALL BE THE STERLING EQUIVALENT OF 100,000 SPECIAL DRAWING RIGHTS EXCLUSIVE OF COSTS OR AT THE OPTION OF THE CLAIMANT THE UNITED STATES DOLLAR EQUIVALENT OF 100,000 SPECIAL DRAWING RIGHTS EXCLUSIVE OF COSTS.

- (5) (APPLICABLE TO BA ONLY)
- (A) IN ACCORDANCE WITH ARTICLE 22(L) OF SAID CONVENTION OR SAID CONVENTION AMENDED BY SAID PROTOCOL, BA AGREES THAT, AS TO ALL INTERNATIONAL TRANSPORTATION BY BA AS DEFINED IN THE SAID CONVENTION OR SAID CONVENTION AS AMENDED BY SAID PROTOCOL, WHICH, ACCORDING TO THE CONTRACT OF CARRIAGE, INCLUDES POINT IN THE UNITED STATES OF AMERICA OR POINT IN CANADA AS POINT OF ORIGIN, POINT OF

- DESTINATION, OR AGREED STOPPING PLACE, BA SHALL NOT INVOKE THE LIMITATION OF LIABILITY IN ARTICLE 22(L) OF THE CONVENTION AS TO ANY CLAIM FOR RECOVERABLE COMPENSATORY DAMAGES ARISING UNDER ARTICLE 17 OF THE CONVENTION.
- (B) BA SHALL NOT AVAIL ITSELF OF ANY DEFENSE UNDER ARTICLE 20(L) OF THE CONVENTION WITH RESPECT TO THAT PORTION OF SUCH CLAIM WHICH DOES NOT EXCEED 100,000 SDRS.
- (C) EXCEPT AS OTHERWISE PROVIDED IN PARAGRAPHS (A) AND (B) HEREOF, BA RESERVES ALL DEFENSES AVAILABLE UNDER THE CONVENTION TO ANY SUCH CLAIM. WITH RESPECT TO THIRD PARTIES, BA ALSO RESERVES ALL RIGHTS OF RECOURSE AGAINST ANY OTHER PERSON, INCLUDING WITHOUT LIMITATION, RIGHTS OF CONTRIBUTION AND INDEMNITY.
- (D) NEITHER THE WAIVER OF LIMITS NOR THE WAIVER OF DEFENSES SHALL BE APPLICABLE IN RESPECT OF CLAIMS MADE BY PUBLIC SOCIAL INSURANCE OR SIMILAR BODIES (EXCEPT WITH RESPECT TO ANY SUCH BODIES LOCATED IN UNITED STATES) HOWEVER ASSERTED. SUCH CLAIMS SHALL BE SUBJECT TO THE LIMIT IN ARTICLE 22(L) AND TO THE DEFENSES UNDER ARTICLE 20(L) OF THE CONVENTION.
- NOTE: (APPLICABLE ONLY TO TRANSPORTATION TO AND FROM THE UNITED STATES) IN THE UNITED STATES, PARAGRAPH (C) (5) OF RULE 55 SHALL EXPIRE UPON ANY FINAL ACTION OF THE DEPARTMENT OF TRANSPORTATION WHICH DOES NOT MAKE PROVISION FOR TARIFFS IDENTICAL TO THAT PARAGRAPH.
- (6) IN ANY EVENT LIABILITY OF CARRIER FOR DELAY OF PASSENGER SHALL NOT EXCEED THE LIMITATION SET FORTH IN THE CONVENTION.
- (7) ANY LIABILITY OF CARRIER IS LIMITED TO 250 FRENCH GOLD FRANCS, USD 20.00, CAD 20.00, PER KILOGRAM IN THE CASE OF CHECKED BAGGAGE, AND 5,000 FRENCH GOLD FRANCS, USD 400.00, CAD 400.00, PER PASSENGER IN THE CASE OF UNCHECKED BAGGAGE OR OTHER PROPERTY, UNLESS HIGHER VALUE IS DECLARED IN ADVANCE AND ADDITIONAL CHARGES ARE PAID PURSUANT TO CARRIER'S TARIFF. IN THAT EVENT, THE LIABILITY OF CARRIER SHALL BE LIMITED TO SUCH HIGHER DECLARED VALUE. IN NO CASE SHALL THE CARRIER'S LIABILITY EXCEED THE ACTUAL LOSS SUFFERED BY THE PASSENGER. ALL CLAIMS ARE SUBJECT TO PROOF OF AMOUNT OF LOSS.
- (8) IN THE EVENT OF DELIVERY TO THE PASSENGER OF PART BUT NOT ALL OF HIS CHECKED BAGGAGE (OR IN THE EVENT OF DAMAGE TO PART BUT NOT ALL OF SUCH BAGGAGE) THE LIABILITY OF THE CARRIER WITH RESPECT TO THE NOT DELIVERED (OR DAMAGED) PORTION SHALL BE REDUCED PROPORTIONATELY ON THE BASIS OF WEIGHT, NOTWITHSTANDING THE VALUE OF ANY PART OF THE BAGGAGE OR CONTENTS THEREOF.
- (9) CARRIER IS NOT LIABLE FOR DAMAGE TO PASSENGER'S BAGGAGE CAUSED BY PROPERTY CONTAINED IN THE PASSENGER'S BAGGAGE. ANY PASSENGER WHOSE PROPERTY CAUSED DAMAGE TO ANOTHER PASSENGER'S BAGGAGE OR TO THE PROPERTY OF CARRIER SHALL INDEMNIFY CARRIER FOR ALL LOSSES AND EXPENSES INCURRED BY CARRIER AS RESULT THEREOF.
- (10) LIABILITY FOR FRAGILE, IRREPLACEABLE OR PERISHABLE ARTICLES
CARRIER IS NOT LIABLE FOR LOSS, DAMAGE TO OR DELAY IN THE DELIVERY OF FRAGILE OR PERISHABLE ARTICLES,

MONEY, JEWELRY, SILVERWARE, NEGOTIABLE PAPERS, SECURITIES OR OTHER VALUABLES, BUSINESS DOCUMENTS OR SAMPLES WHICH ARE INCLUDED IN THE PASSENGERS' CHECKED BAGGAGE, WHETHER WITH OR WITHOUT THE KNOWLEDGE OF CARRIER.

- (11) CARRIER WILL REFUSE TO ACCEPT ANY ARTICLES WHICH DO NOT CONSTITUTE BAGGAGE AS SUCH TERM IS DEFINED HEREIN, BUT IF DELIVERED TO AND RECEIVED BY CARRIER, SUCH ARTICLES SHALL BE DEEMED TO BE WITHIN THE BAGGAGE VALUATION AND LIMIT OF LIABILITY AND SHALL BE SUBJECT TO THE PUBLISHED RATES AND CHARGES OF CARRIER.
- (12) LIABILITY - SERVICES OF OTHER AIRLINES
- (A) CARRIER ISSUING TICKET OR CHECKING BAGGAGE FOR CARRIAGE OVER THE LINES OF OTHERS DOES SO ONLY AS AGENT.
- (B) NO CARRIER SHALL BE LIABLE FOR THE DELAY OF PASSENGER, OR THE LOSS, DAMAGE OR DELAY OF UNCHECKED BAGGAGE, NOT OCCURRING ON ITS OWN LINE; AND NO CARRIER SHALL BE LIABLE FOR THE LOSS, DAMAGE OR DELAY OF CHECKED BAGGAGE NOT OCCURRING ON ITS OWN LINE, EXCEPT THAT THE PASSENGER SHALL HAVE RIGHT OF ACTION FOR SUCH LOSS, DAMAGE OR DELAY ON THE TERMS HEREIN PROVIDED AGAINST THE FIRST CARRIER OR THE LAST CARRIER UNDER THE AGREEMENT TO CARRY.
- (C) NO CARRIER SHALL BE LIABLE FOR THE DEATH OR INJURY OF PASSENGER NOT OCCURRING ON ITS OWN LINE (SEE NOTE).

NOTE: EXCEPT TO THE EXTENT PROVIDED IN PARAGRAPH (C) (4 AND 5) ABOVE, RULES AFFECTING LIABILITY OF CARRIERS FOR PERSONAL INJURY OR DEATH ARE NOT PERMITTED TO BE INCLUDED IN TARIFFS FILED PURSUANT TO THE LAWS OF THE UNITED STATES, AND PARAGRAPH (C) (12) (C) IS INCLUDED HEREIN AS PART OF THE TARIFF FILED WITH GOVERNMENTS OTHER THAN THE UNITED STATES AND NOT AS PART OF BA-1 TARIFF C.A.B. NO. 505 ISSUED BY AIRLINE TARIFF PUBLISHING COMPANY, AGENT FILED WITH THE DEPARTMENT OF TRANSPORTATION.

- (13) CARRIER SHALL NOT BE LIABLE IN ANY EVENT FOR ANY CONSEQUENTIAL OR SPECIAL DAMAGE ARISING FROM CARRIAGE SUBJECT TO THIS TARIFF, WHETHER OR NOT CARRIER HAD KNOWLEDGE THAT SUCH DAMAGE MIGHT BE INCURRED.
- (14) WHENEVER THE LIABILITY OF CARRIER IS EXCLUDED OR LIMITED UNDER THESE CONDITIONS, SUCH EXCLUSION OR LIMITATION SHALL APPLY TO AGENTS, SERVANTS OR REPRESENTATIVES OF THE CARRIER AND ALSO ANY CARRIER WHOSE AIRCRAFT IS USED FOR CARRIAGE AND

GRATUITOUS TRANSPORTATION - 73

- (D) GRATUITOUS TRANSPORTATION
- (1) GRATUITOUS TRANSPORTATION BY CARRIER OF PERSONS AS HEREINAFTER DESCRIBED SHALL BE GOVERNED BY ALL THE PROVISIONS OF THIS RULE, EXCEPT SUBPARAGRAPHS (2) AND (3) BELOW AND WHICH FOLLOW, AND BY ALL OTHER APPLICABLE RULES OF THIS TARIFF.
- (A) TRANSPORTATION OF PERSONS INJURED IN AIRCRAFT ACCIDENTS ON THE LINES OF CARRIER AND

**Exhibit "B" to the complaint
of Dr. Gábor Lukács**

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AREA: ZZ TARIFF: IPRG CXR: BA RULE: 0085 CAT: 70 EFFECT: 05MAY10
08:56:05
CITY/CTRY: FILED TO GOVT: APPROVED ONLY: BOT:

SCHEDULES, DELAYS AND CANCELLATIONS

(A) SCHEDULES

THE TIMES SHOWN IN TIMETABLES OR ELSEWHERE ARE APPROXIMATE AND NOT GUARANTEED, AND FORM NO PART OF THE CONTRACT OF CARRIAGE. SCHEDULES ARE SUBJECT TO CHANGE WITHOUT NOTICE AND CARRIER ASSUMES NO RESPONSIBILITY FOR MAKING CONNECTIONS. CARRIER WILL NOT BE RESPONSIBLE FOR ERRORS OR OMISSIONS EITHER IN TIMETABLES OR OTHER REPRESENTATIONS OF SCHEDULES. NO EMPLOYEE, AGENT OR REPRESENTATIVE OF CARRIER IS AUTHORIZED TO BIND CARRIER AS TO THE DATES OR TIMES OF DEPARTURE OR ARRIVAL OR OF THE OPERATION OF ANY FLIGHT.

(B) CANCELLATIONS

- (1) CARRIER MAY, WITHOUT NOTICE, SUBSTITUTE ALTERNATE CARRIERS OR AIRCRAFT.
- (2) CARRIER MAY, WITHOUT NOTICE CANCEL, TERMINATE, DIVERT, POSTPONE OR DELAY ANY FLIGHT OR THE FURTHER RIGHT OF CARRIAGE OR RESERVATION OF TRAFFIC ACCOMMODATIONS AND DETERMINE IF ANY DEPARTURE OR LANDING SHOULD BE MADE, WITHOUT ANY LIABILITY EXCEPT TO REFUND IN ACCORDANCE WITH ITS TARIFFS THE FARE AND BAGGAGE CHARGES FOR ANY UNUSED PORTION OF THE TICKET IF IT WOULD BE ADVISABLE TO DO SO:
 - (A) BECAUSE OF ANY FACT BEYOND ITS CONTROL (INCLUDING, BUT WITHOUT LIMITATION, METEOROLOGICAL CONDITIONS, ACTS OF GOD, FORCE MAJEURE, STRIKES, RIOTS, CIVIL COMMOTIONS, EMBARGOES, WARS, HOSTILITIES, DISTURBANCES, OR UNSETTLED INTERNATIONAL CONDITIONS) ACTUAL, THREATENED OR REPORTED OR BECAUSE OF DELAY DEMAND CONDITIONS CIRCUMSTANCE OR REQUIREMENT DUE, DIRECTLY OR INDIRECTLY, TO SUCH FACT; OR
 - (B) BECAUSE OF ANY FACT NOT TO BE FORESEEN, ANTICIPATED OR PREDICTED; OR
 - (C) BECAUSE OF ANY GOVERNMENT REGULATION, DEMAND OR REQUIREMENT; OR
 - (D) BECAUSE OF SHORTAGE OF LABOR, FUEL OR FACILITIES, OR LABOR DIFFICULTIES OF CARRIER OR OTHERS.
- (3) CARRIER WILL CANCEL THE RIGHT OR FURTHER RIGHT OF CARRIAGE OF THE PASSENGER AND HIS BAGGAGE UPON THE REFUSAL OF THE PASSENGER, AFTER DEMAND BY CARRIER, TO PAY THE FARE OR THE PORTION THEREOF SO DEMANDED, OR TO PAY ANY CHARGE SO DEMANDED AND ASSESSABLE WITH RESPECT TO THE BAGGAGE OF THE PASSENGER WITHOUT BEING SUBJECT TO ANY LIABILITY THEREFOR EXCEPT TO REFUND, IN ACCORDANCE HERewith, THE UNUSED PORTION OF THE FARE AND BAGGAGE CHARGE(S) PREVIOUSLY PAID, IF ANY.

