

# DECISION 2009-02-24

## Travel Agency Commissioner Area 2

Helene Cedertorn  
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Sweden

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### **The Case:**

Request for Review of Decision by the Agency Administrator the 18<sup>th</sup> Dec 2008 regarding bond requirement

### **Applicant:**

Southall Travel Ltd  
Palmoak House, 19 South Road  
Southall  
Middlesex UB1 1SU  
Represented by Mr Bahia, Managing Director

### **Respondent:**

Agency Administrator, United Kingdom  
International Air Transportation Association, IATA  
Represented by Mr Gilmartin, Country Manager UK & Ireland

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### **Background, formalities etc:**

By a letter the 18<sup>th</sup> of Dec 2008 IATA required a bond of 12,000 000.00 GBP to be submitted by the 18<sup>th</sup> of Jan by Southall Travel Ltd. The deadline for submission was later extended until the 18<sup>th</sup> of Feb. The bond was required on the grounds that the parent company of the agent, Onkar International Ltd, showed that current assets did not exceed current liabilities by 65 200 GBP by balance sheet the 31<sup>st</sup> March 2008.

Southall Travel Ltd requested review by the Travel Agency Commissioner (hereafter TAC) in a letter dated the 29<sup>th</sup> of Dec 2008 in the above matter, under the provisions of Resolution 820e section 1-1.1.5. and section 1-1.1.10.

The parties have met at an informal conference chaired by the undersigned the 4<sup>th</sup> of February 2009, without being able to reach a mutual agreement.

The undersigned ordered interlocutory relief for the Applicant, by an order dated the 6<sup>th</sup> of February 2009.

Both parties have agreed to that a decision by the TAC could be based on the written submissions of the parties.

The undersigned finds that the arguments from both parties are clear and that all submitted evidence in the case are in writing. Therefore the decision could, without jeopardizing the process, be based on the written submissions, and an oral hearing is not necessary.

### **The Review - Rules of interest**

The authority and duties of the Travel Agency Commissioner are set out in IATA Resolution 820e. In this matter the Applicant has requested a review on the basis of Resolution 820e section 1.1.5. and 1.1.10. These sections state:

The Commissioner shall review and rule on cases initiated by:

- (1.1.5) an Agent who has received notice from the Agency Administrator of impending removal of the Agent or an Approved Location of the Agent from the Agency List, or of any action or impending action by the Agency Administrator with regard to the Agent, that unreasonably diminishes the Agent's ability to conduct business in a normal manner;
- (1.1.10) an Agent who considers that the Agency Administrator (as defined) has not followed correct procedures as delegated by the Passenger Agency Conference, to that Agent's direct and serious detriment.

### **The Case - Rules of interest**

To become an accredited agent an agent signs a Passenger Sales Agency Agreement (hereafter referred to as the Agreement) in accordance with IATA Resolution 824. In this contractual relationship the Director General of IATA represents the IATA Members (or in other words the IATA airlines) and acts for and behalf of these.

The Agreement stipulates that terms and conditions governing the relationship between the Carrier and the Agent are set forth in the Resolutions contained in the Travel Agent's Handbook (hereafter referred to as the Handbook) as published from time to time under the authority of the Agency Administrator. The Handbook is local and varies by country and incorporates, amongst other things, local financial criteria. These criteria form the basis for the financial review of agents in a particular country. - The financial criteria are consequently to be considered as part of the contractual relationship between the individual agent and the IATA Members.

The IATA Resolutions may change from time to time, as decided by the Passenger Agency Conference (hereafter referred to as PAConf). The PAConf has the overall decision making authority with regard to the IATA Resolutions. The Agency Administrator of IATA has no power to change, ignore or overrule a Conference Resolution. For the UK the local financial criteria are discussed and recommended by local Agency Programme Joint Council (consists of airline and agent representatives) and thereafter the criteria are proposed to the PAConf. It is ultimately the PAConf who has the power to make a decision, and by this adopt the financial criteria with the effect that the criteria forms part of the individual agent's contract.

The Agreement stipulates that the Agency Administrator shall provide the agent with subsequent editions of the Handbook and all amendments thereto. The agent shall be notified by the Agency Administrator of any amendments to the contents of the Handbook

and such amendments shall be deemed to be incorporated in the contract unless within 30 days of receipt of such notification, the agent terminates the Agreement by written notice to the Agency Administrator.

