

TRAVEL AGENCY COMMISSIONER
AREA 1 – DEPUTY TAC 2
VERÓNICA PACHECO-SANFUENTES
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Vancouver, British Columbia V6K 1R5
CANADA

DECISION – 23rd August 2017

In the matter of:

Astra Travel SAE
IATA Code 90-2 0301
11 Messaha Square, Dokki
Giza, Egypt
Represented by the Chairman of its Board of Directors, Mr.
Nour-Eldin Nosseir

The Applicant

vs.

International Air Transport Association (“IATA”)
Torre Europa
Paseo de la Castellana, número 95
28046 Madrid, Spain
Represented by Ms. Olena Dovgan, Europe Manager
Accreditation

The Respondent

I. The Case

The Applicant sought a review of the Respondent’s denial to its application to establish a *Branch Office Location* (term defined in Resolution 866) in the United Kingdom (“UK”).

The Applicant, as Head Office, had filed the application requesting such foreign accreditation. However, the entity that was supposed to operate from such location, selling international air tickets on behalf of BSP Participating Airlines (and actually intended to have the accreditation), was not the Applicant itself but a **limited liability corporation**, created by the Applicant under the name of “*Astra Travel Limited*” (referred to hereinafter as “LLC”) and duly registered at the UK Companies House (which is the competent registrar authority in the UK), under the registration number 10023643, as a separate entity from the Applicant.

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Initially, the Respondent denied the Applicant's request based on the wrong reasons. The Respondent argued that no branch accreditation was possible coming from another region. Therefore, since the Applicant was located in Egypt, corresponding to the Middle East Region (also referred to as "MENA Region"), and it was applying to operate in the UK, which corresponds to Europe Region, its application was denied.

However, this initial mistake was amended when the case reached IATA-Europe Agency Management level. It was then explained to the Applicant that indeed it could apply to open a Branch Location in the UK, from anywhere in the world, meaning, even if the Head Office was not located in the same region where the Branch Office intended to be operated from.

Other issues of concern in this application were the following:

- 1) Some issues were tackled at the Oral Hearing and subsequent actions were undertaken by the Parties, as explained in Chapter IV *infra*;
- 2) Another matter raised by the Applicant pertains a claim about alleged anti-competition practices, which supposedly the Respondent engaged on, causing, according to the Applicant, substantial damages, particularly in terms of economic losses. This Commissioner has stated, since early stages of this review procedure, that this Office lacks jurisdiction to deal with any matter pertaining anti-competition Law and, therefore, all such claims were not part of the review nor will they be considered in this decision;
- 3) The remaining issues, on which the Parties have substantially different views, will be dealt with by this decision. Those matters are the following:
 - i. Whether or not, according to the UK Domestic Law, the Applicant, being a non-resident trading in the UK as a permanent establishment/branch or agency could validly apply and operate as a Branch Office Location through the LLC that it created;
 - ii. How s. 2.2 of Resolution 800a should be interpreted when it refers to <<*limited liability company*>> and its impact on the application reviewed by the Respondent;
 - iii. How the term "*Branch Office Location*", as referred to in Resolution 800a and in Resolution 818g, s. 2.1.4.4, should be read in light of the defined terms stated in Resolution 866.

II. Brief summary of the Applicant's claims

The Applicant claims against the Respondent (omitting the anti-competition Law arguments against the supposed practices and violations as explained *supra*) are

the following:

- a) It challenges the Respondent's denial to its <<*right to operate accredited UK Branch Office Location*>>, in accordance with Resolution 818g, s. 2, <<*applicable to Astra Travel SAE Permanent Establishment (PE) in UK in full conformity to Domestic Law applicable to Non-Resident Foreign Company Permanent Establishment*>>, as defined in the UK Law;
- b) It challenges the denial of its accreditation, based on the right that Resolution 800a grants to the Applicant, which when ignored by the Respondent caused <<*considerable loss and damage*>>, in addition to the <<*mistreatment due to IATA Administrator excessive unlawful abuse of powerful mandate from IATA Members...*>>;
- c) The Respondent <<*did not follow prescribed PAConf Resolutions 010/800a/818g/824/866 providing Rules and Regulations ... to handle on behalf of IATA Members fair relationship with all Travel Agents on equal basis without prejudice or privileges to countries or origins*>>.

