TRANSPORTATION NOTES

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Iberia Warned About Failure to Post Tariffs Online

In April 2009, the Canadian Transportation Agency (the "Agency") issued a bulletin informing air carriers that amendments to the *Air Transportation Regulations* had come into force and that these amendments required that international air carriers selling flights to and from Canada through their websites keep current on those sites the terms and conditions of carriage found in their international tariffs on file with the Agency.

The relevant section of the *Air Transportation Regulations* provides as follows:

> *Display of Terms and Conditions on Internet Sites*
>
> 116.1 An air carrier that sells or offers for sale an international service on its Internet site must also display on the site the terms and conditions of carriage applicable to that service and must post a notice to that effect in a prominent place on the site.

The Agency has been persistent since the issuance of the 2009 bulletin in encouraging air carriers to comply with the regulation. It has been particularly vigilant about insisting that the substance of the information which is published on the air carrier sites is identical in content to what is on file with the Agency and not a paraphrased version of same.

In matter at hand, the Agency sent a letter to Iberia on February 15, 2010 advising the air carrier that it was not in compliance. The Agency requested that Iberia ensure that its terms and conditions of carriage be posted on the website within 90 days.

In April 2010, the Agency confirmed with Iberia that specific documents that it required to be posted on the Iberia site would result in compliance with the regulations.

Approximately one month later, Iberia confirmed that it was working with ATPCo to clarify outdated tariff filings. Iberia also advised that, once this process was complete, it would update its site and inform the Agency. Unfortunately, Iberia was not able to accomplish this process in the following months.

In November 2010, Iberia requested and was granted a further extension to mid-January 2011. Iberia staff sent emails to the Agency in March, June and October 2011 indicating that they were still working on the project.

In November 2011, the Agency advised Iberia that its continued non-compliance was being referred to the Agency's Enforcement Division. After receiving this notice, Iberia advised the Agency that the up-to-date tariffs would be uploaded to the Iberia site by the following week.

It appears that this did not take place because on February 1, 2012, the enforcement officer assigned to the matter found Iberia to be in contravention of the regulations. The enforcement officer issued a warning of violation. Iberia appealed this issuance of the warning to the Agency three weeks later.

In the appeal, Iberia argued, among other things, that it should not have received the warning because the Agency failed to respond to its November 2011 correspondence. Further, Iberia submitted that, in any event, it was in compliance with the regulations by December 16, 2011 and, finally, Iberia claimed that the warning letter does not provide any documentation or evidence supporting a violation.

The Designated Enforcement Officer (the "DEO") responded that the November 2011 email was a "purely informational letter which did not necessarily require a response." The DEO also advised that if Iberia required documentation, he could provide copies of the original letter outlining non-compliance with the regulations as well as copies of the communications between Iberia and the Agency.

The Agency considered Iberia's claim that it had complied with the regulations by December 2011, but disagreed.

It held that "[a]lthough Iberia claims that on December 16, 2011, its internet site displayed the terms and conditions applicable to international services to/from Canada, it had been clearly advised on several occasions that compliance with [the regulations] required the posting of true copies of the applicable tariffs. Despite this, following a review of Iberia's internet site, a tariff could not be found."

The Agency concluded that Iberia remained in non-compliance, despite repeated warnings that it must post its tariffs online.

The Agency upheld the DEO's finding and ruled that a record of violation, bearing the date of the original warning, will be retained by the Agency to be used as a basis for further enforcement action.

The Agency also noted that if Iberia contravenes or continues to contravene the regulations within four years of the original warning, it could be subject to an administrative monetary penalty of up to $10,000.

Re Iberia, Lineas Aereas de Espana, S.A,
CTA Decision No. 202-A-2012

Inside This Issue

Asia Miles Trademark Application Refused by CIPO

The Trade-Marks Opposition Board (Member Myer Herzig) of the Canadian Intellectual Property Office recently issued a decision which allowed an opposition to the registration of various applications related to the trade-mark, Asia Miles, submitted by Cathay Pacific Airways Limited (“Cathay”). The opposition was brought by Air Miles International Trading B.V. (“Air Miles”) on a number of grounds, including confusion between the Asia Miles and Air Miles marks.

In accordance with the *Trade-Marks Act* Cathay filed an application to register the Asia Miles trade-mark (words and image), in association with various wares and services including: use in promotional materials, newsletters, magazines, and other promotional objects, use at tourist offices and travel agencies; and use in air passenger transport services. The applications were based on use in Canada and in Hong Kong, China, as well as proposed use in Canada.

After the applications were advertised in the *Trade-Marks Journal,* Air Miles filed its opposition. Both parties filed a number of affidavits in evidence, the contents of which are further referred to below.