The financial criteria for UK were changed, with regards to what is here of interest, effective from the 1<sup>st</sup> of Jan 2007. The same criteria were in effect also during 2008. The page most relevant is, for the convenience of the reader, attached to this decision (page 30 of the Travel Agent's Handbook UK). My conclusions relating to this text will be found below under section "Conclusions and reasons for decision".

### **The Applicant's arguments in summary**

Onkar International Ltd is the parent company of Southall Travel Ltd. There are no other subsidiaries. IATA identified a liquidity shortfall of 65 200 in the financial statements of Onkar International Ltd as at 31 March 2008. The consolidated balance sheet for the group shows at this date a substantial liquidity surplus, and the balance sheet of Southall Travel Ltd also meets the financial criteria in full. The liquidity and profitability of the group have increased significantly since 2007. The net current assets have risen from 1,1 MGBP as 31<sup>st</sup> of March 2007 to 2,1 MGBP as 31<sup>st</sup> of March 2008. The profit before tax more than doubled over the same period from 1,5 MGBP to 3,3 MGBP.

The cost of a premium to obtain a bond of 12 MGBP or 8,3 MGBP if given by an insurance company would diminish the ability of Southall Travel Ltd to conduct business in a normal manner. In addition the requirement to place a bond is not consistent with the published UK financial criteria or the previous practice and procedures of IATA.

The UK financial criteria refer to the need for an accredited agent to satisfy prescribed liquidity and profitability tests. There is no dispute regarding the balance sheet of Southall Travel Ltd at 31<sup>st</sup> March 2008. However the extension of the test to the balance sheet of Onkar at that date has apparently created the impression that Onkar has a liquidity deficiency. The relevant text on page 30 of the Travel Agent's Handbook reads.

"For accredited IATA Agents, a bond will be required if you or your Parent Company accounts show that:

- (a) You do not meet any of the requirements in B or C above or
- (b) You or your Parent Company(ies) undergo a significant change of ownership (see below)"

A legal interpretation of (a) above is that it relates to Southall Travel since this paragraph refers to "You" and it does not refer to the Parent Company which is Onkar, since this paragraph (a) unlike paragraph (b) does not refer to "You or your Parent Company(ies)."

IATA has previously ignored a higher liquidity shortfall of 187 985 GBP as of 31<sup>st</sup> of March 2007 (see Onkar financial statements). If IATA had drawn this deficiency to the attention of Southall Travel Ltd, remedial action would have been taken. There were unused borrowing capacity of 300 000 GBP with Barclays Commercial Bank at 31<sup>st</sup> of March 2008, and this was available to draw on to cover the shortfall. The shortfall is insignificant in the context of a net worth of the parent company of 2,7 MGPB, and a consolidated net worth of 6,3 MGBP. This shortfall has no impact on Southall Travel and its ability to meet the prescribed liquidity

ratio. There could be arrangements made for a cash injection from directors/shareholders to cover the liquidity shortfall. The bond of 12 MGBP or 8,3 MGBP is disproportionate to the shortfall identified of 65 200 GBP.

IATA is legally required to provide a copy of the Travel Agent's Handbook to accredited agents on regular basis. The foreword to the Handbook (January 2008) states that "This publication is normally produced annually and is legally required to be provided to each Approved Location of an IATA Agent." Furthermore, clause 2.3 of the standard Passenger Sales Agency Agreement states:

"the agency Administrator shall provide the Agent with subsequent editions of the Handbook and all amendments thereto. The Agent shall be notified by the Agency Administrator of any amendments to the contents of the Handbook and such amendments shall be deemed to be incorporated herein unless within 30 days of receipt of such notification the Agent terminates this Agreement by notice in writing to the Agency Administrator."

This places a continuing legal obligation on IATA to provide a copy of the Handbook, and also to advise agents of any amendments to the contents. An agent then has the right to terminate the Agreement within 30 days of notice of the amendments if they do not accept the changes introduced by IATA. It would be impossible for an agent to consider their position if they are not expressly advised of the changes. The rule change effective from 1 Jan 2007, extending annual financial reviews to the parent companies and setting additional bonding requirements, are examples of changes which should have been notified to accredited agents.

