



CONSUMER LITIGATION AND PASSENGER ASSISTANCE RULES IN AIR TRANSPORT IN BRAZIL

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Abstract

This article examines the consumerist judicialisation of air transport in Brazil compared to the United States, quantifying its impact on the Brazilian airline industry and economy. It discusses relevant legal and regulatory issues and evaluates their effects as triggers of lawsuits, which have typically been won by consumers. Further, it explores the resulting legal uncertainty, along with the Brazilian legal environment's transaction costs in the sector under the institutionalist school perspective. As no public statistics are available in Brazil, the United States or elsewhere, this study quantifies disparities in Brazil regarding the global sectorial scenario by using the number of complaints per 100,000 passengers boarded. In addition, onerous airline obligations in passenger assistance law are applicable in situations beyond the airline's control, such as flight delays for meteorological reasons or as determined by airspace control.

The study proposes the following short-term measures to mitigate the problem: the creation of minimum barriers to access to justice; the criminalisation of the illegal exercise of the legal profession; the elimination of specialised judicial courts at airports; and changes of jurisdiction.

Keywords

Consumerism, Judicialisation, Air Transport

1. Introduction

Conflicts between consumers and airlines are a universal problem, significantly affecting the latter's operating costs and the industry's legal uncertainty. Alongside flight delays and baggage handling problems, extraterritoriality is one of the main problems in the airline-consumer relations. Thus, '[o]n many international journeys, it is difficult to know what rules apply. Over 60 countries have their own consumer protection regulations - and they aren't coordinated with each other. In fact, on one itinerary, as many as three different passenger rights regimes may be in effect. Passengers and airlines should be clear on what entitlements apply in any given situation. Not only is the current situation confusing, but it's also expensive (International Air Transport Association, IATA, 2023).

On the other hand, the scale of consumer litigation against airlines in Brazil is one of the largest – if not the largest – worldwide. The volume of lawsuits stems from rampant litigation in Brazil in this sector. The size of the problem is startling: according to the IATA's Executive Director in Brazil, Dani Oliveira, '[o]f every 100 international flights between Brazil and the U.S., 79 will be sued' (2020). However, to date, no exhaustive study has been conducted concerning such litigation's causes, implications and actual dimensions. To this end, the present article seeks to analyse these aspects and propose corrective actions by the competent authorities.

According to the Organisation for Economic Co-operation and Development (OECD, 2003), 'transaction costs refer to the costs involved in market exchange. These include the costs of discovering market prices and the costs of writing and enforcing contracts. Part of airlines' transaction costs is assumed

herein to be the indemnities they owe to passengers in Brazil. Other transaction costs correspond to maintaining numerous lawyers to manage this avalanche of lawsuits and the related procedural costs, whose tangibility is challenging to assess. At the same time, contradictory court decisions for identical cases in the airline industry in Brazil (Azambuja, 2021) create an environment of legal instability that inhibits the arrival of new entrants and reduces competitiveness in this sector. Ultimately, this has a deleterious effect on the Brazilian economy.

The topic's relevance stems from the low profitability rates of airlines, whereby a difference of just a few percentage points in operating costs can severely affect the rate of return on invested capital. One or two percentage points in total expenses represent about 10 per cent of operating income (IATA, 2020).

2. Rationale

By approaching human behaviour in a multidisciplinary and transversal way, the New Institutional Economics (NIE) offers valuable theoretical tools to understand issues related to conflicts between individuals and the organisations that make up society. Assuming that everyday social life takes place in a massive coexistence between movements of cooperation and conflict between social actors (whether organisations or individuals), it is easy to see that social life can only survive if there are rules to regulate it. According to institutionalists, these norms (both formal and informal) are the 'rules of the game' that govern social behaviour and are called 'institutions' (North, 1990). In addition, the functioning and stability of these institutions are ultimately guaranteed by the State through its powers (executive, legislative and judicial, for example) in its different spheres of government (federal, state and municipal, for instance).

On the other hand, economic transactions do not occur without inherent costs, as neoclassical economists assume. These include the costs of obtaining information to carry out transactions and the related costs of ensuring that contracts between parties are respected (Williamson, 2002). Such hidden costs do not add value to the final product and often assume significant proportions. It follows that an economy is more efficient if its transaction costs are lower.

Another crucial element shaping the NIE approach is Coase's (1937) critique of the neoclassical point of view in his seminal article 'The theory of the firm', specifically that Adam Smith's 'price theory' fails to interpret the real-world economy effectively because it does not consider transaction costs. In this way, the NIE combines a theory of how institutions work with a view of transaction costs.

Nevertheless, despite some essential quantitative work, such as Wallis and North's (1988) 'Should transaction costs be subtracted from the gross national product?', the NIE approach has been criticised for lacking quantitative treatments. In this sense, analysing the behaviour of air transport consumers (in this case, excessive litigation) from a neo-institutionalist perspective presents a unique opportunity, given that industry data and information are comprehensive and relatively standardised in many countries in their operational, statistical and financial aspects. In this sense, the United States and Brazil are at the forefront of structuring the air transport sector in several aspects, including the public availability of complete and qualified data and information.

3. Methodology

The discussion developed in this article is based exclusively on the collection of public and official data on passengers' air transport service litigation, generally through consulting official websites. Our assessment of the level of consumer litigation in the sector is based on the number of passenger complaints registered with consumer protection agencies per 100,000 passengers transported on domestic and international flights in a given period. This indicator is used worldwide and is justified because there are no statistics on lawsuits against airlines involving consumer relations.

