

DECISION 2009-03-11

Travel Agency Commissioner Area 2

Helene Cedertorn
Karlavägen 30
172 76 Sundbyberg
Sweden

The Case:

Request for Review of Decision by the Agency Administrator the 13th Jan 2009 regarding bond requirement

Applicant:

Gray Dawes Travel Ltd
The Octagon, 27 Middleborough
Colchester CO1 1RA
Represented by Ms Lorraine Francis

Respondent:

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

Background, formalities etc:

By a letter the 13th of Jan 2009 IATA required a bond of 2,325,000.00 GBP to be submitted by the 13th of Feb by Gray Dawes Travel Ltd. The letter stated that the bond was required as a result of the loss and lack of liquidity shown in the ultimate parent company accounts. The deadline for submission of the bond has later been extended until the 13th of March.

Gray Dawes Travel Ltd initially requested review by the Travel Agency Commissioner (hereafter TAC) in a letter dated the 9th of Dec 2009, in later communications clarified to be under the provisions of Resolution 820e section 1-1.1.10.

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 1.1.10. This section states:

The Commissioner shall review and rule on cases initiated by 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 1st 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 final arguments in summary

The criteria for assessing the financial statements of the IATA approved agent are unclear, the changes in such criteria were not communicated clearly and the consolidated Parent Company accounts should have been considered when determining financial standing.

IATA is legally required to provide a copy of the Travel Agents' Handbook to accredited agents on a regular basis. The Handbook incorporates the IATA Rules and Resolutions governing the relationship between IATA, its member airlines and accredited agents. Whilst we accept that we were notified of the availability of the 2008 Travel Agents' Handbook via IATA bulletin 22/2007, we do not believe that the significant change in the financial criteria was drawn to agents' attention or communicated in such a way as to highlight its importance. The Handbook is a document consisting of over 200 pages. In the Foreword from the Agency Administrator on Page i, it states that "the changes in this handbook incorporate all the amendments made in 2007, a summary of which is provided in the salient aspects section below." Page ii of the Handbook is entitled "Salient aspects of new or amended resolutions" and provides a summary of changes in resolutions which have taken place since the previous handbook. It would be reasonable to expect that, given the significance of the change in the financial criteria, this would be communicated clearly in the "salient aspects" section. There is no reference to the change in criteria within this section and it is not clear where any specific changes have been made within the local conditions for the UK. We do not have any record of this change in criteria being specifically notified via BSPLink. We would therefore refute that the requirements "were clearly notified to all agents" as stated by IATA.

Furthermore, on page 30 of the Travel Agents' Handbook, it states that

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

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

The requirements in B and C above are defined as:

"B) Profitability – Your accounts must show that you have made a profit before tax at the end of an accounting period.

C) Your accounts must indicate that you have a favourable liquidity ratio. Current assets must exceed current liabilities at the end of an accounting period."

The context of "you" within this paragraph is not clear and can be interpreted as meaning the accredited IATA agent, ie Gray Dawes Travel Limited, which made a profit before tax in its last accounting period and had net current assets so does meet the requirements. The statement from IATA that "the wording of the UK requirements is clear" is completely at odds with our understanding.

We understand that the change in criteria may have been put into place in January 2007. There has been no change in the ownership of Gray Dawes Travel Limited, the accredited agent, its holding company, Gray Dawes Group Limited, or its ultimate parent company, Inchcape Family Estates Limited, since. Neither has there been any significant variance in the financial position of either company from March 2007 to March 2008. The accounts for year ended March 2007 were submitted to IATA in the usual manner in September 2007, however there was no bond requirement assessed on those accounts at that time. Had there been any deficiency in these accounts, remedial action could have been taken at the time. We believe that Gray Dawes has followed procedures correctly regarding the submission of accounts and do not understand how this bonding requirement has arisen.

We acknowledge that assessment of the accounts by IATA is necessary to assist in the "determination of financial standing". We are attaching reports from Creditsafe which show that both Gray Dawes Travel Limited, the accredited agent, and Inchcape Family Estates Limited, the ultimate parent company, have credit ratings of "good creditworthiness". We would draw attention to the clarification from the auditors, Arnold Hill & Co, of the profitability and liquidity position of Inchcape Family Estates Limited and reiterate that the balance sheet of the stand-alone parent company, which is simply a holding company, should not be used in the interpretation of the company's profitability and liquidity position.

