

# DECISION 2009-04-28

## Travel Agency Commissioner Area 2

Helene Cedertorn  
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### The Case:

Request for Review of Decision/Advice by the Agency Administrator the 23<sup>rd</sup> of March 2009 regarding bond requirement; now question of granting Review or not

### Applicant:

Advanced Travel Partners UK Limited  
Represented by Mr. Michael Beacher and Mr. Graham Ramsey  
10, Leake Street  
London SE1 7NN, United Kingdom

### 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:

Due to change of ownership of the agent's parent company IATA required a bond of GBP 10,000,000.00 in July 2008. The bond was duly submitted by the Agent.

The agent has by advice the 23<sup>rd</sup> of March been notified of that the bond shall be increased to GBP 14,200,000.00. Furthermore the agent has received information that a potential acquisition of another travel agent will impact the bonding level.

By a letter the 24<sup>th</sup> of March 2009 the Applicant requested a review by the Travel Agency Commissioner (hereafter TAC) as the Applicant claims that the impending action by the Agency Administrator unreasonably diminishes the Applicant's ability to conduct business in a normal manner. In later communications the Applicant requests that the TAC shall grant relief against IATA's proposed increase in the current level of bond, and that the Commissioner shall order IATA to revoke its requirement for a bond of 10 MGBP resulting from the mere change of control, where such change of control was the sale by one non-trading and non IATA accredited company to another non-trading and non IATA accredited company of at least equal creditworthiness.

The Respondent has maintained its position to require a bond at the level as advised.

## The Applicant's main arguments in short summary

The Applicant has brought forward arguments relating to;

1. the financial strength and creditworthiness of the investor, that the strength of the investor is stronger than most IATA registered agents,
2. that the bond level is prohibitive and could be seen as a barrier to entry,
3. that there has been a dramatic reduction of the number of insurance companies willing to provide a bond, that the new bond level would give the impression that IATA has deemed the Agency to be at risk,
4. that the level of bond imposes an unfair burden of expense,
5. that if the new investor was an existing IATA registered agent, no bond would have been required if the existing agent is not bonded,
6. that the bonding requirement for a change of ownership in the ultimate parent company was introduced in January 2007, and the requirements for bonding were not backdated and this penalises those companies who have utilized private equity funding to grow and expand their business the last two years,
7. that the criteria that IATA UK has applied are not in conformity with resolution 820f as the local criteria inevitably require an agent to provide a bond upon change of ownership,
8. that there has been no material change of the financial performance and turnover since IATA's decision in July 2008. All information was provided to IATA and it was communicated that the Applicant believed that the amount should be 14 MGBP but it was repeatedly advised by IATA that the level was to be 10 MGBP.
9. the Applicant is seeking to acquire ownership of an agent and although IATA has not formally declined approval its unreasonable demands for a bond constitute a constructive disapproval,
10. the revised bonding requirement alternatively constitutes incorporation into the passenger sales agreement of an amendment,
11. IATA explains that an amendment of the local criteria in Dec 2008 has the result that the acquiring party must have a rating of good creditworthiness in order not to have to provide a bond. IATA says that in this case there is no credit rating available on the acquiring company and therefore the Applicant does not qualify under the change of the criteria. – The amendment gives discretion to IATA and there is no requirement that the acquiring party must have rating of good creditworthiness. According to the amendment IATA is only entitled to take into account the credit rating of the agent, not of the parent company. IATA should take into account a wider context when exercising its discretion under the new amended rules.
12. The amendment to the local criteria 2008 does not give IATA the opportunity to increase a bond.
13. There have been several major amendments to the local criteria recently. Until end of 2006 the local criteria did not take account of parent companies' financial standing and did not take account on any changes of ownership (unless those changed profitability and liquidity) this is changed at the end of 2006.
14. The requirement in the UK local criteria for a bond upon change of ownership is arbitrary. A change of ownership does not itself result in changes to management or mean that the agent is any less able to meet its obligations than one that has traded under the same ownership for many years.

