

VERÓNICA PACHECO-SANFUENTES
TRAVEL AGENCY COMMISSIONER, AREA ONE
4047 Del Ray Road
Sechelt, British Columbia V0N 3A1
Canada

DECISION 2009 - # 4

In the matter of:

Viajes Falabella Limitada

IATA Numeric Code: 75 -50105-3
Ahumada 179, Piso # 4
Santiago de Chile,
Chile

Applicant

vs.

International Air Transport Association

Av. Ricardo Lyon 222, Oficina 701A
(751-0125) Providencia
Santiago de Chile,
Chile

Respondent

I. The Case

The current review proceeding seeks to determine whether or not the internal restructuring process that S.A.C.I. Falabella Holding, ultimate owner of the Applicant, went through qualifies as a change of ownership in terms of Resolution 818g, Section 10.

II. The Parties

The Applicant is Viajes Falabella Limitada (called herein after “Viajes Falabella”), an IATA Accredited Agent, with registered offices in Santiago de Chile, Chile and having thirty nine (39) branches.

The Respondent is IATA’s Country Manager for Chile, Mrs. Heather MacDonald.

III. Background

During 2008 Falabella Holding went through an internal restructuring process, without the participation of any foreign partners and implying no change of control.

On June 17th, 2009, IATA sent a communication to the Applicant stating that as a consequence of an updating process of their data, they had detected a change of ownership in Falabella, representing more than 30% of the total issued share capital of the Agent, and as such, according to Resolution 818g, Paragraph 10.2.1 (b), the Applicant must present a financial guarantee to IATA.

On June 21st, 2009, after reviewing a letter submitted by the Applicant where they explained the situation occurred at the interior of the Holding, the Applicant's owner, IATA decided to uphold their original decision and insisted in requesting the commented guarantee from the Agent (for US \$ 2,476,900.00), as well as the fees' payment related to this determination (US \$ 13,815.00).

IV. Authority for Review

Resolution 820e determines the scope of the Travel Agency Commissioner's review proceedings, and as so provides for Accredited Agents, for the Agency Administrator, for a group of Member Airlines and for the Agency Services Manager to seek review by the Commissioner in circumstances described therein. In this case, the most pertinent Paragraph as seen from the Agent's perspective was 1.1.10, as well as Section 11 of Resolution 818g.

Having received the said Request for Review from the Applicant within the thirty (30) day time limit, the undersigned has decided to allow the Review.

Both parties have agreed to waive their rights for a formal hearing and have allowed the Travel Agency Commissioner to base her decision on the documentation rendered. The undersigned finds that the arguments of both sides are clear and an oral hearing can be dispensed without jeopardising the process.

V. The Applicant's Arguments in Summary

A. Arguments:

IATA has incorrectly interpreted the internal restructuring of Falabella Holding, and consequently of Viajes Falabella Limitada as a change of ownership, as stated in Resolution 818g. The said interpretation of the facts does not correspond <<to reality nor to the rules to be followed in Chile about structures of Holdings>>.

It hasn't been any true change of ownership after or before the internal restructuring, nor has any change of control taken place, the ultimate owner of the Applicant is, and has always been, the S.A.C.I. Falabella Holding itself.

Prior to the restructuring, the shareholders of Viajes Falabella Limitada were the following companies, all of them subsidiaries of the Holding S.A.C.I. Falabella:

1. Ventas y Servicios Generales Venser Limitada: 48%
2. Servicios y Administraciones Generales Serva Limitada: 44%, and
3. Promotora CMR Falabella S.A.: 8%

After the restructuring process the only change that has taken place is that the first two partners were replaced by another member of the Holding, so the current shareholders are:

1. Falabella Inversiones Financieras S.A.: 92% and,
2. Promotora CMR Falabella S.A.: 8%

The Applicant quoted the Chilean “Superintendencia de Bancos e Instituciones Financieras” and the “Superintendencia de Valores y Seguro” criteria in a similar case of restructuring process amid another company member of the S.A.C.I. Falabella Holding, in which the said public organisms stated that those changes among subsidiary companies didn’t mean any real change of ownership since the final and ultimate owner remained been the Holding.

The process that took place at S.A.C.I. Falabella Holding does not follow in to any of the hypothesis of Resolution 818g, Section 10.2 because (i) it hasn’t been any reduction of capital; (ii) it hasn’t occurred any disposal or acquisition of stock representing 30% or more of the total issued share, <<the sole operation ... has consisted in a simple division and rights contribution within companies that are all subsidiaries of Falabella’s Holding matrix (S.A.C.I. Falabella)>>, and, (iii) finally, no transfer of the company’s control has happened, since the control of the Applicant was and still is in the hands of the Holding (S.A.C.I. Falabella).

