

# DECISION 2009-05-18

## Travel Agency Commissioner Area 2

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### The Case:

Request for Review of Decision by the Agency Administrator the 16<sup>th</sup> Feb 2009 regarding requirement to submit a bank guarantee

### The Applicant:

Hurra Sp. z o.o.  
Ul. Chmielna 30, 00-020 Warszawa, Poland  
Represented by Mr. Thomas Schulz, General Manager

### The Respondent:

Agency Administrator, Poland  
International Air Transportation Association, IATA  
Represented by Mr. Gwozdowski, Country Manager Poland

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### Background, formalities etc:

During summer 2008 IATA Poland reviewed the financials of the Applicant, financial year 2007. The financials failed to meet the Polish local financial criteria and IATA requested the Applicant to submit a bank guarantee of PLN 1 200 000.00 in order to stay as accredited agent. The Applicant did not provide a guarantee by the required date. At this point the parties agreed that the Applicant would ask for a temporary closure/suspension of its accreditation as IATA agent, for a period of time. From 1<sup>st</sup> Oct 2008 the IATA number of the Applicant was under suspension.

The Applicant submitted its accounts for the financial year 2008 in January 2009. The new accounts meet the Polish local financial criteria; this is not in dispute between the parties.

By a letter dated the 16<sup>th</sup> of Feb 2009 IATA required a guarantee of PLN 1 678 000.00 from the Applicant before its membership as Agent in the Polish BSP system would be reinstated (the amount of the guarantee corresponds to 10 % of sales volume 12 months before suspension). According to the letter the request was based on IATA Resolution 818, article 2.1.4.2.

The Applicant requested review by the Travel Agency Commissioner (hereafter TAC) in the above matter by e-mail dated the 6th of April 2009, under the provisions of Resolution 820e section 1-1.1.8. and section 1-1.1.10.

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The undersigned granted a Travel Agency Review the 26<sup>th</sup> of April 2009, note that the review was granted preliminary considering Resolution 820e section 1-1.1.10.

The parties have met at a hearing in Warsaw chaired by the undersigned the 7<sup>th</sup> of March 2009, without being able to reach a mutual agreement. At the hearing Mr. Thomas Schulz, Mr. Martin Hauschild and Mr. Dominik Pilip were present to represent the Applicant and Mr. Ryszard Gwozdowski and Mr. Mikolaj Kowalczyk represented the Respondent.

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

The Applicant requests a review according to resolution 820e Section 1, paragraph 1.1.8 as well as paragraph 1.1.10.

The decision of the IATA authority in Poland requiring a bank security of PLN 1.678.000 (approx. € 373.000) threatens the commercial survival of Hurra Sp. z o.o. not granting the relief of surety ship according to the rules imposed by the IATA authority in Poland. The calculation of the amount for a bank security is not clear.

The balance sheet for 2008 meets the local Polish criteria imposed by IATA authority in Poland. Hurra Sp. z o.o. voluntarily suspended the IATA number in September 2008. This has been agreed to in accordance with the IATA authority in Poland. Now all normal rules for the registration are simply cancelled and other criteria are applied. The procedure has been discussed with IATA Poland in advance and all requirements demanded are fulfilled. IATA makes no reference to the balance with positive company capital, nor is the steadily increasing positive business development of the company considered. On the contrary, even the reliability of the company is doubted.

According to the conditions in Poland relief of surety exists if the corresponding economic criteria are fulfilled. Even if this was not the case, 8% are usually taken as basis for the calculation of a bank guarantee according to the conditions of the IATA in Poland. Why IATA has increased this to 10% with Hurra Sp. z o.o. is not clear.

The late payment mentioned by IATA is a single incident and had its origin in deposits already paid to airlines. The final account as per 30 September 2008 amounted to approx. 935.000 PLN and already in the previous months approx. 80.000 PLN were paid to the airlines by BSP deposits. Because the ticket issuance was not possible from the 1st of October on the IATA number of Hurra Sp. z o.o., from the perspective of Hurra Sp. z o.o., the deposits actually paid had to flow back, or should be settled. The company accountancy settled a small part of the total claim, and transferred on time on the 15th of October the rest of the claim, or about 890.000 PLN. After internal consultation and in order to avoid irritations Hurra Sp. z o.o. however decided to leave the settlement to BSP and transferred one day later on the 16th of October the full balance. Hurra Sp. z o.o. had to collect, without support of IATA, the outstanding amounts from every single airline individually. This caused additional expenses and there are still airlines simply refusing to pay.