III. Brief summary of the Respondent's position

In the Respondent's own words:

<<*This review is related to the Agent's application for a Branch in United Kingdom (a Branch abroad) that was initially not accepted due to the fact that the Head Office is located in different region*>>;

<<*Following the review of this decision, IATA Madrid acknowledged the error and admitted that this particular reason should not have been used for rejection of the application and withdrew this objection. IATA truly apologizes for this*>>;

<<*The remaining issue with the application is that the Agent is seeking to have its UK location accredited as a Branch Office Location for an Egyptian entity that is the Head Office Location. As discussed in the legal memorandum from IATA's external counsel a "Branch Office Location" under Resolution 866 must be the "same entity as its Head Office Location"*>>;

<<*As the memorandum also explains, there are options available for the Agent (namely, either registering the UK subsidiary as a separate Head Office Location or registering the Egyptian entity as a Branch Office Location in the UK). This choice is ultimately up to the Agent, and IATA is prepared to quickly review an amend [the] application under either option*>>.

IV. Oral Hearing

An oral hearing was held in Cairo, Egypt, on July 18th, 2017. In attendance were: the Applicant, accompanied by Mr. Ayman Mostafa, as his assistant; the Respondent; and, Ms. Dania Al-Abadi, in her capacity of Agency Manager Accreditation for the MENA Region, as witness called by the Applicant.

At the hearing it was agreed that the Respondent would seek legal advice in terms of the applicable UK law, regarding specifically these two issues:

- (i) The viability for the Applicant to legally operate in the UK through an “agent”, according to the terms defined in the **UK International Manual**, issued by Her Majesty **Revenue & Customs** and published on April 9, 2016, latest update made on August 4, 2017 (<https://www.gov.uk/hmrc-internal-manuals/international-manual/intm264050>) (referred to hereinafter by simply the “UK Law”);
- and,
- (ii) If having regard to Resolution 800a, s. 2, the Applicant could be granted accreditation as a Branch Office Location under the form of the LLC that it had created and registered in the UK.

A legal memorandum was submitted by the Respondent. Nonetheless, this Commissioner notes that none of the above mentioned issues were specifically addressed by the Respondent’s external advisors. On the contrary, an absolute lack of reference to the alluded UK domestic piece of legislation, submitted by the Applicant as part of his evidence, was present in such a memo. Therefore, considering that not only all reference was omitted in their analysis, but, taking in to account that such legislation was not challenged either, this Commissioner, after having made her own research of UK domestic law, will take the document submitted by the Applicant as valid. The foregoing analysis of such a text has been done exclusively under the basis of this Commissioner’s views.

It appeared at the Hearing that IATA’s portal facility, when it came to the information that Applicants were to submit when applying for Branch Office Locations was not properly either functioning or clearly enough phrased for Applicants to unequivocally follow, or, some were even unnecessarily creating an extra burden on Applicants, since the information was already in the Respondent’s possession.

Hence, it was agreed at the hearing that both Parties were going to go over the application itself, with the cooperation of an expert in IATA’s portal, in order to assist the Respondent to locate the flaws of the system, and, to provide better service not only to the Applicant, but, in general, to applicants interested in going through the process of opening operations abroad. This process took place and the main concerns were addressed and a mutual understanding was reached between the Parties.

Lastly, pertaining the Applicant's witness, she committed herself to provide further details of her testimony in writing, once back in her office, since the level of precision required by some of the questions asked by the Applicant demanded more complete answers. Such further statements were duly provided by the witness, specifically in regards the accreditation process that applicants, from other regions, have to undertake when interested in setting up operations in the MENA Region.

The witness, Ms. Al-Abbadi, in short, stated, I quote:

<<... If the Applicant has the same owners of the head office, we accept the branch application and, once all requirements are met, we accredited the Agent as a branch. If not, then the application will be considered as a new head office and not a branch whether the head office is located in the same country of the branch or not...

*In other words, **Yes** any branch needs to be owned by the same legal entity of the head office to be considered and accredited as a branch including the branches we have in Egypt that are owned by the same legal entity of its head office located in the UK>>.*

V. Considerations

I will start the analysis of the case by reviewing the UK Law provisions, since in accordance with Resolution 824, s. 4 and Resolution 010, s. 4.1 (1st), the Applicant must, before any other obligation, comply with all government laws and regulations applicable to the sale of air transportation or any other act performed in accordance with the Passenger Sales Agency Agreement, *<<... **of the territory where the approved location will be**>>*. In this case, such location is the UK.

1. Can the Applicant, being a non-resident trading in the UK as a permanent establishment/branch or agency, according to the UK Law, validly apply and operate as a Branch Office Location through the LLC that it created?