AREA: ZZ TARIFF: IPRG CXR: BA RULE: 0087 CAT: 70 EFFECT: 05MAY10
08:56:07
CITY/CTRY: FILED TO GOVT: APPROVED ONLY: BOT:

DENIED BOARDING COMPENSATION

DEFINITIONS - 71

(A) DEFINITIONS

FOR THE PURPOSE OF THIS RULE, EXCEPT AS OTHERWISE SPECIFICALLY PROVIDED HEREIN:

AIRPORT MEANS THE AIRPORT AT WHICH THE DIRECT OR CONNECTING FLIGHT, ON WHICH THE PASSENGER HOLDS CONFIRMED RESERVED SPACE, IS PLANNED TO ARRIVE OR SOME OTHER AIRPORT SERVING THE SAME METROPOLITAN AREA, PROVIDED THAT TRANSPORTATION TO THE OTHER AIRPORT IS

ALTERNATE TRANSPORTATION IS AIR TRANSPORTATION (BY AN AIRLINE LICENSED BY THE DEPARTMENT OF TRANSPORTATION) OR OTHER TRANSPORTATION USED BY THE PASSENGER WHICH AT THE TIME THE ARRANGEMENT IS MADE IS PLANNED TO ARRIVE AT THE PASSENGER'S NEXT SCHEDULED STOPOVER (OF 4 HOURS OR LONGER) OR IF NONE AT THE AIRPORT OF FINAL DESTINATION NO LATER THAN 4 HOURS AFTER THE PASSENGER'S ORIGINALLY SCHEDULED ARRIVAL TIME.

CARRIER MEANS

- (1) DIRECT AIR CARRIER, EXCEPT HELICOPTER OPERATOR HOLDING CERTIFICATE ISSUED BY THE DEPARTMENT OF TRANSPORTATION PURSUANT TO SECTION 401(D) (1), 401(D) (2), 401(D) (5), OR 401(D) (8) OF THE ACT, OR AN EXEMPTION FROM SECTION 401(A) OF THE ACT, AUTHORIZING THE TRANSPORTATION OF PERSONS, OR
- (2) FOREIGN ROUTE AIR CARRIER HOLDING PERMIT ISSUED BY THE DEPARTMENT OF TRANSPORTATION PURSUANT TO SECTION 402 OF THE ACT, OR AN EXEMPTION FROM SECTION 402 OF THE ACT, AUTHORIZING THE SCHEDULED FOREIGN AIR TRANSPORTATION OF PERSONS.

COMPARABLE AIR TRANSPORTATION MEANS TRANSPORTATION PROVIDED TO PASSENGER AT NO EXTRA COST BY CARRIER AS DEFINED ABOVE.

CONFIRMED RESERVED SPACE MEANS SPACE ON SPECIFIC DATE AND ON SPECIFIC FLIGHT AND CLASS OF SERVICE OF CARRIER WHICH HAS BEEN REQUESTED BY PASSENGER AND WHICH THE CARRIER OR ITS AGENT HAS VERIFIED, BY APPROPRIATE NOTATION ON THE TICKET OR IN ANY OTHER MANNER PROVIDED THEREFORE BY THE CARRIER AS BEING RESERVED FOR THE ACCOMMODATION OF THE PASSENGER.

STOPOVER MEANS DELIBERATE INTERRUPTION OF JOURNEY BY THE PASSENGER, SCHEDULED TO EXCEED FOUR HOURS, AT POINT BETWEEN THE PLACE OF DEPARTURE AND THE PLACE OF FINAL DESTINATION.

THE SUM OF THE VALUES OF THE REMAINING FLIGHT COUPONS MEANS THE SUM OF THE APPLICABLE ONE-WAY FARES INCLUDING ANY SURCHARGES AND AIR TRANSPORTATION TAXES, LESS ANY APPLICABLE DISCOUNTS.

VOLUNTEER MEANS PERSON WHO RESPONDS TO CARRIER'S REQUEST FOR VOLUNTEERS AND WHO WILLINGLY ACCEPTS CARRIER'S OFFER OF COMPENSATION, IN ANY AMOUNT, IN EXCHANGE FOR RELINQUISHING HIS CONFIRMED RESERVED SPACE. ANY OTHER PASSENGER DENIED BOARDING IS CONSIDERED FOR THE PURPOSES OF THIS RULE TO HAVE BEEN DENIED BOARDING INVOLUNTARILY, EVEN IF HE ACCEPTS DENIED BOARDING COMPENSATION.

- AIRLINE'S TICKETING, CHECK-IN, AND RECONFIRMATION REQUIREMENTS, OR YOU ARE NOT ACCEPTABLE FOR TRANSPORTATION UNDER THE AIRLINE'S TARIFF FILED WITH THE D.O.T.; OR
- (B) YOU ARE DENIED BOARDING BECAUSE THE FLIGHT IS CANCELLED; OR
- (C) YOU ARE DENIED BOARDING BECAUSE SMALLER CAPACITY AIRCRAFT WAS SUBSTITUTED FOR SAFETY OR OPERATIONAL REASONS; OR
- (D) YOU ARE OFFERED ACCOMMODATIONS IN SECTION OF THE AIRCRAFT OTHER THAN THAT SPECIFIED ON YOUR TICKET, AT NO EXTRA CHARGE. (A PASSENGER WHO IS SEATED IN SECTION FOR WHICH LOWER FARE IS CHARGED MUST BE GIVEN AN APPROPRIATE REFUND.)
- (E) THE AIRLINE IS ABLE TO PLACE YOU ON ANOTHER FLIGHT OR FLIGHTS THAT ARE PLANNED TO REACH YOUR FINAL DESTINATION WITHIN ONE HOUR OF THE SCHEDULED ARRIVAL OF YOUR ORIGINAL FLIGHT.

AMOUNT OF DENIED BOARDING COMPENSATION
PASSENGERS WHO ARE ELIGIBLE FOR DENIED BOARDING COMPENSATION MUST BE OFFERED PAYMENT EQUAL TO THE SUM OF THE FACE VALUE OF THEIR TICKET COUPONS, WITH \$200.00 MAXIMUM. HOWEVER, IF THE AIRLINE CANNOT ARRANGE "ALTERNATE TRANSPORTATION" FOR THE PASSENGER, THE COMPENSATION IS DOUBLED (\$400.00 MAXIMUM). THE "VALUE" OF TICKET COUPON IS THE ONE-WAY FARE FOR THE FLIGHT SHOWN ON THE COUPON, INCLUDING ANY SURCHARGE AND AIR TRANSPORTATION TAX, MINUS ANY APPLICABLE DISCOUNT. ALL FLIGHT COUPONS, INCLUDING CONNECTING FLIGHTS, TO THE PASSENGER'S DESTINATION OR FIRST 4-HOUR STOPOVER ARE USED TO COMPUTE THE COMPENSATION.

METHOD OF PAYMENT

THE AIRLINE MUST GIVE EACH PASSENGER WHO QUALIFIES FOR DENIED BOARDING COMPENSATION, PAYMENT BY CHECK OR DRAFT FOR THE AMOUNT SPECIFIED ABOVE, ON THE DAY AND PLACE THE INVOLUNTARY DENIED BOARDING OCCURS. HOWEVER, IF THE AIRLINE ARRANGES ALTERNATE TRANSPORTATION FOR THE PASSENGER'S CONVENIENCE THAT DEPARTS BEFORE THE PAYMENT CAN BE MADE, THE PAYMENT WILL BE SENT TO THE PASSENGER WITHIN 24 HOURS. THE CARRIER MAY OFFER FREE TICKETS IN PLACE OF THE CASH PAYMENT. THE PASSENGER MAY, HOWEVER, REFUSE ALL COMPENSATION AND BRING PRIVATE LEGAL ACTION.

PASSENGER'S OPTIONS

ACCEPTANCE OF THE COMPENSATION (BY ENDORSING THE CHECK OR DRAFT WITHIN 30 DAYS) RELIEVES CARRIER (THE APPLICABLE CARRIER ABBREVIATION WILL BE SUBSTITUTED FOR THE TERM "CARRIER" IN THE NOTICE DISTRIBUTED TO THE PASSENGER FROM ANY FURTHER LIABILITY TO THE PASSENGER) CAUSED BY ITS FAILURE TO HONOR THE CONFIRMED RESERVATION. HOWEVER, THE PASSENGER MAY DECLINE THE PAYMENT AND SEEK TO RECOVER DAMAGES IN COURT OF LAW OR IN SOME OTHER MANNER.

- (B) APPLICABLE BETWEEN POINTS IN CANADA AND POINTS IN THE UNITED KINGDOM SERVED BY BRITISH AIRWAYS
WHEN CARRIER IS UNABLE TO PROVIDE PREVIOUSLY CONFIRMED SPACE DUE TO MORE PASSENGERS HOLDING CONFIRMED RESERVATIONS AND TICKETS ON FLIGHT THAN THERE ARE AVAILABLE SEATS ON THAT FLIGHT, SUCH CARRIER WILL:
- (1) TRANSPORT PERSONS WHO ARE DENIED CONFIRMED RESERVED SPACE, WHETHER VOLUNTARILY OR

- INVOLUNTARILY, ON ITS NEXT FLIGHT ON WHICH SPACE IS AVAILABLE, AT NO ADDITIONAL COST TO THE PASSENGER REGARDLESS OF CLASS OF SERVICE, OR;
- (2) IF THE CARRIER CAUSING SUCH DELAY IS UNABLE TO PROVIDE ONWARD TRANSPORTATION ACCEPTABLE TO THE PASSENGER, THE CARRIER WILL PROVIDE SUCH TRANSPORTATION ON THE SERVICE OF ANY OTHER CARRIER OR COMBINATION OF CARRIERS IN THE SAME CLASS OF SERVICE AS PASSENGER'S OUTBOUND FLIGHT OR IN DIFFERENT CLASS OF SERVICE AT NO ADDITIONAL COST TO THE PASSENGER AND SUBJECT TO THE AVAILABILITY OF SPACE AND ACCEPTABILITY OF THE PASSENGER PROVIDING SUCH FLIGHTS WILL BE USED WITHOUT STOPOVER AND WILL PROVIDE AN EARLIER ARRIVAL TIME AT THE PASSENGER'S DESTINATION OR NEXT POINT OF STOPOVER OR TRANSFER POINTS; AND
- (3) CARRIER CAUSING SUCH DELAY WILL COMPENSATE SUCH PASSENGER FOR CARRIER'S FAILURE TO PROVIDE CONFIRMED SPACE AS FOLLOWS:
- (A) CONDITIONS FOR PAYMENT OF COMPENSATION SUBJECT TO THE EXCEPTIONS IN THIS SUBPARAGRAPH, CARRIER WILL TENDER TO THE PASSENGER THE AMOUNT OF COMPENSATION SPECIFIED IN SUBPARAGRAPH (B) WHEN:
- (I) PASSENGER HOLDING TICKET FOR CONFIRMED RESERVED SPACE PRESENTS HIMSELF FOR CARRIAGE AT THE APPROPRIATE TIME AND PLACE, HAVING COMPLIED FULLY WITH THE CARRIER'S REQUIREMENTS AS TO TICKETING, CHECK-IN AND RECONFIRMATION PROCEDURE, AND BEING ACCEPTABLE FOR TRANSPORTATION UNDER CARRIER'S TARIFF; AND
- (II) THE FLIGHT FOR WHICH THE PASSENGER HOLDS CONFIRMED RESERVED SPACE IS UNABLE TO ACCOMMODATE THE PASSENGER AND DEPARTS WITHOUT HIM.
- EXCEPTION 1: THE PASSENGER WILL NOT BE ELIGIBLE FOR COMPENSATION IF THE FLIGHT ON WHICH THE PASSENGER HOLDS CONFIRMED RESERVED SPACE IS UNABLE TO ACCOMMODATE HIM BECAUSE OF:
- (AA) GOVERNMENT REQUISITION OF SPACE, OR
- (BB) SUBSTITUTION OF EQUIPMENT OF LESSER CAPACITY WHEN REQUIRED BY OPERATIONAL OR SAFETY REASONS.
- EXCEPTION 2: THE PASSENGER WILL NOT BE ELIGIBLE FOR COMPENSATION IF HE IS OFFERED ACCOMMODATIONS OR IS SEATED IN SECTION OF THE AIRCRAFT OTHER THAN THAT SPECIFIED ON HIS TICKET AT NO EXTRA CHARGE, EXCEPT THAT PASSENGER SEATED IN SECTION FOR WHICH LOWER FARE APPLIES SHALL BE ENTITLED TO AN APPROPRIATE REFUND.
- (B) AMOUNT OF COMPENSATION PAYABLE
- (I) SUBJECT TO THE PROVISIONS OF PARAGRAPH (B) (3) (A) OF THIS RULE, CARRIER WILL TENDER LIQUIDATED DAMAGES IN THE AMOUNT OF 100 PERCENT OF THE SUM OF THE VALUES OF THE PASSENGER'S REMAINING FLIGHT COUPONS OF THE TICKET TO THE PASSENGER'S NEXT STOPOVER, OR IF NONE TO HIS DESTINATION, BUT NOT LESS THAN \$50.00

