

VERÓNICA PACHECO-SANFUENTES
TRAVEL AGENCY COMMISSIONER, AREA ONE
(The Americas and the Caribbean)
4047 Del Ray Road
Sechelt, British Columbia VoN 3A1
Canada

DECISION 2010 - # 1 (formerly numbered 6)

THE PARTIES

1.- Viajes Leman's, S.A. de C.V.

IATA Code # 8051440 5
Loca 1-B, Centro Comercial La Plaza San Miguel
San Salvador, El Salvador
Represented by Mr. José Miguel Guzmán Márquez

2.- Visa Travel S.A. de C.V.

IATA Code # 80767422
Condominio Plaza Suiza L-6 Segundo Nivel
San Salvador, El Salvador
Represented by Mrs. Irma Esperanza Jiménez de Zacarías

3.- Amate Travel, S.A. de C.V.

IATA Code # 80500206
Centro Comercial El Amate
Locales del 2-2 al 2-5
Colonia Escalón
Avenida Masferrer Norte No. 139
San Salvador, El Salvador
Represented by Mrs. María Eugenia Ortíz de Mayorga

4.- Aviles Travel, S.A. de C.V.

IATA Code # 8050058-2
Residencial Olímpica,
57 Av. Sur Y Pje Olímpica 8A-3
San Salvador, El Salvador
Represented by its General Manager, Mr. Daniel Menéndez Abrego

5.- Utravel Service S.A. de C.V.

IATA Code # 8090426-1 y 8051859-4
Av. La Revolución No. 3 Colonia San Benito
San Salvador, El Salvador
Represented by its General Manager, Mr. Carlos Vidal

6.- Viajes Escamilla, S.A. de C.V.

IATA Code # 80-742432
67 Av. Sur

Pasaje 2 No. 24
Colonia Escalón
San Salvador, El Salvador
Represented by Mr. Germán Antonio Escamilla Mijango

7.- Linda Travel Agency S.A. de C.V.

IATA Code # 80857895
67 Av. Sur y Pasaje Carbonell No. 12
Colonia Roma
San Salvador, El Salvador
Represented by Mrs. Emilia de Rivera

8.- All American Travel

IATA Code # 80500545
Centro Comercial Villas Españolas,
Local C-13, Paseo General Escalón,
San Salvador, El Salvador
Represented by Mr. Julio César Flores Menéndez

9.- VIP S.A. de C.V.

IATA Code # 80917690
Alameda Roosevelt
No. 2020, Local 7
San El Salvador
Represented by its President, Mrs. Luisa María Lacayo de Salinas

Agents-Applicants

vs.

IATA-El Salvador

Centro Comercial Loma Linda
Local 14C, Colonia San Benito
San Salvador, El Salvador
Represented by IATA's Country-Manager, Mr. David Hernández and the
Agency Administrator for Area 1, Mr. Carlos Bendjouya Fernández

IATA-Respondent

I. THE CASE

On April 7th, 2010, the Agents-Applicants, identified above, requested a review of the "Notice # 044-2010, about Payment of Weekly Remittances", dated March 8th, issued by IATA's Country Manager, Mr. David Hernández (referred to herein after as the "Notice").

Through the Notice, the Country Manager informed the community of IATA's Accredited Agents about certain ways of how the weekly deposits should be made, whenever they are done with cheques other than from Citibank (IATA's financial institution that manages the "BSP"¹ in El Salvador), for the airlines' tickets sold through the passengers agency program.

On April 16th, 2010, IATA, represented by the Agency Administrator for Area 1, presented its submissions for the case, submitting the arguments that considered convenient for better defend IATA's position. Likewise, on April 9th and 13th, 2010, the Agency Administrator submitted to this Office additional information pertaining to the case.

Considering that the Agents-Applicants have requested the temporary suspension of the Notice while this review proceeding takes place, through this decision the undersigned will evaluate not only her own jurisdiction and determine if a credible case has been made, but will also decide about the requested temporary measure.

II. CONTENT OF THE NOTICE, OBJECT OF THIS REVIEW

In the Notice, IATA's Country Manager states as follows:

<<In regards to the weekly deposit **with cheques coming from different Banks, other than Citibank**, in order to pay for the tickets sold through the BSP program, I would like to remind you that pursuant Resolution 818g, Attachment "A", Section 1, and which refers to Chapter 11 of the BSP Manual for Agents, **these funds have to be available** in IATA's account by the closing of the payment due date (5 pm), Wednesdays of each week.

