Leisure Industries

Newsletter of the Leisure Industries Section of the International Bar Association Legal Practice Division

NUMBER 42 DECEMBER 2014

In this issue

Contributions to this newsletter are always welcome and should be sent to David Grant at the following email address:

david.grant@tlq.travel

Terms and Conditions for submission of articles for this Newsletter

1. Articles for inclusion in the newsletter should be sent to the Newsletter Editor.
2. The article must be the original work of the author, must not have been previously published, and must not currently be under consideration by another journal. If it contains material which is someone else's copyright, the unrestricted permission of the copyright owner must be obtained and evidence of this submitted with the article and the material should be clearly identified and acknowledged within the text. The article shall not, to the best of the author's knowledge, contain anything which is libellous, illegal, or infringes anyone's copyright or other rights.
3. Copyright shall be assigned to the IBA and the IBA will have the exclusive right to first publication, both to reproduce and/or distribute an article (including the abstract) ourselves throughout the world in printed, electronic or any other medium, and to authorise others (including Reproduction Rights Organisations such as the Copyright Licensing Agency and the Copyright Clearance Center) to do the same. Following first publication, such publishing rights shall be non-exclusive, except that publication in another journal will require permission from and acknowledgment of the IBA. Such permission may be obtained from the Head of Editorial Content at editor@int-bar. org.
4. The rights of the author will be respected, the name of the author will always be clearly associated with the article and, except for necessary editorial changes, no substantial alteration to the article will be made without consulting the author.

International Bar Association

4th Floor, 10 St Bride Street,
London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
www.ibanet.org

The *Travel Law Quarterly* (TLQ) is provided in electronic form to members of the IBA Leisure Industries Section as an exclusive member benefit. Members wishing to purchase printed copies of the TLQ and to have access to all past copies of the TLQ at the TLQ website (www.tlq.travel) can do so by visiting the website and clicking on the 'Subscribe' button and following the instructions.

Section officers

Chair
Shivendra Kundra
Kundra & Bansal, New Delhi
Tel: +91 (11) 2923 8021
Fax: +91 (11) 2923 8023
shiven@kundrabansal

Vice-Chair
David Jacoby
Schiff Hardin, New York
Tel: +1 (212) 745 0876
djacoby@schiffhardin.com

Treasurer
Constantine Boulougouris
Norton Rose Fulbright, Sydney
Tel: +61 (2) 9330 8471
Fax: +1 (2) 9330 8111
constantine.boulougouris@gmail.com

Secretary
Sabrina Fiorellino
Gilbert's, Toronto
Tel: +1 (416) 703 3217
sabrinaf@gilbertslaw.ca

Newsletter Editor
John Wilson
John Wilson Partners, Colombo
Tel: +94 (11) 232 4579
Fax: +94 (11) 244 6954
john@srilankalaw.com

Corporate Counsel Forum Liaison Officer
Kees van de Meent
Hocker Advocaten, Amsterdam
Tel: +31 (20) 577 7773
Fax: +31 (20) 671 9710
meent@hocker.nl

Social Media Officer
Joanna Luzak
University of Amsterdam, Amsterdam
j.a.luzak@uva.nl

Website Officer
David Grant
Travel Law Quarterly,
Newcastle Upon Tyne
Tel: +44 (191) 289 2897
Fax: +44 (191) 289 2897
david.grant@tlq.travel

Subcommittee officers

Electronic Entertainment and Online Gaming Subcommittee

Chair
Gabrielle Patrick
iSeed, London
Tel: +44 (0)20 3239 2970
gpatrick@iseed.co

Vice-Chair
Mark Methenitis
T-Mobile USA, Richardson, Texas
Tel: +1 (469) 300 4700
lawofthegame@gmail.com

Programme Officer
Marcus Clinch
Eiger Law, Taiwan
Tel: +886 (2) 2771 0086
Fax: +886 (2) 2771 0186
marcus.clinch@eigerlaw.com

Sports Law Subcommittee

Chair
Javier Medin
Alfaro Abogados, Buenos Aires
Tel: +54 (11) 4393 3003
Fax: +54 (11) 4393 3004
jmedin@alfarolaw.com

LPD Administrator
Charlotte Evans
charlotte.evans@int-bar.org

From the Chair

Shivendra Kundra
Kundra & Bansal New Delhi
shiven@kundrabansal.com

Dear friends,

I trust all of you are well. It was wonderful to see many of you at the Annual Conference in Tokyo, which was a very successful one for the Leisure Industries Section.