- AND NOT MORE THAN \$200.00 PROVIDED THAT IF THE PASSENGER IS DENIED BOARDING IN THE UNITED KINGDOM, THE AMOUNT OF COMPENSATION IN THIS SUBPARAGRAPH WILL READ NOT LESS THAN UKL 10.00 NOR MORE THAN UKL 100.00. SUCH TENDER IF ACCEPTED BY THE PASSENGER AND PAID BY CARRIER, WILL CONSTITUTE FULL COMPENSATION FOR ALL ACTUAL OR ANTICIPATORY DAMAGES INCURRED OR TO BE INCURRED BY THE PASSENGER AS RESULT OF CARRIER'S FAILURE TO PROVIDE PASSENGER WITH CONFIRMED RESERVED SPACE.
- (II) FOR THE PURPOSE OF THIS RULE, THE VALUE OF THE REMAINING FLIGHT COUPONS OF THE TICKET SHALL BE THE SUM OF THE APPLICABLE ONE-WAY FARES OR FIFTY PERCENT OF THE APPLICABLE ROUND TRIP FARES, AS THE CASE MAY BE, INCLUDING ANY SURCHARGES AND AIR TRANSPORTATION TAXES, LESS ANY APPLICABLE DISCOUNT.
- (III) SAID TENDER WILL BE MADE BY CARRIER ON THE DAY AND AT THE PLACE WHERE THE FAILURE OCCURS, AND IF ACCEPTED WILL BE RECEIPTED FOR BY THE PASSENGER. PROVIDED, HOWEVER, THAT WHEN CARRIER ARRANGES, FOR THE PASSENGER'S CONVENIENCE, ALTERNATE MEANS OF TRANSPORTATION WHICH DEPARTS PRIOR TO THE TIME SUCH TENDER CAN BE MADE TO THE PASSENGER, TENDER SHALL BE MADE BY MAIL OR OTHER MEANS WITHIN 24 HOURS AFTER THE TIME THE FAILURE OCCURS.
- (4) CARRIER SHALL FURNISH ALL PASSENGERS WHO ARE DENIED BOARDING INVOLUNTARILY FROM FLIGHTS ON WHICH THEY HOLD CONFIRMED RESERVED SPACE COPY OF THE FOLLOWING WRITTEN STATEMENT:
- COMPENSATION FOR DENIED BOARDING
IF YOU HAVE BEEN DENIED RESERVED SEAT ON BRITISH AIRWAYS, YOU ARE PROBABLY ENTITLED TO MONETARY COMPENSATION. THIS NOTICE EXPLAINS THE AIRLINE'S OBLIGATIONS AND THE PASSENGER'S RIGHTS IN THE CASE OF AN OVERSOLD FLIGHT.
- COMPENSATION FOR INVOLUNTARY DENIED BOARDING
IF YOU ARE DENIED BOARDING INVOLUNTARILY, YOU ARE ENTITLED TO PAYMENT OF "DENIED BOARDING COMPENSATION" FROM THE AIRLINE UNLESS:
- (A) YOU HAVE NOT FULLY COMPLIED WITH THE AIRLINE'S TICKETING, CHECK-IN, AND RECONFIRMATION REQUIREMENTS, OR YOU ARE NOT ACCEPTABLE FOR TRANSPORTATION UNDER THE AIRLINE'S TARIFF FILED WITH THE C.T.C.; OR
- (B) YOU ARE DENIED BOARDING BECAUSE THE FLIGHT IS CANCELLED; OR
- (C) YOU ARE DENIED BOARDING BECAUSE OF GOVERNMENT REQUISITION OF SPACE OR BECAUSE SMALLER CAPACITY AIRCRAFT WAS SUBSTITUTED FOR SAFETY OR OPERATIONAL REASONS; OR
- (D) YOU ARE OFFERED ACCOMMODATIONS IN SECTION OF THE AIRCRAFT OTHER THAN THAT SPECIFIED IN YOUR TICKET, AT NO EXTRA CHARGE. (A PASSENGER SEATED IN SECTION FOR WHICH LOWER FARE IS CHARGED MUST BE GIVEN AN APPROPRIATE REFUND.)
- AMOUNT OF DENIED BOARDING COMPENSATION
PASSENGERS WHO ARE ELIGIBLE FOR DENIED BOARDING COMPENSATION MUST BE OFFERED PAYMENT EQUAL TO THE SUM OF THE FACE VALUE OF THEIR TICKET COUPONS,

WITH CAD 50.00 MINIMUM AND CAD 200.00 MAXIMUM OR UKL 10.00 MINIMUM AND UKL 100.00 MAXIMUM IN THE CASE OF PASSENGERS DENIED BOARDING IN THE UNITED KINGDOM. THE "VALUE" OF TICKET COUPON IS THE ONE-WAY FARE FOR THE FLIGHT SHOWN ON THE COUPON, INCLUDING ANY SURCHARGE AND AIR TRANSPORTATION TAX, MINUS ANY APPLICABLE DISCOUNT. ALL FLIGHT COUPONS, INCLUDING CONNECTING FLIGHTS, TO THE PASSENGER'S DESTINATION OR FIRST 4-HOUR STOPOVER ARE USED TO COMPUTE THE COMPENSATION.

METHOD OF PAYMENT

THE AIRLINE MUST GIVE EACH PASSENGER WHO QUALIFIES FOR DENIED BOARDING COMPENSATION PAYMENT BY CHECK OR DRAFT FOR THE AMOUNT SPECIFIED ABOVE, ON THE DAY AND PLACE THE INVOLUNTARY DENIED BOARDING OCCURS. HOWEVER, IF THE AIRLINE ARRANGES ALTERNATE TRANSPORTATION FOR THE PASSENGER'S CONVENIENCE THAT DEPARTS BEFORE THE PAYMENT CAN BE MADE, THE PAYMENT WILL BE SENT TO THE PASSENGER WITHIN 24 HOURS.

(C) APPLICABLE ONLY TO FLIGHTS OR PORTIONS OF FLIGHTS ORIGINATING IN THE UNITED STATES

(1) BOARDING PRIORITY

IN THE EVENT OF AN OVERSOLD FLIGHT, CARRIER WILL INITIALLY REQUEST PASSENGERS TO VOLUNTEER FOR DENIED BOARDING. IF THERE ARE AN INSUFFICIENT NUMBER OF VOLUNTEERS, PASSENGERS WILL BE INVOLUNTARILY DENIED BOARDING IN ACCORDANCE WITH THE FOLLOWING ORDER OF PRIORITY.

- (A) STANDBY PASSENGERS AND AIRLINE OR TRAVEL INDUSTRY RELATED EMPLOYEES TRAVELING ON REDUCED OR CONCESSIONAL FARE BASIS.
- (B) PASSENGERS PAYING LESS THAN THE FULL PUBLISHED ECONOMY CLASS FARE.
- (C) PASSENGERS PAYING THE FULL PUBLISHED ECONOMY CLASS FARE.
- (D) PASSENGERS PAYING THE FULL CLUB CLASS FARE.
- (E) PASSENGERS PAYING THE FULL PUBLISHED FIRST CLASS FARE.
- (F) UNACCOMPANIED YOUNG PASSENGERS, STRETCHER CASES AND ESCORTS AND CARRIER EMPLOYEES WHOSE MOVEMENT IS OF HIGH DEGREE OF URGENCY SUCH AS REPOSITIONING CREWS, ENGINEERS TRAVELING TO URGENT OPERATIONAL DUTY OR TRAVELING TO OR FROM THE SCENE OF AN AIRCRAFT ACCIDENT.

(2) CONDITIONS FOR PAYMENT OF COMPENSATION

SUBJECT TO THE EXCEPTIONS IN THIS SUBPARAGRAPH, CARRIER WILL TENDER TO PASSENGER DENIED BOARDING INVOLUNTARILY THE AMOUNT OF COMPENSATION SPECIFIED IN SUBPARAGRAPH 3 WHEN:

- (A) PASSENGER HOLDING TICKET FOR CONFIRMED RESERVED SPACE PRESENTS HIMSELF/HERSELF FOR CARRIAGE AT THE APPROPRIATE TIME AND PLACE, HAVING COMPLIED FULLY WITH CARRIER'S REQUIREMENTS AS TO TICKETING, CHECK-IN AND RECONFIRMATION PROCEDURES AND BEING ACCEPTABLE FOR TRANSPORTATION UNDER CARRIER'S TARIFF; AND
- (B) THE FLIGHT FOR WHICH THE PASSENGER HOLDS CONFIRMED RESERVED SPACE IS UNABLE TO ACCOMMODATE THE PASSENGER AND DEPARTS WITHOUT HIM/HER.

NOTE: CHECK-IN MEANS THAT THE PASSENGER MUST PRESENT HIMSELF AT THE AIRPORT FOR CHECK-IN AT LEAST 60 MINUTES PRIOR TO THE SCHEDULED DEPARTURE OF THE FLIGHT ON WHICH HE HOLDS CONFIRMED RESERVED SPACE:

EXCEPTION: THE PASSENGER WILL NOT BE

- WHERE TWO OR MORE PASSENGERS TRAVELING AS ONE PARTY TO COMMON DESTINATION OR POINT OF STOPOVER BY THE SAME FLIGHT, PRESENT THEMSELVES AND THEIR BAGGAGE FOR TRAVELING AT THE SAME TIME AND PLACE, THEY SHALL BE PERMITTED TOTAL FREE BAGGAGE ALLOWANCE EQUAL TO THE COMBINATION OF THEIR INDIVIDUAL FREE BAGGAGE ALLOWANCE.
- (G) COLLECTION OF EXCESS WEIGHT/OVERSIZE AND/OR ADDITIONAL PIECE CHARGES
AT THE PASSENGER'S OPTION, EXCESS WEIGHT, OVERSIZE AND/OR ADDITIONAL PIECE CHARGES WILL BE PAYABLE EITHER AT THE POINT OF ORIGIN FOR THE ENTIRE JOURNEY TO FINAL DESTINATION, OR AT THE POINT OF ORIGIN TO THE POINT OF STOPOVER, IN WHICH EVENT, WHEN CARRIAGE IS RESUMED, CHARGES WILL BE PAYABLE FROM THE POINT OF STOPOVER TO THE NEXT POINT OR DESTINATION. WHEN ON JOURNEY FOR WHICH THROUGH EXCESS BAGGAGE TICKET HAS BEEN ISSUED THERE IS AN INCREASE IN THE AMOUNT OF EXCESS BAGGAGE CARRIED, CARRIER WILL ISSUE SEPARATE EXCESS BAGGAGE TICKET FOR SUCH INCREASE AND COLLECT CHARGES TO DESTINATION OR STOPOVER POINT AS THE CASE MAY BE.
- (H) SPECIAL DECLARATION AND EXCESS VALUE CHARGE
THE MONTREAL CONVENTION LIMITS BRITISH AIRWAYS' LIABILITY FOR COST, DAMAGED OR DELAYED BAGGAGE TO 1,000 SPECIAL DRAWING RIGHTS (SDRS). IF THE PASSENGER HAS MORE VALUABLE BAGGAGE, THE PASSENGER CAN MAKE SPECIAL DECLARATION OF INTEREST AND PAY SUPPLEMENTARY CHARGE TO HAVE THE LIMIT OF BRITISH AIRWAYS' LIABILITY RAISED UP TO 2,000 SDRS. THIS CHARGE IS KNOWN AS THE "EXCESS VALUE CHARGE" OR "SPECIAL DECLARATION CHARGE". THIS CHARGE IS NOT AN INSURANCE PREMIUM SINCE THE AIRLINE WILL MEET CLAIMS ONLY IF LEGALLY LIABLE UNDER THE MONTREAL CONVENTION. THIS EXCESS VALUE CHARGE RELATES TO THE ADDITIONAL COSTS INVOLVED IN TRANSPORTING AND INSURING THE BAGGAGE CONCERNED OVER AND ABOVE THOSE FOR BAGGAGE VALUED AT OR BELOW THE LIABILITY LIMIT. THE TARIFF SHALL BE MADE AVAILABLE TO PASSENGERS ON REQUEST.
- (I) ASSESSMENT OF CHARGE
THE SPECIAL DECLARATION WILL BE CHARGED AT FLAT RATE OF USD 25/CAD 31/GBP 14 OR EUR 21. THE MAXIMUM VALUATION PER PASSENGER IS 2,000 SDRS.
- (J) COLLECTION
EXCESS VALUE CHARGE MUST BE COLLECTED AT THE START OF THE JOURNEY. THE PASSENGER NEEDS TO MAKE THEIR REQUEST TO THE CHECK IN AGENT BEFORE THE BAG IS CHECKED IN. THE CHECK IN AGENT WILL THEN SHOW THE PASSENGER PRINTED NOTICE DETAILING THE TERMS AND CONDITIONS AND LISTING ITEMS THAT SHOULD NOT BE INCLUDED IN CHECKED BAGGAGE. IF THE PASSENGER AGREES TO THE TERMS AND WANTS TO PROCEED, THE AGENT WILL ISSUE AN EXCESS BAGGAGE TICKET. SEPARATE EXCESS BAGGAGE TICKET MUST BE ISSUED TO COVER EACH EXCESS VALUE CHARGE. THE EXCESS BAGGAGE TICKET MUST SHOW THE AMOUNT OF DECLARED VALUE IN THE SPECIAL ITEMS BOX IN SDRS (MAXIMUM 2,000 SDRS) AND THE EXCESS VALUE CHARGE COLLECTED IN THE CHARGE BOX. THE CARRIER BOX SHOULD SPECIFY BA. THE PASSENGER WILL PAY THE CHARGE AT EITHER THE BRITISH AIRWAY CASHIER COUNTER OR TICKET DESK, DEPENDING ON STATION AND LOCAL PAYMENT COLLECTION PROCEDURES.
- (K) JOURNEYS WHICH INCLUDE SECTORS BY SURFACE TRANSPORT SECTORS TRAVELLED WHOLLY OR PARTIALLY BY SURFACE ARE NOT COVERED BY THE SPECIAL DECLARATION. COMPLETE AIR SECTORS BY BRITISH AIRWAYS MAY BE COVERED BY DECLARATION AT THE START OF THE JOURNEY. IF THIS HAS NOT BEEN DONE, SEPARATE DECLARATION MUST BE MADE AT THE POINT WHERE AIR TRAVEL IS RESUMED, IRRESPECTIVE OF WHETHER CHANGE OF CARRIER OCCURS.