Therefore, travel agencies must make the proper arrangements in order for them to, starting the remittance period of March 22nd to 28th, have the funds available in IATA's Bank account on Wednesdays; thus find below the following payment options:

1. Bank transfer, for those who have accounts at the Citibank **(the most recommended option)**;
2. Deposit with Citibank cheques, for those who have accounts at this Bank;
3. Cash deposit;
4. Deposit on Mondays, if payed with cheques from other banks. This option is the less recommended; due to the fact that the internal Bank clearance process could take, in some

¹ English abbreviation of "*Billing and Settlement Plan*", created by IATA.

cases, up to 96 hours, which will be treated as a belated payment.

Please kindly consider the above indicated notes, otherwise your Agency will be fined according to Resolution 818g and the delay in regards to the funds' availability will be considered as an overdraft and we will be obligated to charge the Agency the correspondent amount for liberation of funds, on top of the administrative charges prescribed in the Resolution...>>.

Before considering if a credible case has been made, for clarity purposes, it's important to make a summary of the parties' arguments, particularly considering the fact that IATA has questioned the authority of the Travel Agency Commissioner (referred to herein after as "TAC") for reviewing cases as the present one.

III. THE AGENTS-APPLICANTS' ARGUMENTS IN SUMMARY

- From the Applicants' perspective, IATA's Notice has no legal grounds, lacks of legal fundamentals. The dispositions contained in Section 1, Attachment "A", of Resolution 818g, as well as Chapter 11 of the BSP Manual for Agents, do not indicate that the funds must be available in IATA's account by the end of the payment due date;
- They argue that, according to the Salvadorian legislation, the effect of a certified cheque, by guaranteeing the issuer's availability of funds, liberates the debtor from its creditor with the sole hand-in of the cheque;
- According to Paragraph 11.3 of the BSP Manual for Agents, in order for IATA to demand from Agents the remittances' deposit days earlier than the date established in the respective calendar, a *local agreement* has to exist. Agreement that in this case does not exist in El Salvador;
- The fact of having to deposit two days before the due date, when it is done through certified cheques, implies a decrease in the credit days that the Agents have to make the payments of the BSP tickets sold during a particular period. This will imply, as well, a minor risk for the airlines, and, therefore, it should imply, likewise, a reduction in the amount of the guarantee that Agents have to annually provide to IATA.
- The measure entails a veiled and uncomfortable obligation for Agents to sustain commercial relationships (*id est*, to open bank accounts) with the Citibank; bank that, according to the Applicants, not necessarily provides the best business conditions for them. All of this happened without having reached any specific agreement between the Agents and IATA, nor, at least, between IATA and the said bank in this regard.

- This change will entail an alteration of the payments/credit calendar that Agents maintain with their clients, particularly with the so called corporate clients.
- This requirement that the funds have to be available in fewer days, should imply that the commissions that are paid to Agents would be payed by BSP airlines in less amount of time, as well.
- In the Applicants' opinion, IATA should have waited the time frame that <<the Manual offers to request the correspondent review>> at the Commissioner's Office, before pretending the compliance of the said Notice. The undersigned considers important to indicate that, up to the present moment, this Office has not received any response from the Applicants in regards to the question that she posed them concerning the exact rule which allegedly IATA would have violated.

IV. IATA'S ARGUMENTS IN SUMMARY

Regardless the fact that it was mentioned at the end of its submissions even though is an argument pertaining the admission of the case not its merit, IATA considers that this Request for Review should be dismissed *in limine litis*. From their lecture of Resolution 820e, TACs have no jurisdiction over cases like this one, because (i) the Notice object of this review wasn't issued by the Agency Administrator (as erroneously mentioned by the Applicants), but by the El Salvador-Country Manager; and, (ii) the subject is related to BSP matters, not to accreditation, which makes the case fall out of the scope of the TAC's review process.

Concerning the merit of the case, IATA sustains the following:

- The measure announced by the Country Manager fully complies with all the requirements expressed in Chapter 11, Paragraph 11.3 of the BSP Manual for Agents, as well as with Resolution 818g's rules;
- Resolution 818g, Paragraph 1.6.2.1 (d), confirms the obligation for Agents to ensure that the funds from the sales of BSP airlines' tickets must be available the established due date at the bank (Citibank).
- The fact that exists in El Salvador the clearance bank proceeding when deposits are made with cheques from other banks, and considering that this internal process can take approximately 48 hours or more, if Agents would use this system and pay the exact same "payment due date" (meaning, Wednesdays of each week), by no means those funds would be available for IATA that same day, as requested by the rules, but maybe on Friday or even Monday of the following week. If this proceeding was tolerated, it would not allow IATA to comply with its proper deposit's obligations towards the BSP airlines;
- This is an IATA worldwide proceeding; it is applied wherever a BSP has been established;

