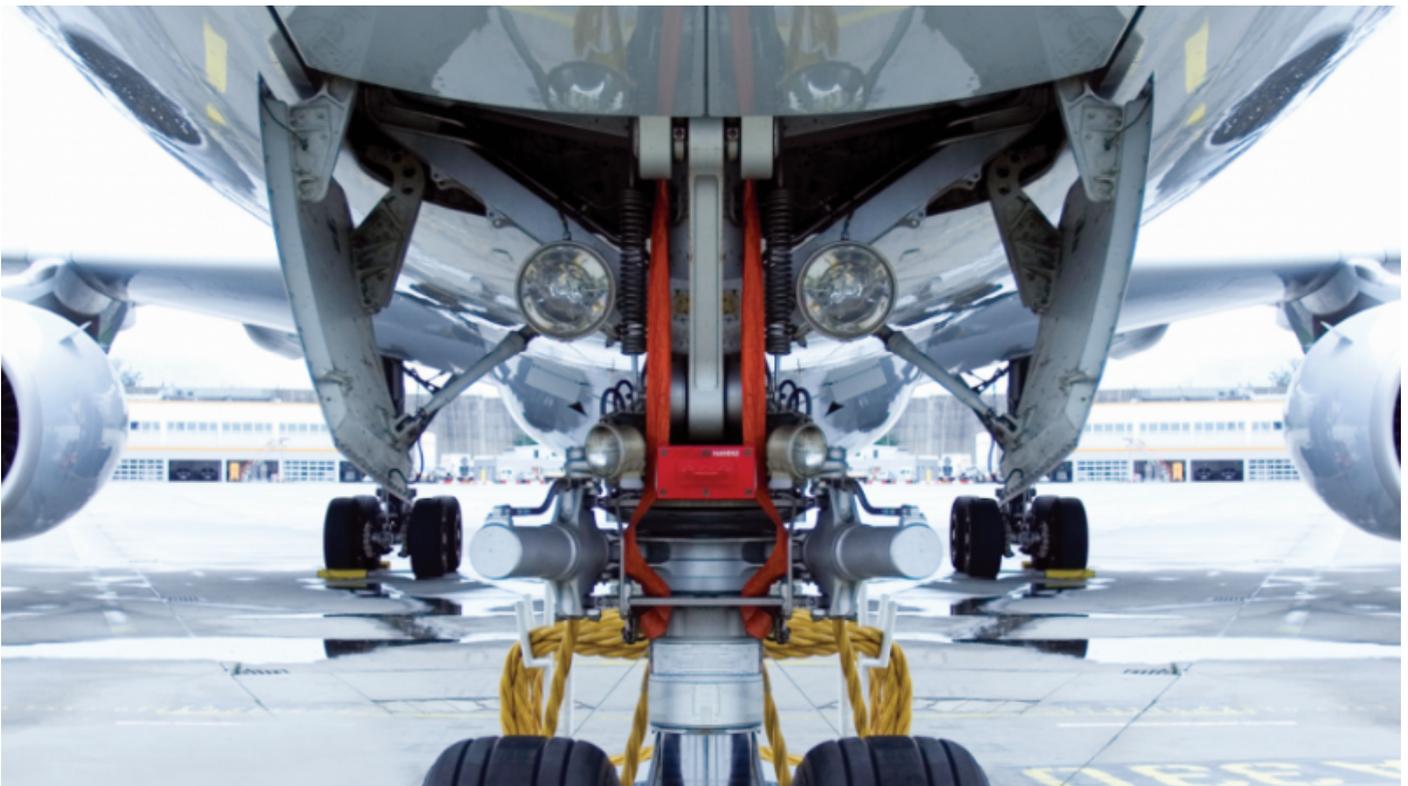


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Brazilian Supreme Federal Tribunal - in favour of application of Warsaw/Montreal Convention regime

Written by [Martyn Plaskett](#) and [Alexandre Lima](#)

The Brazilian Supreme Federal Tribunal (STF) decided yesterday, by a majority of 9 votes for and 2 against, in favour of application of Warsaw Convention 1929-Montreal Convention 1999 regime for international carriage by air. The decision was presented orally in the Supreme Federal Tribunal (STF) in Brasilia yesterday. The published written version will hopefully be available within the next fortnight.



