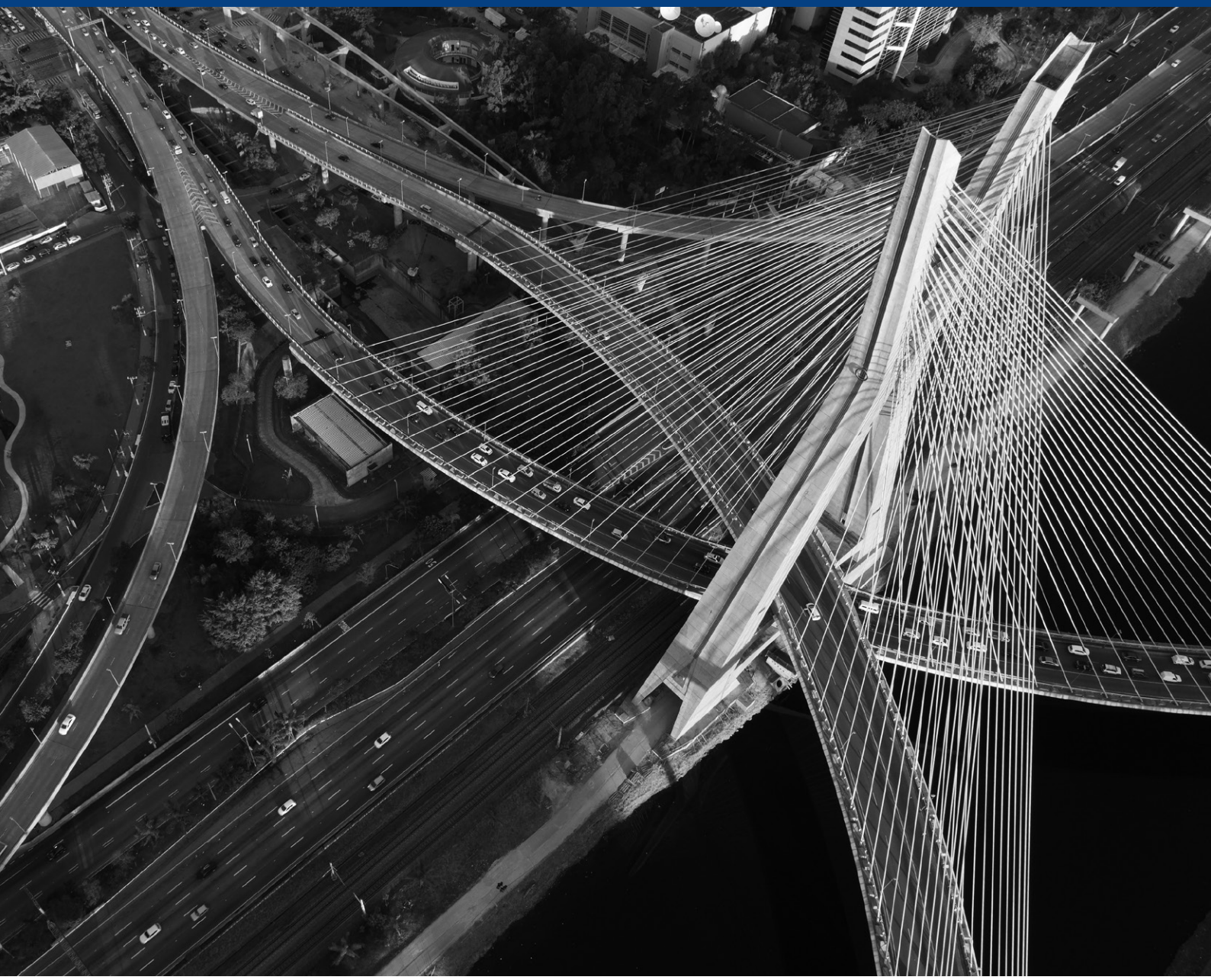

BRAZIL:
CASE LAW UPDATE

The Brazilian Superior Tribunal of Justice (STJ) has recently handed down two judgments that will be of interest to airlines and their insurers:

1. Airline accused of "unjust enrichment" and ordered to pay moral damages for cancelling the return flight of passenger who did not board departure flight

What happened?