IATA may be in breach of their obligations, as defined in Resolution 818 and as required by the Passenger Sales Agency Agreement, if they failed to provide copies to the Handbook to the approved locations of Southall Travel Ltd in 2007 and 2008 and by not securing consent to the change in the financial criteria effective from 1<sup>st</sup> of Jan 2007. The IATA Bulletin 108/2006 does not include any reference to the changes of the financial criteria effective from 1<sup>st</sup> of Jan 2007 and there is no direction to the agents to consult the relevant section in the Handbook. The Travel Agent Handbook was previously printed on paper and physically distributed to all IATA Agents. It was, from memory, usually accompanied by a covering note in which the reader's attention was drawn to significant changes. 2006 and 2007 the Handbook was issued as a CD Rom and in 2008 it was simply published electronically on the IATA website. In the 2008 edition, an introduction to the new edition is included, but there is no specific direction regarding changes financial criteria. The publication runs to nearly 200 pages. The most recent modes of the publication generate considerable inconvenience, particularly when agents are not specifically alerted as to where to look for significant changes in the IATA rules and requirements, as in the present case.

IATA states that the 2007 parent company accounts would not have passed the liquidity check, should this have been noticed a requirement for a bond would have been raised. This demonstrates the lack of clarity in the rules, evidenced by IATA not seeing the requirement in 2007. When the requirement was noticed in 2008, IATA did not provide notice of the change and therefore waived their right to demand a bond following the financial review in December 2008.

Although that through the APJC the travel agent input is taken into account in formulating the local criteria, the Resolutions are written by IATA and its members and adopted solely by IATA members. Furthermore the Travel Agent's Handbook is edited and published not jointly by the APJCs but by the Agency Administrator of IATA who has editorial responsibility for it. For this reason it is important to maintain the principle that any ambiguities in the publication should be construed in favour of the party that did not write it.

As there is sufficient doubt about the meaning of the Handbook section in relation to parent company accounts the reference should be interpreted in the favour of Southall Travel Ltd and against IATA, who introduced the rule. The section may be interpreted to refer to the impact of a weakness in a parent company's accounts on a subsidiary accredited agent. Southall Travel has demonstrated that an apparent shortfall of 65 200 GBP in Onkar International Ltd has no effect on the liquidity of Southall Travel Ltd. An alternative interpretation of this section is that IATA should consider the consolidated accounts in a financial assessment of a parent company, in accordance with established accounting standards and statutory and regulatory requirements for large companies.

The credit reports from Dun & Bradstreet and Creditsafe are based on an analysis of the consolidated balance sheet of Onkar International Ltd as at 31<sup>st</sup> of March 2008 and disclose a positive liquidity of 2 133 184 GBP.

An early audit of the accounts could be arranged for the year ending 31<sup>st</sup> of March 2009 by 5<sup>th</sup> of May 2009. These accounts could be submitted for review by mid May 2009. If an extension could be granted to 31 May 2009, these accounts could be submitted for review by mid May 2009.

The Applicant has submitted copies of the following documents:

Financial Statements the year ended 31 March 2008 for Southall Travel Ltd and consolidated Financial Statements the same period for Onkar International Ltd.

Copy of letter from Barclays Bank stating that on the 31<sup>st</sup> of March 2008 the balance on the Onkar International Ltd loan facility was 700 000 GBP, and the limit on the same facility was 1 000 000 GBP, showing that on this date Onkar International had 300 000 GBP spare headroom for utilisation.

Dun & Bradstreet; compact report dated the 15<sup>th</sup> of Jan 2009 rating Onkar International Ltd.  
Creditsafe; print report relating to Onkar International Ltd.

Plimsoll Analysis; UK Travel Agents (TOP 100)- An industry overview

Letter from Lewis Silkin LLP dated 30<sup>th</sup> of Dec 2008.

Note of Advice from Nigel Hood dated 30<sup>th</sup> of Dec 2008.

Letter from Dawn & Co, Chartered Certified Accountants, Registered Auditors, dated 29<sup>th</sup> of Dec 2008.

Letter from Thakrar & Co, Solicitors, dated 23<sup>rd</sup> of Dec 2008.

### **The Respondent's arguments in summary**

In view of the IATA Resolution 820e paragraph 2.7 coupled with the obligation of the agency administrators to follow resolutions, the application made by the agent for review should be dismissed by the Travel Agency Commissioner.

The review of the accounts of Southall Travel Ltd revealed a failure of the parent company to meet the liquidity criteria of the financial criteria. In these circumstances a bond is required in every case. The parent company accounts would not have passed the liquidity check, should this have been noticed a requirement for a bond would have been raised.

The application of the financial criteria has been carried out within the required timescales, including the grant of an extension of 30 days to enable the agent to arrange bonding. The action does not therefore unreasonably diminish the agent's ability to conduct business but is fully in alignment with the provisions of the Passenger Sales Agency Agreement (PSAA) with regard to failure to satisfy the financial criteria.