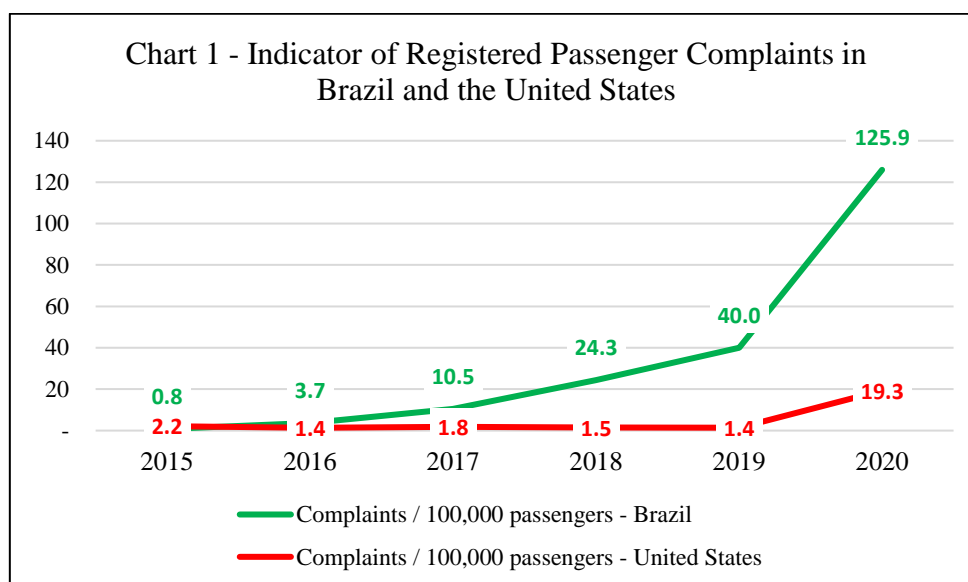
For comparison purposes, we applied the same indicator to air transport markets in Brazil and the United States. We chose these two countries because both are very large in terms of transported passengers and for both, copious amounts of data are accessible. Additionally, significant similarities exist between the characteristics of the industry in the two countries, whether from a technical-normative point of view or in terms of in-flight operations (types of equipment used, flight distances, the relative importance of the domestic and international segments, to name only a few aspects). These elements allowed us to assess the magnitude of consumer litigation in the sector in Brazil compared to international standards.

We analysed the statistics considering the published testimonies of renowned Brazilian jurists. At the end of this article, we make proposals elaborated on these jurists' evaluations (referenced below). We also address the peculiarities of Brazilian legislation regarding service provision failures and the respective penalties imposed on airlines. From a methodological point of view, this study can be classified as a document analysis involving explanatory, applied and qualitative-quantitative research.

4. Complaints filed by passengers in Brazil and the United States

The charts below show the disparities in the number of complaints registered per 100,000 passengers to board flights in Brazil and the United States, including domestic and international flights provided by national and foreign airlines (National Civil Aviation Agency, ANAC, 2021a; National Consumer Secretariat, 2021; U.S. Department of Transportation, 2021). As can be seen, this indicator's values are much higher in Brazil than in the United States and are rising. As expected, they rose significantly in 2020 due to the impact of the COVID-19 pandemic on airlines' operations.

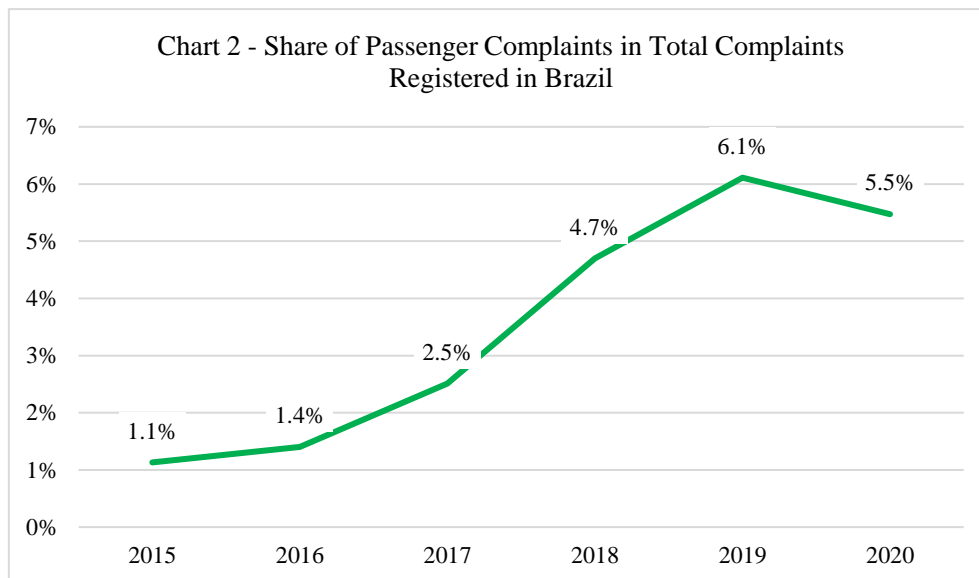
Moreover, according to a survey carried out by the Brazilian Association of Airlines (ABEAR, 2021), the complaint indicator values registered in Brazil covering passengers on board North American airlines are identical to the total onboard passengers for the sector in Brazil and differ substantially from those reported by the same airlines in the United States. This finding suggests that the differences in the indicator values in Brazil and the United States are not due to the companies per se, but rather to differences between the institutions concerning consumer relations in the two countries.



Note: Includes claims made in the respective countries on domestic and international flights operated by local and foreign airlines.

Sources: SENACON, ANAC, U.S DOT.

It is crucial to investigate whether Brazil's high number of consumer complaints is a generalised issue or a particularity of air transport. However, when assessing Chart 2 below, one can see that airlines have been a preferential target of consumer complaints, considering that their proportion of the total observed in Brazil is increasing: the share of complaints against airlines filed with consumer protection bodies rose from 1 per cent to 6 per cent between 2015 and 2020.