The Air Miles mark is licensed for use in Canada to Loyalty Management Group Canada Inc. (“Loyalty”), and is duly registered under the *Trade-Marks Act*. The Air Miles mark has been used in Canada in association with the incentive rewards program since 1992. The rewards program works by allowing customers to gain “air miles” when purchasing wares and services from Program Sponsors.

The Program Sponsors pay a fee to Air Miles in order to participate in the program. Program Sponsors are licensed to use the Air Miles mark, and are required to indicate that the mark is owned by Air Miles. The Board noted that the Air Miles program has grown significantly in Canada, from issuing one billion miles to collectors in Canada in 1994 to 26 billion miles in 2007. The Air Miles program has been advertised on television, in print media, at point of purchase and by other means. Fifteen million dollars is spent on this advertising annually, out of over $100 million of revenue. Air Miles also submitted evidence of market research commissioned by Loyalty which indicated that the Air Miles program was “by far the best known” program involving the collection of points on purchase of goods or services and the redemption of those points. This was the case in 2001 and again in 2005 and 2006.

The evidence submitted by Cathay showed that its business in Canada grew significantly since it first began to provide flights to and from Canada in 1983. Its annual revenues rose from $27 billion in 1998 to about $75 billion in 2007. The evidence showed that the Asia Miles mark was licensed by Cathay to an entity called Cathay Pacific Loyalty Programmes Limited (“CPLP”), a wholly owned subsidiary of Cathay.

Membership in the Asia Miles rewards program increased from 400,000 in 1999 (6,000 Canadian residents) to 3 million in 2007 (250,000 Canadian residents). Between 1999 and 2008, Canadian residents earned several billion miles and redeemed more than one million miles for rewards. The Asia Miles program was extensively advertised by Cathay, costing several million dollars, in print, radio, television, websites and membership cards.

One of the first issues considered by the Board was whether benefit in fact accrued to Cathay, as the applicant, for the use of the Asia Miles mark in Canada.

The Board found that it did not. Rather, the mark was associated with CPLP. In particular, the Board noted evidence that there was no written agreement licensing the use of the mark to CPLP, Cathay was not publicly identified as the owner of the mark and rewards program, CPLP had a business office in Hong Kong, not Canada, and the agreement made by customers of the program was with CPLP and governed by the laws of Hong Kong.

Second, the Board also disallowed part of the application with respect to the use and registration of the mark in Hong Kong, because it found that the use was overly broadly stated. The Board found that the mark was not used for the listed wares but rather for advertising and promotion. The application was therefore not in compliance with the Act which requires the applicant to state wares in ordinary commercial terms.

Third, the Board considered whether there was a reasonable likelihood of confusion respecting the goods and services provided under the Asia Miles trade-mark. The board considered evidence, including: companies displaying registered trade-marks with the component “mile”, websites with the domain name “mile” and connected to rewards programs, registered trade-marks with the component “mile” used in association with frequent flyer programs but also other servicesand a search of records of the Canadian Trade-Marks Office.

The Board held that the onus lay on the applicant to show that its application did not contravene the provisions of the *Trade-Marks Act*, but lay on the opponent to demonstrate that the facts alleged by it in opposition were sufficient to show that a particular issue existed with respect to the application.

Whether confusion exists is decided with reference to a number of factors listed in the *Act*, including the inherent distinctiveness of the marks and the extent to which they have become known, the length of time each has been in use, the nature of the wares and services, the nature of the business and the degree of resemblance “in appearance or sound of the marks or in the ideas suggested by them.”

The Board found that though neither mark had a great degree of inherent distinctiveness, the evidence established that the Air Miles mark was very well known in Canada in practice. Cathay was precluded from relying on use of the Asia Miles mark in Canada due to the first finding of the Board. Moreover, Air Miles had used its mark in Canada for 13 years before Cathay had filed its application for use of its mark in Hong Kong. The wares and services provided were very similar.

The Board also found that as to degree of resemblance, the marks were “more different than alike” both visually and in sound, although the use of the “miles” suffix did create a fair degree of resemblance. The Board concluded, as it had in a past decision considering the proposed registration of the trade-mark “Miles & More” by Lufthansa, which was also opposed by Air Miles, that Air Miles had an established reputation and the proposed Asia Miles mark was not sufficiently different.

Finally, the Board addressed the question of whether the application was a nullity from the outset in that the words and design marks for Asia Miles both relied on the same registration in China. The Board found that it was possible to apply for two different Canadian trade-marks, based on only one foreign registration.