The procedures have been carried out in full compliance with the provisions of the PSAA and the local criteria. The UK local criteria state that " Parent Company Accounts will be considered in the determination of your financial standing as an Applicant or Agent" and "Your accounts must show that you have made a profit before tax at the end of an accounting period" ( UK Travel Agent's Handbook 2008, page 30).

The words quoted "For accredited IATA Agents, a bond will be required if you or your Parent Company accounts show that:". This section would be meaningless unless it is read to say "a bond will be required if the accounts of you (the Agent) or the accounts of your parent company show that..."

One can easily imagine a scenario where a subsidiary company's accounts satisfy all the various tests but, for example only, the parent company's accounts show the parent company to be insolvent. This will clearly have a significant impact on the subsidiary, and it neither makes no sense nor was in the contemplation of the APJC when discussing and settling the form of the Resolution for it to mean otherwise. The criteria are necessarily simplistic as to avoid situations where agents raise arguments about the extent of risk.

There is no arrangement for IATA to accept "cash injections" to resolve liquidity issues.

IATA resolutions are considered and agreed by the Passenger Agency Conference (PACConf), and local criteria are the agreed product emanating from the Agency Programme Joint Council (APJC) which is a joint carrier and agency body. The APJCs are made up of a number of airlines and agents and they determine the criteria and financial standing levels subject to final approval by the PACConf. The criteria are therefore produced as a direct result of discussions between airlines and agents sitting on the APJC and it is not the case that it was IATA which introduced the rule as suggested. - For accredited agents a bond will be required if you or your parent company accounts show the requirements of B or C are not met. The purpose as set out by the APJC is clear.

The proceeds of sale of member airline tickets are trust monies belonging not to the agent but to the carriers, and for that reason alone it is hardly surprising that the financial position of both the agent and a parent company must fall to be highly relevant when the financial standing for bonding requirements is assessed.

The agent was notified of the Handbook by communication via BSPLink and additionally the Bulletin 108/2006 was sent to all IATA agents in BSP UK dated the 11 Dec 2006 for the 2007 Handbook, which also was distributed via CD-Rom prior to 18 Dec 2006. The Bulletin 22/2007 concerning the 2008 Handbook is dated 3 Dec 2007.

The Respondent has submitted copies of the following documents and communications:

A sample message from IATA Service Center Europe dated 11 Dec 2006 with heading "Travel Agent Handbook 2007 Communication UK" and text "Please upload the attached communication for agents in the UK."

Copies of the above mentioned IATA Bulletin 108/2006 and IATA Bulletin 22/207.

### **Conclusions and reasons for decision**

The review:

The undersigned finds that the bond itself is calculated in way that is laid down in the Travel Agent's Handbook. The calculation is based on the BSP turnover to reflect the money at risk and there is no evidence that it is unreasonable in parity to the turnover or the size of the Applicant. I have therefore not found evidence in this particular case that the bonding requirement would unreasonably diminish the Applicants ability to conduct business in a normal manner.

I therefore leave the grounds for review as laid out in Resolution 820e section 1.1.5. with no further action. I would like to note though that there is a certain overlap as it could be argued that section 1.1.5. as basis for TAC review, could also be applicable if the correct procedures have not been followed by the Agency Administrator, as this in itself may create a situation when the agent faces a burden that unreasonably diminishes the agent's ability to conduct business in a normal manner.

The ground for review as described in Resolution 820e section 1.1.10 is however more of interest in this case, and forms the basis for the review. It shall be noted that the Travel Agency Commissioner does not have authority to overrule resolutions, or change the material content of any rules. The Passenger Agency Conference has the power to implement any rules or procedures it so wish. It is purely the process for implementation and execution of the rules that could be reviewed by the Travel Agency Commissioner based on section 1.1.10.

With this being said it is of interest for this case to review how the relevant rules have been implemented, and with what clarity the change of the rules have been communicated by the Agency Administrator, acting on behalf of the Member Airlines as described in Resolution 824, and in accordance with the Passenger Sales Agency Agreement.

The case:

It is not disputed that that the financial criteria for UK (relevant section attached) states that the parent company accounts will be considered in the determination of the financial standing of an agent. The dispute concerns if the more automated "liquidity test" should be applied to the parent company, and consequently result in a bond requirement for Southall Travel Ltd.