As stated in Chapter IV *supra*, the Respondent did not challenge the validity of the document submitted by the Applicant, nor it provided any comments about the core issue that it presents to the case. Therefore, its validity stands unquestionable by this Office. Nonetheless, in terms of its application and its scope, this Commissioner differs from the Applicant's views and the answer to the question above is No, the LLC, created by the Applicant, cannot operate as a **Branch** Office Location, since it cannot be considered, in the terms described by the UK Law, as "**an agent**" having a dependent status from the Applicant. Below is my reasoning:

Under the referred Manual, specifically under the UK Local Law identified as CTA2010/S1141, a **non-resident company**, such as the Applicant, is

considered to have a <<*domestic law permanent establishment in the UK* if:

- i) It has a **fixed place of business** here through which the business of the company is wholly or partly carried on, or,
- ii) An **agent** acting on behalf of the company has and habitually exercises here authority to do business on behalf of the company. (As long as that agent is **not of independent status** acting in the ordinary course of its business)>> (emphasis mine)

So, first conclusion would be that if the Applicant actually has a <<*fixed place of business*>> in the UK, and the legislation provides examples as of what type of business would be considered as a “*fixed place*”, it does not seem to be any doubt about the possibility for the Applicant to apply as such and be legally entitled to operate under the UK law.

However, when we look at the second hypothesis (the “*agent*” concept), the hypothesis discussed at the oral hearing, some elements of the definition distance the Applicant from having such a situation. In fact, the norm does not allow ANY Agent to qualify as being considered the <<*permanent establishment*>> (“PE”) of a non-resident company. On the contrary, the norm qualifies that Agent as one NOT having an <<***independent status acting in the ordinary course of its business***>>.

As it appears on file, the Applicant purposely created a **limited liability company** (the LLC referred to above) and registered it in the UK, according to the UK law, in order to pursue its goal of having an operation in the UK. This fact, on its own, eliminates the possibility for such a company to be considered as an “*agent*”, in the defined terms quoted above, because a LLC is, legally speaking, a different entity, with **independent status** from the entity that created it. In this case, the Applicant being the owner, with most of its shareholders being even the same natural persons, **cannot** be considered as being the **same entity**, which is a separate and different juridical person. The LLC has, legally speaking, an independent status, separated from the Applicant (the *Société Anonyme Egyptienne*).

This separation of entities might be difficult to understand because even when both entities would have the same exact natural persons as owners, as shareholders, the law creates this fiction of considering both entities distinct and separate one from the other; the act of registration creates this fiction.

Furthermore, in this case it has been stated that the LLC will undertake as part of its ordinary course of business the sale of international tickets, a business precisely done also by the Applicant, the creator of this separate entity. The fact that the Applicant would have substantial control over the LLC does not make the LLC to be considered, again legally speaking, the **same entity** as the Applicant, or to use the UK Law vocabulary: the LLC, a registered UK company, will not be

considered of “*dependent status*” just because of this external control exercised by the Applicant. It will still be considered a registered limited liability company in the UK, and as such having an “*independent status*” from its creator.

Lastly, this Commissioner notes that the UK Law provided by the Applicant is a legislative text pertaining **Tax matters**. In fact, when it refers to a PE having a “*fixed place of business*” in the UK, the law states, I quote: <<*If any part of the non-residents business is carried out through a UK fixed place of business then a permanent establishment exists. Only the profits arising through the business carried out through the UK permanent establishment may be taxed in the UK*>> (emphasis mine). This might be an important element for the Applicant to look at and eventually to seek professional advise on.

2. Application of Resolution 800a, s. 2 (and ss. 2.2 *limited liability company*)

This Resolution is, as its title indicates, the “*Application Form for Accreditation as an IATA Passenger Sales Agent*”, so the Applicant had to comply with it and fulfill the information that was requested from it when applying for its operation in the UK.

The issue arises when reading sub-section **2.2**, which refers to: “*Specify legal status*” and provides 4 options to choose from: <<*sole proprietorship, partnership, limited liability company, and other (describe)*>>. Reading the subsection within the context of where it is located, it is clear for this Commissioner that the question pertaining the legal status refers to the status of the Applicant, in this case of *Astra Travel SAE/the Head Office*, who has been, according to the evidence on file and to the Applicant’s own affirmations, all along this process the **applicant** for a Branch Office Location. This question is not referred to the “person” either natural or juridical that would be in charge of advancing the Applicant’s business abroad, which according to the Applicant’s intention was the LLC.