- (L) JOURNEYS WHICH INCLUDE TRAVEL BY MORE THAN ONE AIRLINE
SPECIAL DECLARATION OF INTEREST SHOULD BE MADE AT THE
POINT WHERE THE JOURNEY STARTS WITH EACH CARRIER.
WHERE SPECIAL DECLARATION OF INTEREST HAS BEEN MADE,
BAGS CANNOT BE THROUGH CHECKED ONTO ANOTHER CARRIER,
EVEN IF THAT CARRIER IS FRANCHISEE ONEWORLD CARRIER.
THIS IS BECAUSE EACH CARRIER WILL HAVE IT'S OWN
ARRANGEMENTS FOR EXCESS VALUE.
NOTE ALL AIRLINES DO NOT HAVE THE SAME CHARGES AND
LIMITS. THEIR TARIFFS SHOULD BE CONSULTED IF DETAILS
ARE REQUIRED.
- (M) ROUND TRIP JOURNEYS
THE SPECIAL DECLARATION OF INTEREST MADE AT THE START
OF THE OUTBOUND JOURNEY DOES NOT COVER THE RETURN
UNLESS SPECIFICALLY REQUESTED BY THE PASSENGER AT THE
TIME THE SPECIAL DECLARATION OF INTEREST IS MADE.
- (N) EXCLUDED ITEMS
IN ACCORDANCE WITH THE BRITISH AIRWAYS CONDITIONS OF
CARRIAGE, ITEMS THAT ARE FRAGILE, PERISHABLE OR OF
SPECIAL VALUE MUST NOT BE INCLUDED IN CHECKED BAGGAGE.
IF ANY OF THESE ITEMS, OR ANY OTHER ITEMS FORBIDDEN
UNDER THE BRITISH AIRWAYS CONDITIONS OF CARRIAGE, ARE
INCLUDED IN CHECKED BAGGAGE, BRITISH AIRWAYS WILL NOT
BE LIABLE FOR ANY LOSS OR DAMAGE TO THEM. THESE ITEMS
INCLUDE MONEY, JEWELRY, PRECIOUS METALS, COMPUTERS,
PERSONAL ELECTRONIC DEVICES, SHARE CERTIFICATE, BONDS
AND OTHER VALUABLE DOCUMENTS, BUSINESS DOCUMENTS OR
PASSPORTS AND OTHER IDENTIFICATION DOCUMENTS. THE
PAYING OF THIS CHARGE INDICATES THAT THESE TERMS AND
CONDITIONS HAVE BEEN ACCEPTED.
- (O) EXCESS WEIGHT/OVERSIZE AND/OR ADDITIONAL PIECE AND
VALUE CHARGES ON REROUTINGS AND CANCELLATIONS
WHEN PASSENGER IS REROUTED OR HIS CARRIAGE CANCELLED,
THE PROVISIONS WHICH GOVERN WITH RESPECT TO THE PAYMENT
OF ADDITIONAL FARES OR THE REFUNDING OF FARES SHALL
LIKEWISE GOVERN THE PAYMENT OR THE REFUNDING OF EXCESS
WEIGHT CHARGES AND THE PAYMENT OF EXCESS VALUE CHARGES,
BUT NO REFUND OF VALUE CHARGES WILL BE MADE WHEN
PORTION OF THE CARRIAGE HAS BEEN COMPLETED.
- (P) CHECKING OF BAGGAGE BY CARRIER
EXCEPT AS OTHERWISE PROVIDED IN THIS RULE, EACH
PARTICIPATING CARRIER WILL, UPON PRESENTATION BY
FARE-PAYING PASSENGER OF VALID TICKET COVERING
TRANSPORTATION OVER THE LINES OF SUCH CARRIER, OR OVER
THE LINES OF SUCH CARRIER AND ONE OR MORE OTHER
PARTICIPATING CARRIERS, CHECK PERSONAL PROPERTY WHICH
IS TENDERED BY THE PASSENGER FOR TRANSPORTATION AS
BAGGAGE, WHEN TENDERED AT THE CITY OR AIRPORT OFFICE
DESIGNATED BY THE CARRIER AND WITHIN THE TIMES
PRESCRIBED BY SUCH CARRIER, BUT NO PARTICIPATING
CARRIER WILL CHECK PROPERTY SO TENDERED:
- (1) BEYOND THE DESTINATION, OR NOT ON THE ROUTING,
DESIGNATED ON SUCH TICKET.
 - (2) BEYOND POINT OF STOPOVER.
 - (3) BEYOND POINT OF TRANSFER TO ANY OTHER CARRIER,
IF THE PASSENGER HAS DECLARED VALUATION IN
EXCESS OF THE AMOUNTS SPECIFIED IN PARAGRAPH (H)
OF THIS RULE EXCEPT BETWEEN POINTS WHERE THROUGH
INTERLINE SERVICE IS PROVIDED WITHOUT CHANGE OF
AIRCRAFT BY TWO OR MORE PARTICIPATING CARRIERS.
 - (4) BEYOND POINT BEYOND WHICH THE PASSENGER HOLDS NO
RESERVATION.
 - (5) BEYOND POINT AT WHICH THE PASSENGER IS TO
TRANSFER TO CONNECTING FLIGHT, AND SUCH FLIGHT
IS SCHEDULED TO DEPART FROM DIFFERENT AIRPORT
THAN THAT AT WHICH THE PASSENGER IS SCHEDULED TO

SPECIFIED ABOVE WILL BE ASSESSED BY EACH CARRIER PARTICIPATING IN THE CARRIAGE AT THE RATE OF USD 1.00 /CAD 1.00 PER EACH USD 100.00/CAD 112.00 OR FRACTION THEREOF.

- (H) SPECIAL DECLARATION AND EXCESS VALUE CHARGE
THE MONTREAL CONVENTION LIMITS BRITISH AIRWAYS' LIABILITY FOR COST, DAMAGED OR DELAYED BAGGAGE TO 1,000 SPECIAL DRAWING RIGHTS (SDRS). IF THE PASSENGER HAS MORE VALUABLE BAGGAGE, THE PASSENGER CAN MAKE SPECIAL DECLARATION OF INTEREST AND PAY SUPPLEMENTARY CHARGE TO HAVE THE LIMIT OF BRITISH AIRWAYS' LIABILITY RAISED UP TO 2,000 SDRS. THIS CHARGE IS KNOWN AS THE "EXCESS VALUE CHARGE" OR "SPECIAL DECLARATION CHARGE". THIS CHARGE IS NOT AN INSURANCE PREMIUM SINCE THE AIRLINE WILL MEET CLAIMS ONLY IF LEGALLY LIABLE UNDER THE MONTREAL CONVENTION. THIS EXCESS VALUE CHARGE RELATES TO THE ADDITIONAL COSTS INVOLVED IN TRANSPORTING AND INSURING THE BAGGAGE CONCERNED OVER AND ABOVE THOSE FOR BAGGAGE VALUED AT OR BELOW THE LIABILITY LIMIT. THE TARIFF SHALL BE MADE AVAILABLE TO PASSENGERS ON REQUEST.
- (I) ASSESSMENT OF CHARGE
THE SPECIAL DECLARATION WILL BE CHARGED AT FLAT RATE OF USD 25/CAD 31/GBP 14 OR EUR 21. THE MAXIMUM VALUATION PER PASSENGER IS 2,000 SDRS.
- (J) COLLECTION
EXCESS VALUE CHARGE MUST BE COLLECTED AT THE START OF THE JOURNEY. THE PASSENGER NEEDS TO MAKE THEIR REQUEST TO THE CHECK IN AGENT BEFORE THE BAG IS CHECKED IN. THE CHECK IN AGENT WILL THEN SHOW THE PASSENGER PRINTED NOTICE DETAILING THE TERMS AND CONDITIONS AND LISTING ITEMS THAT SHOULD NOT BE INCLUDED IN CHECKED BAGGAGE. IF THE PASSENGER AGREES TO THE TERMS AND WANTS TO PROCEED, THE AGENT WILL ISSUE AN EXCESS BAGGAGE TICKET. SEPARATE EXCESS BAGGAGE TICKET MUST BE ISSUED TO COVER EACH EXCESS VALUE CHARGE. THE EXCESS BAGGAGE TICKET MUST SHOW THE AMOUNT OF DECLARED VALUE IN THE SPECIAL ITEMS BOX IN SDRS (MAXIMUM 2,000 SDRS) AND THE EXCESS VALUE CHARGE COLLECTED IN THE CHARGE BOX. THE CARRIER BOX SHOULD SPECIFY BA. THE PASSENGER WILL PAY THE CHARGE AT EITHER THE BRITISH AIRWAY CASHIER COUNTER OR TICKET DESK, DEPENDING ON STATION AND LOCAL PAYMENT COLLECTION PROCEDURES.
- (K) JOURNEYS WHICH INCLUDE SECTORS BY SURFACE TRANSPORT SECTORS TRAVELLED WHOLLY OR PARTIALLY BY SURFACE ARE NOT COVERED BY THE SPECIAL DECLARATION. COMPLETE AIR SECTORS BY BRITISH AIRWAYS MAY BE COVERED BY DECLARATION AT THE START OF THE JOURNEY. IF THIS HAS NOT BEEN DONE, SEPARATE DECLARATION MUST BE MADE AT THE POINT WHERE AIR TRAVEL IS RESUMED, IRRESPECTIVE OF WHETHER CHANGE OF CARRIER OCCURS.
- (L) JOURNEYS WHICH INCLUDE TRAVEL BY MORE THAN ONE AIRLINE
SPECIAL DECLARATION OF INTEREST SHOULD BE MADE AT THE POINT WHERE THE JOURNEY STARTS WITH EACH CARRIER. WHERE SPECIAL DECLARATION OF INTEREST HAS BEEN MADE, BAGS CANNOT BE THROUGH CHECKED ONTO ANOTHER CARRIER, EVEN IF THAT CARRIER IS FRANCHISEE ONEWORLD CARRIER. THIS IS BECAUSE EACH CARRIER WILL HAVE IT'S OWN ARRANGEMENTS FOR EXCESS VALUE.
NOTE ALL AIRLINES DO NOT HAVE THE SAME CHARGES AND LIMITS. THEIR TARIFFS SHOULD BE CONSULTED IF DETAILS ARE REQUIRED.
- (M) ROUND TRIP JOURNEYS
THE SPECIAL DECLARATION OF INTEREST MADE AT THE START OF THE OUTBOUND JOURNEY DOES NOT COVER THE RETURN UNLESS SPECIFICALLY REQUESTED BY THE PASSENGER AT THE TIME THE SPECIAL DECLARATION OF INTEREST IS MADE.
- (N) EXCLUDED ITEMS

IN ACCORDANCE WITH THE BRITISH AIRWAYS CONDITIONS OF CARRIAGE, ITEMS THAT ARE FRAGILE, PERISHABLE OR OF SPECIAL VALUE MUST NOT BE INCLUDED IN CHECKED BAGGAGE. IF ANY OF THESE ITEMS, OR ANY OTHER ITEMS FORBIDDEN UNDER THE BRITISH AIRWAYS CONDITIONS OF CARRIAGE, ARE INCLUDED IN CHECKED BAGGAGE, BRITISH AIRWAYS WILL NOT BE LIABLE FOR ANY LOSS OR DAMAGE TO THEM. THESE ITEMS INCLUDE MONEY, JEWELERY, PRECIOUS METALS, COMPUTERS, PERSONAL ELECTRONIC DEVICES, SHARE CERTIFICATE, BONDS AND OTHER VALUABLE DOCUMENTS, BUSINESS DOCUMENTS OR PASSPORTS AND OTHER IDENTIFICATION DOCUMENTS. THE PAYING OF THIS CHARGE INDICATES THAT THESE TERMS AND CONDITIONS HAVE BEEN ACCEPTED.

- (O) EXCESS WEIGHT/OVERSIZE AND/OR ADDITIONAL PIECE AND VALUE CHARGES ON REROUTINGS AND CANCELLATIONS WHEN PASSENGER IS REROUTED OR HIS CARRIAGE CANCELLED, THE PROVISIONS WHICH GOVERN WITH RESPECT TO THE PAYMENT OF ADDITIONAL FARES OR THE REFUNDING OF FARES SHALL LIKEWISE GOVERN THE PAYMENT OR THE REFUNDING OF EXCESS WEIGHT CHARGES AND THE PAYMENT OF EXCESS VALUE CHARGES, BUT NO REFUND OF VALUE CHARGES WILL BE MADE WHEN PORTION OF THE CARRIAGE HAS BEEN COMPLETED.
- (P) CHECKING OF BAGGAGE BY CARRIER
EXCEPT AS OTHERWISE PROVIDED IN THIS RULE, EACH PARTICIPATING CARRIER WILL, UPON PRESENTATION BY FARE-PAYING PASSENGER OF VALID TICKET COVERING TRANSPORTATION OVER THE LINES OF SUCH CARRIER, OR OVER THE LINES OF SUCH CARRIER AND ONE OR MORE OTHER PARTICIPATING CARRIERS, CHECK PERSONAL PROPERTY WHICH IS TENDERED BY THE PASSENGER FOR TRANSPORTATION AS BAGGAGE, WHEN TENDERED AT THE CITY OR AIRPORT OFFICE DESIGNATED BY THE CARRIER AND WITHIN THE TIMES PRESCRIBED BY SUCH CARRIER, BUT NO PARTICIPATING CARRIER WILL CHECK PROPERTY SO TENDERED:
 - (1) BEYOND THE DESTINATION, OR NOT ON THE ROUTING, DESIGNATED ON SUCH TICKET.
 - (2) BEYOND POINT OF STOPOVER.
 - (3) BEYOND POINT OF TRANSFER TO ANY OTHER CARRIER, IF THE PASSENGER HAS DECLARED VALUATION IN EXCESS OF THE AMOUNTS SPECIFIED IN PARAGRAPH (H) OF THIS RULE EXCEPT BETWEEN POINTS WHERE THROUGH INTERLINE SERVICE IS PROVIDED WITHOUT CHANGE OF AIRCRAFT BY TWO OR MORE PARTICIPATING CARRIERS.
 - (4) BEYOND POINT BEYOND WHICH THE PASSENGER HOLDS NO RESERVATION.
 - (5) BEYOND POINT AT WHICH THE PASSENGER IS TO TRANSFER TO CONNECTING FLIGHT, AND SUCH FLIGHT IS SCHEDULED TO DEPART FROM DIFFERENT AIRPORT THAN THAT AT WHICH THE PASSENGER IS SCHEDULED TO ARRIVE AT SUCH POINT.
 - (6) BEYOND POINT AT WHICH THE PASSENGER DESIRES TO RESUME POSSESSION OF SUCH PROPERTY OR ANY PORTION THEREOF, OR
 - (7) BEYOND POINT BEYOND WHICH ALL APPLICABLE CHARGES HAVE NOT BEEN PAID.
 - (8) (APPLICABLE ONLY FOR THROUGH TRANSPORTATION). TO

POINT TO WHICH THE PASSENGER HOLDS NO RESERVATION, UNLESS THE PASSENGER'S NAME OR INITIALS ARE ON THE OUTSIDE OF SUCH BAGGAGE.

