Travel Agency Commissioner – Area 2

Andreas Körösi
P O Box 5245
S-102 45 Stockholm, Sweden
Phone: + 46 70 767 67 30
E-mail: area2@tacommissioner.com
www.tacommissioner.com

Clarification - Decision 66/2017 Conviasa suspension from BSP

Response to IATA´s request for clarification dated 19 January 2018

1. **Clarification of Section V(e) in the Decision – on the issue of "notifying Agents on the 19th instead of the 13th of June 2017"**

   I fully agree with IATA´s statement, so please accept my apologies for this unfortunate wording in the Decision. It is an undisputed fact that the suspension was on the 19th of June and was notified to Spanish Agents at 18:49:20 on the same day.

   Having stated the above, what this Decision wanted, and still wants, to convey is that **suspension of Conviasa should have been initiated on the 13th of June immediately after failing to meet its obligations** as mandated by Resolution 850 § 15.1 (a*):" … the BSP Airline fails to pay any amount due in relation to a BSP settlement…"*

   The BSP is an accounting tool and it is this Office belief that not only participating Airlines but also participating Agents should be confident with IATA´s neutrality as "caretaker".

   Quoting from IATA´s "Pleading Notes", dated 27th of October 2017, presented at the Hearing in Madrid, Section IV (11):

   "Conviasa was suspended on 19 June 2017, only a few days ***following its default towards BSP Spain on 13 June 2017…"***

   At the Hearing it became obvious that IATA, by suspending on the 19th , did not take any consideration to the right for Agents to be "timely notified" about Conviasa´s default towards BSP Spain. IATA was solely concerned about BSP Participating Airlines not being financially affected by Conviasa´s authorised refunds.

   At the Hearing it also became obvious that IATA would have considered even to wait longer with the suspension would the Remittance Date note have been on the 20th of June.

   I hope this clarifies IATA´s question, and **please consider the following as correction of the last § of "*Considerations leading to Decision*", Section V(e) in Decision 66/2017.**

   Amended wording:

   This Commissioner cannot find any mitigating excuse for IATA not to suspend Conviasa from BSP on the 13th of June, as it is mandated by Resolutions. And consequently, Agents should have been notified "immediately" thereafter.

2. Clarification regarding the Application of Resolution 818g, Section 15.2

It is this Office´s view that not acting in bad faith, which is almost an impossibility to prove, does not "unconditionally protect" IATA staff from all wrongdoings.

Resolution 818g Section 15.2, as this Office sees it, is a limitation of general damage compensation claims when IATA DG, AA or executive staff are "exercising their duties **within the framework of Resolutions."**

"Administrative mistakes" and negligence, or **as the findings show in this case, that Resolutions´ requirements intentionally have been breached**, should not preclude a wronged party to seek compensation for financial losses incurred as a consequence of that mistake or breach of Resolutions´ requirements.

As decided, it is up to the wronged party to demonstrate the direct and exact financial damage inflicted between the 13th and 19th of June 2017.

To be clear, this decision does in no way excuse the "risk taking" by an Agent when forwarding refunds which have not yet been part of a Remittance. But it does make IATA a potential contributor to the damage.

Since the only financial compensation sought are for prematurely forwarded refunds this Commissioner deems that a proportionate 50 / 50 financial responsibility is appropriate to attribute between the parties because Agents were deprived a position where they would not have forwarded authorised refunds to clients during that period.

I hope this clarifies this Office´s view about applicability of Resolution 818g, Section 15.2

3. Clarification regarding the proof of the financial prejudice to the Applicants

a) I understand this request from IATA for this Office to specify more in detail what can be included for reimbursement.

I believe the clarification of §2. *supra* does address the issue at hand, but to be even more specific, the Applicants need to substantiate

- *that the "refund" was authorised by Conviasa between 13th and 19th of June*
- *that it was actually refunded to clients within that time span*
- *that the refunded ticket was not part of a package tour, (*since tickets anyways are mandated to be refunded to clients according to Spanish Package Travel Laws)
- *that the refunded amount was not recoverable from the client.*

b) In regard to IATA´s statement about the "limitations" in the "Terms of Reference", agreed by both Parties.

Let me start by quoting § 12 of the Terms of Reference: "…***neither" Party is deemed to have agreed to the other Party's claims".***

Ms Tejero was at first reluctant to sign the "Terms of Reference" drafted by IATA, and as I recall only the last page was signed and only after some persuasion from this Office.

Some quotes from my email dated 29 September 2017, might better demonstrate the situation when the "Terms of Reference" were signed by Ms Tejero.

"…as described in Resolution 820e § 2.2 "proceedings before the Commissioner shall be informal, and the Parties shall not be required to adhere to strict rules of evidence;"

"As I understand the Applicants' request for review, already stated in my emails dated September 11th and 21st, and not refuted by the Applicants," This review is about the Agents´ ***plea for IATA to return the money which would have been theirs should IATA have acted, as they claim, timely when suspending Conviasa."*** (Allegedly on 05, May)

Please also recall my email dated 24 October 2017:

"*I want to remind both Parties that proceedings will be held as mandated in Reso 820e §§ 2.1.5, 2.1.6, 2.1.7* ***and 2.2.*** *By that I want to state that the Hearing is "informal" and not necessarily in accordance with all procedural requirements at a Court of Law or other Arbitral Tribunals."*

IATA´s submission of the "Terms of Reference" did largely contribute to a smooth and efficient Hearing but cannot be considered as a binding agreement to "limit" any Parties´ right to discuss issues or submit new evidence during the Hearing.

Please also note that as the Decision-maker I always have the liberty to ask questions and introduce elements which have not been discussed prior to a Hearing.

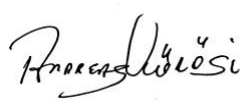
I hope this clarifies IATA´s question under 3. (i).

As already stated supra, I fully agree with 3. (ii): "any financial damages claimed…must be proved by actual evidence…"

Finally, IATA´s remark under §4, about reservation of rights to seek a review by ICC Arbitration is duly noted.

Stockholm 24 January 2018

Respectfully Yours



Andreas Körösi
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