In fact, if we read the section right below, **s. 2.3**, it clarifies even more the context of the preceding section, by stating, I quote: <<**2.3** *if your travel agency is owned by an organization **other that the Head Office mentioned above, answer the following....***>> (emphasis mine), meaning that if the Applicant/Head Office had a different legal status as those mentioned in s. 2.2, then the Applicant would have to answer those other additional questions.

3. Term “*Branch Office Location*”, as referred to in Resolution 800a, and, in Resolution 818g, s. 2.1.4.4, should be read in light of the defined terms stated in Resolution 866.

Resolution 818g, s. 2.1.4.4 indicates the procedure to follow in terms of the Head

Office's assessment when it decides to open a Branch location. In this regard, it was agreed at the Oral Hearing that there was no need for the Applicant to re-submit any financial statements, since the ones that it had already submitted for its Annual Financial Review to the Respondent's MENA Region Office in Amman, were sufficient and the Respondent could gain access to them and send them to its external advisors for its evaluation under the light of the UK Local Financial Criteria.

As of the definition of "*Branch Office Location*" stated in Resolution 866, through which scope all the referred provisions, pertaining this matter, have to be looked at, for clarity sake, I will start by literally quoting the provision in question:

<<**Branch Office Location:** *means an Accredited Agent's place of business entered on the Agency List as a Branch Office location which is **the same entity** as its Head Office Location, with the Head Office having full legal and financial responsibility of the administration, staff, liability maintenance and operational expense of the Branch Office*>> (emphasis mine)

As per the defined term, as explained *supra* when analyzing the UK Law, **same entity** refers to the exact same structure, same exact organs, same exact shareholders acting on the same exact capacity, under the same registration number: in other words, by any means it refers to 2 different entities, even if very closely related, or even one fully controlling or owing the other. **It has to be the same exact person:** whether this person is a natural person or is a juridical person. In this last scenario, it would certainly NOT be possible to consider 2 entities that have actually two different registration numbers and two different legal structures (one being a corporation/a *société anonyme* and the other being a limited liability corporation) as being the <<*same entity*>>, as required by the above copied definition.

It might come illustrative to consider how this legal fiction was recognized by the jurisprudence in the early years of 1897, by the House of Lords in the UK, in the case *Salomon vs. Salomon & Co.* [A.C. 22 (H.L.)], where the Court stated:

<<**The company is at law a different person altogether from the subscribers** to the memorandum; and though it might be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, **the company is not in law the agent of the subscribers** or trustee for them...¹>> (emphasis mine)

¹ Puri, Poonam; Anand, Anita; et al, "*Cases, Materials and Notes on Partnerships and Canadian Business Corporations*" (2011) Fifth Edition, at 59

In the case at bar, as per the definition and case law referred to above, there is no legal possibility for considering the Applicant to be the **same entity** as the LLC, despite its clear control over it. That situation does NOT make them equal entities, according to the Law.

VI. Decision

Based on the above mentioned facts and having carefully analyzed the applicable rules, particularly Resolutions 818g, 800a, 010, 866 and 824, it is hereby decided as follows:

- The Applicant's request to be granted accreditation as a Branch Office Location operated by the LLC cannot be granted;
- Considering the extraordinary length of this process and the initial mistake committed by the Respondent, should the Applicant decide to pursue the other courses of actions that are indeed open to it to pursue its operations in the UK, the Applicant will NOT be charged with any additional charges or fees for its process.

This decision is effective as of today, **August 23rd, 2017**.

Decided in Vancouver, the 23rd day of August 2017.



Verónica Pacheco-Sanfuentes
Travel Agency Commissioner Area 1
Acting as Deputy TAC2

Right to ask for interpretation or correction

In accordance with Resolution 820e § 2.10, any Party may ask for an interpretation or correction of any error, which the Party may find relevant to this decision. The timeframe for these types of requests will be 15 days after receipt of the electronic version of this document (meaning no later than **September 7th, 2017**)

Both Parties are also hereby advised that, unless I receive written notice from either one of you **before** the above mentioned date, this decision will be published in the Travel Agency Commissioner's secure web site, provided no requests for clarification, interpretation or corrections have been granted by this Commissioner, in which case the final decision will be posted right after that.

Right to seek review by Arbitration

If after having asked for and obtained clarification or correction of this decision, any Party still considers aggrieved by it, as per Resolution 820e § 4, the Party has the right to seek review by Arbitration in accordance with the provisions of Resolution 824 § 14, once the above-mentioned time frame would have elapsed.