THE CIVIL LIABILITY IN INTERNATIONAL CARRIAGE BY AIR IN BRAZIL

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ABSTRACT: This article aims to analyze the development of international carriage by air regulations and the interest in developing transnational treaties and conventions in order to ensure the standardization of the incident sources on the subject and cooperation between nations, emphasizing the Montreal Convention and its implementation by foreign courts. It also aims to study the Brazilian legislation applicable to international carriage by air contracts and the need for harmonization between national and international sources of law ratified by Brazil, in particular the Montreal Convention and the Brazilian Consumer Protection Code, to ensure compliance with the internationally accepted obligations and, at the same time, protect the consumer, especially after the delivery of the thesis with a general repercussion on the Theme n. 210 fixed by the Federal Supreme Court, proposing the use of the Dialogue of the Sources method developed by Erik Jayme, which, through a dialogue between sources in apparent conflict, aims to implement the *pro homine* principle.

KEY-WORDS: International carriage by air. Brazilian Consumer Protection Code. Montreal Convention. Dialogue of the Sources. Theme n. 210 of the Federal Supreme Court.

I. Introduction

The word transport comes from *transportare* and grammatically expresses the action of carrying things and people from one place to another[1]. The means of transport have always been essential to human life, in the beginning for survival purposes and nowadays for professional, personal or touristic purposes.

Air transportation has gradually developed since the twentieth century and gained legal relevance after the expansion of the civil aviation industry. Today, it is the most widely used and most developed means of transport, since it allows passengers to move greater distances in less time, corresponding to the desires of the post-modern and globalized society[2].

Internationally, due to the large increase in this means of transport, it was found that national law would not be enough to regulate air transportation contract issues and that it would be necessary to establish the same standards across the countries. Several conferences were held for this purpose, resulting in the elaboration of conventions and the creation of international organizations.

One of the most important conventions created by these conferences is the Convention for the Unification of Certain Rules relating to international carriage by air signed in Montreal on 28 May 1999, known as the Montreal Convention, which establishes the compensation limits

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[1] De Plácido e Silva, *Vocabulário Jurídico*. 28th ed. (Rio de Janeiro: Forense, 2009) 1415.

[2] Pontes de Miranda emphasizes, about the interest of the human being in air transportation, that the man, with the purpose of doing what he did not learn to do because of his biological path, dreamed of what the legends revealed and what was the prophecy of Leonardo da Vinci. (Pontes de Miranda, *Tratado de Direito Privado: parte especial. Tomo LIV. Direito das obrigações, danos à pessoa, acidentes do trabalho*, updated by Rui Stoco (São Paulo: Revista dos Tribunais, 2012) 96).

to be paid by air carriers in case of damages resulting from the death or bodily injury of a passenger, destruction or loss of cargo or baggage in their custody, as well as the delay in the carriage of passengers, baggage or cargo.

Brazil ratified the Montreal Convention and edited Decree n. 5910/2006, which regulates international carriage of persons, baggage or cargo. But the provisions of Brazilian Civil Code and of the Consumer Protection Code are also applied to this type of contract. As a result of an apparent conflict between international and national standards, the interest in harmonizing arises, especially since the dialogue between the sources of law appears to be the best solution to coordinate standards in the current post-modern context.

Observing situations such as this, and the need for coexistence of the sources of law, in Germany, Erik Jayme developed the Dialogue of the Sources Theory, proposing the flexible and useful coordination of the conflicting norms in order to restore its coherence. This method has been widely used by Brazilian courts to solve apparent antinomies between two standards with convergent, but not identical, application fields.

However, concerning international carriage, the Federal Supreme Court fixed a thesis with general repercussion in the Theme n. 210 which establishes that international treaties and conventions limiting the liability of air carriers have a prevalence in relation to the Consumer Protection Code, avoiding the possibility of any harmonization between such standards.

Given the current legal relevance of the subject, this article proposes the analysis of the global interest in standardizing the rules on international carriage by air and why it is important to respect national law, proposing the use of the Dialogue of the Sources method to resolve apparent antinomies between the Montreal Convention and Brazilian law, particularly the Consumer Protection Code.

The article is divided into two parts. In the first part, issues relating carriage by air within the international scope will be analyzed: the development of air transportation regulations throughout history and why there is an interest in standardizing legislative provisions, emphasizing the Montreal Convention and its application through the study of decisions pronounced by international courts. In the second part, the Montreal Convention application in Brazil will be studied, the national incidents provisions on the contracts of international carriage by air, the thesis fixed by the Federal Supreme Court and why it is necessary to establish a dialogue between international and national legislations.

II. The carriage by air contract within the international scope: the interest in standardizing

The creation of the aircraft added a new dimension to transport issues by allowing the fast and safe displacement of people and goods over long distances. With its development, it was found that national regulations would not be enough because of its cross-border nature. In order to ensure international cooperation, several conferences have been held over the years, which have culminated in the creation of bodies and committees, as well as in the creation of conventions aimed at standardizing the regulation of carriage by air.

In this first part of the article, the development of international air transportation regulations will be analyzed, as well as the main conferences held and the conventions created, emphasizing

the Montreal Convention and its application through the study of decisions issued by international courts.

A. The development of carriage by air regulation throughout history

In the first years of aviation it had already been realized that carriage by air contracts would have to be regulated internationally. The French government proposed that an international conference be convened with the purpose of devising regulatory procedures relating to flights into, and over foreign territory. As a result, the first important conference on an international air law[3] code was convened in Paris in 1910, held from 18 May to 29 June at the Ministry for Foreign Affairs[4].

In the following years, the development of aviation arising from the First World War made its potential even more evident, demonstrating that this new means of transport required international attention. It also brought about a decisive change in governmental attitudes towards air transportation and the idea that international collaboration in aviation matters emerged, originating from the military need for cooperation, and that such matters should not end with the purpose of hostilities, but should be geared towards peaceful purposes.

The treatment of aviation matters was a subject at the Paris Peace Conference of 1919. The Special Aeronautical Commission was created and entrusted with the treatment of the subject[5]. Also, the International Air Convention, which regulated the technical, operational and organizational aspects of civil aviation, was drafted, and its provisions have been incorporated into national law of the signatory States and have proved to be an inspiration for the development of national law in Europe.

The Convention also foresaw the creation of the International Commission for Air Navigation (ICAN), under the direction of the League of Nations, to monitor developments in civil aviation and to propose measures for States to maintain the development[6]. The creation of ICAN was the first attempt to promote the orderly development of international civil aviation. It possessed administrative, legislative, executive and judicial powers as well as being an advisory body and a center of documentation[7].

[3] Named International Air Navigation Conference, or *Conférence internationale de navigation aérienne*.

[4] International Civil Aviation Organization, *The Paris Convention of 1910: The path to internationalism*, https://www.icao.int/secretariat/PostalHistory/1910_the_paris_convention .htm (visited 7 October 2018).

[5] International Civil Aviation Organization, *The postal history of ICAO: The 1919 Paris Convention: the starting point for the regulation of air navigation*, https://www.icao.int/secretariat/PostalHistory/1919_the_paris_ convention .htm (visited 7 October 2018).

[6] International Civil Aviation Organization, *The Paris Convention of 1910: The path to internationalism.* https://www.icao.int/secretariat/Postal History/1910_the_paris_convention .htm (visited 7 October 2018).

[7] ICAN was by no means the first international organization designed to further the growth of aviation. In the non-commercial field, the *Fédération Aéronautique Internationale* (FAI) came into existence as early as 1905, as a result of a resolution passed at the Olympic Congress at Brussels. The FAI devoted itself particularly to private aviation, and the development of facilities for air touring had become one of its principal concerns. (International Civil Aviation Organization, *FAI - Fédération Aéronautique Internationale*, https://www.icao.int/secretariat/ PostalHistory/fai_federation_aeronautique_internationale.htm (visited 7 October 2018)).

In 1919, during the Conference of Peace of Versailles, the fundamental letter of the League of Nations[8] was elaborated (in the Peace Treaty of Versailles), whose main objective was the creation of an international forum to discuss various issues, including transport relations[9].

At the same time, civil carriage by air companies emerged in Europe and North America, and the International Air Traffic Association was created[10] in order to assist airline companies to standardize their documents and tickets, as well as to compare the technical procedures of each country. Up until then, air transport activity had been basically related to courier transport. However, with the advent of the International Air Convention, the international airfreight industry was born.

In 1923, the French Prime Minister, Raymond Nicolas Landry Poincaré, verifying the growth of the air industry, proposed the realization of an international conference to establish a convention that regulates carriage by air contracts within the international scope[11]. So, in 1925, in the city of Paris, the first international conference on Private Air law was held, whose main objective was to examine the issue of the liability of airlines and undertake the immense work of codification of the private air law[12].

The final protocol of this Conference determined the creation of a special committee of experts, called *Comité International Technique d'Experts Juridiques Aériens* (CITEJA)[13] to develop a private international air law code through the preparation of draft international conventions for final adoption at periodic international conferences on private air law[14].

