I Wish My Mum Was Brazilian: The Regulation of Passenger Liability in the EU and Brazil

by Delphine Defossez*

1. *Introduction*

After having spent some holidays in Brazil, my mum happily returned to Brussels. However, her happiness soon faded when her initial 21-hour trip was increased by an impressive 19-hour delay. Due to bad weather conditions, the lights of the São Paulo airport went down, causing a delay in the departure of the flight from São Paulo to Madrid and resulting in her missing a connecting flight from Madrid to Brussels. She was denied compensation under European law, due to the cancellation of the flight on the basis of extraordinary circumstances, leaving my mum without any recourse.

The main instrument in Europe is Regulation 261/2004,[1] which provides an extensive set of rights to passengers, but also a broadly phrased exception for airlines. The Regulation is hotly debated and criticized.[2] Recently, some have argued that four significant European airline bankruptcies – Primera Air, Air Berlin, Alitalia, and Monarch – were caused by the Regulation's hidden costs.[3] The Union legislators have held an important role in shaping air transport, but the Court of Justice of the European Union (CJEU) has had an even greater role. The Court seems in a quest to protect consumers from abuses by airlines, even if such protection means greatly departing from the wording of the Regulation.[4]

If Brazilian law had applied, the outcome would have been diametrically different. Indeed, Brazilian law extensively protects consumers, allowing only a few defenses to be raised that seldom succeed. For instance, in a 2018 case, *Guzzi da Luz v. LATAM*, the carrier was ordered to compensate a couple who missed a New Year's Eve celebration with their family because of a 19-hour delay that arose from an air traffic network restructuring. They were granted R$20,000 (roughly 4600 euros) by the 24th Chamber of the São Paulo first instance tribunal.[5] The compensation seems unreasonable in light of the facts, especially because the couple was leaving London and heading to Florianópolis, Brazil. From the facts

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[1] Council Regulation 261/2004, Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights, and Repealing Regulation (EEC) No. 295/91 (Text with EEA relevance), 2004 O.J. (L 46) 1 [hereinafter Regulation 261/2004].

[2] *See generally* AIR PASSENGER RIGHTS: TEN YEARS ON (Michal Bobek & Jeremias Prassl eds., 2016).

[3] Jim Callaghan, *The Primera Air Bankruptcy: Hidden Costs of EU Regulation 261/2004 on Passenger Compensation*, LINKEDIN.COM (Oct. 9, 2018), https://www.linkedin.com/pulse/primera-air-bankruptcy-hidden-costs-eu-regulation-jim-callaghan/.

[4] Christa Tobler, *The Prohibition of Discrimination in the Union's Layered System of Equality Law: From Early Staff Cases to the* Mangold *Approach*, *in* THE COURT OF JUSTICE AND THE CONSTRUCTION OF EUROPE: ANALYSES AND PERSPECTIVES ON SIXTY YEARS OF CASE-LAW 443, 462 (Allan Rosas, Egils Levits & Yves Bot eds., 2012).

[5] Guzzi da Luz v. LATAM, T.J.S.P., Ap. Civ. No. 1009640-14.2017.8.26.002, Relator: Jonize Sacchi De Oliveira, 14.12.2017 (Braz.).

of the case, it seems that the couple resided in the United Kingdom and should, therefore, have made their claim under the EU Regulation. Indeed, the EU Regulation is applicable, regardless of the carrier's license, when the flight is from the EU to a third country.[6] Interestingly, although the Montreal Convention has primacy over Regulation 261/2004, the Regulation's broad territorial application makes it applicable to nearly all situations within the EU. Consequently, if the couple would have brought a claim under EU law they would have received only 600 euros, as the courts would have applied the Regulation instead of the Convention. On top of that, LATAM would have been able to rely on the defense of "extraordinary circumstance," resulting in a similar situation to that of my mother.

Another striking example, *Ferreira v. Delta Air Lines Inc.*, relates to a Valentine's Day lunch. In 2016, Delta was required to pay R$15,000 in moral damages to a man who, because of a delay, missed a romantic lunch date with his girlfriend. The man bought a ticket to arrive on February 14th at 5 a.m. to see his girlfriend, who was in New York and had booked a romantic lunch. However, the flight was delayed by eight hours, making the lunch date impossible. The man in fact arrived at 12:56 p.m., meaning that he could still have had lunch with his girlfriend. Delta argued that the delay was caused by the verification and repair of a mechanical failure of the airplane. However, the tribunal in Rio did not recognize this circumstance as exonerating the airline from its liability. On top of that, the 27th Chamber of Rio's first instance tribunal increased the initial amount of the damages from R$6000 to R$15,000.[7] The appellate judge even referred to "human dignity" as a reason for such high damages, without explaining in which sense this passenger's "dignity" had been violated.[8] This case clearly demonstrates an abuse in compensation.[9] Indeed, looking objectively at the facts of the case, the passenger wanted to be present on Valentine's Day, which although "romantic" does not seem particularly important, and he indeed arrived on that day. The purpose of his visit was not to have lunch on that day with his girlfriend but to see her. Moreover, it is not unacceptable to assume that he was not returning the next day. Although he lost some precious hours with her, he still was there on the day; therefore, the amount in moral damages seems just ridiculous, and especially so when compared with the case of two sisters who missed their father's funeral because of a delay. They received exactly the same amount, R$15,000 each.[10] Under EU law, Delta would have been able to claim it was an extraordinary circumstance and might have been exonerated.

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[6] Regulation 261/2004, *supra* note 1, art. 3(1); Case C-537/17, Claudia Wegener v. Royal Air Maroc SA, [2018] ECLI:EU:C:2018:361.

[7] Ferreira v. Delta Air Lines Inc., T.J.R.J., Ap. Civ. No. 0247949-09.2015.8.19.0001, Relator: Des. Antonio Carlos Dos Santos Bitencourt, 15.04.2016 (Braz.).

[8] *Id.* (Desembargador Antonio Carlos Dos Santos Bitencourt: "Referida indenização pretende compensar a dor do lesado e constitui um exemplo didático para a sociedade de que o Direito repugna a conduta violadora, porque é incumbência do Estado defender e resguardar a dignidade humana. Ao mesmo tempo, objetiva sancionar a lesante, inibindo-a em relação a novas condutas, e por isso, deve corresponder a um valor de desestímulo, que não pode ensejar enriquecimento sem causa, nem pode ser ínfimo, a ponto de não coibir a reincidência em conduta negligente.").

[9] On top of being ridiculous in both the amount granted and the facts of the case!

[10] Frazão de Oliveira v. Azul Lines Aéreas Brasileiras SA, Ap. Civ. No. 1022153-03.2016.8.26.0114, Relator: Pedro Kodama, 17.072014 (Braz.).

Until recently, courts applied the Brazilian consumer code (*Codigo de Proteçao e Defesa do Consumidor*, or CDC), instead of the Montreal Convention, to passenger claims.[11] In 2017, the Brazilian Supreme Federal Tribunal (STF) reversed the trend but still allowed courts to award moral damages, which are regarded as a fundamental right, on top of the Convention's damages. Although courts seem to follow the jurisprudence established by the STF, time will tell whether or not these judgments will bring major changes. Interestingly, in *Guzzi da Luz*, the judge referred to the Convention, and established that both Articles 19 of the Convention and 14 of the CDC impose a strict liability regime. However, the judge did not consider a network restructuring as falling within the exemption. The court also acknowledged the 4150 SDR limit in Article 22 of the Montreal Convention, which at the time of the judgment equated to R$18,599.47.[12] Even if the court had granted lower compensation than that available under the Montreal Convention, this case raises questions, as it seems that the couple did, in fact, forum shop. The situation in Brazil might further change if Bill 6960/10 – which is heavily influenced by Regulation 261/2004 – is enacted.

