Travel Agency Commissioner – Area 1

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Clarification of the clarification rendered on March 3, 2019, about the decisions dated 17 and 20 Nov. 2018
7 Accredited Agents in Venezuela vs. IATA
(Agency Annual Fees 2019)

IATA has requested a clarification of the clarification that this Commissioner issued, when it responded to the request made by 7 Accredited Agents, identified below, with respect to the decisions issued on November 17 and 20, 2018, pertaining the payment of the annual fee in Venezuela. The Accredited Agents who filed the aforementioned clarification were the following:

95-5 0645 6 Agencia Atlas
95-5 2750 4 Alpiviajes C.A.
95-5 5958 6 Beltur S.A. Agencia de Viajes
95-5 2525 3 Capitana Tours
95-7 3330 4 Kovama Tours S.A.
95-9 1801 2 Viajes Madrid Caracas C.A.
95-9 1954 1 Viajes Viam S.A.

As the evidence shows, Agents and IATA had ample opportunity to present their allegations and the evidence they considered relevant in support of their respective positions. Moreover, in the course of this clarifying phase, IATA contacted this Commissioner on several occasions to discuss matters regarding the arguments to be presented and the correct way of gathering the facts and information that IATA wished to bring to these proceedings. Nonetheless, despite such active participation, once the Clarification was issued, IATA now invokes the lack of this Office's jurisdiction; matter that was never put into question before.

Prior to addressing any other issue, it is essential to determine whether this new clarification is admissible or not, in accordance with s. 2.10 of Resolution 820e. Once this point would have been settled, I will analyse the rest of IATA's submissions.

1. With respect to the admissibility of the new clarification

Literally read s. 2.10 of Resolution 820e does **not** contemplate the possibility of requesting a clarification of a clarification. In fact, the provision only contemplates the possibility for the Parties to request clarification of the "*definitive and binding **decision***", rendered by the Commissioner (s. 2.9), for which recourse the Parties have 15 days.

Therefore, if we were to make a strictly literal interpretation of s. 2.10, this Commissioner would be obliged to **deny the clarification** requested by IATA, since it is not about the final and binding decision that was rendered on November 17 and 20, 2018. IATA's request is about the clarification of such decision, and not about the decision itself, as provided by the said rule.

However, it has been this Office's reiterated criterion to make a **generous interpretation** of the rules that form part of the Agency Programme, stated in the applicable Resolutions adopted by the Passenger Agency Conference ("PACONF"), in order to achieve results more in accordance with the spirit, purpose and reason of such rules.

This criterion has been developed by this Office based on the fundamental premise that it is impossible to pretend that the compendium of Resolutions is all encompassing, covering the absolute totality of possible scenarios that can arise - and, in fact, do arise- in real life. No norm has such virtue. That is a reality.

Based on the foregoing, having consulted and agreed with my colleagues, the Commissioners for Areas 2 and 3 respectively, this Office admits the request for clarification made by IATA, not regarding the decision issued by this Commissioner on Nov. 17 and 20, 2018, but with respect to its Clarification dated March 3, 2019.

2. This Office's jurisdiction

(a) Regarding the grounds for review open to Accredited Agents and/or Applicants

IATA considers that this Office has acted outside its jurisdiction in issuing the aforementioned Clarification since, according to IATA, the list of matters that this Office can review and, therefore, to which Agents and/or Applicants would have access to is circumscribed only to those specifically indicated in s. 1.1 of Resolution 820e.

This Commissioner differs from IATA's position. Moreover, this Office has established in repeated decisions, that such enumeration is **not exhaustive**; on the contrary, such listing is **merely illustrative**, that is, refers simply to the matters most commonly invoked by Agents when addressing their requests for

review to this Office. It does **not exclude** any other dispute, such as this case, provided that it arises <<*out of or in connection with*[1]>> matters pertaining the Agency Programme. In fact, the aforementioned provision reads as follows:

> ***Section 1 — Jurisdiction of the Commissioner***
> *All disputes arising out of or in connection with matters enumerated in the present Section shall be finally settled by the Commissioner, in accordance with this Resolution.* (emphasis mine)

This criterion is hereby ratified.

