BRAZIL SUPREME COURT DECISION: A NEW TREND THAT WILL END JUDICIAL INCONSISTENCY OVER LIMITATION OF LIABILITY IN AVIATION CARGO CLAIMS?

The Supreme Federal Court (STF) recently rendered a decision during a plenary session in the *Sura v. Cargolux*[1] claim, affirming the enforcement of cargo liability limits. Seven STF Justices supported the application of the limitation of liability under the Montreal Convention 1999 (MC99) while three opposed it, including the reporting STF Justice.

1. No. 1.372.360/SP

Hopefully this trend will continue and the STF, along with the Superior Tribunal of Justice (STJ), the two higher courts in Brazil, will finally settle the judicial inconsistency over limitation of liability in aviation cargo claims, being filed by cargo owners and subrogated insurers. Brazil has long been a signatory of the major aviation liability conventions (Warsaw/Hague and Montreal) but has often been out of step with other jurisdictions when it comes to applying them.

How did we get to this point?

The STF "general repercussion" precedent

Brazil ratified the MC99 in 2006, but, prior to 2017, international conventions were rarely applied.

In May 2017, what seemed at first to be a very positive judicial development took place. The STF was asked to rule on two cases in which there had been a dispute about whether to apply the Consumer Defence Code 1990 (CDC) or the international conventions. Such disputes were commonplace at that time, with courts often giving an infra-constitutional dimension to the consumer protection in detriment to the application of international conventions.

One of the cases was a baggage loss claim (*Silvia Rosolen vs. Air France*[2]), the other was a flight delay claim (*Cintia Giardulli vs. Air Canada*[3]). Having decided that the international conventions applied to both claims, the STF created a clear and succinct "*general repercussion*" precedent, known as Theme 210:

> *"Pursuant to article 178 of the Brazilian Federal Constitution 1988, rules and international treaties limiting the liability of air passenger carriers, especially the Warsaw and Montreal Conventions, take precedence over the CDC".*

This declaration was particularly important because Brazil has a civil law system which (unlike common law systems) does not automatically give court judgments the status of "*binding precedent*".

Of course, the same international conventions also contain a cargo liability regime. The STF did not mention cargo at all when it issued the "*general repercussion*" precedent. Nonetheless, it seemed logical to conclude that the conventions should also prevail over domestic legal provisions when it came to cargo claims. This stems from the explicit reference to Art. 178 of the Federal Constitution, as highlighted in the "*general repercussion*" precedent. If courts, as of 2017, should apply these conventions to passenger claims over the CDC, a similar approach should be anticipated for cargo air carriage claims.

Indeed, some courts did start to apply conventions to cargo claims. However, there remained uncertainty as to whether the "*general repercussion*" precedent should be confined to passengers matters only.

Limitation of liability and Special Declaration of Value

Of 45 rulings in the 2nd instance court of São Paulo (the most important State civil court in the country) between 2018 and 2023[4], twenty-two applied the MC99 correctly. In another sixteen cases, the court agreed that MC99 should apply to the claim but many refused to enforce the limitations of liability.

The reason for these ill-grounded decisions was (in our view) a mistaken application of Article 22.3 of the convention, which provides that liability limits of 22 SDRs per kg do not apply if the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination (commonly known as a

2 No. 636.331/RJ

3 No. 766.618/SP

4 Please contact the authors of this briefing if you would like to receive the full citations of the cases considered.

Special Declaration of Value). Courts started to hand down judgments in which a simple statement of the value of the consignment on a commercial packing invoice was accepted to constitute a Special Declaration of Value. They often ignored a clear statement on the Air Waybill that no value had been declared.

The other seven rulings did not apply the MC99, of which six found that the "*general repercussion*" precedent applied only to passenger claims.

The convention limits, however, are fundamental to the legal certainty intended by the Montreal regime and are intended as a trade-off for the carrier's acceptance of presumed liability with very limited defences.