This article will demonstrate that if my mother was Brazilian, the outcome for her would have been entirely different, due to the extensive use of moral damages and the extremely restricted defenses available to airlines. For instance, air traffic network restructuring, which falls entirely outside the airlines' control, does not exempt the carriers from liability for compensation.[13] It analyzes the situation in Europe and shows that the balance of power has been shifted in favor of airlines. The article first introduces the European legislation and the different judgments of the CJEU which could apply to my mother's case. Then Brazilian law is analyzed in the same perspective before reaching some conclusions.

2. *European Law and Passenger Rights*

a. *The Problematic Regulation 261/2004*

Since the beginning, airlines have rejected Regulation 261/2004 for overly favoring passengers.[14] Upon its enactment, the Regulation was almost immediately challenged by the International Air Transport Association (IATA) and the European Low Fares Airline Association (ELFAA) as inconsistent with the Montreal Convention, a claim rejected by the CJEU.[15] Nonetheless, the Regulation has been under constant attack, and airline lobbies have tried on various occasions to place its revision on the EU agenda. Airlines claim that the Regulation is too burdensome; however, according to the EU Commission's impact

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[11] Convention for the Unification of Certain Rules for International Carriage by Air, *opened for signature* May 28, 1999, T.I.A.S. No. 13,038, 2242 U.N.T.S. 372 (entered into force Nov. 4, 2003) [hereinafter Montreal Convention].

[12] According to the judgment, SDRs were then valued at R$4.4818. *Guzzi da Luz*, *supra* note 5, at 13.

[13] Correa v. VRG Linhas Aereas S.A., S.T.J., Ap. Civ. R. Esp. No. 1.616.079, Relator: Min. Herman Benjamin, 22.8.2017 (Braz.).

[14] Case C-344/04, The Queen, on the application of Int'l Air Transp. Ass'n & Eur. Low Fares Airline Ass'n v. Dep't for Transp., 2006 E.C.R. I-443; Cees Van Dam, *Luchtvaartmaatschappijen Zijn Niet Gek op Passagiersrechten*, 85 NEDERLANDS JURISTENBLAD 672 (2010).

[15] Case C-344/04, *supra* note 14; FRANCESCO ROSSI DAL POZZO, EU LEGAL FRAMEWORK FOR SAFEGUARDING AIR PASSENGER RIGHTS (2014).

assessment, the "average cost of the Regulation . . . was €1.63 per passenger."[16] Meanwhile, the Court continued interpreting and extending the meaning of Regulation 261/2004, equating in its own way the obligation to compensate to strict liability.[17]

i. Compensation for Cancelled Flights

Article 2(1) refers to cancellation but does not clearly define the term; therefore, the CJEU was requested to intervene. The Regulation grants passengers several rights in case of cancellation. First, under Article 5(1)(a) the passenger is entitled to receive "assistance by the operating air carrier in accordance with Article 8." Second, under Article 5(1)(b) the passenger must "be offered assistance by the operating air carrier in accordance with Article 9(1)(a) and 9(2)." Finally, Article 5(1)(c) obligates the carrier to compensate passengers, in accordance with Article 7, unless the cancellation is the result of an extraordinary circumstance.[18] Article 7(1)(a) allows passengers 250 euros compensation for flights of 1,500 kilometers or less. According to Article 7(1)(b), passengers are entitled to 400 euros compensation for all intra-Community flights of more than 1,500 kilometers, and for all other flights between 1,500 and 3,500 kilometers. Finally, flights not falling under paragraphs (a) or (b) could result in compensation of 600 euros under Article 7(1)(c). These amounts can be reduced by half if re-routing is offered[19] and the arrival time is not later than the originally scheduled flight:

> (a) by two hours, in respect of all flights of 1 500 kilometers or less; or
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> (b) by three hours, in respect of all intra-Community flights of more than 1 500 kilometers and for all other flights between 1 500 and 3 500 kilometers; or
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> (c) by four hours, in respect of all flights not falling under (a) or (b).[20]

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[16] STEER DAVIES GLEAVE, EXPLORATORY STUDY ON THE APPLICATION AND POSSIBLE REVISION OF REGULATION 261/2004, FINAL REPORT (July 2012), https://ec.europa.eu/transport/sites/transport/files/themes/passengers/studies/doc/2012-07-exploratory-study-on-the-application-and-possible-revision-of-regulation-261-2004.pdf.

[17] John Balfour, *Airline Liability for Delays: The Court of Justice of the EU Rewrites EC Regulation 261/2004*, 35 AIR & SPACE L. 71 (2010); Christiane Leffers, *The Difference Between Cancellation and Long Delay under EU Regulation 261/2004*, TRAVEL L.Q., Mar. 2010, at 31; Manuel Gimenez Rasero, *The Capacity of the Court of Justice of the European Union to Promote Homogeneous Application of Uniform Laws: The Case for Air Carrier Liability for Flight Delays and Cancellations*, NYU TRANSNAT'L NOTES (Oct. 26, 2011), https://blogs.law.nyu.edu/transnational/2011/10/the-capacity-of-the-court-of-justice-of-the-european-union-to-promote-homogeneous-application-of-uniform-laws-the-case-for-air-carrier-liability-for-flight-delays-and-cancellations/.

[18] Regulation 261/2004, *supra* note 1, art. 5(1)(c) ("(i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or (ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or (iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.").

[19] *Id.* art. 8.

[20] *Id.* art. 7(2).

The Regulation provides for passengers to be adequately cared for,[21] unless such care would further delay the flight.[22]

The CJEU specified the meaning of cancellation in *Rodríguez v. Air France* as the non-operation of a flight in accordance with the scheduled itinerary.[23] National courts have discretion to decide whether cancellation refers only to situations in which the plane fails to take off or whether it also includes flights which take off and return due to a technical failure, as in *Rodríguez*.[24] Even though the decision is left to national courts, these courts must take into consideration the definition of "itinerary," which requires the plane to reach its destination as appearing on the contracted itinerary.[25] Thus, the CJEU pointed out the way to understand cancellation.[26] The Court went further and held that Article 2(1) does not require any express decision to cancel the flight.[27] The Court used the example of flights that are delayed, for which the original planning is abandoned and the passengers are booked on a flight which was planned independently from the delayed flight, leading to a cancellation of the delayed flight.[28] The classification of a flight as cancelled or not does not take into consideration the reasons for the delay; such considerations only become relevant in the context of compensation under Article 5(3).[29]

Airlines can avoid liability if they can prove that the passengers were informed in advance and provided re-routing. The burden of proof as to whether the passenger was informed of the cancellation of the flight rests on the airline, according to Article 5(4). For instance, in *Wallentin-Hermann*,[30] if Alitalia had informed the passengers earlier on the day the defect was discovered, as they did provide a re-routing, they would have been able to avoid liability. However, in that case, the passengers were informed five minutes before the scheduled departure time, and after checking in, that their flight from Vienna to Rome was cancelled. Even though they were booked on another flight, the new flight arrived twenty minutes after the departure time of their connecting flight. Alitalia claimed that the delay was due to an extraordinary circumstance and rejected the request for compensation. The Court ruled in favor of the passenger as the event was not a case of *force majeure*.

ii. Compensation for Long Delays

"Long delay," covered by Article 6, includes any delay at the final destination equal to or greater than three hours. It does not matter whether the delay occurred at the departure

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[21] *Id.* pmbl. point 17; art. 9.
[22] *Id.* pmbl. point 18.
[23] Case C-83/10, Aurora Sousa Rodríguez and others v. Air France SA, [2011] ECLI:EU:C:2011:652.
[24] *Id.* para. 25. For Advocate General Sharpston, the term "cancellation" covers cases in which a flight departs and then returns to the departure point and does not proceed further.
[25] The term "itinerary" is defined as a journey to be made by an airplane between two airports according to a fixed schedule.
[26] Case C-83/10, *supra* note 23, para. 28.
[27] *Id.* para. 29.
[28] *Id.* para. 30; Joined Cases C-402 & 432/07, Christopher Sturgeon v. Condor Flugdienst GmbH, 2009 E.C.R. I-10923, para. 36.
[29] *Id.* para. 34; Cees Van Dam, *Air Passenger Rights after Sturgeon*, 36 AIR & SPACE L. 259 (2011).
[30] Case C-549/07, Friederike Wallentin-Hermann v. Alitalia-Linee Aeree Italiane SpA., [2008] ECLI:EU:C:2008:771.