Note: Includes passenger complaints made in Brazil on domestic and international flights operated by Brazilian and foreign airlines.

Source: SENACON

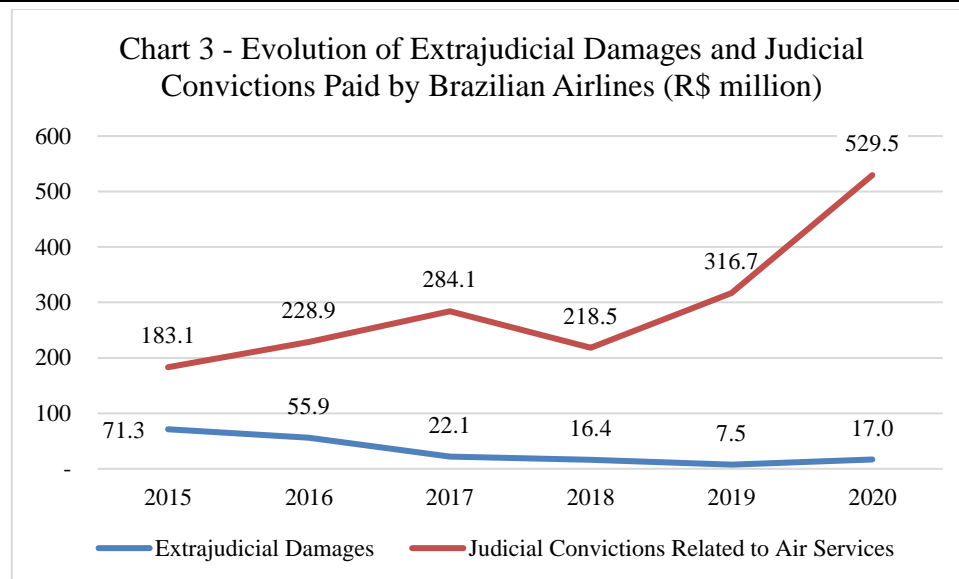
5. The economic impact of passenger complaints in Brazil

While the high incidence of passenger complaints in Brazil is undeniable, it remains to be seen whether this phenomenon is relevant to the sector's operating costs and expenses. It is important to note that approximately half of the complaints are resolved through agreements between the parties. However, there are no published financial statistics on the corresponding values individualised by each company and by domestic or international segment. Furthermore, there is no consolidated information in Brazil concerning where passenger lawsuits were judged and the outcome of individual cases. Thus, one can only determine airlines' losses by analysing their financial statements. Therefore, foreign airlines are excluded from the compilation.

From 2015 to 2020, Brazilian airlines made a net loss of around R\$31.9 billion, equivalent to 15.2 per cent of their total costs and operating expenses. Of the total costs and operating expenses of R\$209.9 billion in the same period, approximately R\$1.8 billion (equivalent to almost 1 per cent of the total amount) corresponded to legal convictions arising from the provision of air services, not including administrative expenses represented by outsourced employees and lawyers, among others (ANAC, 2021b). It is reasonable to assume that these indirect expenses are enormous because, in the period studied, about 159,000 complaints were recorded by the National Consumer Secretariat (SENACON). Indeed, not all lawsuits filed have previously passed through the government agencies of consumer defence. At the same time, the extrajudicial indemnities made to passengers under the current legislation (mainly loss and damage of luggage, accommodation of passengers) from 2015 to 2020 represented R\$190.2 million, equivalent to 0.1 per cent of the total costs and operating expenses of Brazilian airlines.

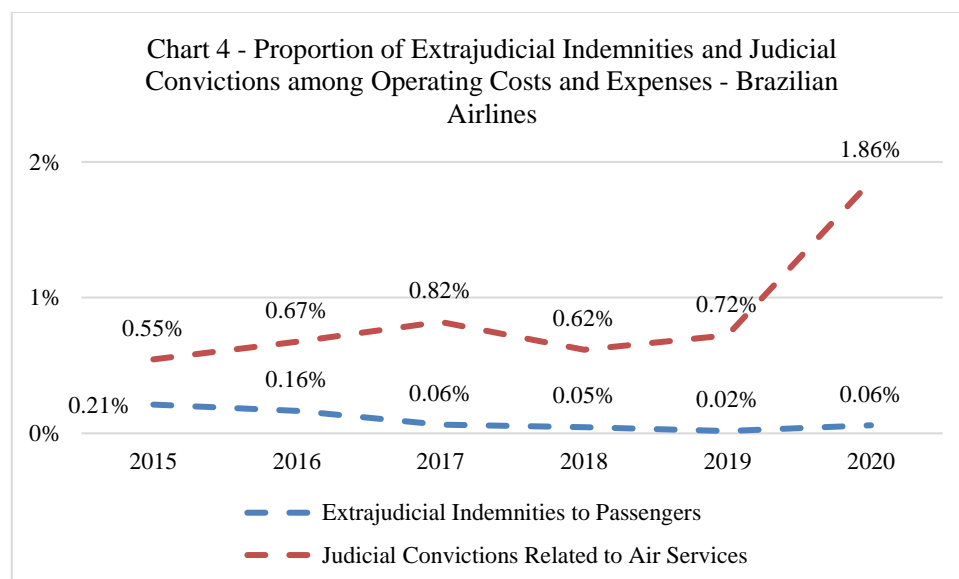
Chart 3 shows the sum of extrajudicial damages and judicial convictions paid by airlines, which rose from R\$254.4 million to R\$539.5 million between 2015 and 2020. Interestingly, the value of extrajudicial damages paid in the same period dropped substantially, the opposite occurring with the amount paid to correspond to judicial convictions.