The work of the CITEJA culminated in the draft of the Convention for the Unification of certain rules relating to international carriage by air, commonly known as the Warsaw Convention, signed in 12 October 1929 in Warsaw, by the Second International Conference on Private air law. Brazil signed the Convention, and on May 02, 1931, the government made the deposit of the instrument of ratification in the archives of the Ministry of Foreign Affairs of the Republic of Poland, and, on November 24, 1931, the Decree N. 20,704 was enacted.

[8] The United States did not participate in the League of Nations or the ICAN and sought to create a separate form of international cooperation on a regional basis. In 1928, the Havana Convention was signed. It applied exclusively to private aircraft (government aircraft were not included) and laid down basic principles and rules for aerial traffic, recognizing that every State had complete and exclusive sovereignty over the airspace above its territory and adjacent territorial waters. It was a certain success, since, signed by 21 States, it was finally ratified by 16 of them by 1944, i.e. Bolivia, Brazil, Chile, Costa Rica, Cuba, the Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Uruguay, the USA, and Venezuela. (International Civil Aviation Organization, *The postal history of ICAO: 1928: The Havana Convention*, https://www.icao.int/secretariat/ PostalHistory/1928_the_havana_convention.htm (visited 7 October 2018)).

[9] Although the Paris and Havana Conventions served a useful purpose, they also caused some degree of confusion in actual practice, since they were two separate sets of rules. However, they were seen to be no longer adequate for the years after World War II, because of the immense wartime development of aerial transport. The Convention on International Civil Aviation signed at Chicago on 7 November 1944 superseded them (International Civil Aviation Organization, *The postal history of ICAO: 1928: The Havana Convention*, https://www.icao.int/ secretariat/PostalHistory/1928_the_havana_convention.htm (visited 7 October 2018)).

[10] It was the precursor of the *International Air Transport Association* (IATA), international organization with headquarters in Montreal, Canada.

[11] Chia-Jui Cheng. *Studies in international air law: selected works of Bin Cheng*. (Leiden: Brill Nijhoff, 2018) 14.

[12] International Civil Aviation Organization, *The postal history of ICAO: International legal instruments before ICAO*. https://www.icao.int/secretariat/postalhistory/international_legal_instru ments_before_icao.htm (visited 7 October 2018).

[13] Isabella Henrietta Philepina Diederiks-Verschoor, *An introduction to air law.* 18th ed (The Netherlands: Kluwer Law International, 2006) 9-10.

[14] International Civil Aviation Organization, *The postal history of ICAO: The first years of the Legal Committee*, https://www.icao.int/secretariat/PostalHistory/the_first_years_of_the_legal_ committee.htm (visited 7 October 2018).

For the French jurist Olivier Cachard[15], the approval of the Warsaw Convention represented an advancement of uniform private law, since, even though it did not suppress all conflicts of laws, it allowed the establishment of a uniform law regime for its signatories.

Although it was a convention for the unification of certain rules relating to international carriage by air[16], its article 24[17] predicted that any action of responsibility, whatever the title in which it was founded, could only be exercised under the conditions and the limits set out in the Convention[18].

Two cases illustrate the issue: in the first, judged by the House of Lords in 1996[19], it was decided that national courts did not have the freedom to provide a solution according to their own law, so, in the absence of an express provision for the reparation of moral damage in the Warsaw Convention, the airlines could not be sentenced to pay any amount. Likewise, in the second case, judged by the Supreme Court of the United States in[20], the claim for moral damages arising from intrusive security inspection and illegal passenger detention was denied under the argument that the Warsaw Convention did not foresee compensation for such a situation and that article 24 prevents demands based on the national law.

[15] Olivier Cachard, *Le Transport International Aérien De Passagers* (Haye: LPRecueils de Cours, 2015) 21.

[16] See what the delegates of the Second International Conference on private Air law have consigned: 'I - A la suite de leurs délibérations les Délégués sus-indiqués sont tombés d'accord de soumettre á la signature des plénipotentiaires respectifs des Hautes Parties Contractantes, le texte d'un projet de Convention pour I 'unification de certaines règles relatives au transport aérien international, qui restera ouvert à la signature jusqu'au 31 janvier 1930. II - La Conférence a émis les vœux et résolutions suivants: A) La Conférence, considérant que la Convention de Varsovie ne règle que certaines questions relatives au transport aérien et que la navigation aérienne internationale soulève beaucoup d'autres questions qu'il serait, désirable de régler par des ententes internationales, émet le vœu que, par les soins du Gouvernement français, qui a pris l'initiative de la réunion de ces conférences, et après étude de ces questions, soient réunies ultérieurement de nouvelles conférences qui poursuivront cette couvre d'unification. B) La Conférence, considérant I 'importance au point de vue international d'un règlement, uniforme, des transports aériens de toute nature, emet le vœu que le Comité International Technique d'Experts Juridiques Aériens prépare, le plus tôt possible, un avant-projet de convention sur la matière'. (Brazil, Decree 20.704 of 24 November 1931. http://www.planalto.gov.br/ccivil_03/Decreto/1930-1949/D20704.htm (visited 15 October 2018)).

[17] See article 24: '1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention. 2. In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights'. (*Ibid.*).

[18] In 1985, judging the case *Air France v. Saks*, in which the passenger claimed to have felt strong pressure and pain in the left ear during the flight and subsequently became deaf, suiting for indemnity provided in the article 17
for understanding that her deafness occurred from maintenance failure of the aircraft, the U.S. Supreme Court considered that the Treaties are created more liberally than private agreements, so that, in order to ascertain their meaning, it must go beyond the written text, analyzing its negotiations and practical constructions adopted by the parties. Thus, for compensation to exist based on the Warsaw Convention, the courts should examine the intent of the parties and the context in which it is written. See the original argument: 'Treaties are construed more liberally than private agreements, and, to ascertain their meaning, we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. Choctaw Nation of Indians v. United States, 318 U. S. 423, 318 U. S. 431-432 (1943). The analysis must begin, however, with the text of the treaty and the context in which the written words are used. See Maximov v. United States, 373 U. S. 49, 373 U. S. 53-54 (1963)'. (United States, Supreme Court. Air France v. Saks, 470 U.S. 392 (1985).

[19] The plaintiffs, who departed from London to Malaysia, during a stopover in Kuwait in the 1990's, were illegally detained because their plane was captured due to the invasion of Kuwait by Iraqi forces at the start of the Gulf War. They required compensation for moral damages. The demand was rejected due to the absence of foresight in the Convention to moral damages. (United Kingdom, House of Lords. Abnett v. British Airways Plc. (Scotland) e Sidhu v. British Airways Plc. London, 12 December 1996).

[20] United States, Supreme Court. El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999). Washington, 12 January 1999.

Three other international conferences on private air law were held before the Second World War interrupted the work of CITEJA [21] and the possibility of unification of private air regulation.

The aviation advances made during World War II resulted in horror and human tragedies, but its utilization also significantly advanced the technical and operational possibilities of air transport. For the first time large numbers of people and goods were transported over long distances and ground facilities had been developed to permit this in an orderly and expeditious manner. It was for this reason that, in 1943, the United States initiated studies of post-war civil aviation problems which confirmed the belief that they were either to be tackled on an international scale or it would not be possible to be used as one of the principal elements in the economic development of the world and the first available means to start 'healing the wounds of war' as President Roosevelt declared[22].

From 1943, the government of the United States conducted explanatory discussions with other allied nations and invited fifty-five allied and neutral states to meet in Chicago, USA, from 1 November 1944, for the International Civil Aviation Conference. For seven weeks, the delegates of fifty-two nations considered the problems of international civil aviation and the most important result was the drawing up of a Convention on International Civil Aviation, named the Chicago Convention, the charter of a new body established to guide and develop international civil aviation, concluding on December 7, 1944, approved on September 11, 1945[23], Ratified by the Brazilian Government on March 26, 1946.

The Chicago Convention was drafted predominantly to allow international cooperation, to avoid disputes and to preserve friendship and understanding among the states[24].

It was established that thirty days after the governments of half of those present at the Conference had ratified the Convention [25], the International Civil Aviation Organization

[21] International Civil Aviation Organization. *The postal history of ICAO: The first years of the Legal Committee*, https://www.icao.int/secretariat/PostalHistory/the_first_years_of_the_legal_committee.htm (visited 7 October 2018).

[22] 'The years between the two World Wars were marked by a continuous growth of civil aviation in both the technical and the commercial fields, even though flying was not yet opened to the masses but remained a rather exclusive means of personal transport. In fact, it was around 1930 when, after an ICAN Meeting, three prominent General Directors of Civil Aviation, met at the Paris Gare du Nord, and that the famous phrase was coined: "The layman flies, the expert takes the train", a phrase which perfectly reflected the uncertainties which surrounded flying at that time, especially during the bad weather periods in Europe. However, the search for higher speed, greater reliability and the covering of greater distances continued throughout this period in all industrialized States and each step forward in these fields brought the great potential inherent to air transport closer to reality.' (International Civil Aviation Organization. *History: The beginning*, https://www. icao.int/EURNAT/Pages/ HISTORY/history_1910.aspx (visited 7 October 2018)).

[23] International Civil Aviation Organization. *The postal history of ICAO: From PICAO TO ICAO: Organizational similarities*, https://www.icao.int/secretariat/PostalHistory/from_picao _to_icao_organizational_similarities.htm (visited 7 October 2018).

