Decision 66 / 2017
Travel Agency Commissioner - Area 2

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Applicants: Viajes Carrefour S.L.U (78-2 5726), Viajes Olalla (78-2 5924), Viajes El Corte Inglés (78-2 9902), Aerticket S.L.U (78-2 3154), Turismat Sol, SL (78-2 7074) and Zamer Viajes (78-2 8246 6)

Represented by:
Ms Mercedes Tejero, Managing Director CEAV
Ms Ana Barluenga, Legal Advisor ACAVE

Respondent: International Air Transport Association - "IATA"
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28046 MADRID, Spain

Represented by:
Mr Éric Vallières, McMillan LLP, Montréal, External Counsel for IATA
Assisted by:
Mr Leslie Lugo, Assistant General Counsel, IATA Legal Services, Montréal
Ms Olena Dovgan, Manager Accreditation, IATA (Europe)
Mr Andrei Pascu, McMillan LLP, Montréal, External Counsel

I. The Case

On June 19th, 2017 (at 18:53) IATA informed all Agents in Spain, the 6 Applicants included, that Conviasa ("VO") had been suspended from BSP **with immediate effect**. The suspension of VO was based on Resolution 850 Attachment F and IATA in detail explained which actions the Agents had to take as a result of the suspension.

Agents were informed to settle all outstanding billings, refunds and pending sales, which had not yet been remitted to IATA, **directly with VO**.

In a clarifying instruction with the title *"Settle Outstanding Billings Directly with CONVIASA",* amongst others, the following was mentioned: *"...no refunds may be deducted or carried out from CONVIASA's Outstanding Billings, pending sales, or any other future transaction."*

Following the above-mentioned information, IATA to individually assist the Agents, also sent a letter titled "Exceptional Remittance Notice" ("ERN") stating: *"In order to simplify the necessary adjustment calculations, please find below the information available from our records, corresponding to your next remittance"*. The Agents **adjusted billing** was included in the ERN.

The Applicants individually, via a more or less template letter, approached this Office stating that they were aggrieved by the suspension of VO and at the same time declared that Ms Mercedes Tejero (CEAV) was authorized to represent them. It was agreed by all Parties to treat this review as a class action.

II. The core of The Applicants´ arguments in summary

Given the financial and operational information about VO, that for months had been spread in public media**,** clients cancelled flights booked on VO and asked for refunds so they would be able to secure alternative flights.

The Applicants processed these refunds via BSP and "*after approval by VO*" **credited the clients.** Refunds which according to the Applicants "*also were confirmed by BSP in the Billing Report."*

The Applicants claim VO should have been suspended from BSP already on the 05th of May 2017 and want this Office to order IATA to "pay back" the amounts requested in the Exceptional Remittance Notice ("ERN") received after suspension of VO. **Amounts which had been approved for refunds prior to 18:50 on 19th of June.** (Time and date of IATA´s notification of the suspension)

Justification for this request is amongst others based on (quoting The Applicants) the following reasons:

- Through media, "the poor state of affairs in VO" was well documented and public knowledge.
- The process to suspend is well described in Resolutions.
- It is stated that IATA is "allowed" to suspend an Airline when it ceases all its scheduled passengers operations.
- VO already on the 05th of May ceased "all" its operation.
- If not suspending VO then IATA should have secured Agents´ monies via Financial Security or Cash Deposit, as mandated by Resolution 850 § 15.2
- The change included in Resolution 850 Attachment F in June 2017 was: "***a material change…***financially affecting those Applicants who remit 3 times per month…"
- and this material change was **not properly communicated** to Agents as requested by Resolution 824 § 2.3

And finally, IATA after suspending VO on the 13th of June, did not follow Resolution´s requirements of **"immediately instructing** Agents" after suspension (Resolution 850 Attachment "F" § 1.c). This was done after business hours on the 19th of June, and furthermore, simply informing Trade Associations is not a proper way of communication to **all** Agents.

III. The core of The Respondent´s arguments in summary

IATA questions the jurisdiction of the TAC Office by claiming: *"…any decision by IATA to suspend or not suspend an airline from BSP is outside the purview of, and not reviewable by, the TAC".* This view is, according to The Respondents, supported by Resolutions 820e, Section 1.1; 3.1; and 3.2.).