The Applicant has submitted copies of the following documents:

Decision by IATA dated 16 July 2008 requiring a bond of 10,000,000.00 GBP

E-mails and written correspondence between the Applicant and IATA during July 2008 and copy of the bond calculation from IATA 1<sup>st</sup> May 2008

**The Respondent's arguments in summary**

IATA's bond request with respect to change of ownership was carried out in accordance with the requirements of the local financial criteria; the action does not therefore unreasonably diminish the agent's ability to conduct business being fully aligned with the provisions of the PSAA.

IATA requested a bond of GBP 10,000,000 from the agent following their notification of a change of ownership in July 2008, in accordance with the terms of the PSAA. The local criteria require a bond to be provided where the parent company has undergone a transfer exceeding 49% of the paid-up share capital.

Following the Special PConf in December 2008, the local criteria were amended with regard to changes of ownership to allow the credit rating of an acquiring party to be taken into account. The acquiring party must have a rating of "good credit worthiness" in order not to have to provide a bond. In this case there was no credit rating available from IATA's credit information company for the acquiring party, ATP Holdco Group, and therefore did not qualify under this rule.

There is no provision in the local criteria or elsewhere to take into consideration "the standing of the incoming investor" or "the amount and depth of due diligence work undertaken". IATA respectfully suggests that the change of ownership obligations of the PSAA and the associated requirements of the local criteria with regard to bonding might form part of such a due diligence process.

The agent makes reference to being in the final stages of an acquisition of another travel agent which will consequentially impact their own bonding level. This is a matter for the agent to take into consideration in their business planning, and it is for them to take into account the requirements of the PSAA and the local criteria.

The methodology to establish the required bonding level is transparent and is stated in the local criteria. For changes of ownership it is set at 16% of projected annual (cash) turnover. Therefore the calculation of the bond level is available to the agent with respect to their future turnover including the context of any planned acquisition. IATA may require the bond level to be adjusted in line with turnover (as stated in the local criteria) and it is subject to periodic review.

With regard to the specific points raised by the agent:

1. As mentioned above, it was not possible to consider the creditworthiness of the acquiring party since IATA's credit information company did not hold a rating as a new company. Consideration of the financial strength of a new investor is out of scope to the financial criteria and should not therefore be a feature of the expectations of a purchaser
2. The cost of bonding is a consideration which must be a factor for any agent planning an acquisition. Whether it is a "barrier to entry" or detrimental to any party is out of scope to IATA's application of the rules
3. The number of current IATA approved insurance companies has reduced from 8 to 5. We reject the assertion that IATA has given incorrect advice. An increase in bonding level does

not indicate to bond obligors that the agency is at risk since the level is purely a reflection of turnover

4. The bonding levels are long-standing and transparent. The impact of costs on an individual agent's competitiveness are not a matter for IATA in its application of the rules.

5. Rule changes are a matter for the APJC and are the subject of that body's recommendations to PAConf. The 2007 changes were jointly agreed by the trade associations and airline representatives.

In view of Resolution 820e Section 2.7 coupled with the obligations of the agency administrator to follow resolutions, IATA would submit that the application made by the agent for review on the ground that IATA has taken action that unreasonably diminishes the Agent's ability to conduct business in a normal manner should be dismissed in accordance with Resolution 820e paragraph 2.1.1.

The Respondent has submitted copies of the following documents:

Calculation of bond based on turnover March 08- Feb 09

### **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 upon notification to the Agent.

### **Travel Agency Commissioner Review – rules and conclusions with regards to this matter**

The procedures under which the Travel Agency Commissioner (hereafter referred to as TAC) operates are contained in IATA Resolution 820e. The Commissioner shall initially decide whether or not a credible case for review has been made, according to section 1.2.3 of this resolution. - The first initial assessment by the TAC is therefore if the matter is a credible

case for review or not. When doing this assessment the TAC needs to be careful in order to ensure that the rights of the Applicant are not diminished or set aside. It is therefore necessary to reflect upon if any grounds for review could potentially be of interest in the matter, based on the claimed circumstances, to ensure no rights are lost. It is also worth to note 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.

