Travel Agency Commissioner – Area 1

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Clarification - Decision March 21st, 2018
Carlson Wagonlit Travel vs. IATA

Response to IATA's request for clarification dated April 13th, 2018

A. Clarification of Section IV(ii) of the Decision regarding proper means of communications

I do not see any need to clarify this part of my decision, since it is not only clear but, it has already been stated in several prior decisions from this Office, in addition to having been reported to the Stakeholders in our Annual Reports:

- BSP*link* postings alone are **insufficient means** to communicate to Agents the matters alluded in ss. 2.3 and 16 of Resolution 824, particularly when it comes to changes to the Passenger Sales Agency Agreement ("PSAA", also referred to hereinafter as "the contract"), hence, not meeting the criteria set out in those provisions.

I deem IATA's request to supposedly "clarify" rather a request for this Office to change a thought through and long standing precedent, which will not happen. The decision rendered on March 21st, 2018 stands.

Notwithstanding that, I consider necessary to make some precisions regarding IATA's submissions pointed out in this section:

1. - This Office has never limited the *supra* mentioned criterion to Notices of Irregularity when it comes to postings on BSP*link* only, as IATA erroneously states. That statement is not only inaccurate but has no support on the applicable Resolutions. Indeed, s. 2.3 of Resolution 824, specifically states that <<***any amendment*** *to the content of the Handbook*>> has to be <<*notified by the*

Agency Administrator>> to the Agent; therefore, there is no doubt about the need for IATA to comply with this specific notification requirement.

2 - IATA claims the <<*BSPlink is a means of communication "that provides proof of dispatch" and allows an efficient tracking of receipt of notices*>>, this is also inaccurate. At least up until now, this Office has never received any proof from IATA as having tracked receipt of the notices to Agents that have been posted on BSP*link*. On the contrary, this Office has received several complaints from Accredited Agents arguing that they never received those notices, since they mostly look at the BSP*link* as a tool where the BSP Sales Report and eventual ADMs are posted, the rest of the material being mostly advertisement or of irrelevant content to their businesses.

Furthermore, IATA is ignoring the clear view that its own Member Airlines voiced at a survey that an IATA working group did, revealing the inadequacy and inefficiency of the BSP*link* as a means to effectively communicate with Agents.

3. - I respectfully disagree with IATA's views when it deems that the changes that the NewGen brings about Accredited Agents' contracts are some sort of minor, as they do not seem to have, I quote: <<*the same effect on Agents as Notices of Irregularity and therefore do not require direct notification to Management*>>. Well, this is not only inaccurate again, but reveals a lack of understanding of the magnitude that this new system entails for Agents.

It is inaccurate because the NewGen provision (I am alluding specifically to the change of ownership ("CoO") topic and the Agent's risk history assessment) is having on Agents an even bigger effect than receiving a Notice of Irregularity ("NoI"). In fact, the sole receipt of a NoI without having any other on record does not entail the submission of any financial security. Conversely, the NewGen amendment regarding the CoO provisions entails for the Agent the submission of a financial security, even when such change had occurred two years ago. So, I ask IATA, which effect do you deem that would impact more an Agent: receiving a NoI without any further request or being risk assessed as "B" due to a CoO that occurred in the past where it was completely lawful and, hence, be suddenly requested to provide a financial security?

4. - The same way IATA's systems deliver thousands of Notices to Agents worldwide every day regarding specific topics, not only NoI, addressing them directly to Management, this Office sees no objection, nor as being unrealistic, that a major and unique amendment to the Agency Programme (the first one done in 50 years since its creation!) would be communicated the same way: **by direct emails to Management**, in full compliance with Resolution 824, ss. 2.3 and 16.

B. Clarification of Section IV(iii) of the Decision regarding the alleged retroactive effects of the NewGen amendments

Before addressing this *retrospective* application of the NewGen amendments, it is important to have in mind how highly debated and controverted the topic is, not only in academia but also in Courts. It has been established, even by its most fervent opponents, that not all kind of retrospective application of a rule is necessarily against the Rule of Law because it would undermine the capacity of the rule to provide guidance and create the basis for reasonable expectations.

