

DECISION 2010-04-11

Travel Agency Commissioner Area 2

Helene Cedertorn
Nybohovsbacken 34B, 117 63 Stockholm
Sweden

The Case:

Request for Review of Decisions by the Agency Administrator the 10th of Feb 2010 regarding requirement to provide guarantees, and subsequent decisions to extend deadline for providing said guarantees; now question of granting TAC Review or not

Applicants:

1. VIAJES MARSANS, S.A.
 2. TIEMPO LIBRE S.A.U.
 3. RURAL TOURS VIAJES, S.A.U.
 4. VIAJES ATENEA, S.A.U.
- Address 1-4: c/ Mahonia, 2, 28043 Madrid, Spain

5. VIAJES MARSANS LUSITANA, S.A.
Address 5: Rua Sousa Martins, 1, Palácio Sottomayor, Lisboa, Portugal
- 1.- 5. are referred to as the "Marsans Group"
Represented by:
Mr. Vicente Muñoz Pérez, Subdirector General Corporativo

Respondent:

Agency Administrator, Spain & Portugal
International Air Transportation Association (referred to as "IATA")
Torre Europa, Paseo de la Castellana 95, 28046 Madrid, Spain
Represented by:
Mr. Jean Charles Odele, Country Manager Spain, Portugal, UK and Ireland

Background, formalities etc:

By letters the 10th of Feb 2010 IATA required companies within the Marsans Group to provide guarantees of the following amounts:

1. VIAJES MARSANS, S.A. - 14 593 000.00 Euro
2. TIEMPO LIBRE S.A.U. - 3 775 000.00 Euro
3. RURAL TOURS VIAJES, S.A.U. - 277 000.00 Euro
4. VIAJES ATENEA, S.A.U. - 82 000.00 Euro
5. VIAJES MARSANS LUSITANA, S.A. - 1 548 928.00 Euro

IATA requested the guarantees as a result of the periodical reviews of the annual accounts of the companies (financial year ending 28 Feb 2009). The review was made by IATA's financial

advisors PLETA/DFK. The initial deadline for submitting the guarantees was the 11th of March, but this deadline was later extended until 11 of April 2010.

The Marsans Group requested in an e-mail the 31 March 2010 review by the Travel Agency Commissioner in the above matter, claiming that it fulfills the local financial criteria and should not have to provide extraordinary guarantees as requested by IATA. To support its claims the Marsan Group has provided a Price Waterhouse Coopers (referred to as PWC) Report dated the 10th of March 2010 and the financial statements of the companies of the group, financial year ending 28 of Feb 2009. The Marsans Group has further in an e-mail the 8th of April stated that they have demonstrated that the agencies Viajes Marsans, Tiempo Libre, Rural Tours Viajes and Viajes Atenea mathematically complies with the financial ratios required in accordance with IATA Resolution 818. The audit report ended on 28 Feb 2009 did neither state that the Financial Statements did not reflect the actual situation nor that the accounting rules were not followed properly. According to their calculation also the Portuguese company Viajes Marsans Lusitana complies with the financial ratio required. The Applicant has sought interlocutory relief to stay the action that IATA would otherwise take on 11th of April 2010, if the guarantees are not submitted by this date.

The Respondent has in an e-mail dated the 31st stated that the financial reviews are outsourced to a third party called TCS who then seeks support to a local partner (Pleta /DFK for Spain) in case of complex situations. The bank guarantee requests were made based on the assessment of accounts performed by TCS and then adjusted by PLETA/DFK, taking into account Marsan's auditors comments on the audit report that was sent along with the balance sheets and P&L. IATA also provided the Pleta Review Report and the calculations. In an e-mail the 8th of April IATA further stated that Viajes Marsans Lusitana fails to meet the local criteria by pure mathematics based on its financial statements. For the rest of the agencies, the IATA uses the audit reports comments from PWC to calculate/adjust the ratios. Marsans Group sees this as a wrong interpretation of the Local Criteria that states that if there is an audit report, such audit report must be provided by the Agency. The Marsans Group does however not clearly specify what should be done with the audit report. IATA considers that the comments of the audit report must be used to calculate the ratios if the audit report states some items in the accounts are not reflecting the actual situation of the company or that accounting rules have not been properly followed.

Rules of interest

To become an accredited agent an agent signs a Passenger Sales Agency Agreement (hereafter referred to as the PSAA) 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. There is one set of local criteria applicable for Spanish Agents and one set of local criteria applicable for Portuguese Agents.

The main issue in this matter is if IATA has followed correct procedures when IATA, based on information provided in the financial statements of the agents, deviated from the actual numbers of the annual accounts and made their own assessments of the numbers.

Travel Agency Commissioner Review – rules and conclusions

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 however 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 wishes.

Portugal:

I start my assessment with the calculations concerning the Portuguese company Viajes Marsans Lusitana. The local criteria for Portugal stipulate the following:

“Financial evaluation for existing Agents

The following indexes are used in the financial evaluation:

Rate of liquidity = Current assets/Current liabilities = min 1.0

Rate of solvency = Total capital/Total liabilities

In the event the Balance Sheet as specified in “Documentation Required” indicates a negative (loss) result, the required minimum Rate of Solvency would be 1.0.

Negative results as specified in “Documentation Required” or accumulated negative results are required to be not more than 25% of Share Capital.