- (Q) DELIVERY OF CHECKED BAGGAGE BY CARRIER
 - (1) CHECKED BAGGAGE WILL BE DELIVERED TO THE BEARER OF THE BAGGAGE CHECK UPON PAYMENT OF ALL UNPAID SUMS DUE CARRIER UNDER CONTRACT OF CARRIAGE AND UPON RETURN TO CARRIER OF THE BAGGAGE (CLAIM) TAG(S) ISSUED IN CONNECTION WITH SUCH BAGGAGE. CARRIER IS UNDER NO OBLIGATION TO ASCERTAIN THAT THE BEARER OF THE BAGGAGE CHECK AND BAGGAGE (CLAIM)

I

(Acts whose publication is obligatory)

**REGULATION (EC) No 261/2004 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 11 February 2004
establishing common rules on compensation and assistance to passengers in the event of denied
boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91
(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE
EUROPEAN UNION,

Having regard to the Treaty establishing the European
Community, and in particular Article 80(2) thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the European Economic and
Social Committee ⁽²⁾,

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article
251 of the Treaty ⁽³⁾, in the light of the joint text approved by
the Conciliation Committee on 1 December 2003,

Whereas:

- (1) Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.
- (2) Denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers.
- (3) While Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied boarding compensation system in scheduled air transport ⁽⁴⁾ created basic protection for passengers, the number of passengers denied boarding against their will remains too high, as does that affected by cancellations without prior warning and that affected by long delays.

(4) The Community should therefore raise the standards of protection set by that Regulation both to strengthen the rights of passengers and to ensure that air carriers operate under harmonised conditions in a liberalised market.

(5) Since the distinction between scheduled and non-scheduled air services is weakening, such protection should apply to passengers not only on scheduled but also on non-scheduled flights, including those forming part of package tours.

(6) The protection accorded to passengers departing from an airport located in a Member State should be extended to those leaving an airport located in a third country for one situated in a Member State, when a Community carrier operates the flight.

(7) In order to ensure the effective application of this Regulation, the obligations that it creates should rest with the operating air carrier who performs or intends to perform a flight, whether with owned aircraft, under dry or wet lease, or on any other basis.

(8) This Regulation should not restrict the rights of the operating air carrier to seek compensation from any person, including third parties, in accordance with the law applicable.

⁽¹⁾ OJ C 103 E, 30.4.2002, p. 225 and OJ C 71 E, 25.3.2003, p. 188.

⁽²⁾ OJ C 241, 7.10.2002, p. 29.

⁽³⁾ Opinion of the European Parliament of 24 October 2002 (OJ C 300 E, 11.12.2003, p. 443), Council Common Position of 18 March 2003 (OJ C 125 E, 27.5.2003, p. 63) and Position of the European Parliament of 3 July 2003. Legislative Resolution of the European Parliament of 18 December 2003 and Council Decision of 26 January 2004.

⁽⁴⁾ OJ L 36, 8.2.1991, p. 5.

(9) The number of passengers denied boarding against their will should be reduced by requiring air carriers to call for volunteers to surrender their reservations, in exchange for benefits, instead of denying passengers boarding, and by fully compensating those finally denied boarding.

- (10) Passengers denied boarding against their will should be able either to cancel their flights, with reimbursement of their tickets, or to continue them under satisfactory conditions, and should be adequately cared for while awaiting a later flight.
- (11) Volunteers should also be able to cancel their flights, with reimbursement of their tickets, or continue them under satisfactory conditions, since they face difficulties of travel similar to those experienced by passengers denied boarding against their will.
- (12) The trouble and inconvenience to passengers caused by cancellation of flights should also be reduced. This should be achieved by inducing carriers to inform passengers of cancellations before the scheduled time of departure and in addition to offer them reasonable re-routing, so that the passengers can make other arrangements. Air carriers should compensate passengers if they fail to do this, except when the cancellation occurs in extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.
- (13) Passengers whose flights are cancelled should be able either to obtain reimbursement of their tickets or to obtain re-routing under satisfactory conditions, and should be adequately cared for while awaiting a later flight.
- (14) As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.
- (15) Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.
- (16) In cases where a package tour is cancelled for reasons other than the flight being cancelled, this Regulation should not apply.
- (17) Passengers whose flights are delayed for a specified time should be adequately cared for and should be able to cancel their flights with reimbursement of their tickets or to continue them under satisfactory conditions.
- (18) Care for passengers awaiting an alternative or a delayed flight may be limited or declined if the provision of the care would itself cause further delay.
- (19) Operating air carriers should meet the special needs of persons with reduced mobility and any persons accompanying them.
- (20) Passengers should be fully informed of their rights in the event of denied boarding and of cancellation or long delay of flights, so that they can effectively exercise their rights.
- (21) Member States should lay down rules on sanctions applicable to infringements of the provisions of this Regulation and ensure that these sanctions are applied. The sanctions should be effective, proportionate and dissuasive.
- (22) Member States should ensure and supervise general compliance by their air carriers with this Regulation and designate an appropriate body to carry out such enforcement tasks. The supervision should not affect the rights of passengers and air carriers to seek legal redress from courts under procedures of national law.
- (23) The Commission should analyse the application of this Regulation and should assess in particular the opportunity of extending its scope to all passengers having a contract with a tour operator or with a Community carrier, when departing from a third country airport to an airport in a Member State.
- (24) Arrangements for greater cooperation over the use of Gibraltar airport were agreed in London on 2 December 1987 by the Kingdom of Spain and the United Kingdom in a joint declaration by the Ministers of Foreign Affairs of the two countries. Such arrangements have yet to enter into operation.
- (25) Regulation (EEC) No 295/91 should accordingly be repealed,
- HAVE ADOPTED THIS REGULATION:
- Article 1*
- Subject**
1. This Regulation establishes, under the conditions specified herein, minimum rights for passengers when:
- (a) they are denied boarding against their will;
- (b) their flight is cancelled;
- (c) their flight is delayed.

2. Application of this Regulation to Gibraltar airport is understood to be without prejudice to the respective legal positions of the Kingdom of Spain and the United Kingdom with regard to the dispute over sovereignty over the territory in which the airport is situated.

3. Application of this Regulation to Gibraltar airport shall be suspended until the arrangements in the Joint Declaration made by the Foreign Ministers of the Kingdom of Spain and the United Kingdom on 2 December 1987 enter into operation. The Governments of Spain and the United Kingdom will inform the Council of such date of entry into operation.

Article 2

Definitions

For the purposes of this Regulation:

- (a) 'air carrier' means an air transport undertaking with a valid operating licence;
- (b) 'operating air carrier' means an air carrier that performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, having a contract with that passenger;
- (c) 'Community carrier' means an air carrier with a valid operating licence granted by a Member State in accordance with the provisions of Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers ⁽¹⁾;
- (d) 'tour operator' means, with the exception of an air carrier, an organiser within the meaning of Article 2, point 2, of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours ⁽²⁾;
- (e) 'package' means those services defined in Article 2, point 1, of Directive 90/314/EEC;
- (f) 'ticket' means a valid document giving entitlement to transport, or something equivalent in paperless form, including electronic form, issued or authorised by the air carrier or its authorised agent;
- (g) 'reservation' means the fact that the passenger has a ticket, or other proof, which indicates that the reservation has been accepted and registered by the air carrier or tour operator;
- (h) 'final destination' means the destination on the ticket presented at the check-in counter or, in the case of directly connecting flights, the destination of the last flight; alternative connecting flights available shall not be taken into account if the original planned arrival time is respected;
- (i) 'person with reduced mobility' means any person whose mobility is reduced when using transport because of any physical disability (sensory or locomotory, permanent or temporary), intellectual impairment, age or any other cause

of disability, and whose situation needs special attention and adaptation to the person's needs of the services made available to all passengers;

- (j) 'denied boarding' means a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation;
- (k) 'volunteer' means a person who has presented himself for boarding under the conditions laid down in Article 3(2) and responds positively to the air carrier's call for passengers prepared to surrender their reservation in exchange for benefits.
- (l) 'cancellation' means the non-operation of a flight which was previously planned and on which at least one place was reserved.

Article 3

Scope

1. This Regulation shall apply:
 - (a) to passengers departing from an airport located in the territory of a Member State to which the Treaty applies;
 - (b) to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier.
2. Paragraph 1 shall apply on the condition that passengers:
 - (a) have a confirmed reservation on the flight concerned and, except in the case of cancellation referred to in Article 5, present themselves for check-in,
 - as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorised travel agent,or, if no time is indicated,
 - not later than 45 minutes before the published departure time; or
 - (b) have been transferred by an air carrier or tour operator from the flight for which they held a reservation to another flight, irrespective of the reason.
3. This Regulation shall not apply to passengers travelling free of charge or at a reduced fare not available directly or indirectly to the public. However, it shall apply to passengers having tickets issued under a frequent flyer programme or other commercial programme by an air carrier or tour operator.

⁽¹⁾ OJ L 240, 24.8.1992, p. 1.

⁽²⁾ OJ L 158, 23.6.1990, p. 59.

4. This Regulation shall only apply to passengers transported by motorised fixed wing aircraft.

5. This Regulation shall apply to any operating air carrier providing transport to passengers covered by paragraphs 1 and 2. Where an operating air carrier which has no contract with the passenger performs obligations under this Regulation, it shall be regarded as doing so on behalf of the person having a contract with that passenger.

6. This Regulation shall not affect the rights of passengers under Directive 90/314/EEC. This Regulation shall not apply in cases where a package tour is cancelled for reasons other than cancellation of the flight.

Article 4

Denied boarding

1. When an operating air carrier reasonably expects to deny boarding on a flight, it shall first call for volunteers to surrender their reservations in exchange for benefits under conditions to be agreed between the passenger concerned and the operating air carrier. Volunteers shall be assisted in accordance with Article 8, such assistance being additional to the benefits mentioned in this paragraph.

2. If an insufficient number of volunteers comes forward to allow the remaining passengers with reservations to board the flight, the operating air carrier may then deny boarding to passengers against their will.

3. If boarding is denied to passengers against their will, the operating air carrier shall immediately compensate them in accordance with Article 7 and assist them in accordance with Articles 8 and 9.

Article 5

Cancellation

1. In case of cancellation of a flight, the passengers concerned shall:

- (a) be offered assistance by the operating air carrier in accordance with Article 8; and
- (b) be offered assistance by the operating air carrier in accordance with Article 9(1)(a) and 9(2), as well as, in event of re-routing when the reasonably expected time of departure of the new flight is at least the day after the departure as it was planned for the cancelled flight, the assistance specified in Article 9(1)(b) and 9(1)(c); and
- (c) have the right to compensation by the operating air carrier in accordance with Article 7, unless:
 - (i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or

- (ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or

- (iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

2. When passengers are informed of the cancellation, an explanation shall be given concerning possible alternative transport.

3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

4. The burden of proof concerning the questions as to whether and when the passenger has been informed of the cancellation of the flight shall rest with the operating air carrier.

Article 6

Delay

1. When an operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure:

- (a) for two hours or more in the case of flights of 1 500 kilometres or less; or
- (b) for three hours or more in the case of all intra-Community flights of more than 1 500 kilometres and of all other flights between 1 500 and 3 500 kilometres; or
- (c) for four hours or more in the case of all flights not falling under (a) or (b),

passengers shall be offered by the operating air carrier:

- (i) the assistance specified in Article 9(1)(a) and 9(2); and
- (ii) when the reasonably expected time of departure is at least the day after the time of departure previously announced, the assistance specified in Article 9(1)(b) and 9(1)(c); and
- (iii) when the delay is at least five hours, the assistance specified in Article 8(1)(a).

2. In any event, the assistance shall be offered within the time limits set out above with respect to each distance bracket.

Article 7

Right to compensation

1. Where reference is made to this Article, passengers shall receive compensation amounting to:

- (a) EUR 250 for all flights of 1 500 kilometres or less;
- (b) EUR 400 for all intra-Community flights of more than 1 500 kilometres, and for all other flights between 1 500 and 3 500 kilometres;
- (c) EUR 600 for all flights not falling under (a) or (b).

In determining the distance, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger's arrival after the scheduled time.

2. When passengers are offered re-routing to their final destination on an alternative flight pursuant to Article 8, the arrival time of which does not exceed the scheduled arrival time of the flight originally booked

- (a) by two hours, in respect of all flights of 1 500 kilometres or less; or
- (b) by three hours, in respect of all intra-Community flights of more than 1 500 kilometres and for all other flights between 1 500 and 3 500 kilometres; or
- (c) by four hours, in respect of all flights not falling under (a) or (b),

the operating air carrier may reduce the compensation provided for in paragraph 1 by 50 %.

3. The compensation referred to in paragraph 1 shall be paid in cash, by electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.

4. The distances given in paragraphs 1 and 2 shall be measured by the great circle route method.

Article 8

Right to reimbursement or re-routing

1. Where reference is made to this Article, passengers shall be offered the choice between:

- (a) — reimbursement within seven days, by the means provided for in Article 7(3), of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant,
 - a return flight to the first point of departure, at the earliest opportunity;
- (b) re-routing, under comparable transport conditions, to their final destination at the earliest opportunity; or

(c) re-routing, under comparable transport conditions, to their final destination at a later date at the passenger's convenience, subject to availability of seats.

2. Paragraph 1(a) shall also apply to passengers whose flights form part of a package, except for the right to reimbursement where such right arises under Directive 90/314/EEC.

3. When, in the case where a town, city or region is served by several airports, an operating air carrier offers a passenger a flight to an airport alternative to that for which the booking was made, the operating air carrier shall bear the cost of transferring the passenger from that alternative airport either to that for which the booking was made, or to another close-by destination agreed with the passenger.