After a pondered analysis of those conflicting positions, the facts of this case and the NewGen amendments, I have reached my own conclusions. In the coming paragraphs I will explain, in further detail, my reasoning. My intention is to clarify, in the sense of providing deeper analysis for IATA, the requesting Party, to better understand the grounds of my decision. I am not altering nor in any way changing that decision.

As per the definition that Driedger[1] presents of retrospectivity, the case at bar falls into a subclass of it according to which the rule imposes new results in respect to past events attaching <<*prejudicial consequences to that prior event*>>. My decision's reasoning and conclusion were based on this negative impact that such application of a rule had on the Agent, who did not commit any wrongdoing and was totally unaware and could not predict any coming change of the applicable rules contained in its contract (also referred to as "PSAA"), hence, unable to undertake any remedial actions and diminish its losses.

According to some academics, Sampford[2] amongst them, retrospectivity does not seem to be an *all-or-nothing characteristic* of a regulation, but rather a *matter of degree*. A sort of spectrum, I would say.

Consequently, the violation of the Rule of Law, the disregard of an Agent's *legitimate and reasonable expectations*[3] not only to have a **pre-defined**, **stable and known rules** to be applied to its contract, but a reasonable level of certainty that any significant change to that set of rules will be properly and timely notified by the other Party to that contract (the rule-maker actually!) will be deemed to have occurred when that retrospective application would be at a

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[1] Elmer A. Driedger, *Statutes: Retroactive Retrospective Reflections*, (1978) 56 Canadian Bar

[2] Charles Sampford, *Retrospectivity and the Rule of Law*, (Oxford University Press, 2006) at 9

[3] Paraphrasing Munzer, an expectation is <u>*rational*</u> when (i) it is based on an appropriately **accurate and detailed knowledge** of the law (in this case, the **contract**), and, (ii) where there is some rational ability to **make predictions** on the basis of that knowledge (as I explain *infra*, where the Agent could have redress its past decision in order to avoid the detrimental "new" consequence of it); and, it is <u>*legitimate*</u> when it is supported by (i) the underlying justification of the law inducing it (again, in this case the PSAA); and, (ii) by the fundamental principles embedded in the legal system itself. (Stephen Munzer, *A Theory of Retroactive Legislation* (1982) 61(3) Texas Law Review at 429, 431-432)

place of the spectrum that impedes the Agent any potential evaluation and redress of the sudden detrimental consequences of its former lawful actions. The Agent is placed in a position where it is unable to avoid the effects that such amendment to its contract generated. The Agent could not have predicted any prejudicial *post-factum* effect from her lawful 2016 decision regarding expanding her proprietary rights in a business that, in fact, she had been running for more than 27 years by herself.

I would like to cite, as an illustration of my position, extrapolating it, *mutadis mutandi,* to the contractual world, a decision rendered by the Supreme Court of Canada, referred to in the McCormack material ("*How to Understand Statutes and Regulations*"), submitted by IATA, where the Court explained the rationale behind the presumption that statutes are *prima facie* **prospective**, especially when the statute (in this case would be the contractual rules applicable at the time when the CoO took place) confer a benefit that extends back in time (in this case the exemption to provide any financial security) I quote:

> *<<At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a* ***stable, predictable and ordered*** *society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action*[4]*>>* (emphasis mine)

A potential solution to this situation could be for IATA and its Members (as rule-makers):

1. Not only to properly and timely notify Agents about the changes that will become effective or, as in Canada, that have become in effect as a whole new set of rules that will govern their contracts (as stated *supra* in Chapter A) but,