For those of you who missed the Conference, you would be delighted to know that Leisure Industries Section participated in five very interesting sessions. We kicked off on Monday morning, 20 October, with a joint session with the Arbitration Committee on arbitration in sports, entitled 'Crossing the line'. This was a well-attended and very successful session with the speakers having years of experience in arbitration. The session covered several high-profile cases in sports. On the same day in the afternoon, the Electronic Entertainment and Online Gaming Subcommittee ran an equally successful session – 'Broken bad: money laundering issues with online gaming, virtual currency and other techniques'. Among other issues, this session discussed laundering of money through the use of game currencies.

On Tuesday, we had another productive session, entitled 'Social media and the digital age in the workplace'. This was led by the Young Lawyers' Committee and supported by the Leisure Industries Section and the Employment and Industrial Relations Law Committee. Again, there was a high turnout for this session.

The Electronic Entertainment and Online Gaming Subcommittee was involved with two more interesting and successful sessions. On Wednesday, the subcommittee ran a session with Banking Law Committee – 'Your money is in the cloud'. This covered mobile payments, virtual currencies, and other issues at the intersection of real money and digital reality. On Thursday, the subcommittee presented a full-day session, entitled, 'Online gaming summit', exploring the latest business trends and legal challenges faced by the electronic games industry.

I would like to congratulate and thank everyone involved with putting together and presenting these sessions. It takes a lot of time and effort to take sessions from inception to fruition and their efforts are laudable. In particular, I would like to thank the officers of the Leisure Industries Section for their tireless support.

You will be happy to know that for the Annual Conference in Vienna next year, our Section has been assigned three sessions and these will be led by us. The first of these will discuss the effects of tourism on the lives of local communities. This session will be supported by the Human Rights Group and the Corporate Social Responsibility Group. The Sports Law Subcommittee will be presenting a session on financing in sports in a

possible collaboration with Banking Law Committee. The third of our sessions, to be presented by Electronic Entertainment and Online Gaming Subcommittee, will be on legal issues confronting mobile payments and virtual currencies. This session will be supported by Criminal, Banking, IP and Technology committees.

On a different note, I am happy to announce that Leisure Industries Section's Global Guide project is in good shape as we have received contributions from some jurisdictions and the pledge to contribute from others. I would like to thank John Wilson from Sri Lanka for spearheading this project. If anyone is interested in contributing to Global Guide, please contact ruwani@srilankalaw.com or djacoby@culhanemeadows.com for details about the project and express your interest in being part of it. If a contribution has not already been received or pledged from your jurisdiction, we will be happy to have you contribute to the project.

Finally, it is with sadness that I bid goodbye to David Grant, who, after having worked tirelessly, admirably, and sometimes thanklessly, will no longer be available to edit our Newsletter on account of other commitments. David, on behalf of the Leisure Industries Section, and personally, I thank you for a job very well done. We will miss him dearly but hope that he will continue to be associated with the Section. Bravo, David!

And on that note, I say thank you to all and bye till we meet again.