As airlines and insurers are painfully aware, although a party to both these Conventions, Brazil having most recently ratified the Montreal Convention in 2006, the Brazilian courts have regularly handed down decisions which "override" provisions of the International Conventions when and where such provisions are considered to conflict with local laws (in particular the 1990 Consumer Defence Code). Yesterday's STF decision brings more clarity to the conflicted issue of whether the Consumer Defence Code or the international aviation Conventions

should apply: The STF decided that in cases involving international air carriage, the Conventions will prevail where there is conflict with the local law. This means, for example, that claims in Brazil arising from international carriage by air must now be brought within 2 years of an event (rather than the 5 years allowed by the Consumer Code).

Yesterday's STF decision relates specifically to 2 suits (brought against Air France and Air Canada respectively) described in more detail below, but should have more widespread implications. The decision is positive news for airlines which fly international routes to/from Brazil, and of course for their insurers. With the advent of the "new" Brazilian procedural code, which came into force in March 2016, lower Brazilian courts should follow this new precedent set by the Supreme Federal Tribunal. That said, the STF decision unfortunately will not resolve the bugbear of high "moral damages" awards, which are regularly made in addition to the limits established by the international Conventions.

The Air France and Air Canada appeals (described in more detail below) were designated "Leading Cases" which would have a widespread repercussion. Accordingly, all the cases before the Supreme Courts in Brasília involving time-bar and the limitation of air carriers' liability pursuant to Warsaw/Hague or the Montreal Convention were suspended pending decisions by the STF made today. There are currently 417 such cases suspended: As a result of yesterday's decision, these cases should now move forward, although we anticipate many cases might be resolved by way of settlement now the subject matter at hand has been clarified by Brazil's highest legal authority.

Sylvia Regina de Moraes Rosolem versus Société Air France

The passenger travelled from Brazil to Spain in October 2005, but her checked bag was lost in transit. Since the Montreal Convention 1999 came into force in Brazil only in 2006, carriage was in theory governed by Warsaw Convention 1929 as amended by the Hague Protocol of 1955. Pursuant to the alternative legislation of Consumer Defence Code of 1990, the passenger claimed: Reimbursement for expenditure on replacement items purchased during her trip; the alleged value of the missing bag's contents as well as moral damages to be quantified at the Court's discretion. Air France argued in its defence that its liability for the baggage loss was limited pursuant to Article 22 of the Warsaw Convention as amended by the Hague Protocol of 1955.

The 1st Instance Court in Rio de Janeiro ruled in March 2007 that, whilst the passenger was entitled to moral damages of R\$ 6,000 pursuant to the Consumer Defence Code 1990 by virtue of her "consumer relationship" with Air France, economic damages should be restricted to the Warsaw/Hague limit. Both Air France and the Plaintiff appealed. In December 2007, the 2nd Instance Court affirmed the 1st instance court's decision, finding that the Consumer Defence Code 1990 should apply. The 2nd Instance Court: Increased moral damages from R\$ 6,000 to R\$ 10,000; and increased material damages from the Warsaw Convention limit to R\$ 7,171 (i.e. the alleged full value of the missing bag's contents). Whereas the 1st Instance Court had sought to strike a middle ground between the Warsaw/Hague limit and the unlimited regime of the Consumer Defence Code 1990, the 3-judge panel of the 2nd Instance Court effectively ruled firmly in favour of the supremacy of the 1990 Brazilian Consumer Defence Code.