We submit that the clause regarding parent companies is capable of several interpretations. As there is a lack of clarity, we request that this be interpreted in our favour. Further, we submit that IATA did not communicate this important issue properly to accredited agents.

The Applicant has submitted copies of the following documents:

Memo from Arnold Hill & Co Ltd, dated Feb 3 2009, titled "Inchcape Family Estates Limited" describing the group ownership structure and attached the group balance sheet.
Letter of support for Gray Dawes Group from Inchcape Family Estates Limited, dated 27th of Aug 2008, to the auditor Arnold Hill & Co.
Print outs of credit rating reports from Creditsafe, dated 25 Feb 2009, for Gray Dawes Travel Ltd and for Inchcape Family Estates Ltd.
Note from meeting with Maureen Block of IATA 090127.
Copies of emails and other correspondence with IATA.
Report and Financial Statements for the year ended 31st of March 2008 for Inchcape Family Estates Ltd, with consolidated group statements.

The Respondent's arguments in summary

Gray Dawes has stated that prescribed procedures have not been followed and that the assessment has been based on "the incorrect balance sheet". According to the UK local financial criteria "If your company is a subsidiary of another company or more than one company, ("Parent Company"), registered in the UK, i.e. financial control is vested in one or more UK Parent Company (ies) you will need to submit a copy of the most recent annual accounts of these controlling company (ies). Such Parent Company Accounts will be considered in the determination of your financial standing...". Therefore the procedures were followed correctly with regard to the consideration of parent company accounts.

Under the terms of the PSAA, the terms and conditions governing the relationship between the carrier and the agent are set forth in the resolutions contained in the Travel Agents' Handbook. Any changes to the rules, resolutions and other provisions as amended from time to time are deemed to be incorporated in the Agreement "and carrier and the agent agree to comply with them". At paragraph 2.2 the agent acknowledges it has received a copy of the Handbook and further "specifically acknowledges it has read and understands the contents of the Handbook".

Under paragraph 2.3 the agency administrator "shall provide the agent with subsequent editions of the Handbook and/or amendments". The local conditions are set out clearly for the UK at page 30 of the Handbook.

The agent was notified about the contents of the Handbook by communication via BSPLink. In addition bulletin 108/2006 was sent to all IATA agents in BSP UK dated 11 December 2006 for the 2007 Handbook, also distributed on CD-Rom, as well as a bulletin 22/2007 dated 3 December 2007 concerning the 2008 Handbook.

The financial accounts which the agent submitted were the ones on which the assessment was made in accordance with local criteria.

The point of the agent, that the procedures in informing agents of the change in the financial evaluation criteria, is incorrect; the correct procedures were followed following submission by the agent of the various accounts submitted. The wording of the UK requirements is clear and the agent must be aware of the parent company requirements since the introduction of parent company account requirements which were clearly notified to all agents.

The process of communication of changes to the Travel Agents Handbook has been approved by the PAC. According to Resolution 824, the Passenger Sales Agency Agreement (PSAA), the Agency Administrator is obliged to provide agents with subsequent editions of the Travel Agent Handbook containing all amendments. The method of communicating change has always been: 1. to include a summary of the salient aspects of change to that edition in the Forward; 2. to advise the reader of the Handbook to contact the local office for a copy of the criteria if they wish; 3. to inform all agents in the country of the publication of the Handbook.

As each Handbook contains local criteria for a number of countries, (there are 43 countries in the Handbook covered by Resolution 818), there is no attempt by IATA to try and describe all changes to the local criteria as we believe this would be impractical. Instead there is an expectation, which we consider to be reasonable, that the agent will make itself aware of the conditions that may affect its relationship with the IATA rules. IATA cannot take into account the provision of credit rating information since this is out of scope to the examination of the agent's accounts as determined by the local criteria.

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 22/2007.