[24] The preamble says: 'WHEREAS the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and people of the world, yet its abuse can become a threat to the general security; and WHEREAS it is desirable to avoid friction and to promote cooperation between nations and peoples upon which the peace of the world depends: THEREFORE, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically; Have accordingly concluded this Convention to that end'. The preamble makes evident the idea of standardizing the rules of international air transport. (Brazil, Decree 21.713 of 27 August 1946 http://www.planalto.gov.br/ccivil03/Decreto/1930-1949/D21713.htm (visited 10 October 2018)).

[25] The Conference, aware of a considerable amount of time until 26 Governments ratified the Convention, foresaw the establishment of a provisional body to operate in the intermediary period, according to the Interim Agreement on International Civil Aviation. This organ was then created and called the Provisional International Civil Aviation (PICAO). It functioned from 6 June 1945 until 4 April 1947. By 5 March 1947 the 26th ratification was received and ICAO came into being on 4 April 1947. (International Civil Aviation Organization. *Convention on International Civil Aviation*, https://www.icao.int/publications/Documents/7300cons.pdf, (visited 7 October 2018)).

(ICAO), would be created which manages, until the present day, the Chicago Convention through the elaboration of Standards and Recommended Practices (SARPs)[26]. Brazil is a founding member and actively participates in the discussions and elaboration of the normative and technical recommendations issued by the Organization[27].

During the Chicago Conference, the delegates recommended the resumption of the work of CITEJA and the first post-war session was held in Paris from 22 to 29 January 1946. However, it was decided to dissolve CITEJA and to establish a Permanent Committee on International Air Law (i.e. a Legal Committee) after the creation of ICAO, which continued its work and proposed amendments to modernize the Warsaw Convention text[28].

The First Amendment took place through the Hague Protocol of 28 September 1955[29], ratified by the Brazilian Government by the enactment of Decree n. 31 in 1963. The second modernization of the Warsaw Convention occurred with the approval of the Guadalajara Convention signed on September 18, 1961[30], ratified by Brazil through the enactment of Decree n. 85 in 1965. The third occurred through the Guatemalan Protocol of March 8,1971, which represented the first major effort in modernizing the carrier's system of liability and fixing fairer and equitable compensation to victims in the event of an air accident, although it has never entered into force[31]. In 1975, ICAO organized a conference held in Montreal with the purpose of drafting a single text that would bring together all the documents applicable to international

[26] ICAO became a specialized agency of the United Nations linked to Economic and Social Council (ECOSOC) , headquartered in Montreal, Canada, And its main objective is to administer the Chicago Convention. ICAO works with the Convention's 192 Member States and industry groups to reach consensus on international civil aviation Standards and Recommended Practices (SARPs) and policies in support of a safe, efficient, secure, economically sustainable and environmentally responsible civil aviation sector. These SARPs and policies are used by ICAO Member States to ensure that their local civil aviation operations and regulations conform to global norms, which in turn permits more than 100,000 daily flights in aviation's global network to operate safely and reliably in every region of the world. Brazil is a founding member of ICAO and participates actively in the discussions and elaboration of the normative and technical recommendations issued by the Organization. (International Civil Aviation Organization. *About ICAO,* https://www.icao.int/about-icao/Pages/ default.aspx (visited 7 October 2018).

[27] Brazil has a permanent delegation with the ICAO Council, which is subordinate to the Ministry of Foreign Affairs and technically advised by and by the Aeronautical command and the ANAC (*Agência Nacional de Aviação Civil* - National Civil Aviation Agency), an autarchy linked to the Ministry of Defense which has the competence to lay down rules for the operation of the civil aviation and responsible for the development of the SARPs. (Brazil, Agência Nacional de Aviação Civil. *Organização da Aviação Civil Internacional (OACI),* http://www.anac.gov.br/A_Anac/internacional/organismos-internacionais/organizacao-da-aviacao-civil-interna cional-oaci, (visited 7 October 2018)).

[28] 'CITEJA fully agreed with the view of PICAO Assembly and held its last working meeting (i.e. the 15th Plenary Session) at Cairo from 14 to 19 November 1946, where it recommended that a Committee on International Air Law be established within ICAO. The 1st Session of the ICAO Assembly, held in Montreal from 6 to 27 May 1947, adopted Resolution A1-46 creating the Legal Committee as permanent body of the Organization replacing the CITEJA. At the same time of the 1st Assembly, CITEJA held its final meeting and decided on its dissolution. Thus, the permanent Legal Committee came into being on 23 May 1947; it was a committee of the Assembly but operated largely under the direction of the Council and its duties were rather straightforward: to study any legal matters referred to it by the Council. It was comprised of legal experts appointed by the Member States. The Legal Committee held its first full session in Brussels from 10 to 25 September 1947'. (International Civil Aviation Organization. *The postal history of ICAO: The first years of the Legal Committee,* https://www.icao.int/secretariat/PostalHistory/the_first_years_of_the_legalcommittee.htm (visited 7 October 2018)).

[29] The Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, done at The Hague on 28 September 1955 – The Hague Protocol.

[30] Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier.

[31] As there has been no ratification by at least thirty countries, since only seven have ratified it, the Guatemalan protocol has not come into force. Although Brazil has signed the Protocol, the Government did not ratify it. The list of signatory countries is available on the ICAO website.

carriage by air. At the end of the Conference four Protocols were adopted, Protocols 1, 2, 3 and 4 of Montreal, but none of which came into force[32].

Finally, the fifth and final amendment culminated in the approval of the Montreal Convention (Convention for the Unification of Certain Rules for International Carriage by Air), opened for Signature in Montreal on 28 May 1999 and entered into force on 4 November 2003, which will be analyzed because of its wide application nowadays.

B. The Montreal Convention and its application: general aspects and analysis of international courts decisions

The Montreal Convention represents the latest modernization of the Warsaw Convention, maintaining the original scope of application (international carriage of persons, baggage or cargo performed by aircraft for reward) intact. For its purposes, the expression *international carriage* means any carriage in which the point of departure and the point of destination are situated either in the territories of two States Parties, or within the territory of a single State Party if there is a stopover within the territory of another State, even if that State is not a State Party.

The main modernization occurred in air carrier's liability and the extent of compensation for damage.

The Warsaw Convention disciplined the air carrier's liability for damage sustained in the event of the death or injury of a passenger or any other bodily injury suffered by a passenger if the accident took place on board the aircraft or in the course of the operations of embarking or disembarking (article 17); the damage sustained in the event of the destruction, loss or damage to luggage or goods during the carriage by air (article 18, 1); and the damage occasioned by delay in the carriage by air of passengers, luggage or goods (article 19).

In the carriage of passengers, the liability of the carrier for each passenger was limited to the sum of 125,000 francs (article 22(1)) and, in the carriage of registered luggage and of goods, the liability of the carrier was limited to a sum of 250 francs per kilogram, unless the consignor had made a special declaration of the value at delivery, in which case the carrier would be liable to pay a sum not exceeding the declared value (article 22(2)). As regards to objects of which the passenger takes charge himself, the liability of the carrier was limited to 5,000 francs per passenger (article 22(3)).

The Montreal Convention also provides the liability of the carrier for damage sustained in case of death or bodily injury of a passenger on board the aircraft or during the operations of embarking or disembarking (article 17(1)), for damage sustained in case of destruction, loss or damage to baggage on board the aircraft or during any period within which the checked baggage was in the charge of the carrier (article 17(2)), for damage sustained in the event of the destruction, loss or damage to cargo during the carriage by air (article 18(1)) and for damage occasioned by delay in the carriage by air of passengers, baggage or cargo (article 19).

[32] According to the jurist and Vice-president of the Macau Civil Aviation Authority José Tomas Baganha, the first three Protocols replace the gold franc by Special Drawing Rights (SDR) defined by the International Monetary Fund and the last Protocol deals with rules relating to the transport of goods, especially all aspects of postal transport and new provisions on goods. (José Tomás Baganha, "Introdução ao direito aéreo internacional (2nd part)" In *Administração* n. 35 (v. X, 1997-1, 7-33), 12-13).

However, the sums are no longer defined in francs, but in Special Drawing Right (SDR), which is defined by the International Monetary Fund. For damages sustained in case of death or bodily injury of a passenger, the liability of the carrier is limited to 100 000 SDR for each passenger (article 21(1)); in the carriage of baggage, the liability is limited to 1000 SDR for each passenger, unless the passenger had made a special declaration of interest (article 22(2)); in the carriage of cargo, the liability of the carrier is limited to a sum of 17 SDR per kilogram, unless the consignor had made a special declaration of interest (article 22(3)); in relation to delay, the liability is limited to 4150 SDR for each passenger (article 22(1)).

Article 24 provides for the revision of the limits of liability every five years. In view of this establishment, in 2009 the ICAO forwarded a correspondence to all signatories indicating the revision of the limits at an inflation rate of 13.1% in the form of Annex A to the Charter, which entered into force on 30 December 2009[33]. The new limits are[34] 113 000 SDR for each passenger for damages sustained in case of death or bodily injury of a passenger; 1131 SDR for each passenger in the carriage of baggage; 19 SDR per kilogram in the carriage of cargo and 4694 SDR for each passenger in relation to delay[35].