Furthermore: "*Section 15.2 of Reso 818g waives any potential liability on the part of IATA provided IATA has acted in good faith",* which according to IATA at no time has been put in question.

The Applicants' claim that IATA was "negligent" by not suspending VO earlier and by that: *"minimize the prejudice they allegedly suffer in relation with the airline´s default to honour refunds*"

Quoting the Respondent in regards of the allegations put forward:

- Agents have been directed to settle all outstanding billings and pending sales which have not yet been remitted to IATA directly with the suspended airline, in accordance with current Agency Resolutions.
- Prior to 13th June 2017, IATA had no factual basis to suspend VO.
- "Subparagraph 15.1(g) of Resolution 850 requires IATA to have "*sufficient financial or legal grounds-including outstanding amounts* ***owed to IATA***" in order to be allowed to review a situation under that provision".
- These circumstances did not exist prior to 13th June 2017.
- The timespan between 13th and 19th June (when the suspension was carried out) did in no way financially affect the Applicants.
- The amendments to Resolution 850 and Resolution 850 Attachment F were duly notified in February 2017 and in any event, they were substantially to the same effect as previous versions of the Resolutions.
- IATA has no say on refunds approved by airlines.
- The Applicants ought to know that if they honour refunds before "*Settlement Day*" they are doing so at their own risk. (TAC comment - "Settlement Date" is normally one business day after Remittance Date)
- The Applicants were well aware of the difficulties faced by VO, and consequently IATA cannot be held liable for the risk they took when they "fronted" the refunds on behalf of VO.
- Section 15 of Resolution 818g waives potential liability on the part of IATA, provided IATA has acted in good faith.

IV. Oral Hearing

An Oral Hearing took place in Madrid on the 27th of October 2017.

V. **Considerations leading to Decision**

Having carefully considered the Resolutions, the statements presented at the Hearing and the submissions done prior and post the Hearing I have come to the following conclusions:

a) <u>On the issue of IATA´s position about the TACs´ *"lack of jurisdiction":*</u>

In this review, The Applicants' plea is to obtain financial compensation attributed to the alleged "*late suspension of VO*". The first consideration done was if the TAC, according to Resolutions, has or has no jurisdiction over potential monetary claims presented by Agents.

This issue has recently been discussed, and decided upon, by this Commissioner in a review requested by IATA. (***"IATA vs. Al Sarah Wing Travel Agency" - Saudi Arabia).*** IATA´s lead representative was also then advocate Eric Vallières.

In the heading of Section 1 Resolution 820e it is stated:

*"**All disputes** arising out of or in connection with matters enumerated in the present Section shall be finally settled, subject to review by arbitration pursuant to Section 4 herein, by the Commissioner, in accordance with this Resolution."*

Since the language in this Resolution text is "broad" it is argued that according to Resolution 820e §§ 1.1 – 1.1.10 where an Agent is aggrieved or where the issue is*:" ... **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"* **is reviewable** by the TACs.

The second consideration is if Resolution 820e §3 "*Courses Open to the Commissioner*" can include damages´ claim reviews.

From the heading of the above-mentioned section it can be concluded that the courses of the TACs´ actions are not strictly limited to the courses mentioned in § 3 but rather are ***"… an indicative summary of possible courses…"*** open to the TACs.

This reinforces the view, according to which cases where an Applicant´s main or partial objective is to obtain financial compensation, derived from an action or impending action from IATA, can indeed be reviewed by the TACs.

In this case The Applicants have made a request for this Office to assess "financial damages allegedly suffered from IATA having suspended VO from BSP on the 19th of June instead of the 05th of May 2017".

Each Applicant has specified their claim to be the amount requested by IATA in the Exceptional Remittance Notice ("ERN"), received after suspension of

VO. Amounts which had been approved for refunds after 05th May but prior 19th June 2017.

Additionally, the 4 Applicants affected by the amendment of Resolution 850 and Resolution 850 Attachment F argue that this Office has to consider those amendments as if "they have not been properly communicated" to them.

b) On the issue of "*authorised refunds credited to Passengers prior to Remittance Day*":

This issue has also been discussed and decided upon earlier by the Commissioners. The most recent decision was made by Commissioner Pacheco-Sanfuentes, dated the 10th of June 2017. (**A&A Travel Ltd. vs. IATA - Trinidad & Tobago.)**

The conclusion is that Agents should be aware that an Airline´s "authorisation of refunds" only means that they will be credited to the Agent´s account in the subsequent billing and will only be honoured on Remittance Day.