airport or at the connecting airport(s); only the delay at the final destination is relevant for the right to compensation, as established in *Folkerts*.[31]

The Regulation recognizes two types of delay: first, when the flight is delayed beyond its scheduled departure time as described in Article 6; and second, when the arrival is delayed, referring to cases encompassed in Articles 5 and 7.[32] Actual arrival time was defined in *Germanwings* as corresponding "to the time at which at least one of the doors of the aircraft is opened, the assumption being that, at that moment, the passengers are permitted to leave the aircraft."[33]

Until the *Sturgeon* case,[34] passengers were not entitled to compensation for long delays under the Regulation but were only entitled to assistance based on the distance of the flight and the duration of the delay.[35] To seek compensation, passengers could only rely on the Montreal Convention's system and had to prove they suffered damages. Airlines could escape liability by proving that all reasonable measures had been taken to avoid the damage or that it was impossible to take such measures. The interpretation of the Regulation resulting in the exclusion of long delays from compensation was based both on the structure and wording of the Regulation, as well as on the explanatory memorandum of the Commission. In that memorandum, the Commission explained:

> Although passengers suffer similar inconvenience and frustration from delays as from denied boarding or cancellation there is a difference in that an operator is responsible for denied boarding and cancellation (unless for reasons beyond its responsibility) but not always for delays. . . . [Therefore], the Commission considers that in present circumstances operators should not be obliged to compensate delayed passengers.[36]

Surprisingly, the CJEU ruled that the passengers of delayed flights have the right to compensation, which was then confirmed in *Nelson* and *TUI Travel*.[37] The Court expressly acknowledged that compensation did not flow from the wording of the Regulation, but it still decided to treat passengers of delayed flights in a similar manner as passengers of cancelled flights or denial of boarding cases, based on the principle of equal treatment.[38] Passengers of

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[31] Case C-11/11, Air France v. Heinz-Gerke Folkerts & Luz-Tereza Folkerts, [2013] ECLI:EU:C:2013:106. In this case, the flight's departure was delayed for less than three hours but it arrived at its final destination with a delay greater than three hours, entitling to passengers to compensation. Mrs. Folkerts' flight from Bremen to Paris was delayed by 2.5 hours, resulting in her missing her connecting flight from Paris to São Paulo. Even though Air France booked her on a later flight, she missed her connection to Paraguay and arrived 11 hours after the time originally scheduled. *See* Joined Cases C-402 & 432/07, *supra* note 28, para. 61; Joined Cases C-581/10 & C-629/10, Emeka Nelson & others v. Deutsche Lufthansa AG & TUI Travel plc & others v. Civil Aviation Authority, [2012] ECLI:EU:C:2012:657, para. 40.

[32] Case C-452/13, Germanwings GmbH v. Ronny Henning [2014] ECLI:EU:C:2014:2141, paras. 14–15.

[33] *Id.* para. 25.

[34] Joined Cases C-402 & 432/07, *supra* note 28; Balfour, *supra* note 17; Leffers, *supra* note 17.

[35] Regulation 261/2004, *supra* note 1, art. 6(1).

[36] *Commission Proposal for a Regulation of the European Parliament and of the Council Establishing Common Rules on Compensation and Assistance to Air Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights*, Explanatory Memorandum, COM (2001) 784 final (Dec. 21, 2001).

[37] Joined Cases C-581/10 & C-629/10, *supra* note 31.

[38] Tobler, *supra* note 4.

both delayed and cancelled flights suffer a loss of time and should have access to similar redress. Treating the two types differently would be unjustifiable and therefore would violate the general principle of equal treatment. Moreover, increasing the protection for passengers of cancelled flights only would be contrary to the Regulation's main aim of increasing the protection for all air passengers.

Before reaching this conclusion, the CJEU rejected the argument that some delays could be qualified as *de facto* cancellations, by stating that "cancelled flights and delayed flights are two quite distinct categories of flights."[39] The decisive element is whether the flight is operated according to its pre-arranged planning, requiring the other elements, except for the departure time, to remain unchanged. A flight can only be classified as cancelled "if the air carrier arranges for the passengers to be carried on another flight whose original planning is different from that of the flight for which the booking was made."[40] The Court went on to explain:

> [T]here is a cancellation where the delayed flight for which the booking was made is 'rolled over' onto another flight, that is to say, where the planning for the original flight is abandoned and the passengers from that flight join passengers on a flight which was also planned – but independently of the flight for which the passengers so transferred had made their bookings.[41]

The Court stipulated that announcements by the air carrier's staff or announcement boards are not conclusive evidence, neither is the obtaining of new boarding passes or recovery of luggage.[42] The Court further argued that the composition of the group of passengers must not be identical to the initial group.[43] The only decisive factor is whether the flight went as planned or not. In other words, my mum, whose flight did not leave as scheduled from São Paulo, cannot rely on the announcements made by the staff, nor on the fact that she received a new boarding pass, in order to know whether or not she can claim compensation. It all depends on whether the flight operated according to its pre-arranged planning. Similarly, for the couple who suffered a 19-hour delay, it will all depend on whether the flight was operated according to its pre-arranged planning. Even though the Court tried to create the fairest test possible, it ended up being relatively complicated for passengers and advantageous for airlines, which could avoid paying by arguing that the flight was delayed instead of cancelled.

b. *"Extraordinary Circumstances": The Secret Weapon of Airlines*

At the outset, the term "extraordinary circumstances" is not defined; instead, a non-exhaustive list of circumstances is embodied in recitals 14 and 15.[44] These specific circumstances include "cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier."[45] It also

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[39] Joined Cases C-402 & 432/07, *supra* note 28, para. 33.
[40] *Id.* para. 35.
[41] *Id.* para. 36.
[42] *Id.* para. 37.
[43] *Id.* para. 38.
[44] Case C-12/11, Denise McDonagh v. Ryanair Ltd., [2013] ECLI:EU:C:2013:43.
[45] Regulation 261/2004, *supra* note 1, pmbl. point 14.

includes decisions of the air traffic management, in relation to a specific aircraft on a specific day, that create a long delay or cancellation.[46] Therefore, a restructuring in the network that results in a long delay or cancellation would exonerate the airline from its liability, unlike in Brazil. However, due to the lack of a definition for "extraordinary circumstances," airlines have made extensive use of this defense, which led the CJEU to restate its position, especially because claims are often dropped.

As the Court already stated, Article 5(3) is a derogation to the general principle established in Article 5(1)(c), with the onus of proof on the airlines.[47] Airlines must demonstrate that the outcome could not have been avoided by taking appropriate measures, including measures that are economically and technically viable for the air carrier.[48] In the *Wallentin-Hermann* judgment, the Court held that the carrier needs to prove that "even if it had deployed all its resources in terms of staff or equipment and the financial means at its disposal, it would clearly not have been able, unless it had made intolerable sacrifices in the light of the capacities of its undertaking at the relevant time, to prevent the extraordinary circumstances with which it was confronted from leading to the cancellation of the flight."[49] However, it seems that airlines took the opposite view, namely that Article 5(3) is the rule and Article 5(1)(c) the derogation.

