COVID-19: BRAZIL'S NEW CIVIL AVIATION EMERGENCY PLAN

On 5 August 2020, the Brazilian President enacted, with immediate effect, a new set of rules to mitigate the adverse effects of Covid-19 contingency measures on Brazilian civil aviation operators – especially airlines, air taxi companies and privatised airports.

The new regulation is consolidated under Law no. 14,034/2020, which was converted from a provisional decree (medida provisória[1]) issued by the president in March 2020, and then approved with some changes by the Brazilian Congress in July 2020

The so-called Civil Aviation Emergency Plan authorises privatized airports to defer, until 18 December 2020, the payment of debts related to the public procurement contracts with the Brazilian Government to explore airport activities.

On the liability side, the plan introduces both temporary rules giving airlines more flexibility on the reimbursement of tickets, as well as a few important permanent changes to the Brazilian Aeronautical Code ("BAC").

In summary, the temporary rules give airlines up to 12 months to reimburse tickets of passengers who changed their travel plans or had their flights cancelled because of the pandemic. Alternatively, passengers can opt to receive a voucher, valid for at least one year, to issue other tickets with the same operator.

With respect to the permanent changes, legislators included Article 251-A in the BAC establishing that payment of extra-patrimonial damages arising from problems in the execution of the air transport contract is now subject to the presentation of clear evidence on the damages and its extension.

Although Brazilian Courts have a history of relying on consumer defence legislation to mitigate aviation rules when the latter are less beneficial to passengers, Article 251-A

ends in theory with the 'presumption of moral damages' adopted by some Brazilian state courts. Precedents from these Courts established a quasi-presumption that passengers who had their flight cancelled were automatically entitled to moral damages (sometimes ignoring liability exculpation arguments such as *force majeure*).

In that sense, despite the fact that the BAC already listed *force majeure* as one of the causes capable of excluding the airline's liability for flight cancellation, the Civil Aviation Emergency Plan expanded on this rule. The BAC now expressly lists in its article 256 (par. 3 and 4) meteorological problems, airport closure due to public authority orders and, most notably, pandemics and other epidemiological crisis as examples of a legally valid reason for airlines not to indemnify passengers whose damages arise from events of such type.

Notwithstanding the above, airlines are still facing unfavourable decisions for failure to comply with regulations requiring them to provide material assistance to passengers in case of flight cancellations (and other situations, such as delays longer than 4 hours), even in *force majeure* and pandemic situations.

The prevailing judicial position in Brazil is that the airlines' failure to provide the required assistance under ANAC's[1] Resolution no. 400/2016, including vouchers for meals, free mobile internet and, in some cases, arranging transport and accommodation, give cause to moral damages awards in favour of the passengers.

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1   In general lines, *medidas provisórias* are a special kind of legislation that can be enacted by the Brazilian president in some exceptional situations. The rules issued are valid immediately but shall be ratified by the Brazilian Congress within 60 days (extendable once for equal period).

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