To date, 136 states have signed the Convention[36]. Some of whom have ratified the text with restrictions. Germany, for instance, declared that the Convention does not apply to international carriage by air performed and operated directly by the Federal Republic of Germany for non-commercial purposes. Similarly, in the United States, the convention is not applied to international carriage by air performed and operated directly by the United States of America for non-commercial purposes as a sovereign State. And the instrument of accession by Argentina contains the following interpretative declaration: 'the term "bodily injury" in Article 17 of this treaty includes mental injury related to bodily injury, or any other mental injury which affects the passenger's health in such a serious and harmful way that his or her ability to perform everyday tasks is significantly impaired.'

The European Union has ratified the Convention as a Regional Economic Integration Organization[37]. In 2002, the European Parliament issued Regulation n. 889, which, by amending Regulation No 2027/1997[38], took away the difference between national and

[33] International Civil Aviation Organization. *Review of limits of liability conducted by ICAO under Article 24 of Montreal Convention 1999 – notification of revision of limits of liability*, https://www.regjeringen.no/contentassets /fcb79c26c3bc4ba29d22162f323624f6/vedlegg-til-hoyring-om-endrin gar-i-luftfartslova.pdf (visited 20 October 2018). See also International Civil Aviation Organization, *Doc 9740 - Supplement*: *Certifying Statement*, https://www.icao.int/Meetings /wrdss2012/Documents/9740_supp_mu.pdf (visited 6 October 2018).

[34] Office Des Transporteurs du Canada, *Avis aux transporteurs aériens concernant la révision à la hausse des limites de responsabilité pour le transport international régi par la Convention de Montréal*, https://www.otc-cta.gc.ca/fra/publication/avis-aux-transporteurs-aeriens-concernant-la-revision-la-hausse-des-limites-de-respon sab (visited 8 October 2018).

[35] In Brazil, the new values are already applied by the courts. See Brazil, 2ª Civil Court of Porto Alegre. Case 001/1.16.0017836-8. Plaintiff: Rosa Maria Campos Aranovich. Defendant: American Airlines Inc. Porto Alegre, 22 August 2017.

[36] International Civil Aviation Organization, *Convention for the Unification of Certain Rules for International Carriage by Air done at Montreal on 28 may 1999*, https://www.icao.int/secretariat/legal/Listof20 Parties/Mtl99EN.pdf (visited 7 October 2018).

[37] On 9 February 2010, the Council of the European Union deposited with ICAO a note verbale referring to the entry into force, on 1 December 2009, of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, and stating: 'As a consequence, as from 1 December 2009, the European Union has replaced and succeeded the European Community and has exercised all rights and assumed all obligations of the European Community whilst continuing to exercise existing rights and assume obligations of the European Union.' (*Ibid.*).

[38] The Regulation (EC) n. 2027/97 provided the liability of a Community air carrier for damages sustained in the event of death, wounding or any other bodily injury by a passenger in the event of an accident, stating that such liability was not subject to any

international transport within the Community, making it clear that its provisions are complementary to the Montreal Convention dispositions [39]. In 2004, it issued another supplementary rule, Regulation n. 261[40], establishing common rules on compensation and assistance to passengers in the event of denied boarding (overbooking) and of cancellation or long delay of flights made within the Community.

Brazil has ratified the Convention without restrictions by enacting the Decree n. 5,910 of September 27, 2006, in force since then.

The Montreal Convention has been applied by the signatory States to address issues relating to the liability of international air carriers, although there are doubts about the scope of its incidence, particularly concerning some interpretative divergences between international courts as will be analyzed below.

In 2010, Mr. Advocate General at European Court of Justice Ján Mazák, when analyzing the case *Axel Walx x Clickair S.A.*, in which an action for damages was brought by Mr Axel Walz against the air carrier Clickair S.A. for the loss of his suitcase on 4 June 2007 during a flight from Barcelona to Porto, concluded that the Montreal Convention uses only one general concept, 'damage', without providing any further details in that respect: 'it cannot be inferred from the wording of Article 17.2 of the Montreal Convention or Article 22(2) thereof that the Contracting States wished to limit the liability of carriers to material damage or, conversely, to non-material damage'. In response to the question submitted to the Court[41], stated that the article 22(2) must be interpreted as meaning that, in the transport of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1000 SDR per passenger in total, independent of the type of damage and the method of providing compensation.

In a similar decision, the Argentine Supreme Court, in examining the case *Alvarez, Hilda Noemí c/ British Airways s/ daños y perjuicios* [42], in which the passenger demanded compensation for moral damages due to the delay in the delivery of her baggage, concluded that the limit of liability set in article 22 of the Montreal Convention does not discriminate the nature of the damage, so that it includes all types of compensations and damages[43].

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financial limit defined by law, convention or contract. (European Union, *Regulation (EC) n. 2027/97 of the Council of 9 October 1997*, https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri= CELEX:31997R2027&from =FR (visited 10 October 2018)).

[39] See Whereas 6: 'it is necessary to amend Council Regulation (EC) n. 2027/97 of 9 October 1997 on air carrier liability in the event of accidents in order to align it with the provisions of the Montreal Convention, thereby creating a uniform system of liability for international air transport'. (European Union, *Regulation (EC) 889/2002 of the European Parliament and of the Council of 13 May 2002*, https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:32002R0889&qid%201538335983256&from=EN (visited 10 October 2018).

[40] For all three situations, the carrier must provide assistance (right to care), such as hotel accommodation, meals and refreshments in a reasonable relation to the waiting time, transport between the airport and place of accommodation and telephone calls. For flight cancellations and overbooking cases, the carrier must compensate the passenger, whose amount will be determined according to the distance to be traveled. (European Union. *Regulation (EC) 261/2004 of the European Parliament and of the Council of 11 February 2004,* https://eur-lex.europa.eu/resource.html?uri=cellar:439cd3a7-fd3c-4da7-8bf4-b0f60600c1d6.0010 .02/DOC_1&format=PDF (visited 10 October 2018)).

[41] The Commercial Court No 4, Barcelona, Spain has referred the following question to the Court for a preliminary ruling: 'Does the limit of liability referred to in Article 22.2 of the Convention for the Unification of Certain Rules for International Carriage, signed in Montreal on 28 May 1999 include both non-material damage and material damage resulting from the loss of baggage?' (European Union. Court of Justice of the European Union (CJEU). *Ján Mazák conclusions of the case C-375/09*, https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri= CELEX: 62009CC0375&from=NL (visited 10 October 2018)).

[42] Argentina, Corte Suprema de Justicia de la Nación Argentina, A. 519. XXXVII. Appellant: Hilda Noemi Alvarez. Appellee: British Airways. Buenos Aires, 10 October 2002.

[43] In Brazil, the Federal Supreme Court has established an understanding that the liability limits provided for in the Montreal Convention does not include the moral damage.

Several other issues relating to the application of the Montreal Convention are submitted to the assessment of international courts. In France, the First Civil Chamber of the Court of Cassation, in the *court decision 409 of Mar. 25, 2015 (13-24.431)*[44], examined a question on which legislation is applied in case of delay in international carriage by air, the Regulation (EC) n. 261/2004 of the European Parliament or the Montreal Convention. The Court considered that they regulate different rights and that the case under review, in which the compensation pursued is that established in the Regulation, did not submit to the rule provided for in article 33 of the Convention[45].

In the United States Supreme Court, an issue for compensation for bodily injury provided for in article 17 of the Montreal Convention was analyzed. In such case *Jane DOE; John Doe v. ETIHAD AIRWAYS (n. 16-1042)*, the passenger was unexpectedly pricked by a hypodermic needle hidden in the aircraft seatback pocket and she claimed damages for her physical injury and her mental distress from natural sequela of possible exposure to various diseases. Although the air carrier has alleged that anguish is not subject to damages because it was not caused by bodily injury (needle sting) but by the possibility of having contracted infectious disease[46], the Court considered that anguish is indeed subject to damages if it originated from the same accident that caused the bodily injury, refuting the claim that article 17 requires direct causal connection between injury and distress[47].

In Chile, the 1º *Juzgado Civil* of Valdivia, adjudging over the case of *Christian Karl Petzold and Sherry Beth Petzold x LATAM*, analyzed whether two delays on the same trip would entail two compensations provided for in article 22(1) of the Montreal Convention, and concluded that the double delay implies a single liability, so that each passenger can obtain up to the compensation limit no matter how many flight delays on the same trip happened[48].

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[44] France. Court of Cassation. First Civil Chamber. Court decision 409 of 25 March 2015 (13-24.431).

[45] 'Article 33 — Jurisdiction. 1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination'.