2. To allow Agents a sort of "grace period" for them to re-evaluate the decisions/actions taken under the former applicable rules, which will have detrimental consequences for them in light of the new system, so they could revert the actions made in the past, if they so wish and can. *Exempli gratia*, in a CoO situation it might be possible for an Agent to go back to the shareholding composition that they had prior the effectiveness of the NewGen and this retrospective evaluation of the Agent's history, and revert the distribution of the company's capital as it was prior the change, thus, making unnecessary any request for a financial security; or

3. To even avoid all consideration about retrospectivity, to simply implement the risk history assessment as of the exact date of the NewGen's implementation in each country <u>onwards</u>, meaning that no

[4] *Reference re Secession of Québec*, [1998] 2 S.C.R. 217 at par. 70

CoO that had occurred in the past, having been in compliance with the applicable rules effective at the time of the change, would be re-assessed, but only those occurring AFTER the implementation of the NewGen. In other words, the application of the new rules will attain prospectivity.

Before concluding this clarification I want to set out very clearly that in no moment in time this Office pretends to invalidate IATA's actions because of this retrospective application of the rule to the case at bar. Indeed, as shown by legal doctrine as well as by the Courts, retrospectivity is not necessarily an evil only justified in exceptional circumstances, since it can actually play a valuable role in upholding values central to the Rule of Law. However, in the case at bar, considering the specific circumstances, such as

(i) Lack of proper communication of the new system and the huge changes that its implementation had and will have on the Agent;
(ii) The fact that this retrospective assessment of the Agent's business decision regarding the CoO that she voluntarily did, placed the Agent in a position were she was impeded from taking action in her own benefit and avoid, if she so wanted, the detrimental effects of the new regulation;
(iii) The fact that the CoO in this case was not even a major one, in the sense that Ms. Jessa (the acquiring shareholder) had been, not only shareholder of the company but its sole Managing Director for more than twenty seven years (so no change pertaining the control of the company as such); the other two shareholders were mainly "sleeping partners", who accepted right away when she offered them to by them out. It is clear that she is not an outsider, and this is why the Local Financial Criteria applicable in Canada did not and still does not consider this CoO as to require a financial security;
(iv) The Agent has had an impeccable record as Accredited Agent during 27 years;
(v) Based on those facts, the Agent had solid grounds to have **reasonable and legitimate expectations** for her situation not to be perceived as "risky" even in light of the new rules, even in light of the major amendments unilaterally made by IATA and its Members Airlines to the contract signed between her and IATA.

Considering the *sui generis* contractual relationship between IATA and the Agent, where the latter's bargaining power is practically non-existent and the dominant position of the first is undeniable, I deem that different measures could have been and could actually be implemented by IATA in order to achieve its ultimate goal, which is to protect Member Airlines' funds. IATA's submissions did not satisfy this Commissioner, on a balance of probabilities' standard, that a retrospective application of the rules stated in the NewGen, as of the risk history assessment of this Agent, was justifiable to fulfil its goal. Different circumstances might have lead to different conclusions.

C. Looking through the NewGen Resolution itself

In any event, considering the facts of the case, namely the fact that Ms. Jessa held, prior the CoO decision, 50% of the total issued shares of the company and her two other "sleeping partners" held each 25% of the remainder shares, it is clear that even under the NewGen Resolution 812 § 10.3.1, the CoO that took place in 2016 does not qualify as a Major CoO, since I quote:

> *<<(iii) the disposal or acquisition of shares representing* ***more than 30%*** *of the total issued share capital of the Agent by any Person****, that has the effect of vesting the control****, as defined in applicable local law, of the Agent* ***in a person in whom it was not previously vested****>>* (emphasis mine)

It is obvious that the CoO did not have the effect in which the *<<control was vested in a person whom it was not previously vested in>>*, as required by the rules, therefore, following the same criterion stated in the "*Travel Design* (SE) *vs. IATA*" decision dated April 11th, 2018, this Commissioner decides as follows:

- Based on the facts of the case, the Agent's Risk History Assessment has to be considered "**satisfactory**" and not as "**failed**"

- The request for a financial security has to be withdrawn.

Decided in Vancouver, the 3rd day of May, 2018