Article 5(3) does not exonerate airlines from all their obligations, but only releases the carrier from the obligation of paying compensation. The obligations in Articles 8 and 9 are still applicable and a failure to provide such care and assistance allows the passenger to still ask for reimbursement.[50] In the *Andrejs Eglītis & Edvards Ratnieks* case, the claimants were passengers on a cancelled flight from Copenhagen to Riga.[51] The cancellation occurred because the crew's working hours had expired by the time the airspace was reopened following an air traffic control power failure. In the view of the Court, "the only issue to matter is the ability of the air carrier to operate the programmed flight in its entirety . . . despite the fact that extraordinary circumstances have given rise to some delay."[52] The reasonableness of the measure should also take into account the secondary risks, "insofar as their constituent elements are foreseeable and calculable."[53]

With regard to the interaction between technical defects and the defense of extraordinary circumstances, the CJEU in 2007 established that, while a technical defect could be regarded as an extraordinary circumstance, it can only release the carrier of its obligation if it could not have been prevented by due diligence or regular maintenance,[54] or when it is "not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin." In other words, a technical

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[46] *Id.* point 15.
[47] Case C-549/07, *supra* note 30, para. 20.
[48] *Id.* para. 40.
[49] *Id.* para. 41.
[50] Case C-294/10, Andrejs Eglītis & Edvards Ratnieks v. Latvijas Republikas Ekonomikas Ministrija, [2011] ECLI:EU:C:2011:303, paras. 23–24.
[51] *Id.*
[52] *Id.* para. 33.
[53] *Id.* para. 34.
[54] Case C-549/07, *supra* note 30, para. 25.

defect might constitute an extraordinary circumstance depending on the facts of the case. For instance, the Valentine's Day delay in the *Ferreira* case in Brazil was caused by the verification and repair of a mechanical failure of the airplane. Under the EU Regulation, the court would have had to assess whether or not such defect could have been prevented by due diligence or regular maintenance, before granting damages. However, the tribunal in Rio did not assess whether the mechanical failure could have been prevented, but instead the judge decided that this circumstance did not exonerate the airline from its liability.

In the Court's view, the list provided in the Regulation's preamble is only indicative and the events listed do not *per se* amount to an exemption, but could amount to one.[55] It is up to the referring court to ascertain "whether the technical problems cited by the air carrier in question in the main proceedings stem from events which are not inherent in the normal exercise of its activity and are beyond its actual control."[56] However, airlines did not see the issue in the same way and continued to exempt themselves whenever a technical defect occurred. Seven years after *Wallentin-Hermann*, the Court got two new opportunities to look at the extraordinary circumstance defense and a latent defect in the *KLM* and *Sandy Siewert* cases.[57] In *Sandy Siewert*, the Court ruled that a collision with mobile boarding stairs does not qualify as an extraordinary circumstance. Due to the stairs' importance and frequent usage, such a collision is inherent in the normal exercise of the activities of the air carrier.

In *KLM*,[58] the CJEU extended the rights of passengers a bit further by establishing that even in the event of a cancellation due to unforeseen technical problems, airlines are required to compensate passengers. In its opinion, defects are intrinsically connected to the operating business of the airline and repairing such defects falls within the normal activity of an air carrier.[59] However, the Court also recognized specific technical problems that could exempt airlines from compensation, based on the courts' discretion, such as a latent defect affecting the safety of flights, acts of sabotage, or acts of terrorism.[60] The Court stated that a technical defect amounts to an extraordinary circumstance:

> where it was revealed by the manufacturer of the aircraft comprising the fleet of the air carrier concerned, or by a competent authority, that those aircraft, although already in service, are affected by a hidden manufacturing defect

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[55] *Id.* para. 22.
[56] *Id.* para. 36.
[57] Case C-257/14, Corina van der Lans v. Koninklijke Luchtvaart Maatschappij NV, [2015] ECLI:EU:C:2015:618; Case C-394/14, Sandy Siewert v. Condor Flugdienst GmbH, [2014] ECLI:EU:C:2014:2377.
[58] Due to a defect in the fuel pump and a defective hydromechanical unit, Ms. van der Lans incurred a 29-hour delay. Replacements for these two defective components had to be transported from Amsterdam to repair the aircraft. The two components did not exceed their average lifetime nor was there any notice from the manufacturer that the components were defective. *See* Vincent Correia, *Air Passengers' Rights, "Extraordinary Circumstances," and General Principles of EU Law: Some Comments After the McDonagh Case*, 13 ISSUES AVIATION L. & POL'Y 245 (2014).
[59] Case C-549/07, *supra* note 30, para. 41.
[60] Correia, *supra* note 58.

> which impinges on flight safety. The same would hold for damage to aircraft caused by acts of sabotage or terrorism.[61]

Furthermore, "premature malfunction of certain components of an aircraft" is not considered an extraordinary circumstance by the Court.[62] For a defect to fall under the extraordinary circumstance exception, it must either be completely out of the control of the airline, such as an act of terrorism, or it must affect a whole series of goods, and not just a single aircraft. Finally, airlines are prohibited from denying payment of compensation because the wrongdoer is the manufacturer. Airlines can seek redress from the manufacturer on a separate claim but this claim cannot interfere with the claim of the passenger.

The Court has significantly limited the possibilities for airlines to deny compensation. It seems that every time the Court has the chance to hear a case, it further extends the passengers' rights. Unfortunately, such an approach has not deterred airlines from ignoring passenger rights. Indeed, there is a tendency among airlines to creatively interpret judgments of the Court in a way that will allow them to deny compensation. This tendency is certainly verifiable with regard to bad weather conditions; airlines, before the *Sturgeon* case, would often claim that a flight was delayed and not cancelled in order to avoid payment of compensation. However, with bad weather conditions, the opposite is now happening. Indeed, under the Regulation, it seems that the defense of extraordinary circumstance for bad weather conditions only affects cancelled flights. Airlines, therefore, use the inconsistencies in the Regulation in their favor, having no problem accepting that delayed flights grant the same rights as cancelled flights when it is beneficial to them.

c. *The Montreal Convention*

The Court established as early as 2004 that the Montreal Convention is an integral part of the European legal order.[63] The Court took the view that the Regulation was in accord with the preamble of the Convention because it protects the interests of consumers and provides equitable compensation. The Court found that nothing in the provisions of the Convention shows an intention by the drafters to shield carriers from other forms of intervention.[64] Consequently, the Court concluded that the Montreal Convention does not prevent the Community legislature from laying down rules to regulate in a standardized manner compensation for delay and cancellation. In the eyes of the Court, Article 6 of the Regulation "constitutes such standardised and immediate compensatory measures" and "the system prescribed in Article 6 simply operates at an earlier stage than the system which results from the Montreal Convention."[65] Article 6 does not preclude passengers from bringing an additional action for redress under the Convention. On the contrary, it enhances the protection

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[61] Case C-257/14, *supra* note 57, para. 38.
[62] *Id.* paras. 41–42.
[63] Case C-181/73, R. & V. Haegeman v. Belgian State, 1974 E.C.R. 449, para. 5; Case C-12/86, Meryem Demirel v. Stadt Schwäbisch Gmünd, 1987 E.C.R. 3719, para. 7; Case C-344/04, *supra* note 14, para. 36; Case C-63/09, Axel Walz v. Clickair SA, 2010 E.C.R. I-4239, paras. 19 & 20.
[64] Case C-344/04, *supra* note 14, para. 45.
[65] *Id.* para. 46.

afforded to passengers and "improve[s] the conditions under which the principle of restitution is applicable to passengers."[66]

In *Nelson*, the Court stated that the loss of time inherent to a delayed flight amounts to an inconvenience rather than damage, excluding, therefore, the obligation to compensate passengers of delayed flights from the scope of the Convention.[67] However, previously, in the *Walz* case, the Court interpreted the term "damage" in the Montreal Convention as including both material and non-material damage.[68] Article 12 of the Regulation includes both types of damage and this interpretation was endorsed in *Rodríguez v. Air France*.[69] According to this ruling, national courts can grant compensation on a legal basis other than the Regulation, under the conditions provided by the Montreal Convention or in national law. However,