[46] See the airline's arguments: 'The contested language here is "in case of." Etihad's argument has two components: its understanding of what "in case of" means, and its application of that understanding to the facts of this case. First, Etihad argues that "in case of" means "caused by," Appellee's Br. 4, or perhaps "caused directly by," see id. at 21. If we impose Etihad's reading of Article 17(1) back onto the text of the treaty, Etihad is then "liable for damage sustained [caused directly by] death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft...." Thus, according to Etihad, in order for Doe to recover for her mental anguish under Article 17(1), Doe would have to prove that (1) an "accident" caused her "bodily injury" on board an aircraft and (2) her "bodily injury" (i.e. the small hole in her finger) directly caused her "damage sustained" (i.e., her mental anguish). Second, Etihad conc edes that an accident caused Doe to suffer a bodily injury on board its aircraft, but Etihad argues that Doe's bodily injury did not directly cause her mental anguish: according to Etihad, Doe's anguish was caused not by her "bodily injury" (i.e., the needlestick, the physical puncture wound) but rather by the "accident" that caused the injury (i.e., being stuck by a needle, as opposed to being stuck by something else). Order Granting Def.'s Mot. for Partial Summ. J. 4 (emphasis added) (citations omitted) ("Plaintiff's mental distress damages were not caused by her physical injury. It is not the physical needle prick itself that caused Plaintiff's distress, but the possibility that she may have been exposed to an infectious disease."); see Appellee's Br. 17 ("[Doe's] mental anguish damages arise from the nature of the accident itself and were not caused by the bodily injury"), *id.* at 20 ("because the plaintiffs' mental injuries were caused by the 'accident' itself and not the 'bodily injuries' sustained in the accident, there could be no recovery under the Convention").' (United States. Supreme Court. Certificate of Compliance N. 17-997 (16-1042). Etihad Airways P.J.S.C. v. Jane Doe, et vir. Washington, 30 August 2017).

[47] 'Clearly, the plain meaning of "in case of" is *conditional*, not *causal*. To say *in case of X, do Y* is to say "if X happens, then do Y"—none of which means that there is a causal relationship between X and Y—just as to say *in case of a compensable bodily injury, the passenger may recover damage sustained* is to say "if there is a compensable bodily injury, the passenger may recover damage sustained.' (*ibid..)*

[48] See excerpt from the decision: 'La responsabilidad por el transporte aéreo internacional de pasajeros […] establecida en el Convenio es de índole mixta; en una primera fase, objetiva, y en una segunda, luego de que los daños se estimen en una cuantía superior a los límites de responsabilidad establecida, subjetiva. […] Que el incumplimiento de la demandada por dos veces

To the Uruguayan Supreme Court of Justice, in the case *Mario Vidales & CIA x Vanguard Logistic Services*[49], it was questioned whether, in an international carriage of cargo where the merchandise was stolen during the truck unloading at Miami International Airport, without special declaration of interest, the limits of liability provided for the Montreal Convention would apply or whether the local law should be enforced because it is not carriage by air or because the damage resulted from an omission done with intent to cause damage or recklessly and with knowledge that the damage would probably result. The Court decided that the compensation limit provided for the Convention should be applied because the damage took place during the carriage by air, because there was not special declaration of interest and because the exception provided for in article 22, 5[50] is not applied to cargo transport.

It should be noted that, in relation to international carriage of persons, there is a certain jurisprudential preference in Uruguay to apply the Consumer Protection Act because it is understood that it is a public policy discipline[51]. For example, in the case *Sanabria, Nelson c/Lan y lan Air Lines y Azul viajes y Turismo S/daños y Perjuicios y cobro de Pesos*, the aircraft and the tourism agency were sentenced to reimburse the value of air tickets and to compensate the passengers for moral damages based on the Consumer Protection Act[52].

In any case, the Montreal Convention has been applied by the signatory States, which demonstrates their commitment to obligations internationally undertaken and to the idea of standardizing certain rules on the subject.

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ponen de manifiesto el retraso consecuencia del incumplimiento del plazo, prácticamente, sin solución de continuidad, obedecen, o dan lugar, a una única responsabilidad, dado que se trataba de un mismo vuelo que fue postergado dos veces, respecto del itinerario contratado. En consecuencia, se dar como indemnización, a cada uno de ellos, 4150 derechos especiales de giro; esto es, $4.086.000; y, por los dos demandantes, la suma de $8.172.000'. (Chile. 1st Civil Chamber of Valdivia. Plaintiffs: Christian Karl Petzold and others. Defendant: LATAN Airlines Group S.A. Reporting Judge: Edinson Antonio Lara Aguayo. Valdivia, 27 february 2017).

[49] Uruguay, Supreme Court of Justice. Case 804/2014. Plaintiff: Mario Vidales & CIA. Defendants: Vanguard Logistics Services and Tesex S.A. – Aeropac Freight Forwarders. Montevideo, 15 September 2014.

[50] 'Article 22 Limits of Liability in Relation to Delay, Baggage and Cargo: 5. The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment'.

[51] Griselda Capaldo, *Nueve años de vigencia del Convenio de Montreal de 1999: su interpretación jurisprudencial respecto del transporte aéreo de pasajeros*, http://www.derecho.uba.ar/investigacion/investigadores/publicacio nes/capaldo-nueve-anos-de-vigencia.pdf (visited 9 January 2019).

[52] See the excerpt of the decision: 'Relaciones de Consumo. Como principio fundamental y punto de partida, debemos admitir sin cuestionamientos la postura que sostiene la aplicación de la Ley N° 17.250 (Ley de Relaciones de Consumo) a los contratos innominados (Merlinski. Contratos de Servicios Turísticos y Relaciones de Consumo. Rev.Crítica de Der.Privado N°4-2007,p. 215). La aplicación de dicha normativa se incorpora al contrato e incluso modifica ciertas estipulaciones de las partes, en forma "más favorables a cierta categoría de contratantes: los consumidores" (idem, p.216). Siguiendo al autor de referencia, es posible plantearse una metodología de análisis que permita llegar a la "interpretación e integración del contrato". De ella obtendremos la validez o nulidad de determinadas cláusulas e incluso la posibilidad de concluir en el incumplimiento contractual. Para ello, primero analizamos el contrato concreto, específico a la luz de "las normas específicas del tipo contractual" sin tomar en consideración la Ley N. 17.520. Luego de realizar la "subsunción" del contrato en la normativa aplicable, pasamos a la calificación de mismo a fin de concluir si estamos frente a una relación de consumo tutelada por las disposiciones legales de la Ley N. 17.520. La ley precitada es de orden público y necesariamente se aplica a toda contratación sea de naturaleza civil o comercial. En este punto, compartimos la postura que sostiene la independencia de la normativa de la Ley de Relaciones de Consumo, frente a la naturaleza civil o comercial del contrato (Cf. Merlinski, pág. 217). Genéricamente puede sostenerse sin hesitación, que todo turista "en tanto usuario de los servicios del operador de turismo, debe ser considerado "consumidor". Ello deriva claramente de la propia definición legal de relación de consumo prevista en el art. 4° de la ley. La relación jurídica entre el turista y la agencia de viajes, es una relación de consumo incuestionablemente. Por lo tanto, se encuentra tutelada por la Ley de Relaciones de Consumo'. (Uruguay, Juzgado Letrado de 1ª Instancia de la Ciudad de la Costa. Nelson c/Lan y Lan Air Lines y Azul Viajes y Turismo s/Daños y Perjuicios y Cobro de Pesos. Ciudad de la Costa, 3 October 2011).

Next, the Brazilian context and the interest in the harmonization between the Montreal Convention and the national provisions on this contractual relationship will be analyzed.

III. The international carriage by air contract within the national scope: the need for harmonization

In Brazil, the right to transport has become a social right by the Constitutional Amendment n. 90 of 2015, which has changed article 6 of the Federal Constitution[53].

The contract of carriage was only typified by the Civil Code of 2002, which disciplines the general rules of all transport contracts in articles 730 to 756. However, the treaties and conventions ratified by Brazil and the special laws preceding its promulgation remain in force in which they are not contrary to the provisions of the civil law. The Consumer Protection Code is also applied to transport contracts that set up consumer relations, and, regarding carriage by air issues, the National Civil Aviation Agency standards practices are also applied[54].

Thus, various sources of law are simultaneously applied to the same contractual relationship, and that is why harmonization is necessary for the best application of the law.

In the second part of this article, the legislation applicable to international air transport in Brazil will be analyzed, as well the thesis fixed by the Federal Supreme Court and the need for harmonization between national and international sources through the method of the Dialogue of the Sources.

A. The development of carriage by air regulation and the thesis in the Theme n. 210 fixed by the Federal Supreme Court

According to Bruno Miragem[55], before the promulgation of the Civil Code in 2002, several sparse norms regulated the modalities of transport in an unsystematic way, such as the Commercial Code (Law n. 556, of June 25, 1850)[56], which regulated trade and certain waterways of maritime transport, and Decree n. 2,681 of 7 December 1912, concerning the civil liability of railways[57].

Concerning carriage by air, the Decree 20.704 of 24 November 1931 was responsible for the incorporation of the Warsaw Convention in national law, which regulates all international

[53] 'Education, health, food, work, housing, transportation, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute are social rights, as set forth by this Constitution'. (Brazil, *Constituição da República Federativa do Brasil de 1988.* http://www.planalto.gov.br/ccivil_03/ constituicao/ constituicaocompilado.htm (visited 5 October 2018)).