- IATA dismisses the argument of the debtor's liberation when he/she pays through certified cheques, as prescribed in the Salvadorian commercial legislation, indicating that according to the contractual relationship between Agents and IATA, the determinant factor is that the funds from the sales of BSP airlines' tickets have to be available for IATA in the previously agreed and informed to Agents due date. This obligation is independent from whether or not the issuing Bank remains responsible for the existence of funds of the cheque's issuer. From IATA's perspective, the obligation and the contractual relationship is with the Accredited Agent (not with the issuing Bank), therefore it's an Agent's obligation to have the funds available for IATA the established due date;

- In regards to the alleged inexistence of a local agreement between Agents and IATA in order to be able to implement a change in the payments calendar, IATA argues that it is not a change; it's a simple reminder for Agents of the valid rules' correct application, specifically of Paragraph 11.3 of the BSP Manual for Agents.

V. TRAVEL AGENCY COMMISSIONER'S AUTHORITY FOR REVIEW

Before going any further, the undersigned will analyze in the following paragraphs her own jurisdiction.

Resolution 820e sets the rules that command the TAC's review process. In this regards, the introduction of the said Resolution is quite eloquent when it states that the TAC:

<<shall conduct reviews and act with respect to decisions and/or actions **affecting Agents and applicants under the Agency Programme** (it being understood that the definitions in Resolution 866 apply to this Resolution), **within the Commissioner's jurisdiction**...>> (our emphasis).

If we analyze this first disposition of Resolution 820e, we find that:

- (i) the TAC will conduct reviews of decisions and/or acts only if they affect Agents;
- (ii) whenever those decisions/acts have been executed under the Agency Programme; and
- (iii) are within the TAC's own jurisdiction²

In order to interpret the terms of the said disposition, Resolution 820e calls for the application of Resolution 866's definitions. So if we take the said Resolution, and look at what "*Agency Programme*" stands for (since, in principle, only Agents

² That jurisdiction, by the way, according to Paragraph 1.2.3 of Resolution 820e, only the TAC can determine.

affected by actions or decisions taken under the execution of that Programme, will be part of the TAC's jurisdiction), we find the following definition:

<<AGENCY PROGRAMME (sometimes referred to as 'IATA Agency Distribution System', 'IATA Agency Programme', 'IATA Industry Distribution System', or 'IATA Agency Passenger Agency Programme') means the various IATA Resolutions and rules and procedures adopted by the Conference to maintain overall standards and industry practices for the sale of international air transportation by Accredited Agents. This includes accreditation, BSP matters, and training>>.

Having in consideration both rules (Resolution 820e and Resolution 866), the undersigned deems that the TAC has authority to review all the cases related to the Agency Programme, which means, not only those related to Agents' accreditation, as erroneously pointed out IATA, but also those related to BSP matters and training, as expressly prescribes the cited Resolution 866, as far as Agents or Applicants would be affected by decisions and/or acts taken in execution of the said Programme.

In regards to IATA's argument that the Notice wasn't issued by the Agency Administrator, but by the El Salvador's Country-Manager, because it was a BSP issue pertaining to IATA ISS Management³, the undersigned considers the following:

- Rules have to be interpreted as a whole, looking at their spirit, purpose and reason. Therefore, in this case, if we analyze in a concatenate way the rules stated in Resolution 820e, as well as the definitions of Resolution 866, the fact that the Notice was signed by the Country-Manager, representing the local ISS Management does not affect the TAC's authority for reviewing this case. As previously indicated, BSP matters do fall under the scope of the TAC's competence, as far as they are brought to the TAC's attention by Agents or Applicants affected by decisions and/or actions taken under the Agency Programme. Consequently, as the Notice didn't treat any matter related to accreditation, it could not possibly be issued by the Agency Administrator. By the contrary, the said Notice was issued by the person that, according to IATA's internal organization, had the authority to deal with BSP matters, pursuant the definition that Resolution 866 has of "*ISS Management*". That person was El Salvador's Country Manager.

Having affirmed the TAC's jurisdiction for reviewing this matter, the undersigned will determine next if a credible case has been made or not.

³ It is worth it to mention that Resolution 866 defines IATA Settlement Systems Management (usually called "**ISS Management**") as: <<the functional areas of the Industry Distribution and Financial Services (IDFS) that are responsible for management and operation of the IATA Settlement Systems. This definition includes the central and regional ISS Management as well as the local ISS representatives who have overall responsibility for the BSP>>. In other words, it includes the ISS Management within the Industry Distribution System, which local representatives, seem to be the Country-Managers. In this particular case, El Salvador's Country-Manager seems to be responsible for BSP matters.

