TRAVEL AGENCY COMMISSIONER - AREA 1
ACTING AS DEPUTY TAC2
VERÓNICA PACHECO-SANFUENTES
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Vancouver, British Columbia V6K 1R5
CANADA

DECISION # 23
September 8th, 2019

In the matter of:

Sopafi, Roger Albert Voyages & ***Foyal Tours***
IATA Codes 81-6 0028 2, 81-6 0004 & 81-6 0029 3, respectively
Martinique, France
Represented by its Administrative and Financial Manager, Mme. Véronique Ursulet

The Agents

vs.

International Air Transport Association ("IATA")
Global Distribution Centre
Torre Europa
Paseo de la Castellana, 95
28046 Madrid, Spain
Represented by the Accreditation Manager, Mr. Francesco Chiavon

The Respondent

I. THE CASE

The Agents are challenging the "Risk History B" classification that IATA has assigned to them, entailing the request of bank guarantees ("BG") in the order of:

Foyal Tours:	226.000 €
Sopafi:	776.000 €
Roger Albert Voyages:	1.151.000 €

This new classification was due to an internal reorganization that took place in the summer of **2018**, within the family of companies that integrate the Holding Company, which was and is the ultimate owner of all the Agents.

It is important to note the following facts on record:

(i) This internal reorganization was approved by IATA in **2018** when it was undertaken by the Agents[1];

(ii) After IATA's thorough and extensive analysis of documents submitted by the Agents, IATA deemed that such reorganization did not require for the Agents to submit any BG. The Agents have been trading for over a year without any BG since the said reorganization took place;

(iii) As a result of the thorough evaluation made by IATA in 2018, it was considered that no major change of ownership (CoO) had occurred and, hence, no new Passenger Sales Agency Agreement (PSAA) was required from the Agents;

(iv) The 'Risk History' factor was introduced by Resolution 812g (NewGen), which became effective in France as of **June 1, 2019**, meaning a year **after** the referred events took place.

II. ORAL HEARING

In the opinion of this Commissioner, as per Resolution 820e, s. 2.3, an oral hearing was not considered necessary. Ample opportunity was given to the Parties to present their submissions and evidence accordingly. They both made good use of this opportunity. Therefore, this decision is based on that written documentation only.

III. BRIEF SUMMARY OF THE AGENTS' POSITION

The Agents challenge this shift of opinion that IATA has had in a one-year period. In 2018 IATA expressly recognized that there was no CoO, since <<***the leading shareholders remained unchanged***. *We have therefore been reclassified as CHC*

[1] In fact, as per the evidence on file, the changes of shareholding (as it was referred to by IATA) that occurred in *SOPAFI* and in *Roger Albert Voyages* were approved in August 17, 2018; the one that occurred in *Foyal Voyages* was approved on September 27, 2018.

(Change of Shareholders) and no additional guarantee had been requested. This year's statute seems to erase the decision made by IATA last year>>.

The three Agents are part of a medium-sized family group corporation, qualified as "*SME*" (small and medium-sized company) according to French Corporate Law.

The Agents have argued and submitted evidence as follows:

1. **With respect to the CoO or control**:

The risk and control structure remain unchanged. The ultimate owner, SOFRAPAR Financial Holding and the Family Holding SOGEPAR have not changed, but the internal organization of the group has become vertical, with the Agent *Foyal Tours* changing level within the organisation, becoming a sub-holding company with shareholders already known to IATA.

- The Agents *Roger Albert Voyages* and *Sopafi,* controlled until the end of 2017 by SOFRAPAR directly, are now 100% controlled directly by *Foyal Tours*, the other IATA Accredited Agent;
- *Foyal Tours* which was indirectly controlled by SOFRAPAR became directly owned and 100% controlled by SOFRAPAR and always indirectly by SOGEPAR at 100%;
- During this reorganization, there was no loss of control of the current partners of the Group for the benefit of any third party. Similarly, no new partner has entered the scope of the Family Group. The family Holding Company remains the same. The financial risk has not changed;
- SOFRAPAR is a shareholder in *Roger Albert Voyages* and in *Sopafi*, both of which have been IATA Accredited for more than 10 years;
- SOFRAPAR is not a new player entering the capital of *Foyal Tours*. It already owned this Agent up to 20% through the company SERACO. The other

outgoing Albert family members are SOFRAPAR and SOGEPAR, so there is no change of power and/or control within *Foyal Tours*.

2. **With respect to the risk history**:

In regards to s. 10.3.1 (b)(iii) and (iv) of Resolution 818g:

> <<... we have shown that the natural and legal persons previously responsible for the commercial debts of the structures have always been, directly and indirectly, through the SOFRAPAR and SOGEPAR Holdings.
> The companies have not changed their legal nature. They have always been Limited Liability Companies>>.