> [The notion] of 'further compensation' may not serve as the legal basis for the national court to order an air carrier to reimburse to passengers whose flight has been delayed or cancelled the expenses the latter have had to incur because of the failure of that carrier to fulfil its obligations to assist and provide care under Article 8 and Article 9 of Regulation No 261/2004.[70]

The Court, therefore, rejected the interpretation of Advocate General Sharpston of "further compensation" in cases of cancellation.[71] The position was reviewed in *McDonagh v. Ryanair*, when the airspace over various EU Member States was closed for several days due to the eruption of the Icelandic volcano Eyjafjallajökull in 2010.[72] Ms. McDonagh's original flight was cancelled and she was not able to return to Dublin until a week had passed. During that time, no care was given to the passenger, as required by Article 9 of the Regulation. The passenger sought reimbursement of the 1,129.41 euros she had spent on accommodations, meals, and transport. Ryanair refused to compensate, relying on the defense of extraordinary circumstance and even considering the circumstance as "super extraordinary," amounting to the exclusion of all the obligations under Article 5 and 9. However, the Court did not buy the argument and upheld the passenger's rights under Article 9.

The Court of Justice went a step further in *Air Baltic Corp.*,[73] by interpreting broadly Articles 19 and 22(1) of the Montreal Convention. The case involved two employees of the Specialist Investigation Service of the Republic of Lithuania (SIR) who traveled from Vilnius

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[66] *Id.* para. 48.
[67] Joined Cases C-581/10 & C-629/10, *supra* note 31.
[68] Case C-63/09, *supra* note 63, para. 29.
[69] Case C-83/10, *supra* note 23, para. 41. Air France refused to pay "further compensation" to the passengers on a Paris-to-Vigo flight which returned to Paris a few minutes after departure due to a technical failure. Three passengers were booked on a flight leaving early the next morning from Paris to Porto, and then traveled by taxi to Vigo. Another traveler was booked on a flight from Paris to Vigo via Bilbao. Three other passengers were booked on the same flight the next day. None of the seven passengers were offered accommodation at Air France's expense or received any assistance.
[70] *Id.* para. 46.
[71] In the view of Advocate General Sharpston, when an air carrier fails to fulfill its obligations imposed under Article 8 and 9, the affected passengers may claim reimbursement of the expenditures incurred as a result of that failure. Such reimbursement cannot be deducted from the compensation granted under Article 7.
[72] Case C-12/11, *supra* note 44.
[73] Case C-429/14, Air Baltic Corp. AS v. Lietuvos Respublikos Specialiųjų Tyrimų Tarnyba, [2016] ECLI:EU:C:2016:88.

to Baku with various stops. Due to a delay on one of the flights, the agents missed a connecting flight and arrived a day after the original scheduled time. SIR had to pay the additional costs for its employees, approximately 338 euros, and sought its reimbursement from Air Baltic. After having referred to Article 31 of the Vienna Convention, the Court examined Article 19 of the Montreal Convention and deplored the fact that Article 19 does not specify who may claim damages. The Court felt the need to interpret the Convention as not only applying to damage caused to passengers but also damage suffered by their employer. Since the tickets were bought by SIR, under Article 1(2) of the Convention, the contract was effectively between SIR and Air Baltic. As a result, the Court felt that Article 19 needed to be interpreted as being applicable to damage suffered by an employer who has concluded the contract of international carriage. Difficulties might occur as the amount of damages claimed for several employees might be higher than the amount that the passengers could have claimed under individual proceedings.[74] The Court, therefore, decided that the amount cannot exceed the amount laid down in Article 22(1) multiplied by the number of passengers carried under the contract.[75] By interpreting the Convention in such a way, the Court made sure that airlines are guaranteed that their liability is not extended above the limit fixed in the Convention, while at the same time employers are able to claim damages for the losses they suffered.

This case might bring serious changes. For instance, employers should consider whether to purchase the tickets for their employees or whether to let the employees book their own tickets. By buying the tickets for their employees, the employers make sure that a contract of carriage is established between them and the airline company, allowing them to claim for greater damages under the Montreal Convention.

3. *Brazilian Law*

a. *The Codigo de Proteçao e Defesa do Consumidor vs. the Montreal Convention*

Although Brazil is a party[76] to both the Warsaw[77] and the Montreal Conventions, Brazilian courts have in the past regularly avoided the application of the Convention regimes where such provisions granted less extensive protections than national law. One of these conflicts is linked to the fact that both Conventions established a fault-based system of responsibility while the CDC establishes a strict and unlimited liability regime.[78] The burden of proof is on the service provider invoking one of the exemptions, namely that the fault is solely due to the passenger or that there is no defect on the side of the service provider.[79] Surprisingly, the CDC does not refer to *force majeure* or Act of God, adopting a similar

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[74] *Id.* para. 47.
[75] *Id.* para. 49.
[76] Decreto No. 5.910 de 27 de Setembro de 2006, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 28.09.2006 (Braz.).
[77] Convention for the Unification of Certain Rules Relating to International Carriage by Air, *opened for signature* Oct. 12, 1929, 137 L.N.T.S. 11, 49 Stat. 3000 (entered into force Feb. 13, 1933) [hereinafter Warsaw Convention].
[78] Lei No. 8.078, de 11 de Setembro de 1990, art. 14, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 12.09.1990 (Braz.) ("O fornecedor de serviços responde, independentemente da existência de culpa, pela reparação dos danos causados aos consumidores por defeitos relativos à prestação dos serviços, bem como por informações insuficientes e inadequadas sobre a fruição e risco.") [hereinafter CDC].
[79] "I - que, tendo prestado o serviço, o defeito inexiste; ou II - a culpa é exclusiva do consumidor ou do terceiro."

system to maritime or road conventions.[80] This omission is in direct contradiction with the "extraordinary circumstance" embodied in both the Warsaw and Montreal Conventions, and widely used under the European Regulation.[81] This omission renders the CDC stricter than the other systems.

Despite the existence of a specific federal agency with its own rules to govern civil aviation, the services rendered by airline companies are made subject to the CDC. Because the CDC reiterates the principles of integral refund, moral damages, and objective responsibility – which, along with principles of economic order, are rooted in the Brazilian Constitution[82] – the Code was considered the exclusive law applicable to consumers' cases. The main argument for the use of the CDC rather than the Warsaw Convention was that the Convention was appropriate for its time but does not fit modern reality. The objective of the Convention is predominantly economic, which was fundamental for the development of civil aviation, while the objective of the CDC is the protection of consumers. Therefore, the two instruments have different objectives, leading to the CDC being more appropriate to regulate cases involving consumers.[83]

Similarly to the situation with the Warsaw Convention, the Brazilian judiciary long established the prevalence of the CDC over the Montreal Convention. Even though the Montreal Convention entered into force after the CDC and is a more specific law, the Brazilian judiciary took a constitutional approach resulting in the prevalence of the CDC. However, in May 2017, the appeals brought by Air France and Air Canada were decided by the Brazilian STF, which came to the conclusion that the Conventions prevail in cases involving international carriage by air.[84] Minister Rosa Weber noted that the failure to apply the Conventions would prejudice the market, create judicial uncertainty, and increase prices to the detriment of consumers.[85] This means that claims arising from international carriage by air must be brought within two years of the event rather than the five years allowed by the Consumer Code.

The decision is, however, not a complete victory for the Conventions, as the eleven ministers unanimously ruled that moral damages should not be subject to any limit. Indeed,

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[80] The same exclusions exist in the Convention on the Contract for the International Carriage of Goods by Road, *opened for signature* May 19, 1956, 399 U.N.T.S. 189, as amended by Protocol to the CMR, *opened for signature* July 5, 1978 [CMR], 1208 U.N.T.S. 427; International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, *opened for signature* Aug. 25, 1924, 120 L.N.T.S. 155 [The Hague Convention], and the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, *opened for signature* Feb. 23, 1968, as amended, 1412 U.N.T.S. 127 [The Hague-Visby Convention], all of which deal with the carriage of goods.