Shivendra Kundra

Conference report
IBA Annual Conference, 19–24 October 2014, Tokyo

Session Chair:
David Jacoby
Schiff Hardin
djacoby@schiffhardin.com

Moderators:
Javier Medin
Chair, Sports Law Subcommittee; Alfaro Abogados Buenos Aires
Kate Brown
DeVejar, Curtis Mallet-Prevost Colt & Mosle Mexico City

Panellists:
Professor Richard McLaren
Western University Ontario
Beng Choo Low
Ranjit Ooi & Robert Low Kuala Lumpur
Jeffrey Kessler
Winston & Strawn New York
Stephen Drymer
Vice Chair, Arbitration Committee Woods Montreal
Antonio Rigozzi
Levy Kaufmann-Kohler Geneva

Leisure Industries' Sports Law Subcommittee played at Premier League level in two excellent programmes in its debut session in Tokyo. *Crossing the Line* (co-sponsored with the Arbitration Committee) is briefly described below.

Professor McLaren, an arbitrator for five sets of Olympics, reviewed the variety of commercial and disciplinary matters resolved by sport tribunals, including the Court of Arbitration for Sports ('CAS'). CAS's remit ranges from the Olympics to ballroom dancing

Ms Low described efforts to improve sport dispute resolution in Malaysia, particularly in view of CAS's role at the recent Asian Games in Inchon and the 2020 Tokyo Olympics. CAS has selected Kuala Lumpur as an alternative hearing centre.

Mr Kessler outlined efforts to let Oscar Pistorius to compete in the 2012 Olympics. A CAS panel chaired by David W Rivkin, now IBA Vice-President, did not support the IAAF's determination that Pistorius' prostheses gave him an advantage, allowing his entry in the London Games.

Mr Drymer narrated the story of 'The Bite' – Luis Suarez of Uruguay v Giorgio Chiellini (Italy) – in the 2014 World Cup. FIFA's Disciplinary Committee fined Suarez CHF100,000, and banned him from nine national matches and from 'football-related activity' for four months. CAS upheld the sanctions as reasonably proportionate to the assault, except for the four-month ban.

Professor McLaren and Mr Kessler also discussed recent American NFL penalties, including those for Ray Rice's assault on his then fiancée.

Mr Drymer and Professor McLaren described the public arbitral hearing Floyd Landis demanded on doping charges, which Professor McLaren chaired. The panel found a doping violation, which CAS sustained. Landis later admitted doping.

Mr Ragozzi discussed match-fixing, noting that few countries have specific laws. However, 15 Council of Europe nations recently signed a Convention on the Manipulation of Sports Competitions. If ratified, it would define the offence and set procedures for appeal to CAS, under Swiss arbitral law.

Other topics discussed were disputes between agents and issues facing efforts to establish sport dispute resolution systems in Canada (previously) and Malaysia (currently).

I cannot close without noting the innovative time-keeping system employed. A whistle alerted speakers time was up; a yellow card was shown for running over time; running over time twice earned a red card. The red card obliged the offender to hold a huge stuffed *Hello Kitty* stuffed soft toy for five minutes. The speakers were notably succinct.

Brand protection for hotels and resorts is not all downhill skiing!

A case study on use of the place name Thredbo

Anthony J Cordato
Cordato Partners, Sydney
ajc@businesslawyer.com

Thredbo Alpine Village is a long established ski resort located at a place called Thredbo at the foot of the Thredbo River Valley, in the Snowy Mountains of New South Wales, Australia. Like many other hotels and resorts in travel destinations, including the place name in its name helps its branding.

In a legal decision with ramifications for hotels and resorts which use place names, the Federal Court of Australia has refused Thredbo Alpine Village's bid to reserve the place name *Thredbo* for its exclusive use, and has allowed ThredboNet, an internet marketer, to use *Thredbo* in its digital marketing of accommodation at Thredbo.

The decision is *Kosciuszko Thredbo Pty Limited v ThredboNet Marketing Pty Ltd* [2014] FCAFC 87, a full court joint judgment of Justices Siopis, Rares & Katzmann.

Why was the name *Thredbo* worth fighting over?