With regards to the Notice of Change, that according to IATA was filed to late, it has been delivered when the new trade register extract was available (called KRS in Poland). Mrs. Rondzio (IATA Poland) was well aware of the situation and the way of proceeding has been done in accordance with her and at her request. The IATA authority was informed only the issuance of the document by the authority lasts as known a little longer, hence, could not be

provided on the day of the actual change. The change was an internal ownership change, as the shares of Hurra were handed over to another company within the group.

The reference to the problems of IATA Poland with other former IATA agents is absolutely important for the IATA Poland, nevertheless, it does not deal with the situation of Hurra and is not comparable with this case. As a 100% subsidiary of the biggest independent German consolidator AERTICKET AG (well-reputed to the IATA) and one of the biggest consolidator throughout Europe, with high respect and trust in the airline industry.

IATA Poland verifies the compliance of all criteria, however does not consider them and from an IATA- Agency point of view, this is not comprehensible. IATA Poland has mentioned the one or other reason for this action (e.g. a payment delay of one day). These reasons however stand in no relation to the demands.

If these rules are just ignored planning reliability and the trust of the IATA-Agencies will be lost. A compromise from Hurra Sp. z o.o. would in fact mean that Hurra Sp. z o.o. consent to pay a bond in amount of 8% of the turnover per year, without the possibility of exemption.

The decision in that case will be important even for other IATA-Agencies for the future.

The Applicant has submitted copies of the following documents:

Information brochure from IATA Poland to applicants for accreditation as IATA Agent in Poland.

Correspondance between the parties from July 2008 and and March 2009

Balance sheet for Hurra Sp. z o.o 2007-2008

Chart describing the group structure of Aerticket AG

Annual Report 2007 of Aerticket AG

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

The initially requested bank guarantee of PLN 1 678 000 is based on 10% of the agent's sales for the last 12 months before suspension. The bank guarantee amount is based on the Sales at Risk concept, which aims to estimate the monies the carriers are at risk of losing in the event an agent fails to make payment for the airline tickets issued since its previous remittance.

Because Poland is on a twice-a-month remittance cycle, the maximum period of Days Sales at Risk is 35 days, which in turn translates to Sales at Risk Amount that is assumed to be equivalent to 10% (ie. 35/365 days) of the agent average sales for the last 12 months.

IATA believe this agent represents a high risk to carriers, based on:

- (i) carrying out an in-depth financial analysis of its financial statements,
- (ii) agent's poor track record of timely payment,
- (iii) agent's late submission of a notice of a change in control,
- (iv) failure to produce the bank guarantee following the last year's financial review, which lead to the agent's request for a "voluntary" suspension (where "voluntary" means it would have been otherwise defaulted outright).

IATA has a duty to the airlines to exercise best judgment and take all the necessary steps to protect the airlines from the risk of default of an IATA accredited agent. Because in IATA's assessment the risk of default of the agent in question is high, IATA decided to invoke Res. 818 Art. 2.1.4.2 and concluded the agent could only be reinstated, if it produces a guarantee equivalent to the full amount of the Sales at Risk, as calculated above.

The carriers have long found the local financial criteria for Poland not fit for its purpose and under the auspices of IATA have been trying to modify the rules for almost the entire last decade, bringing numerous proposals for changes to the Polish Agency Passenger Joint Council (APJC), who is responsible for recommending changes to the Passenger Agency Conference, provided it can reach consensus. However, the agents representation to APJC have successfully torpedoed all such endeavors, voting against each and every proposal put forward by the airlines (the documentation of the Polish APJC process for just the calendar year of 2008 counts literally hundreds of pages, which is an indication itself of the massive effort undertaken to modify the financial criteria).

The amount of default can be far above the amount to be considered as Sales at Risk. This can mean that even the guarantee requested from the agent may not be sufficient to protect the carriers entirely from sustaining big losses from a possible default.

Out of the three bankrupt agents in Poland, two went through a change of control or had irregularities due to late payment in the 12-month period preceding defaults (one had both). And out of the three, only one had to produce a bank guarantee, the other two had perfectly met the current - clearly inadequate - financial criteria and were free to operate without having to furnish any financial security to the BSP Poland whatsoever.