[54] The National Civil Aviation Agency is a federal autarchy linked to the Ministry of Defense that elaborate standard practices for the functioning of civil aviation, which are also applicable to air transport contracts, but on a complementary basis. Its technical norms consider the precepts of international aviation institutions and organizations of which Brazil is a signatory. (Brazil, *Agência Nacional de Aviação Civil*, http://www. anac.gov.br /A_Anac/o-que-fazemos (visited 12 August 2018)).

[55] Pontes de Miranda, *Tratado de Direito Privado:* parte especial. Tomo XLV. Direito das obrigações, contrato de transporte. Updated by Bruno Miragem (São Paulo: Revista dos Tribunais, 2012), 66.

[56] The second part of the Commercial Code is dedicated to maritime trade, with, for example, on vessels, the requirements to be a captain or master of ship, the rights and the duties of the passenger. (Brazil, *Law 556 of 25 June 1850*, http://www. planalto.gov.br /ccivil_03/leis/L0556-1850.htm, (visited 10 October 2018)).

[57] The Decree has already imposed limits to the compensation for damage on the responsibility of the railway network, for example, for cases of loss or theft of goods (article 6), delay in the delivery of goods (article 7) and passenger injury (article 20). (Brazil, *Decree 2.681 of 7 December 1912*, http://www.planalto. gov.br/ccivil_03/ Decreto/d26811912.htm (visited 10 November 2018)).

carriage of persons, luggage or goods performed by aircraft[58], establishing the liability of the carrier in the event of death or injury of a passenger or any other bodily injury suffered by a passenger; the damage sustained in the event of the destruction, loss or damage to luggage or goods and the damage occasioned by delay in the carriage by air of passengers, luggage or goods.

In 1986, the Brazilian Aeronautical Code was edited, which, following the same line as the Warsaw Convention, among several other provisions, stipulates the responsibility of carriers in the national territory[59] for damages resulting from death or passenger injury, as well as delay and loss, destruction or breakdown of cargo and baggage[60].

In 1988, the new Federal Constitution was enacted, which establishes the dignity of the human person as one of its fundamental principles (article 1, III), to build a free, just and solidary society as one of its fundamental objectives (article 3, I) and the right of transportation as a social right (article 6).

The Constitution also instituted the defense of consumers as a fundamental right (article 5, XXXII) and as a general principle of the economic activity (article 170, V). It also determined the promulgation of the Consumer Protection Code (Temporary Constitutional Provisions Act, article 48), which came into force in 1990 (Law n. 8.078), setting forth the norms for consumer[61] protection and defense, regarding public policy and social interest, and establishing the liability[62] of the suppliers for damages resulting from the product or service and from product or service defect. After its promulgation, it has been used in the transport relations in which one of the parties is a consumer and the other is a transport supplier, such as in carriage of persons[63].

[58] Article 1(2): 'For the purposes of this Convention the expression "international carriage" means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place
within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention […]'. (Brazil, *Decree 20.704 of 24 November 1931,* http://www.planalto.gov.br/ccivil_03/Decrto/1930-1949/D20704.htm (visited 15 October 2018)).

[59] See article 1, §2: 'This Code applies to nationals and foreigners throughout the national territory, as well as abroad, to where their extraterritoriality is admitted'. (Brazil, *Law 7.565 of 19 December 1986,* http://www. planalto.gov.br/ccivil_03/leis/L7565compilado.htm (visited 4 October 2018)).

[60] In case of injury or death of a passenger, the compensation for damage is limited to 3,500 National Treasury Bonds (NTB) (article 257). In case of delay, the limit is 150 NTB (article 257). To the damage resulting from the destruction, loss or breakdown of baggage, it is limited to 150 NTB per passenger (article 260). Finally, the compensation for damage caused by the delay, loss, destruction or breakdown of cargo, is limited to 3 NTB per kilogram (article 262). According to article 248, these limits are not applied in case of misconduct or serious guilt of the carrier or its employees (*Ibid.*).

[61] About the concept of consumer, see article 2: 'A consumer is any physical person or corporate entity who acquires or uses a product or service as a final user. Sole Paragraph. The concept and status of consumer is extended to a collective of individuals, that may even be indeterminate, who may have participated in consumer relations'. Also, see article 17: 'For the purposes of this section [Liability over the Fact of the Product and Service], all victims of the event have the same rights as consumers'. Finally, see article 29: 'Any persons exposed to what is described in this chapter [Commercial Practices] and the next will be considered equal to consumers'. (Brazil, *Law 8.078 of 11 September 1990,* http://www.planalto.gov.br/ccivil_03/Leis/L878.htm, (visited 10 October 2018)).

[62] See article 3,*caput:* 'A supplier is any physical person or corporate entity, of a public or private nature, domestic or foreign, as well as other involved in the activities of production, assembly, creation, construction, transformation, importing, exporting, distribution, or commercialization of products or services'. (*Ibid.*).

[63] Bruno Miragem, *Contrato de transporte* (São Paulo: Revista dos Tribunais, 2014) 44-45.

From the promulgation of the Civil Code in 2002[64], all the general rules on transport are regulated by civil law, which gives the definition of a transport contract (article 730)[65] and authorizes the provision of special laws and international treaties and conventions (article 732)[66], thus enabling the dialogue between its dispositions and the Warsaw Convention, the Brazilian Aeronautical Code and the Consumer Protection Code.

The jurisprudence of Brazilian courts established that the provisions of Warsaw Convention and the Brazilian Aeronautical Code that are not compatible with the Civil Code or the Consumer Protection Code are no longer valid, and that is the reason why the articles that limited the air carrier liability were disregarded[67]: they are opposed to the Principle of Full Compensation established by the Civil and the Consumer Law[68]. In that sense, the Federal Supreme Court decided in the analysis of the Extraordinary Appeal n. 351.750[69] of 2009.

It turns out that, on September 27, 2006, the Decree n. 5.910 was published, which promulgated the Montreal Convention, and the discussion came to the fore again. At first, the courts maintained the consolidated understanding[70]. But then, on October 23, 2009, the Federal Supreme Court recognized the general repercussion of the claim for pecuniary and moral

[64] When drafting the explanatory memorandum of the preliminary draft of the Civil Code, Miguel Reale highlighted the need to reform the Civil Code of 1916 as a consequence of changes in the plan of facts and ideas, 'both because of technological progress and the new dimension acquired by the values of social solidarity'. He also said that the new contractual types enriched the law of obligations, emphasizing that the *typification* of the transport contract was one of the fundamental points of the update. (Brazil, *Novo Código Civil: Exposição de Motivos e Texto Sancionado,* http://www2.senado.leg.br/bdsf/bitstream/handle/id/70319/743415.pdf?sequence (visited 12 August 2018)).

[65] Bruno Miragem states that the contract of carriage is costly (requires remuneration), bilateral (because it is concluded between the carrier and the passenger or the owner or possessor of the thing), commutative (there are reciprocal benefits) and concluded by consensus of the parties (by the purchase of the ticket, by completing the form or by concluding a written contract). (Bruno Miragem, *Contrato de transporte* (São Paulo: Revista dos Tribunais, 2014) 45-46). On the other turn, Pontes de Miranda conceptualizes the transport contract as follows: 'it is the contract by which someone binds, upon retribution, to transfer from one place to another person or property. There is a provision of work, which is translocation. What matters is the result [...]. The person transported, or the possessor of good or goods transported, wishes the result. [...] The transport customer knows that the transporter has the bond and the other elements to fulfill what it promises. There is no randomness; The commutativity underscores'. (Pontes de Miranda, *Tratado de Direito Privado:* parte especial. Tomo XLV. Direito das obrigações, contrato de transporte. Updated by Bruno Miragem (São Paulo: Revista dos Tribunais, 2012), 63-64).

[66] Rui Stoco makes two important observations: (I) the legislator expressly authorizes the dialogue with other sources of law, but restricts it to transport as a contractual relationship; (II) this possibility gave survival to the legislation preceding the Civil Code, but restricted its reach and effectiveness, revoking incompatible provisions (Rui Stoco, *Tratado de Responsabilidade Civil.* 6th ed. (São Paulo: Revista dos Tribunais, 2004), 285).

[67] Silvio de Salvo Venosa says that there is no doubt that the Warsaw Convention and the Aeronautical Code are in force in all that concerns air transport, its structure, organization, air services, security, aircraft, etc. The question is whether the compensation limits applies to the consumer. And in this respect, he concludes that the conclusion tends to be negative. (Silvio de Salvo Venosa, *Responsabilidade civil,* 5th ed. (São Paulo: Atlas, 2005), 180).

[68] See the following Superior Court of Justice decisions: *AgI on Ag in REsp n. 874.427; AgRg in REsp n. 1.421.155.*

[69] Summary: 'Extraordinary appeal. Moral damages arising from the delay in international flight. Application of the Consumer Protection Code. Ordinary law matter. Not knowledge. 1. The principle of consumer protection shall be acted upon in the constitutional chapter of economic activity. 2. The special rules of the Brazilian Aeronautical Code and the Warsaw Convention shall be moved away when they imply a social retrogression or vilification of the rights secured by the consumer's protection. 3. It is not worth discussing, in the extraordinary instance, on the correct application of the consumer Protection Code or on the incidence, in the specific case, of antigen consumption standards convened in special legislation on international air transport. Indirect offense to the Constitution of the Republic. 4. Feature not known'. (Brazil, Federal Supreme Court. RE n. 351.750. Appellant: Varig S.A. - Viação Aérea Rio-Grandense. Appellee: Ana Maria da Costa Jardim. Reporting Judge: Marco Aurélio. Reporting Judge for the final court decision: Carlos Brito. Brasília, 17 March 2009).