In the matter of five oppositions by Air Miles International Trading B.V., 2012 TMOB 80

End of the Line: *Gábor Lukács Strikes Again (cont'd)*

(Continued from page 4)

> by the individual United Baggage Services Office at the airport laocation where the damage was discovered. If this is not possible, please direct your report and claim to our airport staff at the location nearest you within 24 hours. We will need a copy of your ticket and claim check and will make a visual inspection of the damage.

Mr. Lukács argued that these proposed amendments did not adequately address the problem.

With respect to the first paragraph, he argued that the language remains misleading. First, he submitted that the *Montreal Convention* does not distinguish between baggage and its contents and, to do so on the website provides a the reader with the false impression that baggage is treated differently from what it contains. Secondly, Mr. Lukács argued that the way in which this paragraph is drafted suggests that "normal wear and tear" is a normal and acceptable phenomenon — and, since this provision appears under the heading "Damage Claim", it leaves the impression that such damage is not compensable.

With respect to the second paragraph of the proposed website amendment, Mr. Lukács argued that this language purported to impose a 24 hour time limit on the notification of damage to checked baggage — and that a notice period of that duration contradicts United's obligations under Article 31 of the *Montreal Convention* which prescribes a seven day notice period. Accordingly, he argued that this provision was also misleading, and therefore contrary to section 18(b) of the *Air Transportation Regulations*.

The Agency accepted Mr. Lukács' arguments with respect to both paragraphs of the proposed amended policy for the Canadian website and, as a result, did not approve of the proposed language.

Then, the Agency considered United's revised international-specific baggage liability policy, which became effective after the complaint was launched. This policy advised United personnel that stations could no longer deny a claim for damaged baggage based on the concepts of "normal wear and tear".

Mr. Lukács submitted that, notwithstanding the implementation of this policy, United was not complying with it. In support of this allegation, he filed an audio recording of a discussion he had with a United baggage agent, which allegedly occurred three months after the policy implementation date. In this conversation, a United agent advised Mr. Lukács over the telephone that United would not provide compensation for "normal wear and tear" to checked baggage.

As a result of hearing this from the United baggage agent, Mr. Lukács alleged that United had failed to distribute the Bulletin giving effect to the policy to its baggage agents.

In response, United filed proof that the Bulletin had, in fact, been distributed by e-mail to its staff, and that it had sent a further advisory to its agents after becoming aware of the telephone call with Mr. Lukács.

The Agency reviewed the contents of the Bulletin and confirmed that it accurately reflects United's obligations to passengers on routes governed by the *Montreal Convention* insofar as the issue of "normal wear and tear" is concerned.

However, the Agency noted (disapprovingly) that the Bulletin was silent on the time that a passenger has to file a complaint about such damage.

The Agency then went on to consider whether United had applied a policy governing baggage liability that did not appear in its tariff.

… 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.

In this regard, Mr. Lukács argued that since the limitation of liability for "normal wear and tear" appeared on the United website but not the tariff — and since Mr. Lukács' complaint was handled in a manner consistent with the website policy, United had disregarded its own tariff in assessing his claim.

The Agency agreed and as a result found that in doing so, United had contravened s. 122(c)(x) and (xi) of the *Air Transportation Regulations*.

As a consequence of the above findings, United was ordered, within 30 days, to:

- file amendments to its tariff that clearly reflect its policy respecting limits to and exclusions from liability relating to baggage, as set out in the Bulletin and that also reflect the time limits within which the complaint must be filed pursuant to Article 31 of the *Montreal Convention*; and
- ensure that the Bulletin and United's Canadian website reflect the findings made by the Agency and remove any language that is contrary to same.

In a separate complaint, Mr. Lukács sought an order from the Agency requiring United to remove the language similar to what had been previously posted on the Canadian website from United's global website.

In that proceeding, United argued that the matter had been rendered moot by the fact that the changes that were applied to its global website as a result of United's integration with Continental Airlines had resolved the issue.

While the new global website still provides that United is not liable for "normal wear and tear", this limitation of liability is now specifically limited to domestic travel within the United States. In addition, the global website now states that claims for damaged baggage for international flights must be reported within seven days.

In reply submissions, Mr. Lukács argued that, although the new website was a "substantial improvement" over the previous version, he objected to a new statement on the global site that requires passengers to obtain prior approval through United's Baggage Resolution Service Center in order for expenses to be reimbursed.

Mr. Lukács alleged in the complaint that the requirement to obtain such a "prior approval" also contradicts United's obligations under the *Montreal Convention*.

In reviewing the matter, the Agency found, with respect to the complaints, that in light of the changes that were undertaken in the integrated United/Continental website the subject matter of the complaint had been rendered moot and as a result, the complaint was dismissed.

