DECISION 2009-03-30

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 20th Jan 2009 regarding bond requirement

Applicant:
Travel By Appointment Ltd
The Linen House, 253 Kilburn Lane
London W10 4BQ, England, United Kingdom
Represented by Finance Director Mr. Ade Taiwo

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

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Background, formalities etc:

By an email the 20th of Jan 2009 IATA confirmed a decision by IATA that Travel By Appointment must maintain a bond of 450,000.00 GBP. The email stated that the bond was required as the accounts for the parent company at company level did not meet the criteria for profit before tax or liquidity, but if the consolidated sheets were reviewed it would meet the criteria.

Travel By Appointment requested review by the Travel Agency Commissioner (hereafter TAC) in an email the 23rd of March 2009, in later communications clarified to be under the provisions of Resolution 820e section 1-1.1.10. The main argument by the Applicant is that IATA has changed the application of the criteria from assessment of the consolidated accounts, to assessment of the parent company accounts, thereby showing inconsistency in its interpretation of its assessment with that of the year 2007. The Applicant request that the bond is returned and that it is returned to monthly accounting immediately.

IATA has in a response the 27th of March 2009 maintained its position.

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.

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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 state:

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 arguments in summary

Travel By Appointment is a wholly owned subsidiary of The Appointment Group Ltd, a company that only exists for consolidation purposes and does not trade on its own right. When the 2007 group accounts were assessed, IATA required a bond because of the loss before tax on the group consolidated profit and loss account of 14,997.00 GBP. At no point did IATA mention that the holding company should show a profit. It was clearly stated that the consolidate profit and loss account did not meet the criteria. Even though Travel By Appointment disagreed with their assessment, the Travel Agency Commissioner agreed with IATA´s decision and sided with them. Now the 2008 accounts are submitted, which meet all the financial criteria set. In both companies ´account there is a profit before tax and both have current assets in excess of current liabilities. The holding company does not trade so there will be no profit and loss account. IATA still says that Travel By Appointment does not meet the criteria because the holding company shows no profit and liquidity. Last year IATA assessed the consolidate account but not this time around. This decision will continue to cost Travel by Appointment unnecessary expenditure both in insurance premium and potential overdraft charges.

During 2008 audit the auditors of Travel By Appointment were asked if all the IATA financial criteria were met, both on the parent and group accounts with reference to all the correspondence of last year´s review. Their view is that the accounts show that all conditions stated are met.

<u>The Applicant has submitted copies of the following documents:</u>

Audited Accounts for the year ended 31st of Dec 2008 for Travel By Appointment Ltd and The Appointment Group Ltd
Various correspondence to/from Agency Commissioner B Barrow and N Gilmartin, IATA, regarding the 2007 account decision, including a response from IATA dated the 18th Sept 2008.

The Respondent´s arguments in summary

The ground for request for review is pursuant to Resolution 820e, Section 1, subparagraph 1.1.10 - an Agent who considers that the Agency Administrator has not followed correct procedure. IATA's requirement to maintain the agent's bond is consistent with the demands of the financial criteria and is therefore fully aligned with the provisions of the PSAA in this regard. The agent has voluntarily opted to settle its BSP liabilities twice per month since there is no such requirement by IATA.

IATA's review of the accounts for year ended December 2008 revealed a failure of the parent company (The Appointment Group Limited), to meet the profitability requirement (GBP 4,566 loss), and the liquidity requirement (net current liabilities of GBP 75,801) of the financial criteria. In these circumstances, a bond is required in every case.

With regard to IATA's assessment of the 2007 accounts, the profitability requirement was not met on the company balance sheet (loss of GBP 4,566), nor for the group (loss of GBP 14,997). IATA identified the failure of the parent company to meet the profitability requirement in our Letter of Response to the Travel Agency Commissioner following the previous Request for Review in September 2008.

Following recent advice from the UK LCAGP, the UK APJC is about to be asked to consider a proposal to recommend a change to the local criteria to include the consideration of consolidated accounts in the assessment of an agent's annual accounts. Unless and until that change is approved, IATA must continue to hold a bond where an agent's accounts are not compliant with the criteria.

In view of Resolution 820e Section 2.7 coupled with the obligations of the agency administrator to follow resolutions, IATA submit that the application made by the agent for review on the ground that IATA the Agency Administrator has not followed correct procedure be dismissed in accordance with Resolution 820e paragraph 2.1.1.

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

The Applicant has taken the position that it is the consolidated parent company accounts that should be considered when determining the financial standing of the agent. The Applicant has brought forward the argument that the parent company is simply a holding company that does not trade, and should not be used in the assessment of the profitability and liquidity position of the agent. Furthermore the agent was under review last year and the information provided stated that it was the consolidated accounts that were taken into consideration.

The Respondent has taken the position that it is the parent´s accounts that should be reviewed with regard to liquidity and profitability. The Respondent has stated that the bond request last year was not only required due to lack of profit in the consolidated group accounts, but also as result of lack of profit in the parent company accounts.

In the response from IATA 18th of Sept, in the previous matter before the previous Travel Agency Commissioner, I can see that IATA stated that "The accounts of the Travel Appointment Group Limited (the parent company), show a loss before tax of GBP 14,997. It is this figure which determines our assessment of whether the agent has made a profit before tax." - I note that this figure relates to the consolidated group accounts of last year, not to the accounts of the stand alone parent company.

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 accounts.

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.

For an agent who has been given information indicating that it is the consolidated accounts that are of interest, it may not have been clear that the intention was to apply the automated “liquidity test” and “profitability test” on the parent company´s accounts. This also as the holding company is not trading, and in most cases a credit assessment would be based on the consolidated accounts.

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.

IATA has stated in this case, in an email the 20th of March 2009, that if the consolidate accounts were to be reviewed, it would meet the criteria. This is also substantiated by the accounts 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 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 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 31st of Dec 2009.

With regards to the request to move to monthly settlement of the BSP liabilities, from twice per month, IATA has stated that this is voluntarily by the Applicant and no requirement by IATA. As the Applicant has requested to return to monthly settlement, I consequently assume that monthly settlement will be arranged as soon as possible.

Decision

The decision by the Agency Administrator the 20th of Jan 2009 requiring a bond from Travel Appointment Ltd is hereby changed. The bond shall be released and returned to the Applicant with immediate effect.

The Applicant shall submit new accounts for year ending 31st of Dec 2009 in accordance with due procedure, and the Respondent may review the financials of the Applicant in accordance with its interpretation of the criteria, requiring a bond if the parent company accounts 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.

As there may be practical aspects, I trust the Applicant and the Respondent to agree on when monthly settlement may be arranged.

Decided in Sundbyberg 2009-03-30

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 Mr. Taiwo.

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

<u>Note:</u>
The parties may, if considered aggrieved by this decision, seek review by arbitration in accordance with the provisions of Resolution 818, section 12.