Consequently, as the matter dealt with in this review process and, therefore, in the March 2019 Clarification, is a matter arising out of or in connection with the Agency Programme, it is necessary to conclude that this Office had jurisdiction to open the review under the terms it did. It is important to note that having jurisdiction to allow a review does not imply that the core of the mater will also be resolved by this Office.

(b) In respect to the courses open to the Commissioner

IATA also argues that this Commissioner would have acted outside her jurisdiction by ordering interim relief measures, since those terms would not be contemplated within (and again here the concept of '*close list*'), the courses open as relief by ss. 3 and 3.1 of Resolution 820e.

Again in this point IATA choses to overlook what has been an established precedent by this Office, according to which, based on a simple reading of the *supra* mentioned provisions, that list is **merely indicative** and in no fashion restrictive.

The content of the provisions in question cannot be clearer about their **illustrative nature**, *verbatim* they state:

> ***Section 3—Courses Open to the Commissioner***
> *The Commissioner's power to award relief shall be as set forth in this Resolution 820e as applied to the facts of each particular case. The following is an **indicative summary** of such possible courses:*
>
> ***3.1 Decisions on Reviews Initiated by Agent or Applicant***
> *Consequent on a review initiated by an Agent or an applicant, the Commissioner **may** decide:* (emphasis mine)

[1] Heading of s. 1 Resolution 820e.

For this Commissioner, together with my colleagues from Areas 2 and 3, the aforementioned provisions are clear in stating the **illustrative nature** of both the grounds for review, accessible to any Accredited Agent or Applicant, as well as to the courses of action or remedies that the Commissioner may dictate in a review process.

(c) With respect to the core of the matter

Finally, IATA alleges this Commissioner's lack of jurisdiction to have decided the core of the case as she did, since supposedly such matter, as indicated in s. 1.4 of Resolution 820e, would be outside this Office's jurisdiction.

In this point, this Commissioner agrees with IATA. In fact, this is exactly what was established in the **actual Decisions [2] and in the March 2019 Clarification**. For the sake of clarity and completeness, I quote the Clarification part to which I am referring to, *verbatim*:

> *The factual situation of this case, given the magnitude of it, is unprecedented and as such it needs to be analysed.*
>
> *It is **not** this Office's responsibility to **create policies** applicable to specific situations in the different markets where the Agency Programme operates.*[3] (emphasis mine)

In this Office's opinion, considering the specific facts alleged and proven by the Accredited Agents and not contradicted by IATA, the case under review is a case that is more about **policies** to be followed than about a particular dispute between an individual Agent and IATA or a BSP Member Airline.

In fact, I expressly stated in the March Clarification that the competent forum to create, discuss and analyse such policies is the APJC and the consensus that results from it should be raised for consideration and eventual ratification of PACONF. I quote:

> *This is a matter within the jurisdiction of the Venezuelan Agency Programme Joint Council, which, by virtue of ss. 1.1.2.1 and 1.1.2.2 of Resolution 818g, is the competent forum for the consideration of this peculiar issue within the Agency Programme, pertaining the annual fees, and, as such shall be the forum to determine reasonable alternatives that the situation requires.* (emphasis mine)

This decision stands.

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[2] Dated 17th and 20th of November 2018

[3] Page 5 of the referred Clarification

(d) With respect to the Clarification's specific **interim measures**, rendered as a corollary to the core decision

From the outset, I start by emphasising what I stated in point 2 (b) *supra*, that the list of possible remedies or courses of action open to the Commissioner, by express mandate of s. 3 (its heading) and s. 3.1 of Resolution 820e, is merely **indicative** and in no manner could it be deemed to be exhaustive or any type of 'close list'; therefore, **this Office has the authority** to render any measure or remedy, be it interim or substantive, which, within the framework of the applicable Resolutions, the proven facts on record and having ensure that no Member Airlines' funds would be at risk, would best suit each particular case.

Consequently, the interim decisions referred to in the Clarification were rendered within the boundaries of that discretionary power that the Resolution itself grants to the Commissioners and, hence, in exercise of this Office's full jurisdiction.

With the March 2019 Clarification this Commissioner intended to provide IATA, in light of the appalling evidence on file and not rebutted by IATA, the opportunity to take the matter to the APJC, whose authority and competence is expressly enshrined in s. 1.1.2 of Resolution 818g, and to serve as an efficient negotiating tool for the benefit of its Members and the Accredited Agents who use and pay for the Agency Programme of which they are ' customers'.