The discrepancy between the absolute values and the corresponding trend suggests that the leading cause of this phenomenon is claimants' increasing willingness to access the judiciary. Claimants lose nothing if their claims are unsuccessful. It should be noted that in the case of a court decision being unfavourable to the consumer, no expense is attributable to the claimant because Brazilian legislation prohibits the collection of procedural costs from the consumer in the case of consumerist claims. Thus, in these cases, the current legislation makes society pay by maintaining a gigantic and onerous judiciary out of the public coffers.



Source: ANAC

Chart 4 shows that airlines' costs have been increasingly affected by judicial convictions in consumer lawsuits, reaching 1 per cent on average during the analysed period. Thus, a large part of the productivity gains of Brazilian airlines – understood as national economic organisations – is transferred to plaintiffs, and to the public bureaucracy applied to these processes. In other words, transaction costs are pressured, reducing the efficiency of the national economy.



Source: ANAC

6. Sectoral rules determined by the Brazilian aeronautical authority regarding passenger assistance

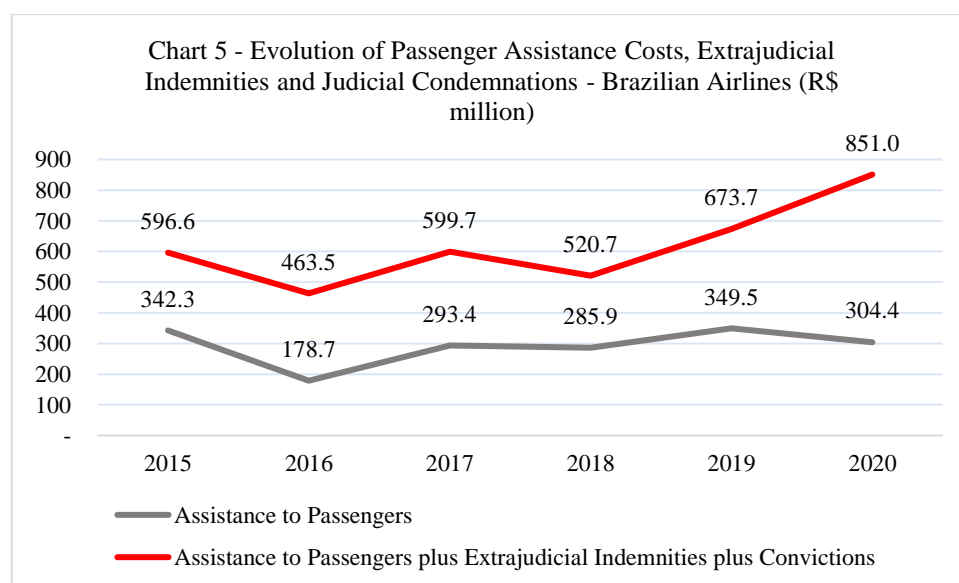
One of the legal acts covering the rights and duties of passengers of regular passenger air transport and airlines in Brazil is ANAC's Resolution No. 400 of 13 December 2016 (which became effective on 14 March 2017). Throughout its 45 articles, Resolution No. 400 details the duties and obligations of the contracting parties. In the body of this Resolution, there is a single provision that distinguishes the air transport of passengers on international and domestic flights. Thus, Article 32, §2, II refers to the deadlines for returning lost luggage (21 days on international flights and seven days on domestic flights). There is a wide window for decisions by judges unaware of international law, which conflicts with Brazilian law and prevails over it because the international agreements signed by Brazil are only subordinated to the Federal

Constitution. Resolution No. 400 refers to Resolution No. 434 of 27 June 2017, regarding the establishment of fines for non-compliance with Resolution No. 400. It transpires that the penalties provided by Brazilian legislation are much higher than those applicable under international law. As one can see, this is yet another source of enormous uproar, negatively affecting the transaction costs of airlines operating in Brazil.

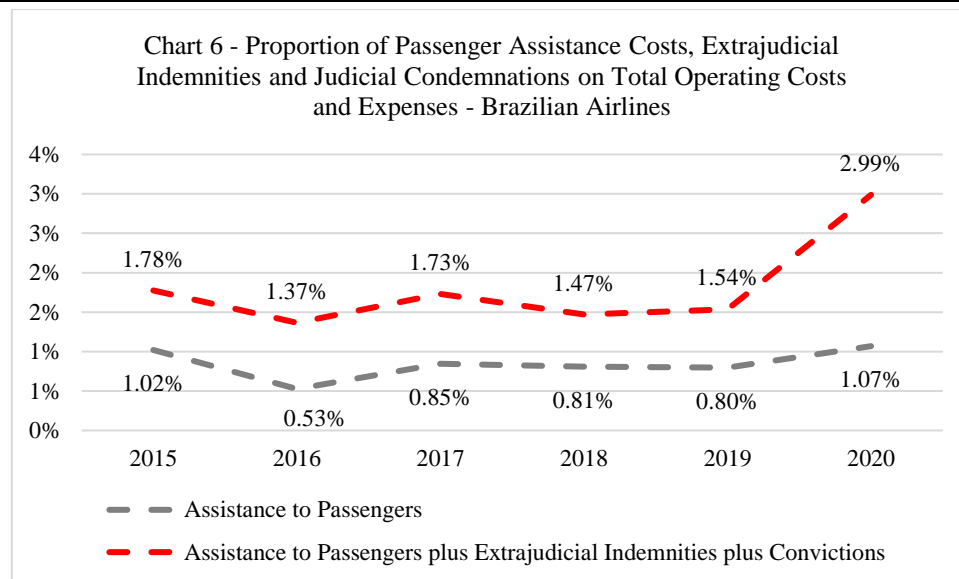
One of the paradoxes of Resolution No. 400 concerns the obligations imposed on airlines regarding flight delays, even when the determining circumstances are beyond the carrier's control, such as bad weather, closure of the origin or destination airport and air traffic. In turn, all these issues increase production costs and – where they generate legal disputes – transaction costs for the airline industry.