For the sake of demonstrating that IATA approach is reasonable and focused solely on protecting the airlines' money, and doing so within the boundaries of the resolutions, IATA is willing to make an agreement on the following terms:

1. IATA is willing to accept a bank guarantee that is requested from a bank by the parent company for its Polish daughter company, which seeks reinstatement, if the Polish daughter company is indeed unable to get a bank guarantee of its own.
2. IATA accepts that the guarantee may be for 8% of the average sales of the last 12 months of the agent before the suspension (PLN equivalent to some Euro 310k as per the latest calculations), rather than 10% originally demanded.
3. The agent may at all times consider signing up for more frequent remittance (weekly) and thus have the bank guarantee reduced by half, ie. to 4% of the average sales of the last 12 months of the agent before the suspension, bringing down the estimated level of the guarantee to PLN equivalent of around Euro 155k.
4. The agent will have an option to ask for re-evaluation of the adequacy of the amount of the bank guarantee six months after a reinstatement, based on the historical six months sales at the time.

This should not be contradictory with a recommended practice for new agents as described in point 2.2(c) of Res. 800f:

"2.2(c) The local IATA manager will review the level of the guarantee after the first six months based on the Amount at Risk computed with reference to the average net cash sales of the Agent during that six month period. The amount of guarantee required will be increased if it is found to be insufficient to cover the Amount at Risk."

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

Calculation of guarantee based on sales 12 months before suspension  
Summary note "Additional bank guarantee from Hurra - justification" dated 13th Feb 2009  
Irregularity notice for late payment dated 17 Oct 2008  
Notification received 28 Jan 2009 of a change of ownership as of 11 Dec 2008  
IATA letter Request for guarantee, dated 22 Sept 2008  
IATA letter Extension of suspension, dated 8 Jan 2009  
IATA letter Request for guarantee, dated 16 Feb 2009  
IATA letter Reminder Request for gurantee, dated 25 Mar 2009  
IATA e-mail with a response to Hurra dated the 6<sup>th</sup> of April 2009  
Power Point presentation with three examples of agent default pattern

### **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 1-1.1.8. and 1- 1.1.10. Section 1-1.1.8 is not applicable as it concerns situations when a Member airline makes an individual decision relating to an Agent, but section 1-1.1.10 could potentially be applicable and it states:

"...the Commissioner shall review and rule on cases initiated by:

- (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 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.

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

In this case the key issue is if the Respondent is able to set aside or overrule the local financial criteria for Poland, and rely on other resolutions, and thereby require additional guarantees based on other financial criteria, from an agent in order for it to get IATA accreditation. To determine this it is necessary to consider relevant parts of the resolutions applicable in the contractual relationship between the Accredited Agents and the Member Airlines, governing also the authority of the Agency Administrator of IATA as the Member Airlines representative.

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.

To become an accredited agent an agent signs a Passenger Sales Agency 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 Passenger Sales Agency Agreement (or in other words Resolution 824 or the Agreement) stipulates that terms and conditions governing the relationship between the Carrier and the Agent are set forth in the Resolutions (and other provisions derived therefrom) 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.

Furthermore Resolution 824 stipulates that the Handbook incorporates the Sales Agency Rules, the Billing and Settlement Plan rules, such local standards as may be provided for under the Sales Agency Rules and other applicable IATA resolutions. Such Rules, Resolutions and other provisions as amended from time to time are deemed to be incorporated in the Agreement and the Carrier and the Agent agree to comply with them (see Res 824 section 2). I note that in the event of any conflict, contradiction or inconsistency between any of the provisions with which the agent is to comply, and any of the provisions of Resolution 824, the provisions of Resolution 824 shall prevail.

The Sales Agency Rules for Europe are contained in Resolution 818 and Section 2 of this resolution is titled "Qualifications for Accreditation". In this section the following is stated, under the subtitle "Finances":

#### **"Finances**

**2.1.4** The financial stability of the applicant is assessed in relation to the funds at risk, taking into account net equity, net current assets compared to the net cash sales of an average prescribed reporting and remitting period. Such evaluation shall be in accordance with established local criteria, as adopted by the Conference and as recommended by the APJC, and published in the Travel Agents Handbook.

**2.1.4.1** The applicant must provide accounts showing a satisfactory financial standing and ability to remain solvent and pay bills. The applicant shall submit independently produced financial statements prepared in accordance with local accounting practices.

**2.1.4.2** To obtain a satisfactory evaluation, the applicant may be required to provide further information or additional financial support in the form of re-capitalisation, and/or bank or insurance bonds or guarantees to cover the funds at risk."