[81] Warsaw Convention, *supra* note 77, art. 20; Montreal Convention, *supra* note 11, arts. 19 & 20.

[82] CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] arts. 5 XXXII, 170 v. (1988) (Braz.). Emenda Constitucional No. 9, de 9 de Novembro de 1995, Lex, Legislação Federal e Marginália, v. 59, p. 1966, out./dez. 1995.

[83] Rodrigo César Rebello Pinho, Ministério Público do Estado de São Paulo, *O Transporte Aéreo e o Código de Defesa do Consumidor*, http://www.mpsp.mp.br/portal/page/portal/cao_consumidor/doutrinas/VARIG%20Consumidor.htm (last visited Mar. 6, 2019).

[84] Rosolem v. Société Air France, S.T.F., Ap. Civ. No. RE 636.331/RJ, Relator: Min. Gilmar Mendes, 25.05.2017 (Braz.).

[85] *Id.* at 66.

Article 22 CDC imposes a certain threshold on companies that offer public services, with airlines definitely falling within this category.[86] On top of that threshold, if the company fails to meet the required standards, it is under the obligation to fully and integrally compensate the consumer for both material and non-material damages.[87] This obligation exemplifies the compensation culture that exists in Brazil and was initially embodied in the CDC to "protect the dignity of the ordinary citizen, against so-called powerful corporations and other institutions."[88] However, over the years, the initial aim was lost, resulting in the normalization of any awards for moral damages, which today are granted even for simple breaches of contract.

Furthermore, Articles 25 and 51 CDC greatly restrict any limitation of liability that the carrier could have tried to invoke. Article 51 also renders void no-show clauses.[89] The CDC creates a balance between the parties but contrary to the situation in the European Union, this balance favors the consumer. Indeed, Article 39 of the CDC prohibits any situation that leaves the consumer in excessive disadvantage. Therefore, if any alteration to the flight occurs before the check-in time, the airline must contact the passengers by all possible means available, such as e-mail, company website, and telephone contact. In order to avoid falling within the prohibition of Article 39, airlines are required to seek confirmation that passengers had knowledge of the alteration. Passengers may refuse the alteration to their flight. The position of Brazilian law is that the contract previously established had been altered and therefore the customer has a right to refuse the changes. Similarly, if the passenger feels that the alternative is not viable, he/she could refuse the changes and start a compensation action for both material and moral damages. Of course, most of these cases are negotiated with the airline or sent for administrative adjudication to the National Agency of Civil Aviation (ANAC) and never reach the court system. When one does, the courts are even harsher than the CJEU and tend to fine companies much greater amounts than in Europe.

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[86] CDC, *supra* note 78, art. 22 ("Os órgãos públicos, por si ou suas empresas, concessionárias, permissionárias ou sob qualquer outra forma de empreendimento, são obrigados a fornecer serviços adequados, eficientes, seguros e, quanto aos essenciais, contínuos.").

[87] *Id.* art. 6(VI).

[88] Peter Macara & Alexandre Lima, *The Brazilian Supreme Court Upholds the Application of the Warsaw and Montreal Conventions*, 43 AIR & SPACE L. 505, 507 (2018).

[89] CDC, *supra* note 78.

Art. 6. São direitos básicos do consumidor:

. . . .

VI – a efetiva prevenção e reparação de danos patrimoniais e morais, individuais, coletivos e difusos.

. . . .

Art. 25. É vedada a estipulação contratual de cláusula que impossibilite, exonere ou atenue a obrigação de indenizar prevista nesta e nas seções anteriores.

. . . .

Art. 51. São nulas de pleno direito, entre outras, as cláusulas contratuais relativas ao fornecimento de produtos e serviços que:

I – impossibilitem, exonerem ou atenuem a responsabilidade do fornecedor por vícios de qualquer natureza dos produtos e serviços ou impliquem renúncia ou disposição de direitos. Nas relações de consumo entre o fornecedor e o consumidor-pessoa jurídica, a indenização poderá ser limitada, em situações justificáveis . . . .

Id.

This decision consolidates the theory that airline lawyers in Brazil have been advocating for years: to balance two protections, Articles 5 XXXII and 178 of the Brazilian Constitution. Although this decision tries to make these two protections compatible – with the Supreme Tribunal noting in the *Air France* case that "consumer protection is not the sole directive that frames the economic order nor the sole constitutional imperative that must be observed by the law maker" – these two principles are *per se* incompatible due to the highly protective strict liability rules of the CDC and the compensation culture existing in Brazil. To find compatibility between these two norms, several STF judges have expressly noted that the right to award non-economic damages is not precluded by the Convention limits, meaning that Brazilian courts will still award moral damages for pain, discomfort, inconvenience, suffering, or stress. While Brazil will be more in line with international practice, the possibility of awarding non-economic damages on top of the damages provided by the Conventions partially safeguards the compensation culture in Brazil. The compensation culture in Brazil flows from Articles 159 and 186 of the Civil Code in conjunction with a broad interpretation of Article 5X of the Brazilian Constitution. Indeed, Article 5X of the Constitution refers to moral damages in cases of violation of human dignity, privacy, intimacy, or honor.[90]

In a similar manner, Judge Barroso indicated that "if we determined that the Warsaw Convention leaves the consumer wholly exposed, then, yes, I think we would have to declare the Convention unconstitutional," which demonstrates the unwillingness of the Court to leave a consumer defenseless, even if this defenselessness is due to his own actions, such as in the case of *Air Canada*.[91]

This decision is a step toward a more "conventional" application of the Conventions, which will allow airlines to rely on defenses that were not available under the supremacy of the CDC. As previously recognized by both the STF and the Brazilian Superior Court (STJ), this decision would have general relevance to over 400 cases and it can be expected that this decision will open the floodgates.[92] At the same time, the reluctance of the Court to give up non-economic damages affords an additional protection, which seems unreasonable regarding checked bags and controversial regarding delay, but which also means that Brazilian passengers will never experience the difficulties of recovering psychological damages in cases of bodily injury. The compensation culture was facilitated in the 1990s by the establishment of a small claims court system with low access costs. For instance, in a 2006 decision of the 6th Civil Court of Belo Horizonte, Judge Antônio Leite of Padua ordered Gol to compensate R$30,000 in moral damages to a passenger and her two children for negligent service offered by the company. The judge took into account the upsets that the family suffered during a trip from Belo Horizonte to Lisbon in September 2006. According to the family, after numerous difficulties, they managed to travel to their destination, but on a different itinerary than the one contracted for. Besides the change in itinerary, the company only paid part of the altered

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[90] Paulo Henrique Cremoneze, *Dono Moral: Quantificação da Indenização Segundo a Doutrina do "Punitive Damage,"* JUS.COM.BR, https://jus.com.br/artigos/18529/dano-moral-quantificacao-da-indenizacao-segundo-a-doutrina-do-punitive-damage.

[91] Both the Warsaw and the Montreal Conventions grant a time limit of two years for the passenger to act, after which any claims would normally be time-barred. However, the *obiter* of Judge Barroso makes it possible for the time limit of the CDC, five years, to still be applied.

[92] Macara & Lima, *supra* note 88, at 506.

tickets and meals, transport, and phone call expenses. Such a case in Europe would not have brought any compensation to this family.