B. Evidence

The documents that have been submitted by the Applicant are:

- A copy authorized by Public Notary of the Incorporation Act, dated June 2nd, 2008 with its pertaining extract registered and published;
- A copy authorized by Public Notary of the Incorporation Act, dated November 3rd, 2008 with its pertaining extract registered and published;
- IATA’s correspondence dated June 17th, 2009;
- The Applicant’s answer to that letter dated July 3rd, 2009;
- IATA’s final decision dated July 21st, 2009;
- Letter sent to the “Superintendencia de Bancos e Instituciones Financieras” dated September 12th, 2008 and its reply dated September 25th, 2008; and,
- Email sent to this Commissioner by Deborah Moomberg, one of the Applicant’s lawyers, replying a request from the undersigned in regards to the capital distribution of “Ventas y Servicios Generales Venser, Ltda.” y de “Servicios y Administraciones Generales Serva Ltda.” prior to the Falabella Holding’s internal reorganization.

VI. The Respondent’s Arguments in Summary

A. Arguments

From the Respondent's perspective the sole fact that prior to the restructuring process the partners of Viajes Falabella were the three companies named: (i) Ventas y Servicios Generales Venser Limitada (48%); (ii) Servicios y Administraciones Generales Serva Limitada (44%); and, (iii) Promotora CMR Falabella S.A (8%) and after the said process the partners appeared to be just two companies, named: (i) Falabella Inversiones Financieras S.A. (92%); and, (ii) Promotora CMR Falabella S.A. (8%) is enough to consider that a change of ownership has taken place and therefore the Applicant is to provide a financial guarantee to IATA and to pay the correspondent fees. No any further argument or evidence was given to explain their interpretation of Resolution 818g, Section 10.2.

B. Evidence

The documents that have been submitted by the Respondent are:

- Emails exchanged between IATA and Viajes Falabella in regards to the company's composition, dated May 28th, 2009 and June 1st, 2009;
- IATA's general information of Viajes Falabella;
- IATA's correspondence dated June 17th, 2009; and,
- IATA's final decision dated July 21st, 2009.

VII. **Considerations Leading to Conclusion**

A. Preliminary consideration

Before analysing the so-called internal restructuring process and whether or not it qualifies as a change of ownership in terms of Resolution 818g, Section 10, alleged by the Applicant, the undersigned considers convenient to clarify the rules that have been denounced by IATA as breached by the Applicant.

According to IATA Country Manager's response to this Commissioner, dated August 10th, 2009, the Agency Administrator <<... based on Resolution 818g, Section 10, determined the Agent was required to provide documents to process the Change of Owner and *would also require the signature of a new Passenger Sales Agency Agreement (PSAA)*>> (our emphasis).

However, in both IATA letters to the Agent, dated June 17th and July 21st, 2009, they indicate as been the case of Change of Owner the hypothesis contemplated in Paragraph 10.2.1 (b) of Resolution 818g, pertaining to the <<*disposal or acquisition of stock representing 30% or more of the total issued share capital of the Agent by any Person*>>. It is important to note that this Paragraph falls under Subsection 10.2, titled <<CHANGES WITHIN A CORPORATION **NOT REQUIRING** A NEW PASSENGER SALES AGENCY AGREEMENT>> (our emphasis).

From the undersigned point of view and in accordance not only with the cited Paragraph 10.2.1(b) of Resolution 818g, but with the written evidence submitted by both parties to this Office, even in the case that the restructuring process that had taken place within the Agent's organization would be considered as a "change of owner" as viewed by the applicable rules, Viajes Falabella should not be required to sign a new Passenger Sales Agency Agreement, since none of the assumptions stated in Section 10.3 of Resolution 818g (PROCEDURES FOR CHANGES **REQUIRING** A NEW PASSENGER SALES AGENCY AGREEMENT) has been denounced by IATA in this case. Furthermore, none of them correspond to the Applicant's situation, due to the fact that the internal restructure of S.A.C.I. Falabella holding, the ultimate owner of Viajes Falabella, did not alter the Agent's legal nature with respect to its responsibilities and obligations.

B. Final Considerations

According to the documents and information that have been sent by the parties to this Office, the new and previous shareholders of the Applicant have always been companies *subsidiaries* of the main holding called S.A.C.I. Falabella and that the ultimate owner and the one who has hold the control of Viajes Falabella has always been the said holding, S.A.C.I. Falabella. It is pertinent to note that this fact was not refused nor denied by the Respondent.

The situation at Viajes Falabella before and after the so-called internal reorganization of the S.A.C.I. Falabella holding was as follows:

(i) Before the internal restructuring process the Applicant's shareholders were:

- a) Ventas y Servicios Generales Venser Limitada (with 48% of the shares)
- b) Servicios y Administraciones Generales Serva Ltda (with 44% of the shares)
- c) Promotora CMR Falabella (with the remaining 8%).