Consequently refunds, if prematurely forwarded to passengers, e.g. before Remittance Day, **is done on that Agent´s own risk.**

c) On the issue of: "notification of amendment in Resolution 850 Attachment F":

Resolution 824 § 2.3 mandates: *"…The Agent shall be notified… of any amendments… such amendments shall be deemed to be incorporated herein unless within 30 days of receipt of such notification the Agent terminates this Agreement by notice in writing to the Agency Administrator."*

Resolution 824 § 16 discusses notices: *"…all notices to be sent…from the Agency Administrator to the Agent …shall be sufficient if sent by any means that provides proof of despatch or receipt addressed…"*

BSPLink is an accepted way of communication *"…that provides proof of dispatch…"* as long as the communication from IATA **also is done through BSPLink basic version.**

This Office has always vigorously argued the need for "**proof of direct notification to Management with return receipt**" when the "notification" is about an irregularity which can lead to default action or even termination of an Agent´s Passenger Sales Agency Agreement ("PSAA"). This would also apply in this case if the amendment in the PSAA would be of such magnitude (materially affecting an Agent) that that Agent would even consider terminating the PSAA on its own initiative.

It is this Commissioner's belief that the amendment was not of such magnitude that it specifically called for "proof of direct notification to Management with return receipt". The annual notification in February 2017 did meet the requirements for notification as mandated in Resolution 824 § 16. **Provided it**

was communicated to all Agents, and not only those having paid for an enhanced version of BSPLink, or, as The Applicants have claimed, only sent to Agents' Associations.

d) On the issue of **not suspending** VO the 5th of May 2017:

The provisions of Resolution 850 § 15 are clear: *"…IATA may immediately suspend…"*. The word **"may"** does not only allow discretion to IATA but entails also full responsibility of the consequences for not suspending. Especially if the prerequisites to suspend are listed in the same provision.

Subparagraph § 15.1 (b): *"…the BSP Airline ceases all scheduled passenger operations, either temporarily or… due to financial or other reasons, … no longer meets the requirements for participation in the BSP…"*

IATA, even though acknowledging that VO had cancelled all international flights, argued that *"**not all** scheduled"* flights had been cancelled since domestic operations were upheld even after the 5th of May.

IATA was well aware of the reason leading to VO ceasing all international operations, namely, **failure to pay insurance premiums**. **A basic obligation to obtain Operating Licence for a Carrier.**

It is this Commissioners view, that even though the financially deeply troubled State of Venezuela keeps operating a state-owed carrier domestically, without an internationally recognized valid Operating Licence, does not "exclude" VO from the Resolution criteria "*all scheduled passenger operations"* as mentioned in the subparagraph 15.1 (b) *supra.*

Subparagraph 15.2:" At *the **discretion of IATA, IATA may elect to refrain** from suspending a BSP Airline …if there are alternatives available **to protect the financial integrity of the BSP** … **including from the risk that refunds may exceed sales**…security deposit, or alternative security acceptable to IATA to be held centrally, and calculated so as to cover funds at risk for a minimum of one month**."*

IATA, at the Hearing, did admit that they did not have *"alternatives to protect the financial integrity of the BSP*" when exercising its **right not to** suspend VO from BSP on the 5th of May- or soon thereafter.

IATA´s explanation, expressed also at the Hearing, that *"obtaining financial security from VO was not possible"* is according to this Commissioner not a viable argument for not suspending.

During the Hearing, it came to light that as of 5th May, IATA did have multiple daily contacts with VO Management to evaluate the situation. More specifically to evaluate if VO would or could soon resume operation.

It is this Commissioners view that, even though not paying insurance premiums is a very heavy indicator of "insolvency", IATA´s decision not to immediately suspend is understandable.

The 5th of May being a Friday, allowing 2-3 Business Days to "investigate, obtain financial security and do considerations" about suspending an Airline from BSP is reasonable. In this case, history proved IATA right since VO resumed operation on the 10th of May 2017.