Kosciuszko Thredbo is long established as the owner and operator of 'Thredbo Alpine Village'. It holds a 99-year lease which was granted in 1957 over all of the land at Thredbo. Thredbo Alpine Village operates like a 'company town'. It consists of the Thredbo Resort, the Thredbo Alpine Hotel, a ski school, a leisure centre, a childcare centre, and services and infrastructure. It compares itself to Disneyland because it occupies 'a unique position of control over the resort'.

Thredbo Alpine Village argued that it had acquired a *distinctive right* to use the place name *Thredbo* exclusively in its marketing because of its long established operation and reputation. It owns the 'Thredbo Alpine Village' business name and trade mark, and uses domain names including www.thredbo.com.au in its marketing.

ThredboNet is a small holiday accommodation provider at Thredbo which was established relatively recently. It argued that it had the right to use Thredbo to market accommodation. It owns and uses domain names such as www.thredboreservations.com.au and www.thredbo.com, has websites and a Facebook page entitled 'Thredbo Reservations'.

Why did the Court refuse to allow Thredbo Alpine Village to use the place name Thredbo exclusively?

Thredbo Alpine Village gave two reasons why ThredboNet should not be allowed to use the name Thredbo. The first was that by using Thredbo, ThredboNet was likely to mislead the public into thinking that

they were looking at its website. The second was that ThredboNet was in breach of a covenant in its sub-lease not to use the name Thredbo.

Misleading conduct/passing off

It is a breach of sections 18(1), 29(1)(g) & (h) of the Australian Consumer Law and also in breach of the tort of passing off to display a website which is deceptively similar in 'get-up' and appearance to a competitor's website. In this case, the use of the place name Thredbo was the only similarity between the websites.

Kosciuszko Thredbo argued that Thredbo was more than a geographic place name: because of its close association with Thredbo Alpine Village, it had acquired a secondary meaning as a 'complete branded entity' for Thredbo Alpine Village.

The Federal Court examined Google screenshots of the searches for Thredbo, and Thredbo Reservations and found that they showed a variety of links to traders other than ThredboNet and Thredbo Alpine Village, which used Thredbo as part of their name. This negated the argument that Thredbo was distinctive to the Thredbo Alpine Village business.

ThredboNet had also placed a disclaimer on its home page, which stated: 'Please note this is NOT the official website of … Thredbo Alpine Village … and is not approved, endorsed or sponsored by them.' The Federal Court considered that this disclaimer was effective to dispel any confusion between the websites.

The Federal Court said that booking holiday accommodation was not an impulsive purchase: 'the ordinary reasonable consumer looking for holiday accommodation at a resort such as Thredbo would be careful about making a selection of the provider, the accommodation and the price.' That is, online consumers are not easily misled and are likely to click on several results in a web search before making a booking.

Therefore, the Federal Court decided that the ordinary reasonable consumer would not be likely to be misled by ThredboNet's use of its domain names, websites and Facebook page containing the word Thredbo into thinking they were dealing with Thredbo Alpine Village.

The sub-lease covenant

The sub-lease of the accommodation leased by ThredboNet contained a covenant that 'The Sublessee must not use … the word "Thredbo" in connection with any business carried on by the Sublessee' with the exception of allowing 'members of the public to occupy the Premises'.

Kosciuszko Thredbo argued that this prohibition on the use of the word Thredbo 'was not in the same class as the name of a suburb but was more … like the brand name of a shopping centre developer.' The Federal Court did not accept the argument. It pointed out that if the covenant were read literally, it would not allow the address to be advertised.

The Federal Court decided that the covenant was not effective to prevent ThredboNet from using the word Thredbo in its marketing. In any event, the covenant was void as an unreasonable restraint of trade.

What are the lessons to be learned?

The geographic place name part of the name of a hotel or resort is hard to protect, even if it has been used for many years.

The Federal Court decision means that hotel internet marketers are able to

digitally disrupt the holiday accommodation industry by prominently displaying the geographic place name, and gain internet search engine optimisation.

Instead of relying only upon a simple domain name registration and lease covenant, Thredbo Alpine Village needed to have adopted an effective digital marketing and social marketing strategy to protect its rights to use the name Thredbo. It also should have registered names such as 'Thredbo Reservations' as a trademark to provide effective legal protection for its 'brand'.

