Travel Agency Commissioner – Area 1

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NOTE: This is the translated version, the original and official version in Spanish language was sent to the Parties in due course.

Vancouver, November 8th, 2012

Re.: **Decision Octubre 8, 2012. IATA vs. Bolivie Tur Pasajes SRL**
Clarification

Through the following text, pursuant Paragraph 2.10 of Resolution 820e, I herewith respond to the clarification requests sent to this Office by the Agent Bolivie Tur Pasajes S.R.L. (referred to herein after as "the Agent"), on the 19th and 22nd of Octubre 2012 and to the questions posed therewith, as well as the clarification request sent by IATA on the 31st of October 2012. The answers will be given respecting the same order in which the questions were submitted.

Preliminary Statement – Scope of a Clarification Request

The aim of a decision's clarification is to allow the author of it, upon the Parties' requests, to elucidate certain aspects or points of the decision that might have generated doubts, or that are not fully comprehended by the Parties or that were not exposed clearly enough by the writer; it also serves to amend or correct errors in calculation, typographical mistakes or of similar nature. The clarification, conversely, it is not a review made by the same author of the decision. The objective of this recourse that the Parties have access to it is not to re-open a closed case in order to obtain a different decision.
Having this concept in mind, I will proceed to clarify the doubtful points as requested by each one of the Parties.

1. **The suspension:**
Once the decision would become effective, it will be up to IATA to evaluate whether to lift the suspension imposed to the Agent or to declare the termination of the Sales Agency Agreement signed by the Agent. In case IATA follows this last option, the Agent will have the possibility to request for a Travel Agency Commissioner's (refer to hereinafter as "TAC") review, in accordance with Paragraph 1.1.5 of Resolution 820e, if it deems it appropriate under the circumstances.

2. **Refunds of unused STDs**[1]:
The subject matters that fall into the TAC's jurisdiction are enumerated in Resolution 820e and refund of STDs is not mentioned amongst them, therefore, any dispute concerning that concept is out of the scope of a TAC review process. This affair would have to be dealt with bilaterally between

[1] STDs: refers to "Standard Traffic Documents"

the Parties involved (Agent/Airline) at the local Civil Courts, by arbitration or by mediation as they might judge it convenient.

Additionally, it is worth to mention that the reason why there is no reference in the decision about unused STDs' refunds from Qatar Airways to the Agent is because, as indicated in the text of the decision (page 20 and next), it does not correspond to IATA the execution of the rules stated in Resolution 824r, IATA is not the recipient of those norms. It is the Member Airline the one who has to comply with those set of rules not the Applicant; therefore, it was not this Office's role to demand compliance with rules that are not addressed to any of the Parties involved in the review process at hand. In fact, Qatar Airways was not a Party in this review process, it simply intervened as a witness, called by the Applicant, and that does not automatically convert it in to a Party, procedurally speaking.

3. Consequent Damages

In regards to:

(i) The payment request of << interests derived from the retained amount given in custody to IATA, over the 60 day period, considering that it is a delayed payment>>: it is important to mention that this request not only was never submitted during the review process, and, therefore cannot be entertained at this time when the final decision has been already rendered; but also pursuant the current stage of IATA Resolutions, TACs are not empowered to condemn interest in arrears as is empowered a Judge at a Civil Court jurisdiction.

(ii) Concerning the Agent's request to receive the funds back from IATA in US Dollars instead of in Argentinian Pesos, considering the loss in the exchange rate that the Agent had to face, the undersigned deems the request to be inadmissible and hence it is dismissed. All the transactions that took place in connection with the issuance of the ADMs were made in Argentinian Pesos: (a) the tickets were issued in Argentinian Pesos; (b) the ADMs that resulted as a consequence of the said issuance were also made in Argentinian Pesos; and, finally, (c) the amount deposited by the Agent in to IATA's custody was also made in Argentinian Pesos. It is therefore alien to this review process the alleged private errands that the Agent had to undertake in order to obtain those funds. This was not a subject matter of the review process.