Article 9

Right to care

1. Where reference is made to this Article, passengers shall be offered free of charge:

- (a) meals and refreshments in a reasonable relation to the waiting time;
- (b) hotel accommodation in cases
 - where a stay of one or more nights becomes necessary, or
 - where a stay additional to that intended by the passenger becomes necessary;
- (c) transport between the airport and place of accommodation (hotel or other).

2. In addition, passengers shall be offered free of charge two telephone calls, telex or fax messages, or e-mails.

3. In applying this Article, the operating air carrier shall pay particular attention to the needs of persons with reduced mobility and any persons accompanying them, as well as to the needs of unaccompanied children.

Article 10

Upgrading and downgrading

1. If an operating air carrier places a passenger in a class higher than that for which the ticket was purchased, it may not request any supplementary payment.

2. If an operating air carrier places a passenger in a class lower than that for which the ticket was purchased, it shall within seven days, by the means provided for in Article 7(3), reimburse

- (a) 30 % of the price of the ticket for all flights of 1 500 kilometres or less, or

- (b) 50 % of the price of the ticket for all intra-Community flights of more than 1 500 kilometres, except flights between the European territory of the Member States and the French overseas departments, and for all other flights between 1 500 and 3 500 kilometres, or
- (c) 75 % of the price of the ticket for all flights not falling under (a) or (b), including flights between the European territory of the Member States and the French overseas departments.

Article 11

Persons with reduced mobility or special needs

1. Operating air carriers shall give priority to carrying persons with reduced mobility and any persons or certified service dogs accompanying them, as well as unaccompanied children.
2. In cases of denied boarding, cancellation and delays of any length, persons with reduced mobility and any persons accompanying them, as well as unaccompanied children, shall have the right to care in accordance with Article 9 as soon as possible.

Article 12

Further compensation

1. This Regulation shall apply without prejudice to a passenger's rights to further compensation. The compensation granted under this Regulation may be deducted from such compensation.
2. Without prejudice to relevant principles and rules of national law, including case-law, paragraph 1 shall not apply to passengers who have voluntarily surrendered a reservation under Article 4(1).

Article 13

Right of redress

In cases where an operating air carrier pays compensation or meets the other obligations incumbent on it under this Regulation, no provision of this Regulation may be interpreted as restricting its right to seek compensation from any person, including third parties, in accordance with the law applicable. In particular, this Regulation shall in no way restrict the operating air carrier's right to seek reimbursement from a tour operator or another person with whom the operating air carrier has a contract. Similarly, no provision of this Regulation may be interpreted as restricting the right of a tour operator or a third party, other than a passenger, with whom an operating air carrier has a contract, to seek reimbursement or compensation from the operating air carrier in accordance with applicable relevant laws.

Article 14

Obligation to inform passengers of their rights

1. The operating air carrier shall ensure that at check-in a clearly legible notice containing the following text is displayed in a manner clearly visible to passengers: 'If you are denied boarding or if your flight is cancelled or delayed for at least two hours, ask at the check-in counter or boarding gate for the text stating your rights, particularly with regard to compensation and assistance'.
2. An operating air carrier denying boarding or cancelling a flight shall provide each passenger affected with a written notice setting out the rules for compensation and assistance in line with this Regulation. It shall also provide each passenger affected by a delay of at least two hours with an equivalent notice. The contact details of the national designated body referred to in Article 16 shall also be given to the passenger in written form.
3. In respect of blind and visually impaired persons, the provisions of this Article shall be applied using appropriate alternative means.

Article 15

Exclusion of waiver

1. Obligations vis-à-vis passengers pursuant to this Regulation may not be limited or waived, notably by a derogation or restrictive clause in the contract of carriage.
2. If, nevertheless, such a derogation or restrictive clause is applied in respect of a passenger, or if the passenger is not correctly informed of his rights and for that reason has accepted compensation which is inferior to that provided for in this Regulation, the passenger shall still be entitled to take the necessary proceedings before the competent courts or bodies in order to obtain additional compensation.

Article 16

Infringements

1. Each Member State shall designate a body responsible for the enforcement of this Regulation as regards flights from airports situated on its territory and flights from a third country to such airports. Where appropriate, this body shall take the measures necessary to ensure that the rights of passengers are respected. The Member States shall inform the Commission of the body that has been designated in accordance with this paragraph.

2. Without prejudice to Article 12, each passenger may complain to any body designated under paragraph 1, or to any other competent body designated by a Member State, about an alleged infringement of this Regulation at any airport situated on the territory of a Member State or concerning any flight from a third country to an airport situated on that territory.

3. The sanctions laid down by Member States for infringements of this Regulation shall be effective, proportionate and dissuasive.

Article 17

Report

The Commission shall report to the European Parliament and the Council by 1 January 2007 on the operation and the results of this Regulation, in particular regarding:

- the incidence of denied boarding and of cancellation of flights,
- the possible extension of the scope of this Regulation to passengers having a contract with a Community carrier or holding a flight reservation which forms part of a ‘package

tour’ to which Directive 90/314/EEC applies and who depart from a third-country airport to an airport in a Member State, on flights not operated by Community air carriers,

- the possible revision of the amounts of compensation referred to in Article 7(1).

The report shall be accompanied where necessary by legislative proposals.

Article 18

Repeal

Regulation (EEC) No 295/91 shall be repealed.

Article 19

Entry into force

This Regulation shall enter into force on 17 February 2005.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 11 February 2004.

For the European Parliament

The President

P. COX

For the Council

The President

M. McDOWELL

NTA(A) No. 313 T.C.A.B. No. 516

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RULE

SECTION I - GENERAL RULES

C87

†[C]PART II DENIED BOARDING COMPENSATION (Applicable to flights or portions to flight originating in Canada)

(A) APPLICABILITY

The following rules shall apply:

- (1) In respect of flights departing from an airport in the European Union (EU) and flights departing from an airport in a third country bound to an airport in the EU unless passenger received benefits or compensation and were given assistance in that third country;
- (2) On condition that passengers have a confirmed reservation on the flight concerned and presents himself/herself for check-in at the time indicated in advance and in writing or electronically; or; if no time is indicated; not later than 60 minutes before the published departure time;
- (3) Only to the passenger travelling with a valid ticket including tickets issued under a frequent flyer or other commercial programme with confirmed reservations and
 - (a) Presents himself at the appropriate place and has observed published minimum check-in times
 - (b) Has complied with Air France's ticketing and reconfirmation procedures
 - (c) Is acceptable for transportation under the carrier's tariff and the flight for which the passenger holds confirmed reservations is unable to accommodate the passenger and departs without him/her
- (4) Where AF is the operating carrier of the flight
EXCEPTIONS: The following passengers will not be entitled to compensations;
 - (a) Passengers travelling to EU who have received benefits or compensation in a third country.
 - (b) Passengers travelling between two airports outside the EU unless the sector is part of a flight (same flight number) that originated in the EU.
 - (c) Passengers without confirmed reservation.
 - (d) Passengers who have not presented themselves for check-in on time
 - (e) Passengers on free or reduced fares not directly or indirectly available to the public, e.g. ID and AD tickets
- (5) The passenger is accommodated on the flight for which he/she hold's confirmed reservations, but is seated in a compartment of the aircraft other than that reserved, provided that when the passenger is accommodated in a class of service for which a lower fare is charged, the passenger will be entitled to the appropriate refund.

(B) PASSENGER RIGHTS

(1) Denied Boarding

Volunteers

Volunteers have the right of mutually agreed benefits plus the right to choose between reimbursement and rerouting with the following options:

- (a) Reimbursement within 7 days of coupons not used or
- (b) Rerouting to final destination at the earliest opportunity under comparable transport conditions or
- (c) Rerouting to final destination at a later date according to passenger's convenience but subject to availability of space. Volunteers are not entitled to care, such as phone calls, foods, accommodation etc.

(2) Involuntary Denied Boarding

In case of Involuntary Denied Boarding the passengers are entitled to the following:

- (a) Right to compensation according to paragraph (C) and
- (b) Right to choose between reimbursement/rerouting with the same options as mentioned under (A)(1) above and
- (c) Right to care including
 - Meals and refreshments, reasonably related to the waiting time
 - 2 telephone calls or telex, e-mails, fax
 - if necessary, hotel accommodation plus transfer between airport and hotel

(3) Amount of Compensation Payable

- (a) The amount of compensation depends on the distance of the scheduled flight or the alternative flight proposed.

Compensation Amounts in EUR/CAD:

Flight KM between And	Amount in	
	EUR	CAD
0-1500	250	400
1500-3500	400	645
Intra EU flights of more than 1500	400	645
greater than 3500	600	965

(Continued on next page)

For unexplained abbreviations, reference marks and symbols see Pages 21 through 29.

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RULE

SECTION I - GENERAL RULES

C87

†(C)PART II DENIED BOARDING COMPENSATION (Continued)

(B) PASSENGER RIGHTS (Continued)

(3) Amount of Compensation Payable (Continued)

(b) If an alternative flight is offered and the new scheduled arrival time does not exceed 2 hours versus the originally planned, the compensation amounts shown under (1) above can be reduced by 50 percent:

Flight KM between And	Amount in	
	EUR	CAD
0-1500	125	200
1500-3500	200	320
Intra EU flights of more than 1500	200	320
greater than 3500	300	485

(c) In lieu of cash payment of the amount mentioned in (B)(1) and (B)(2) the passenger may choose compensation in the form of a voucher valid for further travel on the services of Air France, then the compensation amount will be 150 percent of the amount mentioned in (B)(1) and (B)(2). Following conditions shall apply to such vouchers:

- validity is 1 year from the date of issue
- if, after one year the voucher has not been used, it will be refunded but only at the cash values as applicable in (B)(1) and (B)(2).
- lost vouchers will not be replaced
- a ticket may only be issued in exchange for the voucher in the same name as that on the voucher
- if the value of a desired ticket exceeds the value of the voucher, the passenger shall pay the applicable difference
- if the value of the voucher exceeds the value of a desired ticket, the difference will not be refunded.

(4) Cancellation of Flights

(a) In case of cancellation of a flight the passengers will be entitled to the following:

- (1) Right to compensation according to paragraph (C) and
- (2) Right to choose between reimbursement/rerouting with the same options as mentioned under (A)(1) above and
- (3) Right to care including
 - Meals and refreshments, reasonably related to the waiting time
 - 2 telephone calls or telex, e-mails, fax
 - If necessary, hotel accommodation plus transfer between airport and hotel

(b) Amount of Compensation Payable

(1) The amount of compensation depends on the distance of the scheduled flight or the alternative flight proposed.

Flight KM between And	Compensation Amounts in EUR/CAD:	
	EUR	CAD
0-1500	250	400
1500-3500	400	645
Intra EU flights of more than 1500	400	645
greater than 3500	600	965

(2) If an alternative flight is offered and the new scheduled arrival time does not exceed 2 hours versus the originally planned, the compensation amounts shown under (1) above can be reduced by 50 percent:

Flight KM between And	Amount in	
	EUR	CAD
0-1500	125	200
1500-3500	200	320
Intra EU flights of more than 1500	200	320
greater than 3500	300	485

(Continued on next page)

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RULE

SECTION I - GENERAL RULES

C87

+IC|PART II DENIED BOARDING COMPENSATION (Continued)

(B) PASSENGER RIGHTS (Continued)

(4) Cancellation of Flights (Continued)

(b) Amount of Compensation Payable (Continued)

- (3) In lieu of cash payment of the amount mentioned in (B)(1) and (B)(2) the passenger may choose compensation in the form of a voucher valid for further travel on the services of Air France, then the compensation amount will be 150 percent of the amount mentioned in (B)(1) and (B)(2). Following conditions shall apply to such vouchers:
- validity is 1 year from the date of issue
 - if, after one year the voucher has not been used, it will be refunded but only at the cash values as applicable in (B)(1) and (B)(2).
 - lost vouchers will not be replaced
 - a ticket may only be issued in exchange for the voucher in the same name as that on the voucher
 - if the value of a desired ticket exceeds the value of the voucher, the passenger shall pay the applicable difference
 - if the value of the voucher exceeds the value of a desired ticket, the difference will not be refunded.

(C) LONG DELAY

This rule is only applicable when a flight is delayed at departure, not when a flight leaves on time and is subsequently delayed. A long delay is considered a flight that is delayed according to the following parameters:

- | | |
|--|-------------------|
| Trips less than 1,500 KM | More than 2 hours |
| Trips between 1,500-3,500 KM and all
intra EU flights in excess of 1,500 KM | More than 3 hours |
| Trips more than 3,500 KM (non intra EU) | More than 4 hours |

In this case the passengers are entitled to the following

- (1) Right to care provided this does not result in a further delay of the flight including
 - Meals and refreshments, reasonably related to the waiting time
 - 2 telephone calls or telex, e-mails, fax
 - If necessary, hotel accommodation plus transfer between airport and hotel; in case the flight is delayed until the next day hotel accommodation and transfer are mandatory.
- (2) If flight is delayed more than 5 hours right to be reimbursed within 7 days:
 - (a) Outbound passenger: Cost of ticket
 - (b) Inbound passenger: Cost of Non-used coupon
 - (c) Transit Passenger: Cost of Non-used coupon, if the flight no longer serves any purpose; also cost of the tickets for parts of the journey already made and if relevant return flight to the first point of departure
 - (d) For package tour passengers the value of reimbursement will have to be assigned to unused flight coupon(s)
- (3) Downgrading of Passengers
In case of involuntary downgrading to a lower class of service passengers will be entitled to the following reimbursement within 7 days
 - (a) 30 percent of the ticket price for trips less than 1,500 KM
 - (b) 50 percent of the ticket price for trips between 1,500 and 3,500 KM and all intra EU flights in excess of 1,500 KM
 - (c) 75 percent of the ticket price for all other trips more than 3,500 KM

NOTES: In all cases the relevant distance is understood to be the sector on which the passenger is downgraded. The ticket price is understood to be the one-way coupon value for the sector on which the passenger is downgraded.

(Continued on next page)

For unexplained abbreviations, reference marks and symbols see Pages 21 through 29.

