



## RESPECT FOR INTERNATIONAL AVIATION CONVENTIONS IN BRAZIL GATHERS FORCE

**In what appears to be an increasing trend towards respect of the Montreal Convention regime in Brazil, there have been two further interesting decisions in April. This is encouraging although some uncertainty still remains.**

The Brazilian Supreme Federal Court (STF) issued a decision stating that the international conventions prevailed over the Brazilian Consumer Defence Code (CDC) on a moral damages claim, arising from delay to an international flight. Separately, the Brazilian Superior Tribunal of Justice (STJ) decided that the Montreal Convention 1999 applied to a subrogated claim brought by an insurance company in the context of international carriage of cargo by air.

Both decisions follow the landmark Air Canada and Air France rulings<sup>1</sup> handed down by the STF in May 2017.

The STF overturned its previous decision in 2009, which they said was no longer aligned with the court's current jurisprudence. The reporting judge made specific reference to the May 2017 STF decisions in the Air Canada and Air France cases to reinforce his ruling.

In the STJ case, the court decided that neither the CDC nor the Brazilian Civil Code applied to disputes over the loss of cargo during international carriage by air. The STJ added that the consignor has the choice to assess the risks that it is willing to take and that, if it chooses to pay freight costs following general criteria (i.e. based on the cargo's weight and volume as opposed to its value), then it is reasonable to expect that compensation for its loss or damage will be capped.

### Comment

Local courts are still adjusting to the new reality of having to apply international conventions to cases where they would normally apply the CDC or the Brazilian Civil Code.

It is not yet clear how courts will deal with carriage by air claims that involve an international and a domestic element. Will Brazilian courts enforce the limits of liability of the international conventions in relation to the international legs of journeys but apply the full compensation available under the CDC for the domestic sectors?

The liability limits in articles 21 and 22 of the Montreal Convention 1999 were increased in 2010. However the Brazilian courts appear to be unaware of this, and will at some point have to decide whether the revised limits apply automatically in the Brazilian legal regime or whether they will have to be 'internalised' first in order to be applicable. The courts considered the Portuguese version of the Convention, which was brought into force on 28 September 2006 (and then often ignored before Air Canada / Air France decisions). So far, local court decisions have referred to the original SDR limits contained in the Portuguese text but, at some stage, they will be questioned about whether the increased limits should be considered.

For international flight delay claims, it appears, from the new STF ruling, that, if the claimant is seeking only moral damages, then the award should be no more than the Montreal Convention limit of 4,150 SDRs (revised in 2010 to 4,694 SDRs). However, the STF landmark ruling on the Air France claim in May 2017 indicated that the limitation of liability set out in the Convention only applied to the material damages part of the claim, thus preserving the local judge's absolute discretion to apply unlimited moral damages on top of the prescribed limit. Whether the Brazilian courts ever push the boundaries further remains to be seen.

The written decision on the STJ ruling has not yet been published and further details may emerge

from the detailed analysis of its wording. Nevertheless, this new case law from the STF and the STJ already signals that lower local courts in Brazil will need to rethink their approach by proper consideration of the international conventions in passenger and cargo claims arising from international carriage by air.

1. <http://www.hfw.com/Brazil-International-Conventions-to-prevail-in-international-carriage-by-air-liability-disputes-November-2017>

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