In line with the text of Res 818 section 2.1.4 above, the local financial criteria in countries governed by Resolution 818 are normally discussed and recommended by local Agency Programme Joint Councils (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 must be complied with by all parties involved; the Agency Administrator of IATA, the Member Airlines and the Agents.

There are local financial criteria established for Poland, and these are thereby such local standards as mentioned in Resolution 824, and shall be complied with by the Airlines ("Carrier" in Res 824) and the Agents. Furthermore it is stated in Resolution 818 that the evaluation of the financial stability of an applicant for accreditation shall be evaluated in accordance with these locally established criteria.

According to the Respondent the local financial criteria for Poland are not sufficient. There is documentation available (e.g. PaConf minutes) that show that there have been difficulties to agree on new criteria in the local Polish APJC. - However, the procedure for establishing the local criteria are according to Resolution 818 section 2.1.4 quite clear; the criteria shall be adopted by the Conference (PaConf) as recommended by the APJC. There is no other method available, as the resolutions stands, to change the local criteria.

There may be many reasons for the procedure involving local representatives of the main parties in the development of local financial criteria; for example to uphold a balance of interests between the agents and the airlines, to ensure that local criteria are proportionate and not excessive or to reflect the local practices. Local criteria are in effect in many parts of the world and it would contradict this practice to interpret the rules as if the local criteria are recognized only as minimum standards, and could be set aside, as would be the case if the Polish criteria were no longer binding to the Respondent when representing the Airlines. If the IATA Member Airlines wish to change this procedure and/or the status of the local financial criteria, it will have to be done by new resolutions adopted by PaConf, which clearly describes the change and shows no ambiguity with respect to previous practices.

-The pure reading of the text of Resolution section 2.1.4.2. (see above) might possibly give room for other interpretations, but the text must be seen in its context as outlined above. It might also be worth to reflect on Resolution 800f, "Agent's financial evaluation criteria", adopted by the PaConf. According to its heading it is a resolution adopted to promote a consistent and, wherever possible, standard set of rules for agency accreditation. It is further stated that the financial evaluation criteria of the resolution is to be applied as the baseline for establishment and/or review of the financial criteria in all markets, subject to any local conditions that may apply. – I note that also in the context of Resolution 800f, any local conditions prevails. This is an additional indication that local financial criteria are to be interpreted as governing, and that in case of conflict as in the situation before us, the local established Polish criteria prevails.

The financials of the Applicant shall therefore be assessed in accordance with the Polish local criteria. If there are concerns relating to these criteria there is a process to change these established in Resolution 818, and any deviations from this procedure will have to be implemented by new resolutions adopted by the PaConf. The alternative is that the parties within the Polish APJC simply will have to find a compromise, and agree on new criteria. This last solution would likely be to the benefit of both the agencies and the airlines, as it is in both parties interest that the criteria reflect the local financial environment in a balanced manner.

Some final comments relates to other arguments brought forward by the Respondent during the review: The Applicant did not make full payment at one occasion during autumn 2008, for which the Applicant has received a notice of irregularity, and thereby been informed of that the incident is recorded as two instances of irregularity. I want to underline that however good reason the Applicant may find it had for withholding part of the amount due, this is a serious matter and one additional similar incident within twelve months from the first occasion will result in default. With regards to the late Notice of Change of Ownership I note that the parties have different versions as to if IATA was involved in the decision to wait for the registration documents, before the Applicant submitted the notification. As this is no key issue in the case I have not investigated it further. I however want to be very clear to the Applicant that it must ensure, recognizing it holds money in trust, that IATA is informed timely of any such changes effecting its business. It is in the Agent's best interest to ensure it documents any such notifications, or agreements relating to such notifications.

In summary I have come to the conclusion that the Agency Administrator has not followed correct procedures as delegated by the Passenger Agency Conference when it did not use the established Polish local financial criteria when it reviewed the accounts of the Applicant. This is to the Applicant's direct and serious detriment. As there is no dispute regarding that the Applicant now complies with the Polish local financial criteria, I therefore order that the Applicant shall be reinstated as Accredited Agent in Poland as per below decision.

#### **Decision**

It is hereby ordered that Hurra Sp. z o.o. shall immediately be reinstated as Accredited Agent in Poland without having to set a guarantee, under the present wording of the applicable IATA Resolutions and the Polish local financial criteria. The decision of 16<sup>th</sup> Feb 2009 by the Agency Administrator is thereby no longer in effect.

Decided in Sundbyberg 2009-05-18

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. Gwozdowski and Mr. Schulz

#### **Note:**

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