The Total Capital is required to be equal or more than the Share Capital. Any other generally accepted ratio may be applied if necessary...”

When I investigate the calculations made by IATA I can verify that the company fails to meet the solvency ratio of 1, that is required as the company shows a loss of 3 334 277.77 Euro. Furthermore it fails to meet the requirement that negative results or accumulated negative results should not be more than 25 % of Share Capital. The numbers used for these calculations are to be found in the annual accounts submitted by the agent. – Given that the company fails to comply with two required criteria there is no need to investigate if it fails to meet also other criteria. Already the failure to meet one of the mentioned criteria constitutes a situation when a guarantee is required. This makes it clear that, based on the information at hand, IATA with regards to this company has followed correct procedures. The request for TAC Review with regards to the company Viajes Marsans Lusitana shall consequently be dismissed.

Spain:

Viajes Marsans S.A. is, according to the financial statements of the respective company, the sole shareholder of the companies Tiempo Libre S.A.U. and Rural Tours S.A.U. For the company Viajes Atenea S.A.U. it is the ultimate shareholder (other company is the direct shareholder).

The financial statements of the company Viajes Marsans S.A. contained waivers by the auditors of PWC. The waivers are summarized as follows (translated from Spanish):

Viajes Marsans, S.A. keeps short term accounts receivables for the amount of Euro 189,6 Million and has provided guarantees that, up to the closing of the fiscal year's date, were evaluated in Euro 212,6 Million to, basically, the linked company Teinver, S.L. and to its subsidiaries, Air Comet, S.A. and Astra Worldwide International Leasing, Ltd., that is facing very delicate business times that could compromise its continuity. In order to ensure the account receivable balance of Euro 189,6 Million, as well as the guarantees provided, Viajes Marsans, S.A. has received from Teinver, S.L., through legal document, security shares from one of its subsidiaries, which estimated value, done by its administrators, is of approximately Euro 180 Million, but which valuation and affectivity we have been unable to evaluate, since we haven't had any report from an independent expert about this topic. Teinver, S.L. also guaranties, in that legal document, the delivery of the total outstanding amount in order to fully serve the debt, in case the security shares would be insufficient at that given moment. Some of these guarantees are being cleared. Additionally, Parque Pórtico, S.A., a company 50% owned by Viajes Marsans, S.A., and with an accounting net value of Euro 2,5 Million has an outstanding balance against Teinver S.L. of Euro 25,9 Million. Likewise, Marsans International, S.e.r.l. and Club Caribe, S.A., companies 100% owned by Viajes Marsans, S.A., and with an accounting net value of Euro 4,6 Million and Euro 12,6 Million, respectively, have outstanding balances against Teinver, S.L. of Euro 6 Million and of Euro 2,2 Million, respectively. Due to all of those factors, we haven't been able to evaluate the possible effects that from those circumstances might derive, if any, in regards to the future functioning of the Company and on its annual accounts here attached.

As part of the audit proceedings we have come to know that information received from the Company didn't contain all the significant aspects related to the guarantees given to Teinver, S.L., Air Comet, S.A. and Astra, therefore the Company has included information to that regard in the attached Report. In light of these circumstances, we cannot consider the received manifestations as evidence for our audit, therefore we cannot affirm, based on reasonable proofs, that the Company could have included all the relevant information in the current annual accounts. - Due to the great importance of our audit's waivers we cannot express an opinion about the attached 2009 annual accounts.

PWC has later in the report dated 10th of March 2010 submitted by the Applicant explained how it commenced its review of the financial year ending 28th of Feb 2009. – I note that PWC does not express any alternative opinion with regards to the itemized matters that raises concerns according to the waivers described above.

The Spanish local criteria does not specifically mention how to handle situations with waivers included in the annual accounts, but it does provide for IATA to ask for additional information, in the event that the furnished documents are not deemed sufficient to undertake a correct analysis of the financial situation of the accredited agent (see § 2.1. third subsection of the Spanish local financial criteria). In this lays a clear possibility for IATA to make an assessment of the annual accounts or any other documentation provided. It would also, in my opinion, be without any logic if IATA would not be able to act on waivers or similar data included in the financial statements of an Agent, when performing its periodical review of the financial situation of the agent. - Based on the information at hand I therefore find that with regards to the company Viajes Marsans S.A. that IATA had good cause to assess its assets considering the waivers by the auditors of the agency. The agent has not brought forward any evidence of substance that gives reasons to question this assessment.

With this being said I can only conclude that the financial statements of all the other three Spanish companies have notes/waivers from the auditors with a reference to the waivers of the statement of Viajes Marsans A.S. This as all three companies have significant transactions with Viajes Marsans A.S. – With this information I find that IATA had good cause to assess the assets of these companies not considering outstanding balances within the group due to the difficulty to assess the value of these assets. Also in this case the agencies have not brought forward any evidence of substance that gives reasons to question this assessment.

Altogether this means that I find that IATA, based on the available information, has followed correct procedures when assessing the financials of the Marsans Group. 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. Consequently also the request for interlocutory relief is also dismissed.

Decision

The request for Travel Agency Review is dismissed. The decisions by IATA to require guarantees stand.

Decided in Stockholm 2010-04-11

Helene Cedertorn

Sent this date by e-mail to Mr. Jean Charles Odele and Mr. Vicente Muñoz Pérez

Note:

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