In any event, it is important to indicate that the TAC has no jurisdiction to grant any compensation derived from proven consequent damages.

4. Airlines' Protection of Funds (Res. 818g, Attachment "A", Paragraph 1.8):

Before continuing any further, the undersigned deems appropriate to remind the Agent that in case of disagreement with her decision, it has the right to request for arbitration, specially having in mind that the request for Clarification it is not aimed, as indicated in the Preliminary section of this document, to review the factual and legal grounds that were at the origin of the decision. Therefore at this stage the Commissioner will only indicate that, as it can be read in the proper text of the decision under comments: (i) IATA's primary role is not the protection of funds of the BSP Member Airlines, but definitively one of the most important ones that it has, especially when it comes to the implementation of the Agency Programme; and (ii) the origin of these funds (coming them from STDs, ADMs, etc.) has to be expressly indicated in IATA's applicable Resolutions, being these rules fairly known among the community of Member Airlines and IATA Accredited Agents, as well.

Nevertheless, the undersigned deems appropriate to clarify that the interpretation of the rule contained in the quoted Paragraph 1.8 of Res. 818g, Attachment "A", was limited to determine if in the case at hand the Applicant had, by the time it took the decision of suspending the Agent from the BSP system, enough elements (supporting written evidence) as to justify its action. As indicated in the decision, it not only refers to the ADMs' issuance, but to a series of situations that led the Agency Administrator to doubt in regards to the Agent's credibility and payment reliability. **Situations** that, according to this Commissioner's views, fall under the scope detailed in the heading Paragraph of Section 1.8, whereas the rule does not limit nor conditions in any way the type of situation that should be considered or analysed by the Agency Administrator. The only requirement that the rule mandates in that those situations –**any one of them**- generate reasonable doubts in the Agency Administrator in regards to an Agent's soundness and ability to honour its BSP reports.

In this sense, the undersigned would like to quote the case Law established by the Award issued on the 20th of October 2011, by the ICC[2] Arbitrator, Mr. Barry Leon, in the case VMS *vs*. IATA, where when analysing the scope of this rule (also found in Resolution 832, Section 1.8) it expressly stated as follows:

> <<However the Arbitrator considers that both the Agency Administrator and the Travel Agency Commissioner were entitled to take a broad view of what is relevant. **Any information that tends to suggest doubt as to the travel agent's ability or intent to pay is relevant and may be given some weight.** …
> The fact that the information might relate to other situations or other Resolutions, or constitute a breach of some other provision, does not mean that it is not relevant to an assessment under section 1.8 of Resolution 832. This is the case even if: (a) under the other provision there would be a different process to determine if there was a breach, or a different penalty or remedy if a breach were found; or (b) the same conduct fell under more than one provision. And this is even more the case when conduct that may fall under several other provisions –all of which are relevant to a determination whether the test in section 1.8 of Resolution 832 (of a belief respect the ability or intent to pay) has met– may lead to the suspension of IATA Ticketing Privileges>> (page 53) (Emphasis ours).

5. Consideration in regards to the ADMs issuance, in light of Section 1.8 of Res. 818g Attachment "A"

Regarding the issuance of ADMs itself, the moment they can be disputed by the Agent, it exists the possibility that the value amount of an ADM will not end up being owned by a Member Airline, but accredited to the Agent, situation that would correspond to both Parties to deal with.

Nevertheless, in light of the rule under analysis, it is the Agency Administrator's responsibility to evaluate all and every single element that surrounds an Agent in any given moment in time[3] (these

[2] ICC stands for "International Chamber of Commerce", located in Paris, France, and host of the International Court of Arbitration

[3] Being a valid element the Agency Administrator's consideration, as indicated in the decision, of the fact that not only 1 but 33 ADMs were issued against the Agent due to an alleged fault in issuing the tickets concerned, amongst other factors.

factors could be discarded afterwards, if factual and legal circumstances so determine), and based on the complexity of those circumstances to establish whether or not that Agent is worth IATA's trust or not, because the rule only requires to its application the existence of a reasonable doubt (supported notwithstanding in written evidence).