Thredbo Alpine Village has paid the price for its complacency. It relied too heavily on its reputation and failed to properly assess the risks to brand protection in today's digital economy.

The new argument on erroneously filed fares finds favour

Carlos P Martins
Bersenas Jacobsen Chouest Thomson Blackburn, Toronto
cmartins@lexcanada.com

A series of passenger complaints brought before the Canadian Transportation Agency during the last year has given rise to a previously unused defence that air carriers can avail of where erroneously low fares are offered for sale on the Global Distribution System.

Brewer v Swiss International Airlines[1]

This case, decided in June 2013, involved 15 complainants (including the named passenger, Brewer), who had purchased 15 one-way, multi-segment tickets for travel from Yangon, Myanmar to Montreal. The tickets each involved three to five segments, for the most part in business or first class. All were purchased through Expedia or Travelocity, with the prices ranging from US$550 to US$850. The actual values of those tickets were significantly higher than the prices paid.

Six days after the tickets were purchased, passengers were notified that Swiss International Airlines planned to cancel them. Full refunds were subsequently provided.

The passengers launched complaints with the agency against Swiss, claiming various forms of redress, such as:

- reinstatement of the tickets for alternative travel dates or destinations; and
- reimbursement of moneys paid to buy similar carriage from other airlines.

The various complaints were consolidated by the agency and heard as one process.

Swiss justified its actions by citing Rule 5(F) of its International Rules and Fares Tariff,[2] which provides that:

> 'Swiss reserves the right to cancel reservations and/or tickets with an erroneously quoted fare by reason of a technical failure prior to said erroneous quote being detected and corrected. Swiss reserves the right to void the purchased ticket and refund the amount paid by the customer and/or offer the customer the ticket at a published fare that should have been available at the time of the booking.'

Four of the 15 complainants argued that this tariff provision did not apply to them because it was not posted on Swiss' website when they purchased their tickets (although it was on file with the agency).

The agency held that:

> '[a]ir carriers cannot rely on terms and conditions that are filed with the Agency but not disclosed to customers on the carrier's Web site or in other publicly-available tariffs. Swiss' failure to maintain a current tariff on its Web site represents a contravention of section 116.1 of the Air Transportation Rules, SOR/88-58'.

Although the agency seemed sympathetic to the complainants on this preliminary issue, this did not really influence the final decision, given the balance of the agency's analysis.

Instead, to deal with this complaint, the agency considered three questions:

- Were Swiss's cancellation terms for erroneously quoted fares 'clearly stated' in its tariffs?
- Was Swiss's Tariff Rule 5(F) 'just and reasonable'?
- Did Swiss properly apply the rule in this circumstance?

On the first point, the agency considered the complainants' arguments that the tariff term 'technical failure' was ambiguous and not easily discernible from the drafting. According to the agency, Swiss did not address the issue of tariff clarity in its submissions.

As guidance, the agency looked to *H v Air Canada*,[3] where it had ruled as follows:

> '… the Agency is of the opinion that an air carrier's tariff meets the 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.'

In analysing Tariff 5(F), the agency noted that it did not include a definition of the term 'technical failure' and provided no examples. The agency implied in its decision that it may be somewhat of a stretch to include human error as a technical failure; consequently, it found that the tariff was unclear and therefore in violation of Section 110(4) of the Air Transportation Rules.

The agency then turned to the issue of whether the tariff was, in any event, 'just and reasonable' as is required by Section 111(1) of the Air Transportation Rules. On this point, Swiss argued that as soon as it discovered the error, it corrected the situation. It also immediately followed up with an investigation to determine the source of the error. To assess the reasonableness of the tariff, the agency applied the reasoning from *Anderson v Air Canada*,[4] which required an inquiry into whether Swiss's response resulted in a balance being struck between the rights of passengers to be subject to reasonable terms and conditions of carriage and its own statutory, commercial and operational obligations.