In regards to France's LFC:

> Last year, after IATA's analysis, our change was not classified as a Change of Ownership but well downgraded to Change of Shareholding, which had avoided us, given the absence of risk, of having to provide a new financial guarantee or to sign a new PSAA. IATA's Accreditation Department clearly considered that there was no major CoO or control and that we were not to be considered as New Agents.

<<The transition to status B is possible for only 2 cases of significant change in the last 24 months: significant change of ownership or significant change of legal status. We do not think of falling into either one of these two cases>>;

<<We do not understand why our risk deemed "absent" last year returns to a "risk history" this year and forces us to provide new BG>>;

Lastly, the Agents seek:

> We request that, in accordance with Resolution 812, s. 2.5.5, the risk assigned to our companies be level A for *Roger Albert Voyages* and *Sopafi* (because of the satisfactory financial assessment) and level B for *Foyal Tours* (due to its unsatisfactory financial assessment).

As a result, the Agents *Roger Albert Voyages* and *Sopafi* would be exempt from the submission of BG; *Foyal Tours* should provide a BG, which we leave to IATA to calculate in accordance with the provisions of Resolution 812.

IV. BRIEF SUMMARY OF IATA'S POSITION

IATA presents the following facts:

- With respect to the Agent *SOPAFI* – the form submited by the Agent shows a change in its shareholding structure, where 100% of the shares changed from the former shareholder SOFRAPAR[2] to *Foyal Tours*;

- With respect to the Agent *Roger Albert Voyages* - the form submited by the Agent shows a change in its shareholding structure where 100% of the shares changed from former shareholders SOFRAPAR (80%) and members of the Albert family[3] (namely, Anne Marie Albert[4], Bernard Albert[5], Elizabeth de Raynal, Jean Claude Albert[6] et Maryvonne Raveneau Albert[7] - holding the remainder 20%) to one sole corporation: *Foyal Tours*[8].

- With respect to the Agent *Foyal Tours* - the form submited by the Agent shows a change in its shareholding structure where 100% of the shares changed from former shareholders members of the Albert family (namely, Bernard Albert,

[2] It is worth mentioning that this corporation was the former owner of the Agent *Sopafi*, as per the previous internal structure. In other words, it was not a strange company for IATA.
[3] All of which are, as per the Agent's submissions not rebutted by IATA, also direct shareholders of SOFRAPAR.
[4] This shareholder died in 2012, as per the Agents' submissions, not rebutted by IATA.
[5] This shareholder died in 2015, also as per the Agents' submissions, not rebutted by IATA.
[6] This shareholder is the President of SOFRAPAR, as per the Agents' submissions, not rebutted by IATA.
[7] The proper name of this shareholder has been taken from the Agent's submissions, not rebutted by IATA.
[8] At this point it is also worth mentioning two relevant facts: (1) *Foyal Tours* is one of the claimants in this review procedure, so it was already prior the change a corporation known and assessed by IATA; furthermore, (2) *Foyal Tours* is, as per the new structure, wholly owned by SOFRAPAR, the same corporation that prior the change was 80% owner of the Agent *Roger Albert Voyages*, which means that it was a shareholder already known to IATA.

Jean-Claude Albert, Maryvonne Raveneau Albert, Elizabeth de Raynal) and the corporation SERACO SARL[9] to the sole corporation SOFRAPAR[10].

In IATA's words:

1. Regarding the CoO:

We need to understand what is the definition of these three types of changes compared to the Resolution in force at the time, which was Resolution 818g, in order to determine if the Agents should receive a "risk event" during the migration to NewGen.

Section 10.3 assists us with this because it states that

"*in the case of a limited liability company:" (paragraph 10.3.1 (b))*

"any change which reduces the liability of any Person who was previously liable for the debts of the corporation, whether directly or indirectly..." (paragraph 10.3.1 (b) (iii)); and,

"any change in the legal nature of the Agent, such that after the change, the legal nature of the Agent is not that existing prior to the change of legal status" (paragraph 10.3.1 (b) (iv)).

In addition, if we read the Local Financial Criteria for France, in effect in 2017-2018, paragraph 5.3 clearly indicates that Agents with a change of ownership or control will have to be considered as New Agents. That is, they will have to submit a BG to meet the Local Financial Criteria for France.