VI. ABOUT THE ADMISSION OF THE REQUESTS FOR REVIEW

Before getting in to the details regarding the admission of the Requests for Review, the undersigned deems appropriate to precise that the Notice, communicated by the Country-Manager, is not a decision in nature, in the sense that it does not modify, alters or changes any *status quo* in particular, nor solves any specific issue. Through this written communication the Country-Manager basically reminds the Accredited Agents about the application of pre-existent rules, encouraging them to comply with those rules in order to avoid applicable penalties.

Pursuant Paragraph 1.2.3 of Resolution 820e, once determined her own jurisdiction, the TAC will determine whether or not a credible case has been made.

Whereas the arguments and rules cited by the parties in regards to the Agents' obligation of having the funds available by the end of the convened due date (in this case by Wednesdays of each week), the undersigned considers appropriate to analyze Paragraph 14.7.2 of the BSP Manual for Agents-Local Procedures El Salvador. In my opinion, this rule elucidates completely the debated issue; because it seems that the parties have a different lecture of the exact same rules that both of them have cited, meaning Paragraph 11.3 of the BSP Manual for Agents, and Attachment "A" of Resolution 818g, Section 1, Paragraph 1.6.2.1 (d).

In fact, Paragraph 14.7.2 of the BSP Manual for Agents-Local Procedures El Salvador prescribes the following:

<<14.7.2 Method of Remittance

Remittance must be made via certified or cashiers cheque, via electronic transfer or in cash to the IATA account 8-303-00000737-7 of Citibank. **The Agent must ensure that the funds are available on the remittance date**>> (our emphasis).

The undersigned considers that the text of the cited rule is clear enough as per leaving no room for doubts or interpretation. Therefore, is an Agents' obligation to deposit the funds from the airlines' tickets sales in the Citibank account, in a way that those funds would be **available** for IATA the convened due date, which in this case is Wednesdays of each week. This availability implies that IATA will have access to those funds at its sole discretion by the end of the payment due date; otherwise, the rule would be violated by the Agents, who would be considered in default due to the lack payment on time.

Pursuant the cited rule, the argument presented by the Agents, in the sense that as debtors they would be liberated from the remittances' obligation towards IATA, by depositing certified cheques the same due date (Wednesdays of each week) has to be dismissed, because as has been recognized by both parties, due to the internal

clearance process that banks have in El Salvador for cheques coming from other banks, it's obvious that those funds will not be available for the creditor that same day, as required by the commented Chapter 14 rule. Therefore, the debtor will not be liberated of his/her obligation if by the end of the due date the funds aren't available for the creditor. Consequently, it's in the Agent/debtor's own interest to find the way of making the remittances' deposits in order for the funds to be completely available for IATA by the end of the convened date.-

VI. DECISION

Having carefully reviewed all the arguments submitted by the parties in connection with this case, as previously described,

Having looked at the applicable Resolutions,

This Commissioner decides

- Travel Agency Commissioners are empowered to review cases related to BSP matters, as indicated in the rules and definitions mentioned in Resolutions 820e and 866, respectively; therefore, the undersigned reaffirmed her authority to review the present Request;

- The Requests for Review submitted by the Agents-Applicants have to be dismissed because they lack of legal grounds. Chapter 14, Paragraph 14.7.2 of the BSP Manual for Agents-Local Procedures El Salvador, clearly indicates the path to be followed by Agents whenever they deposit their remittances. Hence, it is useless to conduct a review when, *in limine litis*, the undersigned considers inadmissible the main argument of the Request;

- Consequently, the request for interlocutory suspension of the Notice has to be also dismissed;

- The Notice # 044-2010, about Payment of Weekly Remittances, dated March 8th, 2010, issued by IATA's Country Manager is upheld and the Agents-Applicants have to comply with it.-

Decided in Sechelt, BC, Canada, on April 22nd, 2010

Verónica Pacheco-Sanfuentes
Travel Agency Commissioner Area 1

Per Resolution 820e, Section 4.1, any party has the right, if he/she considers him/herself aggrieved by this decision, to seek review by Arbitration, in accordance with the provisions of Resolution 818g, Section 12.

Note: The original signed version of this decision will be sent to the parties by regular mail. In the mean time, in order to ensure timely receipt by the parties, an electronic version of it is sent on April 22nd, 2009.