7. The economic impact of the obligations of the general conditions of transport for the airlines

Considering the above discussion about the existence of regulatory conflicts and contradictions in Brazil, it is crucial to ascertain the economic impact on Brazilian airlines. The cost of passenger assistance services carried out between 2015 and 2020 amounted to approximately R\$1.8 billion for Brazilian airlines (equivalent to 0.8 per cent of their total operating costs and expenses). Adding the cost of extrajudicial damages and judicial convictions to the passenger assistance charges, Brazilian airlines' costs reached a figure of R\$3.7 billion, corresponding to 1.8 per cent of their total operating costs and expenses during this period. It is important to note that these costs escalated significantly in 2020, the year in which commercial aviation was hit severely by the COVID-19 pandemic, an event that was of course totally beyond its control. Charts 5 and 6 illustrate this argument.



Source: ANAC



Source: ANAC

8. Consumer litigation involving air transport in Brazil

Complaints records do not constitute records of disputes, given that – as mentioned above – they represent alternative indicators of litigation in the absence of systematised information on the number of conflicts generating economic losses and legal uncertainty. However, occasional surveys confirm the existence of a disproportionate amount of litigation involving consumers and airlines in Brazil compared to the rest of the world. In this sense, IATA (2021) has compiled data on its members that operate in Brazil and the United States – American Airlines (AA), Delta Airlines (DL) and United Airlines (UA) – resulting in Table 1.

Table 1 - Lawsuits related to passengers compared with respective traffic in the United States and Brazil: American Airlines (AA), Delta Airlines (DL) and United Airlines (UA)

Brazil (AA, DL, UA)	2017	2018	2019
Flights taken	7,263	7,300	5,913
Carried PAX	2,757,432	2,800,698	2,549,978
Lawsuits	7,797	9,044	11,225
Lawsuits/flight	1 per 1.1	1 per 1.2	1 per 1.8
Lawsuits/PAX	1 per 353	1 per 309	1 per 227
USA (AA, DL, UA)	2017	2018	2019
Flights taken	4,021,779	4,180,050	4,338,321
Carried PAX	397,754,000	413,407,000	429,060,000
Lawsuits	353	368	342
Lawsuits/flight	1 per 13,393	1 per 11,358	1 per 12,685
Lawsuits/PAX	1 per 1,126,780	1 per 1,123,388	1 per 1,254,561

Note: PAX means carried passengers.

Source: IATA and Bernardi & Schnapp Advogados (2021)

Although provided for by law, it is noteworthy that the consensual solution to conflicts is seldom applied in Brazil, generating enormous congestion in the judiciary as well as transaction costs that harm the country's economy. Thus, the Civil Procedure Code of 2015 expressly provides in paragraph 3 of Article 3 the duty of lawyers, public defenders, members of the Public Ministry and judges to encourage alternative methods of conflict resolution during the judicial process, including through negotiation, self-composition, conciliation, mediation and arbitration (Reis, 2021). However, less than half of consumer complaints against airlines were resolved within the scope of PROCON (the government consumer protection system in Brazil) (see Table 2 below), the most likely reason being the absence of economic risk for the consumer of losing the lawsuit.

Table 2 - Proportion of resolved and unresolved closed complaints made against airlines

Complaints	2018	2019	2020	2021
Resolved	47%	51%	43%	39%
Unresolved	53%	49%	57%	61%

Note: This does not include claims whose closure has not been evaluated.

Source: SENACON

We have exhaustively highlighted the excess of litigation involving air transport passengers in Brazil compared to in the United States. This discussion has two aspects: the legislation applicable to the sector and the judicial interpretation frequently adopted in consumer–airline conflicts. It is necessary to establish a connection with the formal and informal rules, traditions and customs prevailing in Brazil concerning the providers of air transport services.

The general legislation applicable to consumer conflicts in the air transport of passengers is the Federal Constitution of 1988, the Consumer Defence Code (CDC) (Law no. 1986, as amended by Law 14034/2020), the Civil Code (Law No. 10,406 of 10 January 2002, and amendments), the Montreal Convention (enacted by Decree No. 5,910 of 27 September 2006) and Resolution No. 400 of ANAC of 13 December 2016 (Starling, 2021).

It so happens that these legal provisions have conflicting devices, giving rise to many disputes. Important legal antinomies have emerged from the enactment of the Consumer Protection Code. First, there was a lack of clarity regarding which legislation should prevail in the case of air transport in terms of the provision of international conventions to which Brazil is a signatory or the Brazilian legislation regarding consumer relations. Second, it is necessary to know whether the same legal provisions are uniformly applicable to international and domestic flights. Third, it was unclear how Brazilian and international legislation would apply to property issues (mishandling baggage, for example) and off-balance sheet issues (moral damage, for example) as well as how to characterise them (Starling, 2021).

Additionally, there is the problem of dealing with the general lack of knowledge concerning specific international legislation (federal scope) of state judges who are in the first instance responsible for judging consumer cases (Azambuja, 2021; Rêgo, 2021; Starling, 2021). How one can overcome the protectionism of the CDC granted to passengers remains to be seen, considering magistrates' general lack of familiarity the operational characteristics of air transport. Finally, it is unclear how one can prevent opportunistic law firms from taking advantage of the history of decisions favourable to passengers and the lack of sanctions for the claimant, generating unreasonable claims (Rêgo, 2021; Souto, 2021).

To date, only parts of the issues raised above have been resolved. Among them is the one referring to the applicability of international legislation to cases involving property losses on international flights (mishandling baggage, for example).