The main rule is that control of a corporation is acquired when a person or group of persons acquires more than 50% of the voting shares of the corporation, where that person or group did not hold more than 50% of the voting shares immediately before that time. Another rule, which is not based on the concept of legal control, generally provides for the acquisition of control of a corporation

[9] This corporation was wholly owned by SOFRAPAR.

[10] Again, it is worth mentioning that this SOFRAPAR shareholder was not a strange company for IATA, since, as already mentioned, it was the former shareholder (100% ownership) of the Agent *Sopafi* and part owner of *Roger Albert Voyages*.

when a person or group of persons acquires shares that have a right market value in excess of 75% of the fair market value of all of the Corporation's shares (regardless of the number of voting rights).

Concluding that:

It is obvious that according to the list of old and new shareholders of the three IATA Accredited Agents, there is no evidence that confirms that the control of the three companies remained unchanged. On the contrary, according to the two rules I just referred to, in the case of different societies, we must assume that the control has completely changed.

2. Regarding the risk evaluation and the assignment of a "risk event", leading to the BG request for the three Agents:

Resolution 846 indicates in paragraph 5 that:

"*Prior to implementation of Resolution 812 in a country*

[…] IATA will assess the Risk Status of all Agents and assign a Remittance Holding Capacity, in accordance with the provisions of Resolution 812 section 5. The assignation of the Risk Status will include a Risk History Assessment, and will consider any events incurred by the Agent which constitute Risk Events per Resolution 812 section 4.2 and which have not expired on the day Resolution 812 becomes effective in that country"

This is a **retrospective analysis** of the history of the IATA Accredited Agent.

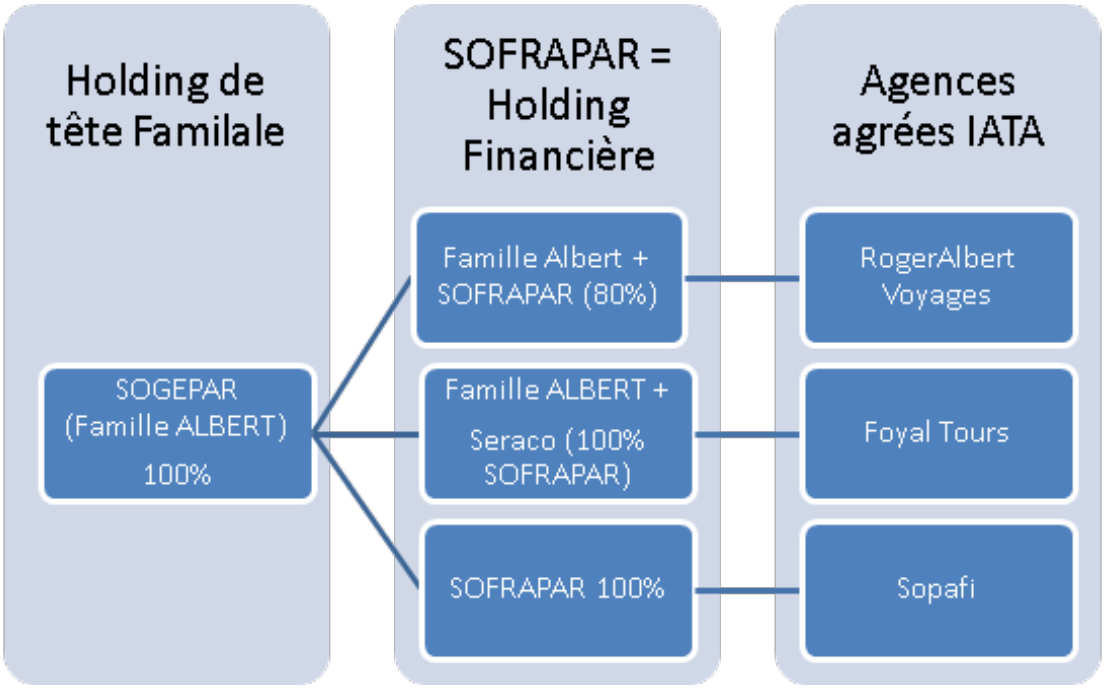
Since the three changes mentioned above took place in a period of 2 years prior to the effective date of the migration of BSP France to the NewGen environment (1 July 2019) and are the result of a change of property with change of control, IATA correctly assigned a risk event to each Agent in accordance with paragraph 4.3.6 of Resolution 812. The consequence of these risk events is the assignment of a risk level B, in accordance with Resolution 812, paragraph 2.5.5 to the three IATA Accredited Agents.