Air France appealed to the Supreme Courts in Brasília in January 2008 and it is this appeal which was, at long last, decided yesterday. Air France argued that in applying the Consumer Defence Code rather than the Warsaw Convention/Hague Protocol, the 2nd Instance Court had violated Article 178 of the Brazilian Constitution which provides that International Treaties regarding international transportation signed by the Brazilian Government must be observed, subject to reciprocity. Ergo, Air France's liability to the passenger should be limited pursuant to Article 22 of the Warsaw Convention as amended by the Hague Protocol of 1955.

The case has attracted the attention of the International Air Transport Association (IATA), the International Union of Aerospace Insurers (IUAI) and American Airlines who each filed amicus briefs in support of Air France's

arguments in an attempt to persuade the Brazilian courts that the International Conventions should be applied. In its amicus brief, American Airlines requested the STF to define, in respect of cargo claims, that the unbreakable limit of 19 SDRs/kg contained at Article 22(3) of the Montreal Convention 1999 should be applied.

Cintia Cristina Giardulli vs Air Canada

This claim related to delay in passenger transportation. A flight departing from Brazil was delayed, apparently due to a technical problem with the aircraft's radar. The passengers were forced to spend the night in the airport and were not accommodated in hotels nor provided with meals until the following morning. The Plaintiff passenger was also deprived of access to her checked baggage during this delay.

The passenger filed suit in a small claims court in Sao Paulo in May 2009. Air Canada argued that the passenger's claim was time-barred pursuant to the International Conventions as she had filed her suit more than 2 years after the delay had occurred.

The 1st Instance Court in São Paulo dismissed Air Canada's time-bar defence in September 2011, ruling that the claim was filed in time pursuant to Article 27 of the Consumer Defence Code 1990 (which provides for a 5 year limitation period). The claimant was awarded moral damages of R\$ 6,000 (then approx. USD 3,700) plus interest and monetary correction. Favourably for Air Canada, the passenger's claim for economic damage was rejected as she had failed to prove her losses with substantiating evidence.

The 1st Instance decision was upheld on appeal in April 2012 and Air Canada appealed to the Supreme Courts. With a similar line of argument to the American Airlines amicus brief, Air Canada argued that the application of the Consumer Defence Code 1990 by the lower courts in preference to Warsaw/Hague or the Montreal Convention constituted a violation of Article 178 of the Brazilian Constitution. Ergo, the relevant prescription period should be that contained in Warsaw/Hague or the Montreal Convention (2 years) and not the Consumer Defence Code 1990 (5 years).

Chronology of Supreme Tribunal Federal's ruling

In September 2012, the Brazilian Public Prosecutor appointed in the case recommended to the Supreme Federal Tribunal that Air France's appeal should be rejected. The pro-consumer Prosecutor considered that the provisions of the Consumer Defence Code 1990 should take precedence over the Warsaw/Hague regime, and that International Conventions signed by Brazil do not have greater weight than the Brazilian Constitution which expressly provides for the defence of the consumer (Article 5, XXXII).

The STF began its ruling on both the above suits on 8 May 2014. Notwithstanding the unfavourable opinion issued by the Public Prosecutor in the Air France case, the first 3 Judges (who are known as "Ministers") Gilmar Mendes, Roberto Barroso and the late Teori Zavascki[1] voted in favour of the supremacy of the Warsaw/Hague/Montreal regime over the Consumer Defence Code of 1990 in both of the law suits. The three STF Ministers noted Warsaw/Hague/Montreal regime establishes specific laws for international aviation matters and, therefore, more relevant to the disputes in question than the Consumer Defence Code. Minister Barroso suggested that the STF affirm, by virtue of Article 178 of the Federal Constitution, that the provisions of the Warsaw/Montreal Conventions should prevail over the Consumer Defence Code in the event of conflict. Concerned by the potential ramifications of such a decision, the 4th Minister (Rosa Weber) asked for a postponement in order to review the entire Court files. As a result, decisions in both cases were suspended.

The case had been scheduled for consideration by the STF since February 2016 but, until yesterday, other cases before the court had taken precedence. At the oral hearing yesterday (25 May 2017) in Brasilia the remaining 8 Ministers cast their votes.