The agency preferred the complainants' submissions in this respect over Swiss's plea that it could not be expected to carry passengers at a loss, as it had obligations to its employees and stakeholders. The agency noted that Swiss had provided no specific evidence on how honouring the tickets in question would have impinged on its commercial obligations. In ruling in favour of the passengers, the agency noted that the tariff:

- provided no time limit for Swiss to cancel an erroneously priced ticket;
- provided no examples of situations that may lead to such an error; and
- imposed no obligations on Swiss to take reasonable steps to prevent the issuance of erroneously priced tickets.

As a result, the agency issued a preliminary finding that the tariff was unreasonable in accordance with Section 111(1) of the Air Transportation Rules. The use of the term 'preliminary' in this portion of the decision was not clearly explained.

Finally, the agency dealt with the issue of whether Swiss had properly applied its tariff in the matter at hand. On this issue, the agency considered Swiss's explanation for the error. Swiss had asserted that the posting error was, in fact, committed by ATPCo after the correct 'fare tape' was submitted to ATPCo by the International Air Transport Association (IATA). In support of its position, Swiss had filed a letter from ATPCo wherein that organisation expressed its regret for the distribution of the 'low fares'[5] and indicated that it would put additional audit procedures in place to prevent low fares from being distributed again. The agency focused on ATPCo's choice of words and found that Swiss had failed adequately to describe the precise technical failure that resulted in the error. It emphasised the lack of evidence that the failure was 'technical in nature, as opposed to human'.

As a result, compensation was awarded to the passengers; but more significantly, Swiss was given 30 days to show cause as to why Tariff 5(F) should not be disallowed.

Alberque v US Airways[6]

Nearly a year later, the same issue arose in the case of a first-class, one-way, multi-segment ticket purchased on Travelocity by a single passenger, Paul Alberque. Alberque's itinerary was almost identical to that which was at issue in Swiss. Upon discovering the error, US Airways cancelled the ticket. Alberque brought a complaint before the agency, asking it to order US Airways to provide the service requested in the same class for the fare originally quoted.

US Airways took a different approach to the complaint. It began by arguing that the agency should not intervene in a dispute with only a 'tangential connection' to Canada. It argued that Alberque had engaged in 'hidden ticket pricing' – a strategy whereby a passenger does not fly the final leg of his or her journey but books that segment in order to obtain a preferable fare.

US Airways argued that Alberque had already arranged alternative transport to fly from Europe, the termination of the penultimate segment of his journey, to his home in Boston. Alberque strongly denied this suggestion.

The agency summarily dismissed the argument, stating that the only relevant factor to consider was whether the ticket, as purchased, included Canada as a destination.

The agency had to determine whether there was a valid contract for carriage between US Airways and Alberque. US Airways provided significantly more detail on the nature of the error that had occurred than Swiss in the previous case, and this played a significant role in the agency reaching a different conclusion.

> '… [the doctrine of mistake arises when a party] knows or ought to have known of another's mistake in a fundamental term, remains silent and snaps at the offer, seeking to take advantage of the other's mistake.'

In its submissions, US Airways explained that in November 2011, IATA had electronically provided a package of Flex Fares to ATPCo that allowed passengers to book travel on routes that were not

served by a single carrier. With this product, passengers were at liberty to build an itinerary using several carriers. Included in these itineraries were segments that could be combined to draw up an itinerary from Yangon to Montreal. At the time that these fares – which were quoted in Myanmar kyats – were filed, they were not yet approved by the foreign governments and were thus held in ATPCo's system, pending such approval.

On 2 April 2012 the kyat was devalued such that it was then worth 0.7 per cent of its former value. Several months later, IATA instructed ATPCo to release new economy and business-class fares for Yangon to Montreal travel. The pricing was adjusted to account for the devaluation of the kyat. ATPCo carried out these instructions, but also erroneously released the first-class fares – which were not to be released and had not been adjusted to account for the currency devaluation. This resulted in the availability of a fare of just US$114 for an itinerary that should have been sold for US$14,570 before taxes.