The reason is very simple: under the old Resolution (818g) this was allowed. During a CoO such as major shareholding, IATA was obliged to perform a financial analysis of the last balance sheet of the Agent. If the result of this analysis was positive, the change could be approved without the need for a BG. Nevertheless, in the context of the **retrospective analysis** carried out by IATA during the migration to the NewGen environment, Resolution 812, the said change gives rise to the need to present a BG, because the consequence of this change is the reclassification of the level: from A to B, which in turn forces IATA to ask for a BG. [Emphasis added]

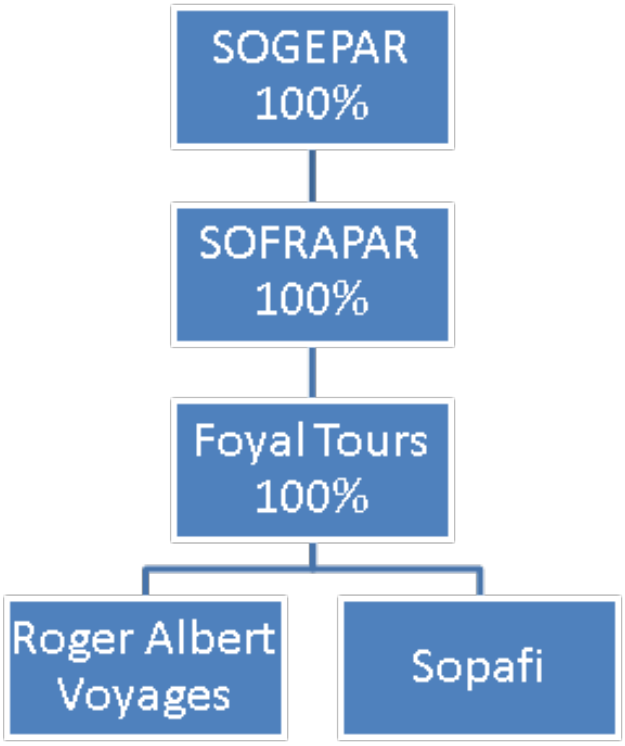
V. CONSIDERATIONS

For clarity sake, I start by contrasting the two structures of the Agents' family holding in order to better understand the nature of the changes that occurred in 2018: that is the former one *vs*. the resulting structure after the internal reorganization of the group.

Former structure of the Group:



Resulting structure:



After a thorough review of the abundant submissions and evidence provided by the Parties, I observe that IATA based its analysis of a potential CoO looking at Resolution 818g, s. 10.3.1(b), subsection (iii) pertaining the reduction of liability, and, to subsection (iv) pertaining a change in the legal nature of the resulting Agents, in conjunction with the LFC applicable to France at the time. This Resolution was in effect in 2018 in France at the time when the changes were made, since Resolution 812 NewGen hadn't become effective in France back then; it only became so in June 2019. On the other hand, IATA refers to Resolution 812 when it comes to the analysis of the Agents' Risk History and their Risk Assessment, since these concepts were recently introduced by IATA in the French market, through NewGen Resolution, and were non-existent at the time when the alluded changes took place. I will follow that same order when addressing the different issues of the case at bar.

(a) Change of control / CoO

As I have referred to in the different footnotes *supra*, shown by the evidence and the submissions made by the Parties, and illustrate by the charts copied above, the ultimate owners of the three Agents have remained the same (**individuals and legal entities**) before and after the reorganization of this family Holding with the same percentage of shares. The only former shareholder, SERACO SARL, of *Foyal Tours* that does not appear in the new structure was already before the reorganization wholly owned by SOFRAPAR. Meaning that all the shareholders, natural persons and legal persons, **were already known to IATA**, since the Agents have been trading as Accredited Agents during the last 10 years; therefore, I do not consider that any actual **reduction** of the liability of any person who was previously liable for the debts of the Agents has actually taken place, as required by ss. 10.3.1(b)(iii) of Resolution 818g.

With respect to the legal nature of the resulting Agents, as described in Resolution 818g, s. 10.3.1(b)(iv), no alteration has occurred either, since prior and after the changes the Agents were and still are **limited liability corporations**.

Furthermore, the LFC applicable in France in its s. 5.3 **exclusively** refers to <<… *Agents that have a change in ownership or control … that necessitates a new Passenger Sales Agency agreement*>> and only those will be <<*considered as New Agents*>>; therefore, those Agents which CoO does not require the signature of a new PSAA, as is the situation of these Agents, will NOT be considered as New Agents, hence, no BG will be required.

In fact, it is worth mentioning that these same conclusions were reached by IATA, a little over a year ago, when it considered, after a detailed evaluation of the changes that occurred within the Agents' family Holding structure, made through the same lenses of Resolution 818g, effective at the time where the changes took place, being the same one used by IATA these days, and the same LFC referred to *supra*, **that the changes were NOT a major CoO** and, therefore, did not require any BG nor the signature of any new PSAA. IATA's decisions of August 17 and September 27, 2018 stand.