Minister Rosa Weber, voted in favour, stating that the Warsaw Convention, as amended by Montreal, is a rational regulation: Failure to apply the Convention prejudices the market, creates judicial uncertainty and increases prices to the detriment of consumers. By contrast, one of the 2 Ministers voting against, Celso Mello, stated that the Consumer Defence Code is a fundamental right enshrined in article 5 of the Brazilian Constitution and should prevail. Minister Fux commented that article 178 of the Brazilian Constitution establishes that where International Conventions and Treaties conflict with local laws, the Conventions and Treaties should take precedence, except over matters involving human rights.

Details of the considered arguments by the eleven Ministers judging the suit will become available when the decision is published.

Preliminary analysis of effects of the STF decision

The decision is a positive step for airlines in that it should effectively reduce the time bar period for claims brought in Brazil relating to international air carriage from 5 years (CDC) to 2 years (MC99). It should also limit material (or economic) damages claimed to the limits specified in the Montreal Convention 1999. This should, for example, assist airlines to limit damage awards when passengers claim the loss of high value items from their baggage (unless the passenger can establish the limit breaking provisions of Article 22(5) – intent or recklessness with knowledge – should be applied). Under the Brazilian Consumer Defence Code which has hitherto been applied by local courts, there is no limit and the defendant airline has the (unfair) burden of proof to show the missing goods were not being carried. Under the provisions of the Montreal Convention 1999 for international air carriage, liability in respect of passenger baggage is limited by article 22(2) to 1,131 SDR (USD 1,565) per passenger (unless a special declaration of value is made).

Cargo: The STF found in favour of the application of the limits imposed by the Montreal Convention and some of the Ministers specifically mentioned cargo in their considerations. Yesterday's decision should therefore assist airlines to defend the application of the 19SDR per kilo, "weight limit" specified in article 22(3) of the Montreal Convention 1999. As mentioned, American Airlines had specifically asked the court to address this issue in the amicus brief it filed. We note that many cargo claims are framed under the Brazilian Civil Code, as opposed to the Consumer Code considered by the STF in these two suits. We would also caveat that, in separate cargo litigation afoot in Brazil, Plaintiffs have argued that the contention that the MC99 cargo weight limit of 19SDR per kilo cannot be surpassed (unlike the baggage limit) renders the Convention's weight limitation provision unconstitutional. The effect of yesterday's STF decision in relation to cargo weight limitation issues may therefore not be clear cut; our views will be honed following publication of the Court's decision.

What the STF decision unfortunately (for airlines) does not change is the Brazilian judiciary's ability to award moral (non-economic) damages in addition to the International Convention limits. The continued right to award such moral damages, in addition to the Convention limits was indeed expressly cited by some of the STF Ministers when casting their votes. Regrettably, this means Brazilian courts can, and likely will, continue to award moral damages (for pain, suffering, discomfort, inconvenience, stress, etc.) in addition to the Montreal Convention 1999 limits even for delayed or damaged baggage. Leaving this door open for the Brazilian courts means yesterday's STF decision will not change the lamentable scenario of relatively high damages awards by Brazilian courts in the vast majority of passengers' suits against airlines.

We anticipate that the lower courts may take some time to adjust to the new guideline which is established by this STF decision. It will fall to the lawyers defending airlines in Brazil to ensure this positive precedent is adduced in the Defence arguments for all relevant cases.

In summary: Yesterday's STF decision will help airlines and insurers to limit, to 2 years, the time in which claimants in disputes arising from international air carriage must file suit. It should also help limit most economic damages claims to the amounts established by the Montreal Convention 1999. Regrettably, the decision will not

alter the widespread practice by Brazilian courts of relatively high awards of moral damages: The limits stipulated in Montreal Convention 1999 will, for the time being, still not apply or contain awards of moral damages.

For further details in relation to the above please contact [Martyn Plaskett](#), [Alexandre Lima](#) or any of our aviation team in Brazil. More details will be available following publication of the STF's decision.

[1] This Minister regrettably died in a light aircraft accident earlier this year

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