The Applicant has argued that a TAC Review shall be granted on the grounds of Resolution 820e section 1.1.5. This section states that the Commissioner shall review and rule on cases initiated by 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. A request for review shall be submitted within 30 calendar days of the date of the Agency Administrator's notice of the decision in question (Res 820e 1.2.2.1.).

In this case the Applicant has raised some arguments relating to the initial decision of July 2008, claiming that the bond calculation was wrong. This decision in itself could not be part of any potential review, partly because it is outside the time frame of 30 days, but also as I cannot review a decision at the request of an Applicant if the decision in question bears a fault that is to the benefit of the Applicant. However the Applicant has made arguments that IATA should not have changed the bond level, as the financials or the turnover has not materially changed since July 2008. In relation to this I can only reflect upon that the text of the Handbook states that "The bond will continue (and may be adjusted in line with turnover)...etc" (see Handbook UK Financial Criteria section Effect of changes of ownership on bonding). - It is therefore quite clear that the Respondent has a right to review the situation, and I cannot see that the new calculation, based on figures that are not in dispute, is made in violation of any rules. By this it is also logical that acquisition of new Agent companies will have an effect on the bond level.

In general terms the text of the Handbook is clear enough that a bond is required if the Agent or its parent company(ies) undergo a significant change of ownership. The term significant change of ownership is defined as a total acquisition, or a transfer exceeding 49 % of the paid up capital, representing a change in control. The bond levels are also clearly disclosed. I cannot find, based on arguments brought forward, that the application of these rules are in contradiction to any applicable laws or regulations. I do not either find that the application of these rules are in contradictions to IATA Resolution 800f, as this resolution forms a baseline, subject to any local conditions that may apply (see initial text of Res 800f).

The amendment, or new text from Dec 2008, that allows IATA not to request a bond at change of ownership, based on the credit rating of an Agent, could possibly be clearer. IATA however seems to apply it with a favorable interpretation for acquiring parties that are not Agents, allowing also these to benefit from the rule. Of most importance in this particular case is however that the Applicant (or its parent company) has not brought forward any evidence that it fulfills the requirements of the rule, no matter how it is interpreted. Therefore arguments relating to this rule is no potential ground for success in a TAC Review.

- When reflecting on other potential grounds for review I note that there have been a few TAC Reviews granted by the undersigned, also mentioned by the Applicant, where I have granted review. The previous reviews were based on Resolution 820e section 1.1.10 stating; 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. In these reviews I came to the conclusion that the UK Financial criteria in the specific situations were to be interpreted in favour of the agents, as there is a certain lack of clarity in the wording of the financial criteria and its applicability to the parent company accounts. This situation is however different, as the rules concerning bond requirements at change of ownership are quite clear. I can therefore not see any potential possibility for the Applicant to be successful based on similar arguments as in previous cases.

As mentioned above the calculation of the bond is based on the BSP turnover to reflect the money at risk and there are no circumstances that indicate that it is unreasonable in parity to the turnover or the size of the Applicant. I have seen no evidence that it in any other way could be seen as unreasonable as in the context of the IATA Resolution 820e. The text in the Handbook is clear that this bond is required, and as described above any potential problems with the new amendment is not applicable in this particular situation. Therefore in summary I cannot find that there is any potential possibility for success for the Applicant in a Travel Agency Review on any of the grounds for review as laid out in Resolution 820e, based on the claimed circumstances. In light of the need to ensure the resources of the TAC Office are handled with care, and my obligation to initially decide whether a credible case for review has been made, I therefore dismiss this request for review in accordance with resolution 820e section 1.2.3.

### **Decision**

The request for Travel Agency Review is dismissed.

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Decided in Sundbyberg 2009-04-28

Helene Cedertorn

Sent this date by e-mail to Mr. Ramsey and Mr. Gilmartin. Original signed copies will be sent to the parties by postal mail.

### **Note:**

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