Conclusions and reasons for decision

Resolution 820e section 1.1.10, described above, forms the basis for this 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 intended change of the financial criteria have been incorporated in the text of the Handbook, and 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.

-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 and how the “liquidity test” and “profitability test” that may result in a bond requirement for the accredited agent, should be applied.

The Applicant has in its final statement taken the position that it is the consolidated ultimate parent company accounts that should be considered when determining the financial standing of the agent. One of the arguments the Applicant has brought forward is that the stand-alone parent company, which is simply a holding company, should not be used in the interpretation of the profitability and liquidity position of the agent.

The Respondent has taken the position that it is the next level parent company’s accounts that should be reviewed with regard to liquidity and profitability, and this review shall be done by a “liquidity test” and a “profitability test”.

Both parties have brought forward arguments of some weight supporting their respective interpretation of the text of the Handbook. It is therefore of interest to determine which one of the parties that have to bear the risk for lack of clarity in the text.

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 PAConf. The PAConf 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, or lack of clarity in the contract itself, will be at the risk of the Member Airlines, as the issuer of new contractual obligations on the counterpart. – This conclusion does however not in any way diminish the obligation by the agents to read relevant sections of the Handbook, when notified of changes or new versions by the Agency Administrator. If the text of the Handbook is clear, the agent will be bound by the text, as it forms part of the contract.

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 test” and

the “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” and “profitability test” also for parent companies.

In the section where parent company as a term is defined the following text appears; “If your company is a subsidiary of another company or more than one company (“Parent Company”)...” ---- “Such Parent Company Accounts will be considered in the determination of your financial standing as an Applicant or Agent.” – I note that this section does not provide any further guidance on how the review of the parent companies accounts will be done.

The lack of clarity in the actual text of the Handbook could have been overcome if any other communication had been sent to the agents, for example by an explanatory note or other information. However in this case the only relevant communication that has been sent to the Applicant is a new version of the actual Handbook.

For an agent with a financial standing that normally would be rated as good considering the consolidated accounts of the whole group, it may not have been clear that the intention was to apply the automated “liquidity test” and “profitability test” on the immediate parent company’s accounts.

It is worth to note that in the initial letter by IATA dated the 13 Jan 2009, the wording “ultimate parent company accounts” is used when describing the loss and lack of liquidity of the next level parent company, not what normally would be described as the *ultimate* parent company. The Applicant consequently argued that IATA had reviewed the incorrect balance sheet, and requested that the financial standing of the ultimate parent company Inchcape Family Estates Limited should be considered.

As I have already established that lack of clarity in the text of the Handbook is at the risk of the Respondent. Altogether I find that the text could be interpreted as suggested by the Applicant. I therefore find that 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(ies), if it negatively effects the financial situation of the agent.

The Applicant has presented the consolidated group accounts dated 31st of March 2008, as well as a memo from their auditors describing the financial position of the consolidated group. According to this the consolidated net current assets for the group was 1,199 000.00 GBP and profit before taxation was 1,082 000.00 GBP. The Applicant has furthermore submitted Creditsafe reports for the Applicant, as well as the ultimate parent company, and stated that these show that the companies have credit ratings of “good creditworthiness”. In addition a copy of a Letter of Support for Gray Dawes Group, from Inchcape Family Estates Ltd, has been submitted. – The Respondent has not argued against any of these claimed circumstances.

Based on the interpretation of the text as outlined above, and the arguments and evidence brought forward by the parties, my conclusion is that the Applicant should have passed the financial review with no requirement to submit a bond.

As the Applicant now is aware of the "liquidity test" and "profitability test" and its applicability to the immediate 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 the Applicant as soon as possible after the financial year end, but not later than the 15th of May 2009.

Decision

The Applicant shall submit new financial statements the latest by the 15th of May 2009.

The decision by the Agency Administrator the 13th of Jan 2009 requiring a bond from Gray Dawes Ltd is hereby changed. The requirement to submit a bond will not be effective until the 18th 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 15th of May 2009 the decision of 13th of Jan 2009 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.

Decided in Sundbyberg 2009-03-11

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. Noel Gilmartin and Ms Lorraine Francis.

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.