The internal share distribution of those companies was:

- a) Ventas y Servicios Generales Venser Limitada: S.A.C.I. Falabella = 99.78527078%
Promotora CMR Falabella = 0.21472922%
- b) Servicios y Administraciones Generales Serva Ltda: S.A.C.I. Falabella = 85%
Promotora CMR Falabella = 15%
- c) Promotora CMR Falabella: S.A.C.I. Falabella = 100%

(ii) After the internal restructuring process the Applicant's shareholders are:

- a) Falabella Inversiones Financieras S.A. (with 92% of the shares)
- b) Promotora CMR Falabella (with the remaining 8%).

The internal share distribution of those companies is:

- a) Falabella Inversiones Financieras S.A.:
 - Inversiones Falabella Limitada = S.A.C.I. Falabella + Inversiones Parmin (100% owned by S.A.C.I. Falabella)

- Inversiones Parmin SPA = 100% owned by S.A.C.I. Falabella.

b) Promotora CMR Falabella: S.A.C.I. Falabella = 100%

In order for the undersigned to review the Respondent's decision it's important to take a close look at Section 10 of Resolution 818g, referred to as "Change of Ownership, Legal Status, Name or Location", particularly to Subsection 10.1 "Notification of Changes" and at Section 10.2 "Changes within a Corporation Not Requiring a New Passenger Sales Agency Agreement". Those rules literally state as follows:

<<10.1 NOTIFICATION OF CHANGES

All changes of ownership, legal status, name or location of the Agent that may impact its accreditation status shall be notified to the Agency Administrator prior to the change to enable processing in accordance with the respective provisions of this section...

10.2 CHANGES WITHIN A CORPORATION NOT REQUIRING A NEW PASSENGER SALES AGENCY AGREEMENT

10.2.1. the following changes to an Agent, which is structured as a corporation or limited liability company, require notice as required in Subparagraph 10.2.2 but do not require execution of a new Sales Agency Agreement, provided that the changes do not alter the Agent's legal nature with respect to its responsibilities and obligations under applicable law>>.

(Emphasis ours)

Based on those rules, two different factors are to be considered while analysing the Applicant's corporate changes. The first one is in regards to the Applicant's obligation to notify the Respondent prior to accomplish any change of ownership, legal status, name or location. The second one pertains to particular situations where the Agent, even though does not require to sign a new passenger sales agency agreement, has to notify the Respondent about those changes and has to submit a current financial statement to the Agency Administrator.

From a combined lecture of both rules the relevant changes that might happened within an Agent, not requiring the signature of a new agreement, but requiring notice to the Agency Administrator are those that (1) <<may impact its accreditation status>> and that, (2) at the same time, <<do not alter the Agent's legal nature with respect to its responsibilities and obligations under the applicable law>>.

Having reviewed all the documents sent by the parties at the light of the applicable rules, considering that those changes didn't imply the incorporation of any foreign company at all neither any change in the control of the Applicant, but was most likely a re-accommodation among subsidiaries of the same holding, named S.A.C.I. Falabella, who was and remains the ultimate owner of the Applicant, the undersigned estimates that the changes that took place

within the Applicant's corporate structure do not seem to have any impact on the Applicant's accreditation status and definitively do not alter the Agent's legal nature. As a matter of fact, the Applicant continues to be a limited corporation, entirely owned by a public holding named S.A.C.I. Falabella that participates in the Santiago de Chile's Stock Exchange Market and is, therefore, subject to those local financial rules.

Further more, at no time the Respondent demonstrated nor provided arguments in regards neither that in any manner the Applicant's accreditation status was impacted nor that the commented internal reorganization could have altered the Applicant's legal nature. No arguments or proofs were put forward in order to demonstrate any alteration or non-fulfillment of the Applicant's respect to its responsibilities and obligations as an Accredited Agent.

VIII. Decision

Having carefully reviewed all the evidence and arguments submitted by the parties in connection with this case, as defined at the beginning of this decision,

Having looked at the applicable Resolutions,

This Commissioner decides

1. The decision taken by the Respondent on July 21st, 2009, estimating that the changes that took place within the Applicant's corporate structure are to be considered as a "Change of Ownership" is not in accordance with reality nor with the requirements stated by Paragraphs 10.1 and 10.2 of Resolution 818g, therefore, it is changed. No financial guarantee is required from the Applicant neither to pay any related fees. However, the Applicant is to send the documentation requested originally by the Respondent on letter dated June 17th, 2009, according to Paragraph # 3 of the said letter.

Nonetheless, if the Respondent considers, based on other applicable rules and under different circumstances, that the Member Airlines' monies would be at risk, he might request the Applicant to provide IATA with a financial guarantee.

Per Resolution 820e, Section 4, the parties have the right, if they consider themselves aggrieved by this decision, to seek review by Arbitration, in accordance with the provisions of Resolution 818g, Section 12.

Decided in Sechelt, BC, the 1st day of September, 2009

Verónica Pacheco-Sanfuentes
Travel Agency Commissioner Area 1