Thus, jurisprudence in Brazil has evolved. It was only in 2017 that the Federal Supreme Court (STF) established a binding rule. Soon after, this was accompanied by the Superior Court of Justice (STJ), which determined that cases involving property issues on international flights would be governed by international legislation. Given that even the Montreal Convention is silent about causes of moral damage, these have been referred to the Brazilian legislation. On the other hand, property claims have been directed to international or Brazilian law where they involve domestic or international flights, respectively. At the same time, the creation of small claims courts, which cover most disputes between air carriers and consumers, has enabled unhindered access to the judiciary, with most of these cases closing with convictions of airlines (Bartijotto, 2021).

Furthermore, specialised courts at airports, combined with behavioural factors of the first-degree judiciary mentioned above, make it easier for the consumer to initiate a lawsuit than to settle with the air carrier. It is worth remembering that the installation of these courts at airports dates to 2006 when the Brazilian airport infrastructure collapsed (an occurrence called 'air blackout') and is no longer justified today (Bartijotto, 2021).

Another incentive for judicialisation was the first-degree courts' habitual granting of compensation for moral damages with pedagogical or punitive characteristics. The judges took these decisions independently of any practical demonstration of the damage (IATA and Bernardi & Schnapp Advogados, 2021). Although this practice was considered unlawful by the STJ in a decision of 27 August

2019 in Special Appeal 2018/0166098-4, it continued to be adopted by the lower courts until it was prohibited temporarily by law No. 14,034 of 5 August 2020 (Chini, 2021).

The participation of opportunistic law firms often takes the following form. Knowing that its clients will almost certainly win their lawsuits and, in the case of non-conviction of the airlines, there are no sanctions of any nature, the firm can buy the rights of its clients in cash, while the sponsoring offices absorb the proceeds of the won cases. Sometimes law firms in this segment charge fees above those stipulated by the National Bar Association (OAB). According to Bartijotto (2021), ‘33 companies and 172 lawyers in this segment [...] distributed more than 17 thousand lawsuits against airlines between 2020 and 2021’.

At the same time, within regard to LATAM Airlines, 85 per cent of lawsuits filed by passengers in Brazil are won by the claimants (Bartijotto, 2021). This fact configures a bias in the judiciary that is consistent with the view that the state must protect the weakest, supposedly the consumer. Incidentally, this approach predominates in the Labour Court, where the employer has very rarely won a case in the first instance. In the case of air transport, it escapes decision makers that operating costs and expenses of all kinds are added to the prices of air tickets paid by all consumers. In other words, once again, it is the society that pays for unrestrained litigation.

9. General conditions of transport that affect airlines in Brazil

The voluminous set of obligations imposed by the legal apparatus on Brazilian airlines, whether specific to the sector (ANAC’s Resolution No. 400) or applicable to consumer relations in general (CDC), set the gateway to the litigation processes discussed above (Albuquerque, 2021). ANAC’s Resolution No. 400 of 13 December 2016 establishes a series of obligations and penalties for incumbents providing air transport services. Most of these obligations and penalties follow the standards determined by the Montreal Convention and are extended to domestic flights by not being distinguished from international flights.

Section III of Resolution No. 400 (‘On Material Assistance’) establishes airlines’ obligations in the case of a flight delay, flight cancellation, service interruption, or passenger deferral. However, Resolution No. 400 makes no distinction in its application between non-conformities that occur during trips under the carrier’s responsibility between the responsibility of other entities participating in the air transport system. Thus, if a flight delay is caused by weather or air traffic problems (beyond the airline’s control), its treatment is similar to a delay caused by factors within the scope of the operator’s management, such as maintenance problems and lack of crew. *In extremis*, an airline may be sued for moral damages by a passenger who missed an appointment due to a flight delay caused by the aeronautical authority’s temporary closure of an airport. Such situations are far from uncommon in day-to-day commercial aviation.

It is important to note that the Brazilian judiciary has only reacted to the excessive consumerist litigation in Brazilian transport since 2019, even though it had already been detected in 2017. It is likely that the judiciary’s movement is mainly concerned with the volume of claims that began to ravage the courts rather than with an increase in sectoral transaction costs.

However, rampant litigation in Brazil is not restricted to the airline sector, as more than 80 million cases are processed in the country, most for free. The claims are promoted by more than 1.3 million lawyers registered with the Brazilian Bar Association. In addition, there are 4 million bachelors in law and about 18,000 judges involved in these cases (Gil, 2021).

10. Potentially mitigating measures for consumer litigation in air transport in Brazil

The webinars ‘Brazilian Air Sector – Paths to Reducing Litigation’ and ‘Air Sector – Unbridled Judicialization or Necessary Litigation?’ were promoted by the National Council of Justice (CNJ) on 25 May 2021 and 9 November 2021, respectively, and offered fruitful analyses and proposals from specialists in aeronautical law and consumer law as well as public authorities concerning the issue of judicialisation and the corresponding legal uncertainty generated in air transport in Brazil. Some of these proposals are summarised below. Minister Luis Fux, then President of the STF, opened the event on 25 May 2021. On this occasion, the Air Transport Booklet (developed by the National Council of Justice, 2021) was launched, aiming to clarify to Brazilians their consumer rights regarding air transport and encourage non-judicial conflict resolution.

10.1 Creation of minimum barriers to access to justice

The non-existence of any impediment to access to justice currently encourages opportunism in litigation because there is no risk for the claimant of any burden for their action, regardless of whether it has any foundation. One possibility is to levy small fees to be borne by the losing party, whether the consumer or the airline. Another measure in this direction is to create a penalty if the court decision is less favourable than the proposal made in the pre-procedural phase, indicating the misuse of justice to obtain more significant gains, as practised in English justice.