ATPCo learned of the mistake on 28 September 2012. It advised IATA in early October and US Airways was advised by IATA on 4 October 2012. US Airways then began cancelling the tickets. In support of taking this step, US Airways invoked the common law doctrine of 'mistake'. This doctrine provides that when a party enters into a contract knowing that a material contractual term has been erroneously expressed, that party should not be entitled to take advantage of the error. Rather, the court will view this as a flaw in the formation of the contract and the contract will be void from the outset.

US Airways went further to argue that it did not have to show that Alberque had subjectively known of the error, just that a reasonable person would have recognised it. In this respect, it relied on a Supreme Court of Canada ruling, which held that it is not necessary to prove actual knowledge on the part of the non-mistaken party in order to ground relief, as in this context one is taken to have known what would have been obvious to a reasonable person in light of the surrounding circumstances.

Even without this jurisprudential authority, there was ample evidence to demonstrate that Alberque was aware of the error. For example:

- three hours before purchasing his ticket, he posted online that he had found a mistaken price that would 'probably get cancelled'; and
- two hours before the purchase, he posted on another website ruminating how the US Department of Transport would treat the situation if a complaint were made.

US Airways also argued that a party seeking fare information for this itinerary online would easily determine that the price was an error, especially given that the price for the same journey in economy or business class was much more than the first-class fare.

The agency accepted US Airways' submissions in this respect and rejected Alberque's claim that the fare was not so unreasonable – as he had obtained other extremely advantageous fares on other trips by using unusual routes. His complaint was dismissed – but the agency did identify what it felt was a reasonable procedure to take when erroneous fares are filed. It stated that in these situations, air carriers should, at a minimum:

- notify the passenger – no later than 72 hours after the carrier becomes aware

of the erroneous fare, that all or any portion of the ticketed itinerary has been cancelled; or
- at least 24 hours before the passenger's scheduled departure from the point of origin issued on the ticket, that all or any portion of the ticketed itinerary has been cancelled, if the ticket was purchased less than 72 hours before their scheduled departure; and
- refund the total cost of the ticket.

With respect to interline itineraries, participating carriers are expected to coordinate among themselves and decide which of the interline carriers will notify the passenger and provide the refund in the event that the passenger's ticketed itinerary is cancelled.

83 Complainants v Swiss International Airlines[7]

The final case in the trilogy brought the matter to a full circle. The complaint was brought against Swiss by an additional 83 passengers who had booked similar itineraries, under the same circumstances that had occurred in the previous cases. In this complaint, Swiss adopted US Airways' approach and provided a similarly detailed description to what US Airways had provided in its complaint.

The agency used the same analysis as it did in US Airways and reached the same conclusion, dismissing all 83 complaints. One difference in this case was that Swiss did not advance evidence as to the subjective knowledge of each complainant as to whether the quoted prices were in error. Rather, the agency accepted that 'a reasonable person ought to have known that a total cost of approximately US$1,000 for first and business class travel from Yangon to Eastern Canada is not simply a low ticket price, but a mistake'.

The agency held that even though Swiss offered, as a gesture of goodwill, to carry en route passengers in economy class, it was under no obligation to do so.

In its closing remarks, the agency reiterated the process that it found reasonable for air carriers to take when an erroneously priced ticket is sold.

Notes

1 *Brewer v Swiss International Airlines*, CTA Decision 239-C-A-2013.
2 NTA(A) No. 496.
3 *83 Complainants v Swiss International Airlines*, CTA Decision 202-C-A-2014
4 Decision 666-C-A-2001
5 Note the reluctance to characterise them as 'erroneous fares'
6 *Alberque v US Airways*, CTA Decision No 177-C-A-2014; Decision 2-C-A-2001.
7 *83 Complainants v Swiss International Airlines*, CTA Decision 202-C-A-2014