[70] See the following Superior Court of Justice decisions: *AgRg on Ag 1.230.663; Ag.Rg on Ag 1.343.941 and AgRg on AREsp 607.388.*

damages occasioned by loss of cargo[71] in the analysis of the Interlocutory Appeal n. 762.184[72] and determined its conversion to the Extraordinary Appeal n. 636.331 and its inclusion in the Theme n. 210: 'Limitation of liability for damages sustained in the event of loss of baggage on the basis of the Warsaw Convention'. The appeal was subjected to the analysis of the Minister Gilmar Mendes.

In parallel, Minister Roberto Barroso, analyzing the Extraordinary Appeal nº 766.618[73], which discussed the term to file a suit of damage related to an international carriage by air contract, determined its submission to the plenary and proposed a simultaneous trial with the other Appeal.

The trial began in 2014 and was finalized on May 25, 2017 after Minister Rosa Weber's opinion.

Minister Gilmar Mendes, the reporting judge of the Extraordinary Appeal n. 636.331, voted in the sense that international Conventions limiting the liability of air carriers should preferably be applied in relation to the Consumer Protection Code, because consumer protection is not the only guideline to which the Brazilian economic order is oriented. Also, the legislator of the Federal Constitution imposed the respect and fulfillment of international agreements assumed by Brazil in matters relating to international carriage by air through article 178[74]. The Minister stated in the end that the Montreal Convention is a special law that applies to all international carriage of persons, baggage or cargo performed by aircraft (special law standard) and which is also subsequent to the Consumer Protection Code (chronological standard), which is why it must prevail.

In a similar vote, Minister Luís Roberto Barroso, the reporting judge of the Extraordinary Appeal 766.618, assured that the hierarchical standard of international treaties is the same as the Consumer Protection Code (both are ordinary law), so that antinomies are solved by chronological and special law standards. However, if this were the simple conclusion, the discussion would spin on an infra-constitutional issue. Thus, in his opinion, what legitimated the admission of the two Extraordinary Appeals is the existence of a specific constitutional device that regulates the matter: the article 178.

For Barroso, the article provides specific conditions for resolving antinomies on carriage by air in the same way as the Introduction Act to Brazilian Law Rules (Decree-law n. 4,657, of 4 September 1942). He also affirmed that the constitutional protection of consumer rights is a

[71] Sylvia Regina de Morais Rosolem filed a suit against Société Air France due to the loss of her luggage. She demanded for compensation for moral and pecuniary damages. (Claudia Lima Marques, Tatiana de A.F.R. Cardoso Squeff, Maria Luiza Baillo Targa, "Embargos de Declaração no Recurso Extraordinário n. 636.331", in *Revista de Direito do Consumidor*, v. 115 (São Paulo: Revista dos Tribunais, 2018), 526).

[72] Brazil, Federal Supreme Court. AI n. 762.184. Appellant: Société Air France. Appellee: Sylvia Regina de Moraes Rosolem. Reporting Judge: Cezar Peluso. Brasília, 22 October 2009.

[73] Cintia Cristina Giardulli filed a suit against Air Canada due to the delay in the carriage by air of passengers that forced her to sleep at the airport, demanding compensation for moral damages. The carriage by air claimed the prescription of the action in its defense. (Claudia Lima Marques, Tatiana de A.F.R. Cardoso Squeff, Maria Luiza Baillo Targa, "Embargos de Declaração no Recurso Extraordinário n. 766.618", in *Revista de Direito do Consumidor*, v. 115 (São Paulo: Revista dos Tribunais, 2018), 563-564).

[74] 'Article 178. The law shall provide for the regulation of air, water and ground transportation, and it shall, in respect to the regulation of international transportation, comply with the agreements entered into by the Union, with due regard to the principle of reciprocity. (CA No. 7, 1995) Sole paragraph. In regulating water transportation, the law shall set forth the conditions in which the transportation of goods in coastal and internal navigation will be permitted to foreign vessels'. (Brazil, *Constituição da República Federativa do Brasil de 1988*. http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm (visited 5 October 2018)).

principiological standard (or a basic principle) and that, when a constitutional rule has a different meaning to that indicated by a constitutional principle, the rule should be applied, which is the option clearly expressed by the legislator.

Inaugurating the divergence, Minister Marco Aurelio Mello reported to the judgment profiled by the Second Panel of the Federal Supreme Court in the Extraordinary Appeal n. 172.720[75] in order to demonstrate that the Court had already decided that the constitutional provisions related to consumer protection overlaps the treaties and conventions provisions ratified by Brazil.

Also proffering a dissenting vote, Minister Celso de Mello stated that special law and chronological standards cannot be invoked to 'nullify the fundamental right ensured in favor of the consumer, whatever the nature of the consumer relationship involved is'. He considered that the hierarchy standard must be used because the consumer protection is imposed by the Federal Constitution and, analyzing article 5, XXXII disposition, the Minister concluded that consumer protection is protected by an immutable clause, which gives it a preponderant legal effectiveness in relation to article 178, precisely because it enunciates a fundamental right[76]. Finally, the Minister affirmed that private autonomy cannot be exercised to the detriment of or with disrespect to the fundamental rights secured to the consumer and that means that Consumer Protection Code provisions take precedence over international conventions standards in civil liability of international carriage by air issues.

At the end of the trial, the Plenary of the Supreme Court, by majority (nine votes to two), in accordance with the votes of the Reporting Judges, accepted both the Extraordinary Appeals and fixed the following thesis with general repercussion[77]: 'under article 178 of the Constitution of the Republic, the international treaties limiting the liability of carriage by air of persons, especially the Warsaw and the Montreal Conventions, are prevalent in relation to Consumer Protection Code'.

It is important to emphasize that the Ministers ruled out the application of the thesis on requests related to moral damages, which are not subject to the limits imposed by the

[75] Summary: 'Indemnity - Moral damage – baggage loss in international air travel - Warsaw Convention - mitigated observation - Federal Constitution - Supremacy. The fact that the Warsaw Convention reveals, as a rule, the indemnity charged for material damage does not exclude the liability of the carrier of compensation for moral damages. Once it is configured by the feeling of discomfort, embarrassment, annoyance and humiliation arising from the loss of a suitcase, Constitutional provisions – sections V and X of article 5, must be respected, in which it overlaps with treaties and conventions ratified by Brazil'. (Brazil, Federal Supreme Court. RE 172.720. Appellants/Appellees: Sergio da Silva Couto e Iberia – Lineas Aereas de España S.A. Reporting Judge: Marco Aurélio. Brasília, 6 February 1996).

[76] The Minister continues: 'This context, in which a clear state of dialectical tension is recorded between the norms established in article 178 and in article 5th, XXXII […], it becomes essential to acknowledge that the overcoming of this antagonism, which opposes values impregnated with constitutional stature, will depend on the concrete weighting between the rights and interests placed in situation of conflict, in order to harmonize them. That means […] that overcoming the existing antagonisms between constitutional principles and values is to result from the use of standards that allows the public authorities (and the magistrates and courts) to ponder and evaluate, "*hic et nunc*", according to a given context and from a concrete axiological perspective, what should be the right to preponderate in the case, considered the situation of conflict occurring, provided that, however – as the Magisterium of the doctrine warns in the analysis of very delicate question pertaining to the subject of the collision of rights [...] – the use of the method of weighting of goods and interests does not matter in emptying the essential content of fundamental rights, among which it is substantial, for its significant Fundamental right of protection to which the consumer is entitled'. (Grime in the original).

[77] Brazil, Federal Supreme Court. RE 636.331. Appellant: Société Air France. Appellee: Sylvia Regina de Moraes Rosolem. Brasília, 25 May 2017. And Brazil, Federal Supreme Court. Ag on RE 766.618. Appellant: Air Canada. Appellee: Cintia Cristina Giardulli. Reporting Judge: Luis Roberto Barroso. Brasília, 25 May 2017.

international Conventions. In this way, national law is applicable to moral damages demands or requests.

Although there is no final *res judicata* (transit in *rem judicatam*), the observation of the thesis by other courts and by the Federal Supreme Court itself is already being imposed[78].

As a result of the fixed thesis, which diverges from the previously consolidated jurisprudence and precludes a dialogue between Brazilian norms and international conventions, the study of the method of the Dialogue of the Sources is important to verify its application on the matter and to harmonize apparent antinomies.

B. The harmonization of national and international law through the Dialogue of the Sources

The German jurist Erik Jayme, in his studies, found that in the post-modern[79] and globalized society, the classic standards for antinomies solutions (hierarchy, chronological and special law standards) are no longer supported, which preach the prevalence of one source of law to the detriment of others, since today the coexistence of different laws and their harmonization is sought[80]. In other words, Jayme found that the need to *overcome* antinomies is replaced by the need for *coexistence* of the different sources of law, which can be achieved by means of a dialogue between the sources in apparent conflict.