10.2 Criminalisation of the illegal exercise of the legal profession

On 11 September 2021, the Full Council of the OAB approved a proposal for a legislative change to be sent to the National Congress to make irregular law practice a crime. The intention was to inhibit the performance of opportunistic law firms. Firms encourage litigation based on the CDC through aggressive advertising and through purchasing the rights of complaining consumers in the administrative spheres of the complaints site of SENACON, among other ways to massify lawsuits.

10.3 Elimination of specialised judicial courts at airports

As discussed above, specialised courts at airports are no longer justified and have unfavourable effects in terms of stimulating the judicialisation of claims against airlines.

10.4 Change of jurisdiction

Article 109 of the Federal Constitution establishes that it is incumbent on federal judges to prosecute and judge cases based on a treaty or contract between Brazil and a foreign state or international organisation, which is the case of lawsuits that deal with consumer complaints related to occurrences on international flights. The advantage would be to submit these cases to magistrates with a broader knowledge of federal legislation. In this way, the issues currently dealt with by state justice would become matters for a federal judge.

11. Conclusions

The issue of consumer litigation against airlines is undoubtedly a significant obstacle to the development of commercial aviation in Brazil, both domestically and internationally. The reasons for its importance are its economic volume, as shown above, and indirect expenses, represented by the large number of qualified employees applied by airlines to defend their rights before the judiciary. Thus, ascertainable or not, these expenses constitute transaction costs (North, 1990). In addition, as judicial decisions on the subject are taken in a fragmented and often contradictory way, a clear situation of legal uncertainty is configured.

There is no statistical system available to the public in Brazil – nor in other countries such as the United States where it is possible to investigate – in which consumerist lawsuits are catalogued by sector. Thus, the worldwide practice in civil aviation uses the indicator number of complaints per 100,000 passengers boarded. This indicator has historically shown much higher values in Brazil than in the United States, although the standards for quality of service are comparable between the two countries.

This study has shown that Brazilian legislation and its application encourage litigation because there are no mechanisms in the country to curb the judiciary's abuse of issues that are perfectly solvable by consensus. In other words, the consumer loses nothing in litigating and can only gain from the paternalistic application of consumer legislation. In addition, most first-degree magistrates of the state judiciary are unaware of the international legislation applicable to the sector and the circumstances in which the CDC does not prevail over specific international legislation, as determined by the Brazilian Constitution. In this scenario of legal antinomies and unfamiliarity with the relevant legislation on the part of the judges, a culture of protectionism to the detriment of airlines has come to dominate, giving opportunistic law firms a chance to see the consumer causes under their sponsorship prosper.

Brazilian jurisprudence has evolved towards a better understanding of the problem, even as the sector's operational losses accumulated rapidly during the pandemic and economic recession. Paradoxically, COVID-19 abruptly reduced air transport activity, which triggered a sense of urgency in public power and led to Law 14,034, which provides emergency measures for Brazilian civil aviation due to the pandemic. This law mitigates the harmful effects of the crisis.

To conclude, this study proposes the following measures that, far from resolving the issue, at least make it less harmful to the development of the sector: the creation of minimal barriers to access to justice;

the criminalisation of the illegal exercise of the legal profession; the elimination of specialised judicial courts at airports; and changes of jurisdiction.

References

- Albuquerque, G. C. (2021). Presentation at the webinar *Setor Aéreo Brasileiro – Caminhos para a Redução da Litigiosidade*, promoted by the National Council of Justice, 25 May 2021. Retrieved from <https://www.youtube.com/watch?v=8IKHg2xQxF0>
- Azambuja, J. (2021). Presentation at the webinar *Setor Aéreo Brasileiro – Caminhos para a Redução da Litigiosidade*, promoted by the National Council of Justice, 25 May 2021. Retrieved from <https://www.youtube.com/watch?v=8IKHg2xQxF0>
- Bartijotto, B. (2021). Presentation at the webinar *Setor Aéreo – Judicialização Desenfreada ou Litigância Necessária?* promoted by the National Council of Justice, 9 November 2021. Retrieved from <https://www.youtube.com/watch?v=VDyYNpOr8Xw>
- Brazilian Airlines Association. (2021). *Panorama 2020*. Retrieved from <https://www.abear.com.br/publicacoes/>
- Chini, A. (2021). *Moral damage in delays/cancellations due to force majeure or acts of God and mass litigation in the air sector*. Presentation at the webinar *Setor Aéreo Brasileiro – Caminhos para a Redução da Litigiosidade*, promoted by the National Council of Justice, 25 May 2021. Retrieved from <https://www.youtube.com/watch?v=8IKHg2xQxF0>
- Coase, R. H. (1937). The nature of the firm. *Economica*, 4(16), 386–405.
- Gil, R. (2021). Lecture at the webinar *Setor Aéreo Brasileiro – Caminhos para a Redução da Litigiosidade*, promoted by the National Council of Justice, 25 May 2021. Retrieved from <https://www.youtube.com/watch?v=8IKHg2xQxF0>
- International Air Transport Association (IATA). (2020). *Economic performance of the airline industry, June 2020 report*. Retrieved from <https://www.iata.org/en/iata-repository/publications/economic-reports/airline-industry-economic-performance-June-2020-report/>
- International Air Transport Association (IATA). (2021). *Perspectives for world aviation*. IATA presentation at the webinar *Projeto TMA-SP Neo*, promoted by the Department of Airspace Control of the Brazilian Air Force, 13 May 2021. Retrieved from <https://www.youtube.com/watch?v=oMJFPBM9x30>
- International Air Transport Association (IATA). (2023). *Consumer issues*. Retrieved from <https://www.iata.org/en/programs/passenger/consumer-issues/#tab-3/>
- International Air Transport Association (IATA) and Bernardi & Schnapp Advogados. (2021). *The applicability of the CDC and the Warsaw and Montreal Conventions in air transport*. Presentation at the webinar *Setor Aéreo Brasileiro – Caminhos para a Redução da Litigiosidade*, promoted by the National Council of Justice, 25 May 2021. Retrieved from <https://www.youtube.com/watch?v=8IKHg2xQxF0>
- Legal Route. (2021). *OAB will forward to the National Congress a proposal to make the irregular practice of law a crime*. Retrieved from <https://www.rotajuridica.com.br/oab-vai-encaminhar-ao-congresso-nacional-proposta-to-make-crime-the-irregular-practice-of-lawyer/>
- National Civil Aviation Agency (ANAC). (2016). *Resolution No. 400 of December 13, 2016*. Retrieved from https://www.anac.gov.br/assuntos/legislacao/legislacao-1/resolucoes/resolucoes-2016/resolucao-no-400-13-12-2016/@@display-file/arquivo_norma/RA2016-0400%20-%20Compilado%20at%C3%A9%20RA2017-0434.pdf
- National Civil Aviation Agency (ANAC). (2021b). *Financial statements of Brazilian airlines*. Retrieved from <https://www.gov.br/anac/pt-br/assuntos/dados-e-estatisticas/demonstracoes-contabeis/demonstracoes-contabeis-of-Brazilian-airline-companies>
- National Civil Aviation Agency (ANAC). (2021a). *Statistical data*. Retrieved from <https://www.gov.br/anac/pt-br/assuntos/dados-e-estatisticas/dados-estatisticos/dados-estatisticos>
- National Consumer Secretariat (SENACON). (2022). *consumer.gov*. Retrieved from <https://www.consumidor.gov.br/pages/dadosabertos/externo/>
- National Council of Justice. (2021). *Air transport booklet – Strengthening citizenship and reducing litigation*. Retrieved from https://www.cnj.jus.br/wp-content/uploads/2021/05/cartilha-transporte-aereo-CNJ_2021-05-20_V10.pdf