With respect to the new allegation pertaining to the requirement that passengers obtain prior approval for any expenses arising from delayed or damaged baggage, the Agency held that this was an entirely new issue and therefore, would not be considered as part of the original complaint.

Lukács v. United Air Lines Inc.
CTA Decision No. 182-C-A-2012; and
CTA Decision No. 200-C-A-2012

End of the Line: *Gábor Lukács Strikes Again*

Gábor Lukács has been at it again. Mr. Lukács is well known to many air carriers operating in Canada as a passenger rights activist. He is an academic who, over the last few years, has filed numerous complaints with the Canadian Transportation Agency (the "Agency") against air carriers on tariff related issues.

Two of Mr. Lukács' more recent complaints, brought against United Air Lines ("United"), were adjudicated in May 2012.

The first relates to an incident that occurred in March 2011, when Mr. Lukács travelled from Winnipeg to Savannah, Georgia with United. Upon arrival at Savannah, Mr. Lukács discovered that his name tag was missing from his suitcase. When he attempted to complete a damage report, he was referred by a United check-in agent to a sign that stated that United does not assume liability for "normal wear and tear" (which was defined as including, among other things, "damage or loss to protruding baggage parts").

After being advised by the United check-in agent that he was not eligible to file a damage report, Mr. Lukács spoke to a supervisor, who did complete a report and was alleged to have advised Mr. Lukács that he would be contacted in relation to the incident.

United did not contact Mr. Lukács, although it did compensate him for the damage through an informal dispute resolution process facilitated by the Agency.

Nevertheless, Mr. Lukács complained to the Agency that certain information posted by United relating to delayed and damaged baggage was inconsistent with the provisions of the *Montreal Convention* and, argued Mr. Lukács, contrary to s. 18(b) of the *Air Transportation Regulations* which provide that licensees "shall not make publicly any statement that is false or misleading with respect to the licensee's air service or any service incidental thereto."

More specifically, Mr. Lukács alleged that the exclusion of liability for normal wear and tear was contrary to Article 17(2) of the *Montreal Convention*, which may be said to impose such liability in respect of such damage.

With respect to the defence of inherent defect, he cited *McCabe v. Air Canada* (CTA Decision No. 227-C-A-2008), *Lukács v. Air Canada* (CTA Decision No. 208-C-A-2009) and *Lukács v. WestJet* (CTA Decision No. 477-C-A-2009) for the proposition that, in order for a carrier to be exempt from liability for damage to baggage under Article 17(2) of the *Montreal Convention*, there must be a causal relationship between the damage and an inherent defect, quality of vice of the baggage.

Mr. Lukács' complaint was directed towards:

- the signage at United's airport check-in counters;
- United's "Delayed and damaged baggage" web page on its Canadian website; and
- United's policy as reflected in its *Bulletin B11-05* (described more fully below).

With regard to the airport signage, United filed submissions indicating that the language complained of was no longer in place at its check-in counters.

However, in response to this assertion, Mr. Lukács produced a photograph taken after United's submissions were filed demonstrating that the offending sign was still in at least one airport.

United explained that the situation at the Winnipeg airport occurred through inadvertence. It undertook to canvas its stations to ensure that any such signage was removed.

Mr. Lukács challenged the assertion that the signs remained in place due to inadvertence.

In support of this allegation, he filed an audio recording of a telephone conversation he had with a United baggage agent, which purportedly took place approximately one month after United advised that it was attempting to correct the error. In that conversation, the agent advised Mr. Lukács that United was not responsible for normal wear and tear to checked baggage. In its responding submissions, United explained that information provided by baggage agents is general in nature and applies without regard to the passenger's itinerary.

Based on the preceding facts, the Agency found that United had, in fact, displayed signage at the airport counter in Winnipeg that was misleading in that it misstated United's liability for baggage as set out in Article 17 (2) of the *Montreal Convention*. However, the Agency accepted that, at the time of rendering its decision, the signs have been removed and, as such, no further action is contemplated on this portion of the complaint.

Insofar as the Canadian website was concerned, Mr. Lukács alleged that the web page on that site also misleadingly provided that United was not responsible for normal wear and tear to checked baggage, even though he was not able to find language supporting this policy in United's tariff.

As a result, United agreed to amend the website to state the following:

> **Damage Claim**
>
> Baggage is designed to protect the contents. Normal wear and tear such as scratches, nicks or dirt may appear despite care in handling, especially of your bag is oversized or over-packed.
>
> Damages should be reported to and resolved

(Continued on page 3)

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