Exclusive remedies

In the seventh case of the 2nd Instance court of São Paulo that did not apply the MC99, the court found that, because the carrier acted with "*culpa grave*" i.e., "serious fault" (a concept in theory similar to approach to wilful misconduct in other jurisdictions), the Brazilian Civil Code should apply instead of the MC99. This is a good example of the fact that the concept of "*exclusive remedies*" (prescribed by Article 29 of MC99) is foreign to the Brazilian legal system. Instead, local judges systematically interpret laws in force, which means that one law does not necessarily preclude the other – rather, they coexist. The judge will apply the law that results in the most socially acceptable outcome: in this case, full compensation arising from the "serious fault" of providing a defective service, notwithstanding the limitation provision under the MC99.

Support from the appeal court

Fortunately, the appeal court - the Superior Tribunal of Justice (STJ) - has a good record of understanding how to apply the conventions correctly. Although the STJ cannot revisit facts or evidence, when lower courts circumvent the application of the liability limits based on the erroneous analysis of documents and facts, then the STJ usually sends the case back to the 2nd instance court for retrial. In one recent case, it stated that accepting commercial documents as a Special Declaration of Value would be to interpret MC99 in an overly expansive way which could violate Brazil's international obligations.

This is encouraging, but many of these retrials are yet to reach a conclusion so it remains to be seen how they will eventually turn out. It also means that litigants are forced to incur significant time and expense in appealing decisions and funding retrials before they can obtain a judgment based on sound application of the conventions.

Update mechanisms

Another point of concern arises in the context of how Brazilian courts will navigate the revision mechanism of Article 24 of the MC99. Whilst Claimants persist in advocating for full indemnity, the pendulum shift toward applying the conventions' liability limits raises questions in relation to the correct Special Drawing Right ("SDR") value during the enforcement stage of an award.

So far, a single decision arising from a cargo claim, this time of the 2nd instance court in Rio de Janeiro, found that, at the time of the loss, in August 2018, the revised limit was 19 SDRs per kilo of cargo, as set out by the first revision made by ICAO of the liability limits under the MC99[5].

We take the view that airlines and its insurers should insist in the application of the updated limits in litigation afoot in Brazil (even if it represents a higher payment), to avoid the erosion of limits, which has been used as an argument against the application of MC99.

Current position at the STF

As of February this year, the STF has handed down thirteen collegiate decisions dealing with the applicability of MC99 on cargo-related disputes and whether the "*general repercussion*" (Theme 210) applies. Five are in favour but eight were against it.

Whilst the inconsistency is concerning, we view the recent plenary decision on the *Sura v. Cargolux* as a very positive development, because 10 STF Justices participated in this judgement and seven of them found that the "*general repercussion*" precedent applies to cargo claims.

The reporting STF Justice voted against applying the "*general repercussion*" precedent to cargo claims. A dissenting vote was then issued by another STF Justice, who was the reporting judge in the 2017 "*general repercussion*" judgement. When referring to the 2017 decision in his dissenting vote, he stated that: "*the rationale of the judgment did not make any distinction between the transportation of baggage and cargo. It is certain that the precedent only analysed the issue according to the factual framework set out in those records, namely, the hypothesis of baggage loss.*"

The dissenting STF Justice stated that the current debate, arising from a cargo dispute, is the same as that arising from the baggage claim back in 2017 (i.e., whether Article 178 of the Federal Constitution is applicable). Therefore, he concluded that the "*general repercussion*" "*applies to all types of conflicts involving international transport, whose rules have been the subject of international treaties signed by Brazil*".

What next?

In our view, the next big step forward will come when a unified view is formed in the higher courts, as to what constitutes a Special Declaration of Value and whether cargo limits are effectively unbreakable. This should then trickle down to the lower courts. However, it is hard to predict when this might happen.

We also hope for clarity in the position of the courts as to whether the insurer "*steps into the shoes*" of its insured in a subrogated claim. However, if the courts ultimately recognise the limitation provisions in the international conventions, then we believe that it should follow that courts should not permit insurers to recover more than their insureds could recover if they brought a direct claim against the carrier. This would not result in unfairness to the subrogated cargo insurer which paid out the full value of the cargo because it should have priced the premium to reflect the limited recourse against the air carrier.

5 2019 Revised Limits of Liability Under the Montreal Convention of 1999 (icao.int)

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