A passenger purchased return domestic flights for her and her son. They missed their outward flight because, at the last minute, the mother realised she did not have all the necessary identification documents to travel with her son and decided to travel by bus instead.

When the passenger tried to select seats for the return flight she found that their reservation had been automatically cancelled by the airline (without prior warning). Subsequently, the passenger sued for moral damages in a state court in Porto Velho, Rondônia (northern Brazil).

In its defence, the airline argued that the fault lay entirely with the passenger because she had not noticed the clause in the contract of carriage that allowed the automatic cancellation of subsequent flights, if the passenger had failed to embark previous flights. It contended that this contractual clause was in line with the rules set out by the Brazilian Civil Aviation Agency (ANAC).

The first instance court applied the Brazilian Consumer Defence Code and found the airline liable to pay R$10,000 (c.US$3,000) of moral damages. A second instance court raised the award to R$25,000 (c.US$7,500).

The airline appealed to the STJ, which confirmed the second instance court decision. The STJ ruled that this practice:

- goes against basic consumer rights, as it is unreasonable to determine that a return flight will only be valid if the originating flight has been used; and
- results in 'unjust enrichment' for the airline as the consumer has paid for both inbound and outbound flights.

As far as the ANAC rules were concerned, the STJ decided that, even if this practice was allowed by ANAC at the time that the facts of this case arose, it was not appropriate to determine liability based on administrative rules alone. It also held that the airline had not provided any reasonable technical argument to justify the unilateral cancellation.

What has changed?

ANAC Resolution 400, in force for tickets purchased from March 2017, is in line with the STJ's decision outlined above. It stipulates that airlines are not allowed to automatically cancel part of a passenger's flight for a 'no show'. This is provided that a passenger advises the airline, up until the time of the departure flight, that they will not be able to embark but still intend to use the return flight. That said, the STJ decision suggests that, in other situations, simple reliance on ANAC rules may not offer airlines an adequate defence to a claim.

2. Victim of accident can claim additional compensation directly from the insurer

A panel of STJ judges has recently allowed a victim of a road traffic accident to bring proceedings directly and exclusively against the insurer of the driver who caused the accident. This is allowed by the STJ provided that the insurer has already established the fault of its insured driver and has, as a consequence, paid the insurance claim to the third party.

The appellant, who was riding a motorcycle, collided with a car. The insured driver of the car admitted his fault and recognised his obligation to pay damages to the victim, notifying his insurer accordingly.

An out-of-court settlement was agreed for the repair costs of the motorcycle, which were paid by the insurer. However, the victim's hospital expenses and the days that he was unable to work were not compensated.

Therefore, the victim went to court to claim for an addition to the civil liability insurance payment he had already received. Since there was no doubt about who had caused the damage, the STJ ruled that the claimant (who was a third party as far as the insurance arrangement is concerned) could bring a claim directly against the insurer.

What does this mean for insurers?

This decision marks a shift from the previous (non-binding) position of the STJ that, on facultative civil liability insurance, a claim could not be brought by a third party directly and exclusively against the insurer of the party who allegedly caused the damage.

In his reasoning, the STJ judge explained that such understanding arises because, *"the obligation of the insurer to indemnify for the damages suffered by third parties presupposes the civil liability of the insurer, which, in principle, cannot be recognised in a claim in which it did not intervene, otherwise it would infringe the due process of law and full rights of defence"*.

However, the STJ judge continued that where a partial payment has already been made by the insurer to the third party, *"a new substantial legal relationship between the parties has been created"*.

This decision raises some concern that insurers may become exposed to direct actions from third parties. More than ever, it is crucial that, when paying civil liability claims in Brazil, insurers do it against a full and final release that is carefully drafted in a way which fully protects insurers, as well as their own insured and any other potentially liable party, from any future claims that the victim may wish to bring.

For further information, please contact the author of this briefing:

MARIANA SOMENSI
Senior Associate, São Paulo
T +55 (11) 3179 2900
E mariana.somensi@hfw.com

HFW has over 500 lawyers working in offices across the Middle East, Australia, Asia, Europe and the Americas. For further information about our aerospace capabilities, please visit www.hfw.com/aerospace

hfw.com

Beirut Brussels Dubai Geneva Hong Kong Houston Jakarta Kuwait London Melbourne Paris Perth Piraeus Riyadh São Paulo Shanghai Singapore Sydney