(b) Risk History

Since IATA concluded last year, and this Office concludes this year in this review procedure that (i) no actual CoO occurred within the Agents' family Holding; and, (ii) that no modification of the legal nature of the Agents resulted as a consequence of the change, the logic conclusion is that no change of *Risk Status* should be applied to the Agents, as a result of their Risk History assessment. None of the hypothesis referred to in ss. 4.3.6.1 and 2 of Resolution 812 was present in this case. What happened within the internal organization of the Agents' family Holding was colloquially speaking a "reshuffling" of positions of some primary shareholders, going from a horizontal to a vertical structure, where none of the shareholders were new to IATA, where at no point the liability was reduced and where the ultimate shareholders remained unmodified.

Nonetheless, since it was argued by IATA, I will address the matter pertaining the so-called **retrospective analysis** of the risk history of an IATA Accredited Agent, <<since the three changes mentioned above took place in a period of 2 years prior to the effective date of the migration of BSP France to the NewGen environment>>, as stated in IATA's submissions.

As I referred to the Parties, particularly to IATA, at an early stage of this review procedure, I have already decided over this "retrospective" application of a rule, which, as I extensively explained in the case *Carlson Wagonlit vs. IATA* (Canada, 21 March 2018, and in its clarification dated 3 May 2018), I considered this analysis undertaken by IATA a **retroactive application** of a norm unilaterally created by one party in detriment of the other party to a contract.

I will quote *infra* the relevant parts[11] of the above-mentioned Clarification rendered by this Office, at IATA's and its external counsel's request, since in its submissions in this review procedure IATA only quoted the specific part that referred to the facts of that case, discarding the essence of the decision that related to the actual **principle of non-**

[11] Pages 3 and 4

retroactivity of a rule, particularly in a contractual setting as the one that binds the Agents and IATA. This Commissioner's decision was as follows:

> As per the definition that Driedger[12] 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[13] 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*[14] 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 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

[12] Elmer A. Driedger, *Statutes: Retroactive Retrospective Reflections*, (1978) 56 Canadian Bar Review 268 at 271

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

[14] 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)

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*[15]*>>* [Emphasis added]

There is no doubt that in the case at bar, IATA's sudden change of views as of what had occurred within the Agents' internal family Holding organization was a breach of the Agents' *legitimate and reasonable expectations* without any justification, since the rules under which the analysis of the CoO was done (*id est*, Resolution 818g, ss. 10.3.1(b)(iii) and (iv) and the LFC for France) were exactly the same in 2018 and 2019, therefore, there is no legal right that assists IATA to revoke its own decisions and state that a given situation that a year ago was considered NOT to be a CoO requiring a new PSAA or a submission of a BG, suddenly does require both things, making the Agents being affected by s. 4.3.6 of Resolution 812, failing their Risk History and entailing the downgrading of their risk, pursuant s. 2.5.5.1 of Resolution 812. I hereby apply the quoted decision and confirm that precedent.

VI. DECISION

Based on the referred arguments, evidence and applicable rules, it is decided as follows:

- IATA's decisions dated August 17, 2018 and September 27, 2018 stand;

- IATA's decision of 2019, altering the qualification of the CoO that occurred in 2018 within the Agents' internal structure, and, thus, altering the Agents' Risk Status is declared null and void;

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

- The changes that took place in the Agents' internal structure in 2018 do not satisfy the requirements set in Resolution 818g, ss. 10.3.1(b)(iii) and (iv), therefore, the Risk Status of the Agents should be re-assessed by IATA considering this factual circumstance;

- Neither a BG shall be required from the Agents based on the CoO referred to *supra* nor the signature of any new PSAA;

- With respect to *Foyal Tours*, based on the unsatisfactory results of this Agent's annual financial review, IATA's decision to request this Agent a BG stands.

This decision has immediate effect.

Decided in Vancouver, the 8th day of September 2019.

In accordance with Resolution 820e § 2.9, any Party may ask for an interpretation or correction of any error, which the Party may find relevant to this decision. The time frame for these types of requests will be 15 days after receipt of the electronic version of this document (meaning no later than **23 September, 2019**).

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.

If after having asked for and obtained clarification or correction of this decision, any Party still considers aggrieved by it, as per Resolution 820e § 2.10, the Party may seek a reviewed decision by the majority of all the Commissioner; furthermore, if after this decision the Party still feels aggrieved, 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.