Consequently, this Commissioner confirms IATA´s choice not to suspend VO on the 5th of May or shortly thereafter.

Having stated the above, IATA, despite on the 5th of May been made aware of the "deeply troubled finances" of VO, not obtaining financial security to protect the financial integrity of the BSP **for almost 6 weeks**, is noteworthy and, according to this Commissioner, even borders to negligence.

Due to failure from VO to meet its obligations mandated by Resolution 850 § 15.1 (a*):" … the BSP Airline fails to pay any amount due in relation to a BSP settlement…"* and Resolution 850 § 15.1 (d): *"...the BSP Airline defaults on a material obligation to the BSP",* IATA, on 13th of June finally suspended VO from BSP.

Except of stating the obvious, that IATA did not obtain financial security to protect the financial integrity of the BSP, this Commissioner has no basis to establish a certain date between the 5th of May and the 13th of June when IATA should have suspended VO from BSP.

e) <u>The issue of notifying Agents on the 19th instead of 13th of June:</u>

IATA´s obligations, as outlined in Resolution 850 attachment "F" are clear.

Already §1, in bold and capital letters, mandates**:"** ***IMMEDIATE action by IATA in the event of suspension"*** followed by § 1(c) (i) where IATA is mandated to*:"* ***Instruct*** *all Agents…* ***to suspend immediately*** *all ticketing activities on behalf of the BSP Airline concerned."*

This Commissioner cannot find any mitigating excuse for IATA not having notified Agents on the 13th of June, following VO suspension from BSP, as mandated by Resolutions.

f) <u>On the issue of having been notified after Remittance Date 20th June:</u>

The Applicants also claim that since the notification from IATA was done after business hours on June 19th and remittance already was executed, notification should be considered having been done after Remittance Date of June the 20th and thus allowing the refunds to be settled as per the original billing.

Remittance Date in question was on the 20th of June. The Remitted funds have to reach IATA´s Clearing Bank on Remittance Date as defined in Resolution 866: *"… the Clearing Bank´s* ***close of business****…"* This supports the stand that IATA´s notification, even after business hours of the 19th of June, has to be considered done "timely" to include the refunds affecting the Applicants.

VI. Decision

Having carefully considered Resolutions and the evidence presented by The Parties it is hereby decided as follows:

- IATA´s actions **after** suspension were according to Resolutions
- Not suspending on the 5th of May 2017 was according to Resolutions

As stated *supra,* this Commissioner has no basis to establish an exact date between the 5th of May and the 13th of June when IATA, **based on the lack of *"alternatives to protect the financial integrity of the BSP"*,** should have suspended VO from BSP.

At no stage during this review has there been claims of IATA acting in "bad faith", neither has this Commissioner's findings during the review process lead him to believe that IATA had acted in bad faith between the 5th of May and until suspending VO from BSP on the 13th of June.

Consequently **Section 15 §2 of Resolution 818g** where the Applicants waive potential liability on the part of IATA, provided IATA has acted in good faith, **has to be acknowledged as applicable.**

Having stated the above it is clear that by not notifying the Applicants on the 13th of June IATA should be held accountable for financial damage inflicted between that date and the 19th of June.

Therefore, it is hereby also decided that

- Financial prejudice, on an individual basis by each Applicant, which can be proven as a result from not notifying on 13th of June, have to be reimbursed by IATA

This Decision is effective as of today and in accordance with Resolution 820e, § 2.10, any Party may ask for*: "an interpretation of the decision or correct in the decision any error in computation, any clerical or typographical error, or any error or omission of a similar nature."*

The time frame for these types of requests, normally maximum 15 calendar days after receipt of this decision is hereby, due to the upcoming Holidays, allowed to be **15 Business Days** (Spain) Meaning as soon as possible and **not later than 19 January 2018.**

Please also be 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.

Please note that if after having asked for and obtained clarification or correction any Party still considers aggrieved by this decision, as per Reso 820e, §4, the Party has the right to seek review by Arbitration in accordance with the provisions of Reso 824, §14.

I would be grateful if both Parties could acknowledge receipt of this decision.

Decided in Stockholm on the 22nd of December 2017.

Respectfully

Andreas Körösi
Travel Agency Commissioner
(for Europe, Middle East & Africa)

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