Allowing passengers to claim pain and suffering for delay, unless such delay results in unreasonable losses, such as loss of opportunity, seems to go a step too far. A flight delay is not a nice experience but it is one of the risks of air travel, and it is not always in the control of the airline. To punish airlines for something that might be external to them seems a bit harsh, because even if they will be able to rely on defenses such as *force majeure* or Act of God, which were not available under the CDC and will need to be interpreted by Brazilian courts, Brazilian courts will still grant non-economic damages. Brazilian courts seem not to differentiate between non-economic damages that are inherent to air travel and unreasonable losses. As Macara and Lima noted in relation to moral damages:

> In claims against airlines, the situation was exacerbated by the view (often held by the Brazilian judiciary) that air travel is a special experience for most people, often connected with an important business or family event, or a well-earned holiday. This resulted in moral damages habitually being awarded for all types of claims by passengers, including even minor delays.[93]

Lower courts will have to follow this new precedent according to the new Brazilian procedural code. This will bring relief to airlines flying international routes to and from Brazil as well as their insurers. Indeed, the CDC gives Brazilian judges jurisdiction to hear any case involving a Brazilian consumer, even if all the elements tend to favor another jurisdiction, according to Article 1. Unfortunately, the judgment does not resolve the high moral damages awards which are regularly made in addition to the limits established by the international Conventions and which substantially increase the amount of damages. The reason for maintaining the status quo on moral damages seems to flow from the fact that the Conventions do not provide any right to moral damages, while such right is enshrined in Brazil's Federal Constitution. It can be expected that the courts will continue to award moral damages of the same level against airlines, or even increase them to compensate for the limitation imposed on material damages by the STF.

b. *Projeto de Lei (PL) 6960 de 2010*

Given the complex situation, some members of the parliament have suggested some amendments to the Brazilian aeronautic law.[94] This proposed law (*Projeto de Lei* or PL) will apply to any cancelled or delayed flights leaving Brazil, as long as the delay is greater than two hours, and also to denial of boarding.[95] Article 229 establishes the various options airlines could propose to passengers as alternatives. For instance, paragraph IV refers to the obligation of reimbursement, while paragraph III relates to the possibility of using an alternative mode of transportation and being reimbursed the possible difference in price. Article 229(3) establishes that if a flight is cancelled, delayed, or the passenger is denied boarding at a connecting airport, the passenger can decide to return to his initial departure point at no cost and can ask for reimbursement of the ticket. In addition to the refund of the ticket, the

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[93] *Id.* at 507.
[94] Lei No. 7.565, de 19 Dezembro de 1986, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 20.12.1986 (Braz.).
[95] Código Brasileiro de Aeronáutica alterado, 07.12.2009, art. 229.

passenger is also entitled to compensation of 50 percent of the value of the ticket.[96] Even if the passenger chose another option available under Article 229, he is still eligible for the compensation of 50 percent of the value of the ticket. However, Article 230(1) limits the compensation if the airline proves: (I) the passenger knew about the cancellation at least seven days in advance; (II) the cancellation, delay, or denial was caused by *force majeure*, Act of God, or normal exercise of policy power; or (III) if the passenger opted for option I to III of Article 229 and arrived at his final destination not later than two hours after the initially contracted arrival time. This article is an equivalent to Article 5(1)(c) of Regulation 261/2004. Additionally, according to Article 230-B I, the passenger has the right to snacks, telephone calls, Internet access, or other communication means, proportionally to the waiting time, only for cancelled flights or in the case of denial of boarding for passengers with confirmed reservations. Carriers must also provide accommodations and means of transportation to and from the airport or to his home address if the passenger lives close to the departure place, in case of cancellation or denial of boarding for passengers with confirmed reservations.[97]

According to Article 230-A I, if the delay or cancellation was partially or entirely caused by another carrier, the latter is under the obligation to reimburse the carrier that compensates the passenger. If the delay or cancellation was partially or entirely caused by the authority in charge of the airport or airplane services, the carrier could offset the amount compensated from the fees it owes to that authority.[98] Finally, the carrier is required to inform the passenger of his rights.[99]

This proposal regulates the passengers' assistance and the obligations of the companies and is greatly influenced by the European Regulation. However, the PL is more rigid and grants more rights to passengers. For instance, the minimum time before a passenger could rely on the PL is shorter than under EU law. Similarly to the situation in the European Union, the concept of "delay" has not been defined in the proposed law itself. Unlike the situation in the EU, the proposed law takes into consideration the delay at departure and not the delay upon arrival. Consequently, flights that leave on schedule but arrive late would not result in any compensation to the passengers. The Brazilian proposal further establishes a category of delay that excludes several other situations leading to waste of time, inconvenience, and damages to passengers.

Unlike the European Regulation, this proposal does not provide any solution for flights that arrive in Brazil later than scheduled due to one of the situations listed in Article 229. This lacuna could cause problems and lead to disparate decisions in regional tribunals across Brazil. However, it is most likely that the courts would apply the same rules as for delayed flights departing from Brazil. Another major difference is that, under this proposal, airlines would be obliged to reimburse the price of the ticket and not compensate according to a fixed compensation formula. The Brazilian legislator took the view that passengers should be compensated for the inconvenience caused by cancelled or delayed flights, or denial of boarding. Such inconvenience does not depend on the value of the ticket but is left to the court's discretion, which could mean a high amount of damages. This approach is criticized,

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[96] *Id.* art. 230.
[97] *Id.* art. 230-B II.
[98] *Id.* art. 230-A II.
[99] *Id.* art. 230-D.

as the criterion of "value" poses problems in relation to the criterion of "price," certainly with regard to round-trip tickets and tickets acquired during a promotion.

A fixed amount based on objective criteria, as in the European Union, such as distance and time, could be regarded as more advantageous. However, it should not be forgotten that in the Union the price of the ticket is not reimbursed. In the case of my mother, she paid 650 euros for her tickets to Brazil. At best, under European law, she would receive 600 euros, leaving her with a 50-euro difference out of her pocket. In contrast, according to Article 229 in conjunction with 230, she would be entitled to 650 euros plus 325 euros, leading to a total of 975 euros. This is why, for this case, my mum should have been Brazilian. She would have received greater compensation and assistance.

If the PL is enacted, it would replace the actual framework. Cases such as *Ferreira* would no longer be compensated based on the assessment of the judge, but on objective criteria.

c. *National Agency of Civil Aviation (ANAC) Rules: Resolution 141/2010*

The National Agency of Civil Aviation (ANAC) Resolution of 2010, which lays down the obligations of the airlines, also defines passengers' rights in cases of delay, cancellation, or denial of boarding. It clarifies the rights and obligations applicable to regular flights departing from or within Brazil. This Resolution urges airlines to communicate with the customer about the alteration of schedules, through e-mails and telephone, if this alteration is known in advance. In case of problems occurring after check-in or when the passengers are within the airport facilities, airlines are obliged to provide assistance to passengers, similarly to what is imposed in Europe. When passengers are faced with delay, cancellation, or denial of boarding due to overbooking, aircraft change, or operational safety reasons, they are entitled to receive assistance involving catering, communications, and accommodations. This Resolution does not lay down the amount of compensation, but it stipulates that passengers may ask for rebooking or reimbursement. It also stipulates the fines if airlines do not comply with their obligations toward passengers. As such, this instrument is complementary to the CDC or the PL, by stipulating how a passenger should be treated in cases of delay or cancellation, and what types of compensation must be offered. If the passenger feels that the situation he faced requires higher compensation, then he can sue under the Montreal Convention or the CDC. The Resolution, therefore, applies before or when the passengers are at the airport. The measures contained in the Resolution have been created pursuing a similar aim as in the European Union: to minimize passengers' discomfort while waiting for a flight, but above all to fulfill their needs.