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RULE	SECTION I - GENERAL RULES
87	<p>PART II DENIED BOARDING COMPENSATION (Continued)</p> <p>(D) BOARDING PRIORITY</p> <p>(1) Crew Members positioning in preparation for a flight and ground personnel needed for emergency repairs on an aircraft grounded at a station.</p> <p>(2) Transit passengers continuing on the same flight</p> <p>(3) Unaccompanied children (under +[15 years of age)</p> <p>(4) Stretcher and wheelchair cases</p> <p>(5) Hardship cases as determined by the manager on duty</p> <p>(6) Transit passengers continuing on the same flight</p> <p>(7) Connecting passengers</p> <p>(8) Passengers holding confirmed reservations will be boarded before any passengers not holding confirmed reservations or any who are not entitled to confirmed reservations.</p> <p>(9) Passengers holding confirmed reservations and a valid ticket for the flight</p> <p>(10) Local passengers in the order their boarding card has been issued excluding passengers who volunteered for denied boarding.</p> <p>(11) Passengers having volunteered for denied boarding compensation in the order they volunteered.</p> <p>(E) DEFINITIONS</p> <p>For the purpose of this rule, except as otherwise specifically provided herein: the following definitions shall apply:</p> <p>Airport means the airport at which the direct or connecting flight, on which the passenger holds confirmed reserved space, is planned to arrive or some other airport serving the same metropolitan area, provided that transportation to the other airport is accepted (i.e. used) by the passenger.</p> <p>Alternate Transportation is air transportation provided by a carrier or other transportation used by the passenger which, at the time the arrangement are made, will provided for arrival at the passenger's destinations or next point of stopover, within four hours of his originally scheduled arrival time.</p> <p>Carrier means an carrier, except a helicopter operator, holding a commercial air service licence authorizing the transportation of persons.</p> <p>Comparable Air Transportation is provided by air carrier to the passengers at no extra cost.</p> <p>Confirmed Space (reservation) is that which applies to a specific AF flight, date and fare type as requested by the passenger and which is verified in AF reservations system and is so noted on the ticket.</p> <p>Cancellation means the non-operation of a flight which was previously planned and on which at least one place was reserved.</p> <p>Ticket means a valid document giving entitlement to transport, or something equivalent in paperless form, including electronic form, issued or authorized by the air carrier or its authorized agents.</p> <p>Stopover is a deliberate interruption of a journey requested by the passenger which is scheduled to exceed four hours at a place between the points of origin and destination.</p> <p>Oversold is that condition which is the result of there being more passengers with confirmed reservations and tickets that there are seats available on a flight.</p> <p>Volunteer means a person who responds to carrier's request for volunteers and who willingly accepts carrier's offer or compensation, in any amount, in exchange for relinquishing his confirmed reserved space. Any other passenger denied boarding is considered, for the purposes of this rule, to have been denied boarding involuntarily, even if he accepts denied boarding compensation.</p>

For unexplained abbreviations, reference marks and symbols see IPGT1-1, C.A.B. NO. 581, NTA(A) NO. 373.

ISSUED: May 5, 2010

EFFECTIVE: June 19, 2010

(Except as Noted)

+ - Effective May 6, 2010 and issued on not less than one (1) day's notice under NTA(A) Special Permission No. 56067.

CREDIT FOR FUTURE TRANSPORTATION ON LH IN LIEU OF MONETARY COMPENSATION. THE AMOUNT OF THE TRANSPORTATION CREDIT OFFERED SHALL BE EQUAL TO OR GREATER THAN THE MONETARY COMPENSATION DUE THE PASSENGER. THE CREDIT VOUCHER SHALL BE VALID FOR TRAVEL ON LH ONLY WITHIN 365 DAYS FROM THE DATE OF ISSUE, AND SHALL BE NON-REFUNDABLE AND NON-TRANSFERABLE.

(E) METHOD OF PAYMENT

THE AIRLINE WILL GIVE TO EACH PASSENGER, WHO QUALIFIES FOR DENIED BOARDING COMPENSATION, A PAYMENT BY CHECK, OR CASH, OR MCO, OR VOUCHER FOR THE AMOUNT SPECIFIED, ON THE DAY AND PLACE THE INVOLUNTARY DENIED BOARDING OCCURS. HOWEVER, IF THE AIRLINE ARRANGES ALTERNATE TRANSPORTATION FOR THE PASSENGER'S CONVENIENCE THAT DEPARTS BEFORE THE PAYMENT CAN BE MADE, THE PAYMENT WILL BE SENT TO THE PASSENGER WITHIN 24 HOURS. THE AIR CARRIER MAY OFFER FREE TICKETS IN PLACE OF THE CASH PAYMENT. THE PASSENGER, MAY, HOWEVER, INSIST ON THE CASH PAYMENT, OR REFUSE ALL COMPENSATION AND BRING PRIVATE LEGAL ACTION.

(F) PASSENGER'S OPTIONS

ACCEPTANCE OF THE COMPENSATION (BY ENDORSING THE CHECK OR DRAFT WITHIN 30 DAYS) RELIEVES THE CARRIER FROM ANY FURTHER LIABILITY TO THE PASSENGER CAUSED BY ITS FAILURE TO HONOR THE CONFIRMED RESERVATIONS. HOWEVER, THE PASSENGER MAY DECLINE THE PAYMENT AND SEEK TO RECOVER DAMAGES IN A COURT OF LAW OR IN SOME OTHER MANNER.

DENIED BOARDING COMPENSATION
APPLICABLE ONLY TO FLIGHTS OR PORTIONS OF FLIGHTS
ORIGINATING AND/OR TERMINATING IN CANADA

(A) APPLICABILITY

THE FOLLOWING RULES SHALL APPLY:

- (1) IN RESPECT OF FLIGHTS DEPARTING FROM AN AIRPORT IN THE EUROPEAN UNION (EU) AND FLIGHTS DEPARTING FROM AN AIRPORT IN A THIRD COUNTRY BOUND TO AN AIRPORT IN THE EU UNLESS PASSENGER RECEIVED BENEFITS OR COMPENSATION AND WERE GIVEN ASSISTANCE IN THAT THIRD COUNTRY;
- (2) ON CONDITION THAT PASSENGERS HAVE A CONFIRMED RESERVATION ON THE FLIGHT CONCERNED AND PRESENTS HIMSELF/HERSELF FOR CHECK-IN AT THE TIME INDICATED IN ADVANCE AND IN WRITING OR ELECTRONICALLY; OR; IF NO TIME IS INDICATED; NOT LATER THAN 60 MINUTES BEFORE THE PUBLISHED DEPARTURE TIME;
- (3) ONLY TO THE PASSENGER TRAVELING WITH A VALID TICKET INCLUDING TICKETS ISSUED UNDER A FREQUENT FLYER OR OTHER COMMERCIAL PROGRAMME WITH CONFIRMED

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RESERVATIONS AND

- (A) PRESENTS HIMSELF AT THE APPROPRIATE PLACE AND HAS OBSERVED PUBLISHED MINIMUM CHECK-IN TIMES
- (B) HAS COMPLIED WITH LUFTHANSA'S TICKETING AND RECONFIRMATION PROCEDURES
- (C) IS ACCEPTABLE FOR TRANSPORTATION UNDER THE CARRIER'S TARIFF AND THE FLIGHT FOR WHICH THE PASSENGER HOLDS CONFIRMED RESERVATIONS IS UNABLE TO ACCOMMODATE THE PASSENGER AND DEPARTS WITHOUT HIM/HER

- (4) WHERE LH IS THE OPERATING CARRIER OF THE FLIGHT EXCEPTIONS:

THE FOLLOWING PASSENGERS WILL NOT BE ENTITLED TO COMPENSATION:

- (A) PASSENGERS TRAVELLING TO EU WHO HAVE RECEIVED BENEFITS OR COMPENSATION IN A THIRD COUNTRY
- (B) PASSENGERS TRAVELLING BETWEEN TWO AIRPORTS OUTSIDE THE EU UNLESS THE SECTOR IS PART OF A FLIGHT (SAME FLIGHT NUMBER) THAT ORIGINATED IN THE EU
- (C) PASSENGERS WITHOUT CONFIRMED RESERVATIONS
- (D) PASSENGERS WHO HAVE NOT PRESENTED THEMSELVES FOR CHECK-IN ON TIME
- (E) PASSENGERS ON FREE OR REDUCED FARES NOT DIRECTLY OR INDIRECTLY AVAILABLE TO THE PUBLIC, E.G. ID AND AD TICKETS

- (5) THE PASSENGER IS ACCOMMODATED ON THE FLIGHT FOR WHICH HE/SHE HOLD'S CONFIRMED RESERVATIONS, BUT IS SEATED IN A COMPARTMENT OF THE AIRCRAFT OTHER THAN THAT RESERVED, PROVIDED THAT WHEN THE PASSENGER IS ACCOMMODATED IN A CLASS OF SERVICE FOR WHICH A LOWER FARE IS CHARGED, THE PASSENGER WILL BE ENTITLED TO THE APPROPRIATE REFUND.

- (B) PASSENGER RIGHTS

- (1) DENIED BOARDING

VOLUNTEERS

VOLUNTEERS HAVE THE RIGHT OF MUTUALLY AGREED BENEFITS PLUS THE RIGHT TO CHOOSE BETWEEN REIMBURSEMENT AND REROUTING WITH THE FOLLOWING OPTIONS:

- (A) REIMBURSEMENT WITHIN 7 DAYS OF COUPONS NOT USED OR
- (B) REROUTING TO FINAL DESTINATION AT THE EARLIEST OPPORTUNITY UNDER COMPARABLE TRANSPORT CONDITIONS OR
- (C) REROUTING TO FINAL DESTINATION AT A LATER DATE ACCORDING TO PASSENGER'S CONVENIENCE BUT SUBJECT TO AVAILABILITY OF SPACE. VOLUNTEERS ARE NOT ENTITLED TO CARE, SUCH AS PHONE CALLS, FOOD, ACCOMMODATION ETC.

- (2) INVOLUNTARY DENIED BOARDING

IN CASE OF INVOLUNTARY DENIED BOARDING THE PASSENGERS ARE ENTITLED TO THE FOLLOWING:

- (A) RIGHT TO COMPENSATION ACCORDING TO PARAGRAOH (C) AND
- (B) RIGHT TO CHOOSE BETWEEN REIMBURSEMENT/REROUTING WITH THE SAME OPTIONS AS MENTIONED UNDER (A) (1) ABOVE AND
- (C) RIGHT TO CARE INCLUDING
- MEALS AND REFRESHMENTS, REASONABLY RELATED TO THE WAITING TIME
 - 2 TELEPHONE CALLS OR TELEX, E-MAILS, FAX
 - IF NECESSARY, HOTEL ACCOMODATION PLUS TRANSFER BETWEEN AIRPORT AND HOTEL
- (3) AMOUNT OF COMPENSATION PAYABLE
- (A) THE AMOUNT OF COMPENSATION DEPENDS ON THE DISTANCE OF THE SCHEDULED FLIGHT OR THE ALTERNATIVE FLIGHT PROPOSED.
- COMPENSATION AMOUNTS IN EUR/CAD:
- | FLIGHT KM BETWEEN AND | AMOUNT IN | |
|-----------------------|-----------|-----|
| EUR | CAD | |
| 0-1500 | 250 | 400 |
| 1500 - 3500 | 400 | 645 |
| INTRA EU FLIGHTS OF | | |
| MORE THAN 1500 | 400 | 645 |
| GREATER THAN 3500 | 600 | 965 |
- (B) IF AN ALTERNATIVE FLIGHT IS OFFERED AND THE NEW SCHEDULED ARRIVAL TIME DOES NOT EXCEED 2 HOURS VERSUS THE ORIGINALLY PLANNED, THE COMPENSATION AMOUNTS SHOWN UNDER (1) ABOVE CAN BE REDUCED BY 50 PERCENT:
- | FLIGHT KM BETWEEN AND | AMOUNT IN | |
|-----------------------|-----------|-----|
| EUR | CAD | |
| 0-1500 | 125 | 200 |
| 1500-3500 | 200 | 320 |
| INTRA EU FLIGHTS OF | | |
| MORE THAN 1500 | 200 | 320 |
| GREATER THAN 3500 | 300 | 485 |
- (C) IN LIEU OF CASH PAYMENT OF THE AMOUNTS MENTIONED IN (B) (1) AND (B) (2) THE PASSENGER MAY CHOOSE COMPENSATION IN THE FORM OF A VOUCHER VALID FOR FURTHER TRAVEL ON THE SERVICES OF LUFTHANSA, THEN THE COMPENSATION AMOUNT WILL BE 150 PERCENT OF THE AMOUNT MENTIONED IN (B) (1) AND (B) (2). FOLLOWING CONDITIONS SHALL APPLY TO SUCH VOUCHERS:
- VALIDITY IS 1 YEAR FROM THE DATE OF ISSUE
 - IF, AFTER ONE YEAR THE VOUCHER HAS NOT BEEN USED, IT WILL BE REFUNDED BUT ONLY AT THE CASH VALUES AS APPLICABLE IN (B) (1) AND (B) (2).
 - LOST VOUCHERS WILL NOT BE REPLACED
 - A TICKET MAY ONLY BE ISSUED IN EXCHANGE FOR THE VOUCHER IN THE SAME NAME AS THAT ON THE VOUCHER
 - IF THE VALUE OF A DESIRED TICKET EXCEEDS THE VALUE OF THE VOUCHER, THE PASSENGER SHALL PAY THE APPLICABLE DIFFERENCE
 - IF THE VALUE OF THE VOUCHER EXCEEDS THE VALUE OF A DESIRED TICKET, THE DIFFERENCE WILL NOT