Regarding the specific points indicated by IATA, here are my conclusions:

- I ratify that since the APJC has the required authority and competence to deal with <<*all aspects of the Agency Programme*[4]>>, considering that the annual fee and its calculation are an integral part of the Agency Programme affecting all Accredited Agents, they come under the jurisdiction of the APJC;

- The precautionary measures rendered by this Commissioner were issued taking into consideration the transition period that is created while the APJC analyses the Venezuelan situation and arrives at a conclusion to be presented to PACONF, according to the specific procedure established in ss. 1.1.2.2, 1.1.2.3 and 1.1.2.4 of Resolution 818g. Such interim measures are intended to address this temporary situation and in no fashion seek to impose results to the APJC or to IATA or any Party. In fact, when I referred to the possible scenarios to be analysed by the APJC, I expressly used the words in Latin *'exempli gratia'*, precisely to denote that what I was mentioning were only examples of eventual solutions; since, again, it is not within the scope of this Office's authority to create policies or conditions applicable in any market;

[4] s. 1.1.2.1 of Resolution 820e

- In this context, should the APJC not endorse any change in the current criteria of calculation and payment method for the agency annual fees, these interim measures shall have no effect;

- Once again, I respectfully invite IATA to analyse all the facts (many of them are public knowledge[5]) and the evidence submitted in the course of this proceeding, in order to understand the spirit, purpose and reason of these precautionary measures. They seek to remedy the vacuum that will be created while the APJC, and later on PACONF, decide the path to follow regarding the calculation of the annual fee and its payment in the Venezuelan market. As all interim orders, these measures are merely circumstantial and obey to a factual situation that needs to be addressed. In particular, I highlight the following:

    - Until this matter would have been properly discussed, analysed and resolved by the APJC and then by PACONF, the rules stated in s. 14.6.1 of Resolution 818g, pertaining the annual fees, should not be applied to the Accredited Agents in Venezuela.

      It should be noted that only two Member Airlines operate in BSP-Venezuela; they are local Airlines and the tickets are sold in local currency. In light of this current scenario, it seems obvious to infer that IATA's workload and operating cost to manage the Agency Programme in Venezuela does not appear to justify the same USD/CHF IATA fee applied in other markets.

    - At no time have I ordered to ignore the use of the official exchange rate applicable in Venezuela; what I have indicated in the March 2019 Clarification was specifically that having in mind that:

      > *<<The imposition of the said provisions on Accredited Agents, given the extraordinary circumstances that exist in Venezuela, result in excessively onerous contractual burdens for them. Moreover, in some circumstances, it creates for them obligations of impossible compliance, considering the actual lack of access to the payment-currency under the Venezuelan controlled regime of 'Dicom' referred to above>>*

      I offered, as a suggestion to the APJC, taking into account this factual reality, not disputed by IATA, the possibility of alternative forms, in fact not only the reference to the parallel dollar, but also, for example, to the number of tickets sold instead of their value[6]. I quote the Clarification:

      (i) to measure the true size of the Accredited Agencies in Venezuela, exempli gratia, it could be taken as reference the exchange parity

[5] Extensively documented by the international press
[6] Echoing what the Agents have actually suggested, as shown in the evidence.

published in the parallel market (https://dolartoday.com), as the Agents have proposed, or to consider the number of tickets sold instead of the amount to which they were sold, among other methods;

- Regarding the alleged retroactive application to all the Accredited Agents that have already paid what would be decided by the APJC, it should be noted that at no time does the Clarification refer to any retroactivity. The Clarification specifically states, I quote:

  > *Therefore, any measure that IATA decides to adopt, based on what could be agreed upon at the meeting of the Venezuelan APJC, should be applied to the entire Venezuelan market.*

  This measure is absolutely logical, since, as I indicated *supra*, the case at bar goes far beyond a bilateral dispute between an Accredited Agent and IATA or one of its Members. It affects an entire market.

  Now, it will be IATA's responsibility and good judgment to determine the manner in which it will implement what would be agreed at the APJC and finally approved or not by PACONF. This is the essence of how that paragraph should be interpreted.

In these terms the March 2019 Clarification is hereby clarified.
The March 2019 Clarification stands *in totum*.

Decided in Vancouver, the 14th day of April 2019