Unlike the European Union, the Brazilian system obliges the carriers to provide assistance gradually according to the waiting time. The time starts counting from the moment of the delay, cancellation, or denial of boarding. The system starts after one hour and requires airlines to provide means of communication, such as Internet, telephone calls, or others to the passengers. This is a drastic difference between Brazil and the European Union, as under EU law assistance only starts after three hours. After two hours, catering should be offered, which needs to include at least water and snacks, or voucher, etc. After four hours, passengers should be taken to another facility, or even provided accommodations. The transportation to and from the site of the accommodations is at the airline's expense. If the passenger resides in the city where the airport is located, the airline may only offer transportation between the

passenger's residence and the airport. For cancelled flights and denial of boarding, the airline must offer the passenger the options of re-routing or refund. Delayed flights exceeding four hours also entitle the passenger to re-routing or refund. The required assistance is independent of whether the passenger is inside the aircraft or not. However, airlines may suspend the assistance in order to immediately initiate boarding procedures.

The obligations under the Resolution should not be taken lightly by airlines. Indeed, noncompliance with the ANAC Resolution can generate a fine between R$4,000 and R$10,000.

i. Cancellation

According to the rules provided by ANAC, in case of cancellation, the passenger is entitled to a full refund, including airport charges. Airlines are not obliged to assist the passenger after the refund is granted. If the cancellation occurs at a connecting airport, on top of refunding the passenger, the airline is required to ensure that the passenger returns to the airport of origin at the airline's expense. The airline is obliged to offer assistance rebooking a flight at any date of convenience for the passenger in order to be relieved from its obligations. Passengers might also want to stay at the connecting location and request the refund for the unused portion of the trip. When passengers take one of these options, the airline is relieved from its duty to assist them.[100]

If the passengers decide to pursue their journey, the airline needs to provide assistance. That the passengers are booked on the next flight to the same destination by the same airline or the flight is operated by another carrier does not change the obligations of the airline. Similarly, if the passengers decide to terminate their trips by another means, such as taxi, bus, etc., the airline will still be required to provide assistance. The ruling in *Rodríguez v. Air France*[101] – denying the passengers' claims for "further compensation" to cover the price of their accommodations – would not have been allowed under Brazilian standards.

ii. Delay

Delay of over four hours entitles passengers to request refund or re-routing. Airlines have to reimburse the full price, including airport charges, even if the passenger is in the airport and made use of it. If the delay occurs at a connecting airport and the passenger opts for a refund, the airline is required to provide a full refund as well as ensure that the passenger returns to the airport of origin at the airline's expense. Airlines are obliged to rebook the flight at any date of convenience for the passenger. Passengers might also want to stay at the connecting location and request a refund for the unused portion of the trip. When passengers choose one of these options, the airlines are relieved from their duty to assist them. However, if the passengers decide to pursue their journey, the same obligations apply as for cancellation.

This assistance is dramatically more burdensome on the airlines than in the European Union. Under the Brazilian system, airlines bear the risks inherent to their activities by placing the balance of power at the middle. In cases of delay, the passengers are offered various options, giving them the power of decision over their trips. This option is not provided in the EU Regulation.

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[100] Similar to the obligation found in the draft law.

[101] *See supra* note 69.

Interestingly enough, when airlines are under the obligation to refund, even in cases of cancelled flights or denial of boarding, the refund needs to be in accordance with the payment method used to purchase the ticket. If the payment was done through credit card in installments, the refund must be done in accordance with the credit card company's rules. However, all of these arrangements, whether related to payment in cash, check, or with a credit or debit card, should be effectuated immediately. The passenger might opt for miles instead of a refund.

iii. Extraordinary Circumstance

Under Brazilian law, airline companies do not have the opportunity to use the defense of "extraordinary circumstance," as it is not recognized. Contrary to the situation under the European Regulation, strikes by workers in Brazil do not release airline companies from their obligation to pay.[102] Only Acts of God or *force majeure* are accepted as defenses. In other words, unless the air carrier can prove that the situation could not be avoided and that it took all necessary and reasonable measures, or that it was impossible for the carrier to take such measures, which is similar to the defenses embodied in the Conventions, the carrier will be liable. However, such defenses are rarely successful in Brazilian courts. Therefore, consumers in Brazil are almost certain to be compensated.

In my mother's case, the airline could not have relied on any defenses and would have been obliged to pay. The damages would not have been limited to 600 euros but would be the price of the tickets plus 50 percent of the price of the tickets and other moral damages that she could claim. The amount is hard to establish but one thing is certain: my mum would have been better off if she was Brazilian!

4. *Conclusion*

The European and Brazilian systems are in some ways similar but the amount of compensation is diametrically opposed. As much as the European Regulation provides legal certainty for the airlines, the airlines have not stopped using and abusing the defenses granted by the Regulation, to a point where the Court of Justice renders more severe decisions every time, in its effort to stem the erosion of passenger rights. On the opposite side, Brazilian courts have protected consumers to an extent that put into jeopardy the legal certainty of the airlines, due to high moral damages and limited defenses. Depending on the side that you are adjudicating, one system will look more advantageous than the other. In the case of my mother, I wish she was Brazilian, or at least had bought her tickets in Brazil. Even though the amount of compensation to which she would be entitled is hard to establish, one thing is certain: she would have been better off, as *Guzzi da Luz* demonstrated.

The Court of Justice of the European Union is having greater influence on shaping passengers' rights, but in this "war" it seems that the airlines are a step ahead. Airlines are not respecting the judgments of the Court and unless more cases are filed and reach the Court, the situation will not change. Of course, the best option would be to create a new piece of legislation in which the contradictions and vagueness of Regulation 261/2004 are suppressed. At the same time, if ever a new piece of legislation is enacted, the pressure from the airlines will be so important that the new provisions will probably be written in their favor. At the end

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[102] *See, e.g.*, Carvalho Dantas v. Transportes Aéreos Portogueses S.A., T.J.D.F., Ap. Civ. No. Juizado Especial ACJ 20080110035572 DF, Relator: José Guilherme de Souza, 04.12.2008 (Braz.).

of the day, passengers will be required to pay more while airlines will more easily refuse compensation.

The representatives of major airlines make Regulation 261/2004 and the judgments sound extremely harsh, but under the general rule of contract law, passengers are required to pay while airlines are obliged to carry them for the specific routes and durations contracted for. Whenever a flight is delayed or cancelled, the company defaults on its obligations. Of course, some defenses are available, but it seems that the exception became, in fact, the rule. Airlines have seemingly changed the balance of power in their advantage. This is exemplified by the fact that whenever a technical problem occurs when buying a ticket leading to an increase in a flight's price, passengers have no recourse and no other choice than to buy a more expensive ticket. If a passenger tries to argue that the lower fare should apply because of the technical problem, the airline will probably answer to the effect that "I am sorry but there is nothing I can do." This begs the question of why can airlines default on their obligation and escape compensation.

The approach endorsed by airlines obliged the CJEU and national courts to try to protect passengers as best as they can. Recently, the Italian Supreme Court ruled that the burden of proof in cases of cancellation or delay lies with the carrier because it has unconditioned access to flight records. Brazilian courts are, in this regard, far ahead with consumers extensively protected by the CDC and still allowed to claim moral damages on top of the Montreal Convention's damages. The extensive protections could even be regarded as putting in jeopardy the principle of mutual recognition. Allowing passengers to claim pain and suffering for delay, unless such delay results in unreasonable losses, such as loss of opportunity, seems to go a step too far. Flight delays are part of the risks of air travel, and they are not always in the control of the airlines. Interestingly enough, airlines seem to fear Brazilian courts more than they will probably ever fear the CJEU, as they know that in Brazil they will not be able to escape their liability as is done in Europe. Taking the example of my mother, under the European Regulation, because the airline refused to compensate her, her only chance is to go to court and hope the case reaches the CJEU in a reasonable amount of time. But even if the case reaches the CJEU, she still has no certainty that the case will be judged in her favor. If she was Brazilian, she would have gone to the small claims court and would have been compensated a greater amount than under European law. Furthermore, the assistance that the airline would have been obliged to give her under ANAC rules would be more extensive than in Europe. For all these reasons, I wish my mum was Brazilian, or that the EU would follow a more Brazilian approach by limiting the defenses available to air carriers.