- BE REFUNDED.
- (4) CANCELLATION OF FLIGHTS
- (A) IN CASE OF CANCELLATION OF A FLIGHT THE PASSENGERS WILL BE ENTITLED TO THE FOLLOWING:
- (1) RIGHT TO COMPENSATION ACCORDING TO PARAGRAPH (C) AND
- (2) RIGHT TO CHOOSE BETWEEN REIMBURSEMENT/REROUTING WITH THE SAME OPTIONS AS MENTIONED UNDER (A)(1) ABOVE AND
- (3) RIGHT TO CARE INCLUDING
- MEALS AND REFRESHMENTS, REASONABLY RELATED TO THE WAITING TIME
 - 2 TELEPHONE CALLS OR TELEX, E-MAILS, FAX
 - IF NECESSARY, HOTEL ACCOMODATION PLUS TRANSFER BETWEEN AIRPORT AND HOTEL
- (B) AMOUNT OF COMPENSATION PAYABLE
- (1) THE AMOUNT OF COMPENSATION DEPENDS ON THE DISTANCE OF THE SCHEDULED FLIGHT OR THE ALTERNATIVE FLIGHT PROPOSED.
- COMPENSATION AMOUNTS IN EUR/CAD:
- | FLIGHT KM BETWEEN AND | AMOUNT IN | |
|------------------------------------|-----------|-----|
| | EUR | CAD |
| 0-1500 | 250 | 400 |
| 1500 - 3500 | 400 | 645 |
| INTRA EU FLIGHTS OF MORE THAN 1500 | 400 | 645 |
| GREATER THAN 3500 | 600 | 965 |
- (2) IF AN ALTERNATIVE FLIGHT IS OFFERED AND THE NEW SCHEDULED ARRIVAL TIME DOES NOT EXCEED 2 HOURS VERSUS THE ORIGINALLY PLANNED, THE COMPENSATION AMOUNTS SHOWN UNDER (1) ABOVE CAN BE REDUCED BY 50 PERCENT:
- | FLIGHT KM BETWEEN AND | AMOUNT IN | |
|------------------------------------|-----------|-----|
| | EUR | CAD |
| 0-1500 | 125 | 200 |
| 1500-3500 | 200 | 320 |
| INTRA EU FLIGHTS OF MORE THAN 1500 | 200 | 320 |
| GREATER THAN 3500 | 300 | 485 |
- (3) IN LIEU OF CASH PAYMENT OF THE AMOUNTS MENTIONED IN (B)(1) AND (B)(2) THE PASSENGER MAY CHOOSE COMPENSATION IN THE FORM OF A VOUCHER VALID FOR FURTHER TRAVEL ON THE SERVICES OF LUFTHANSA, THEN THE COMPENSATION AMOUNT WILL BE 150 PERCENT OF THE AMOUNT MENTIONED IN (B)(1) AND (B)(2). FOLLOWING CONDITIONS SHALL APPLY TO SUCH VOUCHERS:
- VALIDITY IS 1 YEAR FROM THE DATE OF ISSUE
 - IF, AFTER ONE YEAR THE VOUCHER HAS NOT BEEN USED, IT WILL BE REFUNDED BUT ONLY AT THE CASH VALUES AS APPLICABLE IN (B)(1) AND (B)(2).
 - LOST VOUCHERS WILL NOT BE REPLACED
 - A TICKET MAY ONLY BE ISSUED IN EXCHANGE FOR THE VOUCHER IN THE SAME NAME AS THAT ON THE VOUCHER
 - IF THE VALUE OF A DESIRED TICKET EXCEEDS THE VALUE OF THE VOUCHER, THE PASSENGER SHALL PAY

THE APPLICABLE DIFFERENCE

- IF THE VALUE OF THE VOUCHER EXCEEDS THE VALUE OF A DESIRED TICKET, THE DIFFERENCE WILL NOT BE REFUNDED.

(C) LONG DELAY

THIS RULE IS ONLY APPLICABLE WHEN A FLIGHT IS DELAYED AT DEPARTURE, NOT WHEN A FLIGHT LEAVES ON TIME AND IS SUBSEQUENTLY DELAYED. A LONG DELAY IS CONSIDERED A FLIGHT THAT IS DELAYED ACCORDING TO THE FOLLOWING PARAMETERS:

TRIPS LESS THAN 1,500 KM MORE THAN 2 HOURS

TRIPS BETWEEN 1,500-3,500 KM & ALL INTRA EU FLIGHTS IN EXCESS OF 1,500 KM MORE THAN 3 HOURS

TRIPS MORE THAN 3,500 KM (NON INTRA EU) MORE THAN 4 HOURS

IN THIS CASE THE PASSENGERS ARE ENTITLED TO THE FOLLOWING

- (1) RIGHT TO CARE PROVIDED THIS DOES NOT RESULT IN A FURTHER DELAY OF THE FLIGHT INCLUDING
 - MEALS AND REFRESHMENTS, REASONABLY RELATED TO THE WAITING TIME
 - 2 TELEPHONE CALLS OR TELEX, E-MAILS, FAX
 - IF NECESSARY, HOTEL ACCOMMODATION PLUS TRANSFER BETWEEN AIRPORT AND HOTEL; IN CASE THE FLIGHT IS DELAYED UNTIL THE NEXT DAY HOTEL ACCOMMODATION AND TRANSFER ARE MANDATORY.
- (2) IF FLIGHT IS DELAYED MORE THAN 5 HOURS RIGHT TO BE REIMBURSED WITHIN 7 DAYS:
 - (A) OUTBOUND PASSENGER: COST OF TICKET
 - (B) INBOUND PASSENGER: COST OF NON-USED COUPON
 - (C) TRANSIT PASSENGER: COST OF NON-USED COUPON, IF THE FLIGHT NO LONGER SERVES ANY PURPOSE; ALSO COST OF THE TICKETS FOR PARTS OF THE JOURNEY ALREADY MADE AND IF RELEVANT RETURN FLIGHT TO THE FIRST POINT OF DEPARTURE
 - (D) FOR PACKAGE TOUR PASSENGERS THE VALUE OF REIMBURSEMENT WILL HAVE TO BE ASSIGNED TO UNUSED FLIGHT COUPON(S)
- (3) DOWNGRADING OF PASSENGERS
IN CASE OF INVOLUNTARY DOWNGRADING TO A LOWER CLASS OF SERVICE PASSENGERS WILL BE ENTITLED TO THE FOLLOWING REIMBURSEMENT WITHIN 7 DAYS
 - (A) 30 PERCENT OF THE TICKET PRICE FOR TRIPS LESS THAN 1,500 KM
 - (B) 50 PERCENT OF THE TICKET PRICE FOR TRIPS BETWEEN 1,500 AND 3,500 KM & ALL INTRA EU FLIGHTS IN EXCESS OF 1,500 KM
 - (C) 75 PERCENT OF THE TICKET PRICE FOR ALL OTHER TRIPS MORE THAN 3,500 KM

NOTE:

IN ALL CASES THE RELEVANT DISTANCE IS UNDERSTOOD TO BE THE SECTOR ON WHICH THE PASSENGER IS DOWNGRADED. THE TICKET PRICE IS UNDERSTOOD TO BE THE ONEWAY COUPON VALUE FOR THE SECTOR ON WHICH THE PASSENGER IS

- DOWNGRADED.
- (D) BOARDING PRIORITY
PASSENGERS HOLDING CONFIRMED RESERVATIONS WILL BE
BOARDED BEFORE:
(1) ANY PASSENGERS NOT HOLDING CONFIRMED RESERVATIONS.
(2) ANY WHO ARE NOT ENTITLED TO CONFIRMED
RESERVATIONS.
- PASSENGERS HOLDING CONFIRMED RESERVATIONS AND A VALID
TICKET FOR THE FLIGHT IN QUESTION WILL BE BOARDED IN
THE SEQUENCE IN WHICH THEY HAVE PRESENTED THEMSELVES
FOR CHECK-IN.
- EXCEPTIONS:
THE FOLLOWING PASSENGERS CANNOT BE LEFT BEHIND:
- LUFTHANSA CREW MEMBERS TRAVELLING WITH CONFIRMED
RESERVATIONS
- LUFTHANSA EMPLOYEES ON DUTY TRAVEL HOLDING CONFIRMED
RESERVATIONS
- SICK AND/OR HANDICAPPED PASSENGERS
- UNACCOMPANIED CHILDREN (12 YEARS AND UNDER)
- HEADS OF STATE AND OTHER LEADING STATESMEN, OFFICIAL
GOVERNMENT DELEGATIONS, DIPLOMATIC COURIERS
- HARDSHIP CASES AS DETERMINED BY THE MANAGER ON DUTY

AREA: ZZ TARIFF: IPRG CXR: LH RULE: 0090

TITLE/APPLICATION - 70

REFUNDS

(A) GENERAL

- (1) IN CASE OF REFUND, WHETHER DUE TO FAILURE OF
CARRIER TO PROVIDE THE ACCOMMODATION CALLED FOR BY
THE TICKET, OR TO VOLUNTARY CHANGE OF ARRANGEMENTS
BY THE PASSENGER, THE CONDITIONS AND AMOUNT OF
REFUND WILL BE GOVERNED BY CARRIER'S TARIFFS.
- (2) EXCEPT AS OTHERWISE PROVIDED IN PARAGRAPH (F) OF
THIS RULE, REFUND BY CARRIER FOR AN UNUSED TICKET
OR PORTION THEREOF OR MISCELLANEOUS CHARGES ORDER
WILL BE MADE TO THE PERSON NAMED AS THE PASSENGER
IN SUCH TICKET OR MISCELLANEOUS CHARGES ORDER
UNLESS AT THE TIME OF PURCHASE THE PURCHASER
DESIGNATES ON THE TICKET OR MISCELLANEOUS CHARGES
ORDER ANOTHER PERSON TO WHOM REFUND SHALL BE MADE
IN WHICH EVENT REFUND WILL BE MADE TO PERSONS SO
DESIGNATED, AND ONLY UPON DELIVERY OF THE
PASSENGER COUPON AND ALL UNUSED FLIGHT COUPONS OF
THE TICKET OF MISCELLANEOUS CHARGES ORDER. A
REFUND MADE IN ACCORDANCE WITH THIS PROCEDURE TO A
PERSON REPRESENTING HIM AS THE PERSON NAMED OR
DESIGNATED IN THE TICKET OR MISCELLANEOUS CHARGES
ORDER WILL BE CONSIDERED A VALID REFUND AND
CARRIER WILL NOT BE LIABLE TO THE TRUE PASSENGER
FOR ANOTHER REFUND.

EXCEPTION 1: REFUND IN ACCORDANCE WITH PARAGRAPH
(E) BELOW OF TICKETS FOR
TRANSPORTATION WHICH HAVE BEEN
ISSUED AGAINST A CREDIT CARD WILL

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140806

Docket: 14-A-37

Ottawa, Ontario, August 6, 2014

CORAM: TRUDEL J.A.
WEBB J.A.
NEAR J.A.

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

CANADIAN TRANSPORTATION AGENCY and

BRITISH AIRWAYS PLC

Respondents

ORDER

UPON motion by the moving party, Dr. Gábor Lukács, for leave pursuant to section 41 of the *Canada Transportation Act*, S.C. 1996, c.10, to appeal:

1. a decision made by the Canadian Transportation Agency dated May 26, 2014 and bearing decision no. 201-C-A-2014; and if and to the extent necessary,
2. decisions made by the Canadian Transportation Agency dated April 16, 2014 and bearing decision no. LET-C-A-25-2014, and dated May 2, 2014 and bearing decision no. LET-C-A-29-2014;

AND UPON considering the materials filed by the respondent British Airways PLC in response to the motion;

THIS COURT ORDERS that the moving party's motion for leave to appeal is granted.

No order is made as to costs.

"Johanne Trudel"

J.A.

« WWW »

« D.G.N. »

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

– and –

**CANADIAN TRANSPORTATION AGENCY and
BRITISH AIRWAYS PLC**

Respondents

AGREEMENT AS TO CONTENTS OF THE APPEAL BOOK (RULE 343(1))

PURSUANT to Rule 343(1) of the *Federal Courts Rules*, the parties agree that the documents, exhibits, and transcripts to be included in the appeal book are as follows:

1. Notice of Appeal;
2. Decision No. 201-C-A-2014 of the Canadian Transportation Agency, dated May 26, 2014 (“Final Decision”);
3. Revised (under protest) Reply of Dr. Lukács, dated May 8, 2014;
4. Decision No. LET-C-A-29-2014 of the Canadian Transportation Agency, dated May 2, 2014 (“Procedural Decision No. 2”);
5. Motion of Dr. Lukács to reconsider Decision No. LET-C-A-25-2014, dated April 23, 2014;

6. Decision No. LET-C-A-25-2014 of the Canadian Transportation Agency, dated April 16, 2014 (“Procedural Decision No. 1”);
7. Letter of Dr. Lukács to the Agency, dated April 1, 2014;
8. Further submissions of British Airways, dated March 28, 2014;
9. Reply of Dr. Lukács, dated March 26, 2014;
10. Submissions of British Airways, dated March 17, 2014;
11. Erratum to Decision No. 10-C-A-2014 of the Canadian Transportation Agency, dated January 21, 2014;
12. Decision No. 10-C-A-2014 of the Canadian Transportation Agency, dated January 17, 2014 (“Show Cause Decision”), with its Appendix;
13. Reply of Dr. Lukács, dated October 20, 2013 [included at the insistence of the Respondents];
14. Answer of British Airways, dated March 22, 2013 [included at the insistence of the Respondents];
15. Complaint of Dr. Lukács to the Canadian Transportation Agency, dated January 30, 2013 [included at the insistence of the Respondents];
16. Order of the Federal Court of Appeal granting Leave to Appeal, dated August 6, 2014;

- 17. Agreement as to the Contents of the Appeal Book (Rule 343(1)); and
- 18. Certificate of Completeness (Form 344).

September ____, 2014

DR. GÁBOR LUKÁCS
Appellant

September ____, 2014

ODETTE LALUMIERE
Counsel for the Respondent,
Canadian Transportation Agency

September ____, 2014

CAROL MCCALL
Counsel for the Respondent,
British Airways Plc

Court File No.: A-366-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

– and –

**CANADIAN TRANSPORTATION AGENCY and
BRITISH AIRWAYS PLC**

Respondents

CERTIFICATE OF COMPLETENESS OF APPEAL BOOK

I, Dr. Gábor Lukács, the appellant, certify that the contents of the appeal book in this appeal are complete and legible.

September 10, 2014

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Appellant