- North, D. C. (1990). *Institutions, institutional change and economic performance* [Portuguese translation]. Sao Paulo: Three Stars.
- Oliveira, D. (2020). *Portal brasileiro do turismo*. Retrieved from <https://www.mercadoeventos.com.br/noticias/aviacao/de-cada-100-voos-no-brasil-79-serao-processados-afirma-iata/>
- Organisation for Economic Co-operation and Development (OECD). (2003). *Glossary of statistical terms*. Retrieved from <https://stats.oecd.org/glossary/detail.asp?ID=3324#:~:text=Transaction%20costs%20refer%20to%20the,of%20writing%20and%20enforcing%20contracts>
- Rêgo, W. (2021). Presentation at the webinar *Setor Aéreo Brasileiro – Caminhos para a Redução da Litigiosidade*, promoted by the National Council of Justice, 25 May 2021. Retrieved from <https://www.youtube.com/watch?v=8IKHg2xQxF0>
- Reis, C. V. (2021). Lecture at the webinar *Setor Aéreo Brasileiro – Caminhos para a Redução da Litigiosidade*, promoted by the National Council of Justice, 25 May 2021. Retrieved from <https://www.youtube.com/watch?v=8IKHg2xQxF0>
- Souto, M. (2021). Presentation at the webinar *Setor Aéreo Brasileiro – Caminhos para a Redução da Litigiosidade*, promoted by the National Council of Justice, 25 May 2021. Retrieved from <https://www.youtube.com/watch?v=8IKHg2xQxF0>
- Starling, V. C. A. S. (2021). *Fomenting litigation or ensuring rights?* Presentation at the webinar *Setor Aéreo – Judicialização Desenfreada ou Litigância Necessária?* promoted by the National Council of Justice, 9 November 2021. Retrieved from <https://www.youtube.com/watch?v=VDyYNpOr8Xw>
- Timm, L. (2021). Presentation at the webinar *Setor Aéreo Brasileiro – Caminhos para a Redução da Litigiosidade*, promoted by the National Council of Justice, 25 May 2021. Retrieved from <https://www.youtube.com/watch?v=8IKHg2xQxF0>
- U.S. Department of Transportation (2021). *Air travel consumer reports*. Retrieved from <https://www.transportation.gov/individuals/aviation-consumer-protection/air-travel-consumer-reports>
- U.S. Department of Transportation (2021). *Passengers - All carriers - All airports*. Retrieved from <https://www.transportation.gov/individuals/aviation-consumer-protection/air-travel-consumer-reports>
- Wallis, J. J., & North, D. C. (1988). Should transaction costs be subtracted from gross national product? *The Journal of Economic History*, 48(3), 651–654.
- Williamson, O. E. (2002). Transaction cost economics. In C. Ménard, & M. M. Shirley (Eds.), *Handbook of New Institutional Economics*. pages 41–65 (2008). Berlin & Heidelberg: Springer-Verlag.

Glossary

- ABEAR – Associação Brasileira das Empresas Aéreas (Brazilian Association of Airlines)
- ANAC – National Civil Aviation Agency (Brazil)
- CDC – Consumer Defence Code
- IATA – International Air Transport Association
- NIE – New Institutional Economics
- OAB – Ordem dos Advogados do Brasil (National Bar Association)
- OECD – Organisation for Economic Co-operation and Development
- PROCON – System of state-owned foundations in Brazil created to protect consumer rights
- SENACON – Secretaria Nacional do Consumidor (National Consumer Secretariat)
- STF – Supremo Tribunal Federal (Federal Supreme Court)
- STJ – Superior Tribunal de Justiça (Superior Court of Justice).