As the Respondent correctly have pointed out the financial criteria in the UK are discussed in a forum consisting of representatives from airlines and agents and this forum also recommends the criteria. The agent representatives are however not able to contractually bind the individual agents to any changes of the Agreement; this is only possible by adoption

of the criteria at the PAAConf. The PAAConf consist of the IATA Member Airlines. The Agency Administrator acts on behalf of the Member Airlines when it issues new versions of the Handbook, and when communicating changes. By this it is clearly so that any lack of clarity in the communication of changes to the contract will be at the risk of the Member Airlines, as the issuer of new contractual obligations on the counterpart.

Looking at the pure text of the Handbook there is a certain lack of clarity, which could leave room for other interpretations, in the section for "Bonding requirements" as there is no reference to the Parent Company under section (a) referring to the "profitability and liquidity test", but only under section (b) referring to significant change of ownership. It is therefore in my judgment not written with the clarity one could wish for, that the intention was to introduce the "liquidity test" also for parent companies. For an agent with a financial standing that normally would be rated as very robust, also considering the parent company accounts, it may not have been clear that the intention was to apply the "liquidity test" also on the parent company's accounts. The lack of clarity in the actual text of the Handbook could easily have been overcome if any other communication had been sent to the agents, for example by pointing out the change or by an explanatory note. However in this case the only relevant communication that has been sent to the Applicant is a new version of the actual Handbook. I therefore find that the text of the Handbook in this particular case must be interpreted in favour of the Applicant.

This constitutes a situation where the Respondent has failed to follow correct procedures. The failure would cause the Applicants direct and serious detriment, as the pure cost of a bond of the required amount must be regarded as to the serious detriment of the Applicant.

By this it is clear that the text still gives the Agency Administrator a possibility to consider also the accounts of the parent company, if it negatively effects the agent's financial situation. In this particular case the Agency Administrator has not argued that any such review would have a negative outcome for Southall Travel Ltd. Southall Travel has presented consolidated accounts dated 31 March 2008 that show that the financial situation of the group is very good. The net current assets by the consolidate group (Southall Travel Ltd and Onkar International Ltd) by Balance Sheet 31<sup>st</sup> of March 2008 was 2,133 184.00 GBP. The soundness of the financial standing is also substantiated by the Dun & Bradstreet Compact Report submitted by the Applicant. - Based on the interpretation of the text as outlined above, and the arguments and evidence brought forward by the parties, my conclusion is that Southall Travel Ltd should have passed the financial review with no requirement to submit a bond.

As the applicant now is aware of the "liquidity test" and its applicability to the parent company accounts I find that the text of the Handbook (if not changed by communication by the Agency Administrator) should be read as interpreted by the Respondent from the financial year ending 31 of March 2009. This means that new accounts should be submitted by Southall Travel Ltd as soon as possible after the financial year end, but not later than the 15<sup>th</sup> of May 2009.

## **Decision**

The Applicant shall submit new financial statements for Southall Travel Ltd and Onkar International Ltd the latest by the 15<sup>th</sup> of May 2009.

The decision by the Agency Administrator the 18<sup>th</sup> of December 2008 requiring a bond from Southall Travel Ltd is hereby changed. The requirement to submit a bond will not be effective until the 18<sup>th</sup> of May 2009, at what date a bond shall be submitted by the Applicant in accordance with the original decision by the Agency Administrator, if the Applicant fails to meet the above stipulation to submit new financial statements.

If the Applicant submits new financial statements the latest the 15<sup>th</sup> of May 2009 the decision of 18<sup>th</sup> of Dec 2008 is no longer effective. The Respondent may review the financials of the Applicant based on these new financial statements. The new financial statements may be reviewed by the Respondent in accordance with its interpretation of the criteria, requiring a bond if the parent company fails to meet the profitability or liquidity criteria of the Handbook. Note that the criteria may be changed by new resolutions adopted by the PAConf and communicated by the Agency Administrator as described above.

The Interlocutory Relief Order in this matter, dated the 6<sup>th</sup> of February 2009, is hereby overruled by this decision.

Decided in Sundbyberg 2009-02-24

Helene Cedertorn

Signed original copies of this decision will be sent by postal mail to the parties.  
Sent this date by e-mail to: Mr. Gilmartin and Mr. Bahia

Attachment: Copy of Travel Agent's Handbook UK 2008, page 30

**Note:**

**The parties may, if considered aggrieved by this decision, seek review by arbitration in accordance with the provisions of Resolution 818, section 12.**