

# Non-patrimonial damages in air transport and **judicialization** in Brazil

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18<sup>th</sup> International Association of Consumer Law Conference

**Hamburg**



# Introduction

The Covid-19 pandemic severely affected aviation around the world. Aiming to aid airlines, the Brazilian government adopted emergency measures through provisional measures (President of the Republic) and resolutions (Brazilian Civil Aviation Agency - ANAC).

## MAIN GOALS

- To mitigate the impacts of the pandemic on the aviation sector;
- To ensure cash flow relief for airlines;

## MAIN PROBLEM

- Through these temporary measures, permanent changes in the Brazilian Aeronautical Code (Law n. 7,565/1986) related to non-patrimonial damages have permanently modified the right to redress moral damages

## OUTLINE:

- I. The emergency measures
- II. Non-patrimonial damages and judicialization

# I. The emergency measures

## 1. Resolution n. 556 from ANAC (Brazilian Civil Aviation Agency):

- (a) Longer deadline for prior communication to the passenger about programmed changes
- (b) Longer deadline to answer the passengers' demands
- (c) No longer required to offer flight with another airline
- (d) No longer required to provide material assistance
- (e) No longer required to offer travel by another means of transportation

**Effectiveness:** flights from February 4<sup>th</sup>, 2020, to March 31<sup>st</sup>, 2022.

## 2. Provisional Measure n. 925 (March 18<sup>th</sup>, 2020)

- **The goal:** to promote an immediate relief in the cash flow of the aviation sector enterprises
- **Main measure:** the deadline for airfare refund was increased **from 7 days to 12 months.**
- **Effectiveness:** flights purchased until December 31<sup>st</sup>, 2020



## The Law n. 14,034 (August 5<sup>th</sup> , 2020)

- **The goal:** to regulate emergency measures to mitigate the effects of the Covid-19 pandemic crisis on Brazilian civil aviation.
- **Main measure:** the law keeps the airfare refund deadline to 12 months from the flight cancellation.
- **Effectiveness:** flights purchased from March 19<sup>th</sup>, 2020, to December 31<sup>st</sup>, 2020

The “Tortoise” amendments (Emendas Jabuti): include a topic unrelated to the original text

Although the law continues to regulate emergency and **temporary measures**, amendments introduced **permanent changes** to the Brazilian Aeronautical Code:

- New hypotheses of force majeure that exclude airlines’ liability
- **Non-patrimonial damages:** the compensation for non-patrimonial damages due to fault in the execution of the transportation contract is conditioned upon the demonstration of the **effective occurrence of the damage** and its **extension** by the passenger.



“Tortoise doesn't climb trees. If it is there, it was either a flood or the action of people”.

# II. Non-patrimonial damages and judicialization

## 1. Judicialization (= excessive litigation)

- The number of lawsuits filed by passengers in Brazil is higher than in other countries.
- There is a belief that there is a "moral damage industry"
- **Numerical comparisons:** "Taking three major airlines headquartered in the United States that also operate in Brazil, in 2019 the United States saw approximately one lawsuit for every 1.25 million passengers. In Brazil, there was one lawsuit for every 227 passengers".

## 2. The Vulture Websites ("sites abutres") = ambulance chasing / predatory activity

- Some websites capture clients by specializing in lawsuits for moral damages against airlines
- "In Brazil litigation against airlines has become a '**judicial commodity.**' Essentially, opportunistic companies started to foster litigation by purchasing indemnity rights from passengers and suing airlines for a profit or engaging in association with plaintiffs to sue and get a piece of the compensation"



## The formal explanation

"We understand the relevance of [...] partially welcoming the proposal submitted by the Ministry of Infrastructure that introduces in the Brazilian Aeronautical Code [...] a clearer definition on the purpose of compensation for non-patrimonial damage. [...] Thus, I support the reasons that justify the ministerial proposal, recognizing that one of the main criticisms of the current business environment is the excessive judicialization of consumer relations. [...] I reinforce, therefore, the conviction that the suggested change will contribute to the improvement of the business environment of the airline sector in the country [...]"

(the bill's rapporteur in the House of Representatives).



## I. The mere complaint or lawsuit cannot be viewed negatively

- The consumer has the right to seek redress.
- The consumer is recognized by the Brazilian legal system as **vulnerable** in the consumer market
- The **State** must protect the consumers (State = legislative, executive and judiciary powers)
- The law cannot be designed to prevent consumers from filing lawsuits

## II. The mere statistical comparison between countries is ineffective:

- It disregards historical and cultural aspects and singularities of each country
- It is not the best comparative law technique

## III. The extraordinary situation increased the number of consumer complaints

Period	Complaints filled against air carriers	Complaints for each 100,000 passengers
From <b>January to December 2019</b>	45,396	38.5
From <b>October to December 2020</b>	17,576	114.3
From <b>October to December 2021</b>	23,900	129.1
From <b>October to December 2022</b>	22,304	85.1



# Conclusions

- The tortoise amendment is inappropriate. It should not have been included permanent changes in a law that regulates exceptional measures arising from Covid-19. Also, this amendment was design to prevent consumers from filing lawsuits
- The consumer has the right to complain when he/she understands that his/her rights have been violated and this cannot be seen as wrong. It is a right guaranteed by the constitution and the State has a duty to protect the consumer
- The amendment try to avoid the **consequence** (lawsuits) without understand and analyze the **cause** (the reasons that lead to the filing of lawsuits)
- **More actions may be filed with the aim that the Judiciary interprets the legislation in an integrated manner (dialogue with the Consumer Protection Code) in order to protect the interests of passengers.**



Thank you!

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