It is not IATA's role to finally determine the validity or not of those ADMs. And, as explained in the decision, that subject matter was not part of this review process, and hence, was not analysed by the decision, since the dispute concerning their validity was not brought to this Office's attention by any of the concerned Parties.

6. Order of precedence between the applicable rules that IATA had to consider when dealing with ADM's disputes (Res. 818g, Attachment "A" Section 1.7.9 *vs.* Res. 850m)

When interpreting applicable rules it is important to have in consideration not only their spirit, purpose and rationale, but also the context in which they are located, as well as the concrete circumstances that they aim to regulate.

Having stated so, I will clarify in the next paragraphs the reasoning behind the application of the rules in the manner that they were done by the author of the decision in question.

- The rule stated in Paragraph 4.11 of Res. 850m is located in the "Issuance Principles" section and as such alludes to the situation when an ADM has been issued and included in the BSP billing, presuming the rule that, until that moment, both Parties (Airline/Agent) have agreed on that issuance. The norm only contemplates the possibility of a subsequent dispute of such ADM, meaning, once the ADM has been included in the BSP for its payment, and again assuming that both Parties are in agreement with it, and that this <<dispute>> is <<upheld by the Airline>>, this dispute should be solved directly between them and eventually it may even result in the issue of an Agency Credit Memo (ACM) in the Agent's favour.

- It is clear though that the above mentioned Paragraph **does not** regulate situations where the Parties are not in agreement; **does not** regulate the way how these eventual disputes have to be processed when an ADM has been timely disputed, as in the case under study.

Therefore confronted with this lack of regulation in a specific rule, located in the section named "Issuance Principles" of ADMs, the interpreter has to look for the **specific rule concerning ADM disputes**, considering that it was this situation and not the other one that was the subject of this review process. Those set of rules are the ones located in Section 1.7.9 of Resolution 818g, Attachment "A" titled <<**Disputed Agency Debit Memo**>> with particular emphasis in Paragraphs 1.7.9.6 and 1.7.9.7. In fact, in accordance with the evidence on file, once the 60 days that the Parties had to solve their differences had elapsed without an agreement been reached by them, the only possible avenue for IATA to undertake was to <<withdraw>> those ADMs from the BSP Billing, in order for that difference to be solved bilaterally between the Airline and the Agent.

- Furthermore, it is important to take into account the heading of Section 1.7.9 of Res. 818g, Attachment "A", where it is clearly stated that when analysing both rules, they should be interpreted in conjunction with one another instead of excluding one text from the other.

Finally, the undersigned stresses, as it was indicated with further detail in the decision itself, that it does not exist any IATA Resolution in effect that would authorise the Applicant to credit in an

Airline's favour funds that were retained in custody from an Accredited Agent, without its express consent. None of the rules in Res. 850m, nor the ones in Res. 818g, Attachment "A" allowed that behaviour. The dispute resolution procedure had to take place between the Airline and the Agent bilaterally and outside the BSP, as indicated in Res. 818g. Attach. "A" Paragraph 1.7.9.7.

7. Effects of the TAC decision facing the arbitration request

In order to determine the effects of the decision in time, the undersigned esteems that:

- Considering that both Parties have placed a request to bring the TAC decision to arbitration;
- Considering that the decision that was rendered in this case was a complex one, having four (4) different and independent requests to be solved and, therefore, were decided independently one from the other but all covered in one sole text;
- Considering that the decision solves favourably to one Party two of the four submitted requests and favourable to the other Party the other two requests;
- Considering that each Party has announced arbitration in regards to the part of the decision by which it felt aggrieved, resulting from it that the four decisive points were object to the Arbitration notice;

Pursuant Paragraph 2.9 of Resolution 820e, it can only be concluded that the entire decision will automatically be stayed until the arbitration process would have been concluded.

Not having anything else to clarify, the decision rendered on October 8th, 2012 is confirmed and has herewith been clarified.-

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TAC Area 1