For this reason, he developed the Theory of Dialogue of the Sources, using this expression for the first time in 1995, whose meaning can be translated as the simultaneous, coherent and coordinated application of the multiple sources of law, with fields of application convergent but not identical[81].

[78] Minister Barroso has recently determined the review by the ordinary courts of a decision given in 2009 to reinstate it to the newly fixed thesis. (Brazil, Federal Supreme Court. RE 351.750. Appellant: Varig S.A. - Viação Aérea Rio-Grandense. Appellee: Ana Maria da Costa Jardim. Reporting Judge for the final court decision: Carlos Brito. Brasília, 17 March 2009). The Precedents Management Center of the Court of Justice of Rio Grande do Sul, which seeks to disseminate decisions and information on paradigmatic decisions reported the publication of the thesis in the 210 Theme in its quarterly newsletter, edition 04/2017, to be observed by all judges. (Brazil, Court of Justice of Rio Grande do Sul, *Núcleo de Gerenciamento de Precedentes: boletim Informativo Trimestral Edição 04/2017*, http://www.tjrs.jus.br/institu/nurer_/docs/_Boletim-Trimestral-Edicao-04-2017-NUGEP-TJRS.pdf (visited 26 August 2018).

[79] In attempt to elucidate what post-modernity means, Erik Jayme points out that, when it comes to post-modernism, it is thought of architecture and art. The meeting point between the post-modern culture and the law relates to the common values that both share: pluralism, communication, narration and the return of feelings. In relation to the first, it ponders that the postmodern civilization is characterized by a pluralism of styles and values and that the cultural identity of each nation is respected, making the right to difference emerge. For him, the principle of equality requires that different situations are treated differently, so that the equality is only reached when the differences are effectively considered. Regarding communication, Jayme states that people want to communicate, which also means being part of a globalized society, which entails the need to adapt private international law to the new reality in order to safeguard integration and to ensure the proper functioning of the international market. As for the narration, Jayme affirms that narrative norms emerge in international law, which describes values to be attained by the nations. Finally, the fourth characteristic is the return of feelings: in post-modernity, it is accepted that usually people act by its emotions and not only by reason and, in this context, the law aims to safeguard the cultural identity that is precisely the maximum expression of such feelings. (Erik Jayme, "Identité culturelle et intégration: le droit international privé postmoderne: cours général de droit international privé" in. *Recueil des cours:* collected courses of the Hague Academy of international law, tome. 251. (Haia: Martinus Nijhoff Publishers, 1995), 251-261).

[80] Flavio Tartuce affirms that, in the post-modern society, the insular interpretation of the law, according to which each branch would represent an island, is overcome, and the Law is seen as a solar system in which the planets are the codes, the satellites are the statutes and the sun is the Federal Constitution, which radiates its rays (principles) throughout all over the system. (Flávio Tartuce, *Manual de Direito do consumidor: direito material e processual*, 5th. ed. (Rio de Janeiro: Forense, 2016) 17-19).

[81] Antonio Herman Benjamin, Claudia Lima Marques, "A teoria do diálogo das fontes e seu impacto no Brasil: uma homenagem a Erik Jayme". In *Revista de Direito do Consumidor*, v. 115 (São Paulo: Revista dos Tribunais, 2018) 21-40.

In the words of Claudia Lima Marques[82], the expression is self-explanatory: '*di-a-logues*, two "logics", two "laws" coordinating a meeting in the "a", a "coherence" necessary to "restore" the values of the system, of this new order of sources, in which one no longer revokes the other (which would be a mono-logue, because only one law "speaks")[83]'.

Jayme states that, from the moment that the idea of communication is evoked in law, the logical corollary is that the overcoming of antinomies results from a dialogue between the sources, it being the duty of the judge to coordinate them through listening to what they say, a dialogue that is enlightened by constitutional values and human rights, since its *leitmotiv* is the restoration of coherence between the conflicting norms by valuing the constitutional values that put the human person at the center of the issue (*Pro Homine* principle)[84].

According to Claudia Lima Marques[85], there are three possible dialogues: dialogue of systematic coherence (*diálogo sistemático de coerência*), dialogue of complementarity and subsidiarity (*diálogo de complementaridade e subsidiariedade*), and the dialogue of systematic coordination and adaptation (*diálogo de coordenação e adaptação sistemática*).

The first occurs when one of the laws in dialogue serves as a conceptual basis to the other, usually between a general law and a special law that is not materially complete[86]. Likewise, the second usually occurs between a general law and a special law, applying the general one to fill gaps in this through norms, principles and general clauses[87]. Finally, the third occurs when the sources in dialogue influence each other, whether they are general or special laws (*double sens* dialogue)[88].

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[82] Claudia Lima Marques, 'O "Diálogo das Fontes" como Método da Nova Teoria Geral do Direito: Um Tributo a Erik Jayme' *In* Claudia Lima Marques (org) *Diálogo das Fontes: do conflito à coordenação de normas do direito brasileiro.* 2nd. ed (São Paulo: Revista dos Tribunais, 2012) 26-27.

[83] See excerpt from the book of Jayme: 'The existence of several sources, characteristic of the current legal systems, requires the search for solutions of conflicts that can be born between them. In principle, there are two ways to resolve conflicts. The first is to give prevalence to a source discarding the other, which means applying a certain hierarchy between them. The second solution is the search for coordination of sources. [...] In my view, a method that tends to coordinate sources is preferable to a hierarchical solution'. (Erik Jayme, "Identité culturelle et intégration: le droit international privé postmoderne: cours général de droit international privé" in. *Recueil des cours:* collected courses of the Hague Academy of international law, tome. 251. (Haia: Martinus Nijhoff Publishers, 1995), 60-61).

[84] See Marques above n 2, at 29.

[85] Ibid, at 32.

[86] As an example, we cite the dialogue between the Civil Code (general law) and the Consumer Protection Code (special law by virtue of the protection of the consumer), in which the first brings concepts applicable to consumer relations. Marques teaches: 'The CDC is a special law of consumer relations, but it is not exhaustive or pretension of completeness, as clearly demonstrates art. 7th [...] [So that the Civil code] will serve as a new conceptual basis for the specific microsystem of the CDC, in what fits'. (Claudia Lima Marques, "Diálogo entre o Código de Defesa do Consumidor e o Novo Código Civil: do 'diálogo das fontes' no combate às cláusulas abusivas" *in Revista de Direito do Consumidor*, n. 45 (São Paulo: Revista dos Tribunais, 2011), 92).

[87] This dialogue is also possible between two special laws. Marques explains: A law can complement the application of another, depending on its field of application (dialogue of complementarity and subsidiarity), both its norms and its general principles and clauses may find subsidiary or complementary use, "dialogue" this exactly in the opposite direction of the repeal or classic subrogation, in which a law was overcome and "withdrawn" from the system by the other'. (Claudia Lima Marques, "O 'diálogo das fontes' como método da nova teoria geral do direito: um tributo a Erik Jayme" In Claudia Lima Marques (coord.). *Diálogo das Fontes: do conflito à coordenação de normas do direito brasileiro* (São Paulo: Revista dos Tribunais, 2012) 32).

[88] As an example, there are the influences between the Consumer Protection Code and the law regulating Health Plans, which are special laws. Both perform influences in a reciprocal way in view of the respective incidence of different application, but usually convergent. In this third kind of dialogue there is also the idea that the parties may opt for the prevalent source or by an abstract conflict law in a particular situation (Antonio Herman Benjamin, Claudia Lima Marques, Leonardo Roscoe Bessa. *Manual de Direito do Consumidor*. 6th (São Paulo: Revista dos Tribunais, 2014) 135).

Critics to the theory indicate that it confers great power of creation to the judge, causing legal insecurity. In any case, the method has been widely used by Brazilian courts due to the efforts of Claudia Lima Marques, which continue the studies of Jayme and adapt the theory to allow its application in Brazil.

The theory gained national repercussion after the trial of the Direct Action of Unconstitutionality N. 2,591 in 2006, when the Federal Supreme Court understood the application of the Consumer Protection Code to be constitutional to banking activities although there are specific laws regulating the issue[89].

Despite being used in the various areas of law, the branch in which it is most applied is in consumer relations, because the Consumer Protection Code allows the dialogue between its norms and other sources of law in the *caput* of its article 7[90] by allowing the sum of rights established in national or international laws to the rights already foreseen in the Code[91].

In relation to carriage by air contracts, the Theory is commonly used by the courts, and Marques notes that the Superior Court of Justice uses the dialogue of subsidiarity between the sources applicable to this relationship to address the issues relating the subject[92], as well as the Court of Justice of Rio Grande do Sul[93].

It occurs that, after the thesis fixed by the Federal Supreme Court, it is feared that the Courts no longer conduct a dialogue between the international Conventions and national law in the judgment of situations relating to international carriage by air, further enhanced by Minister Rosa Weber expressly pushing away the application of the Theory of Dialogue of the Sources

[89] See excerpt from the vote of Minister Joaquim Barbosa: 'In many cases, the law operator will come across facts that call for the application of norms of both one and another area of legal knowledge. Thus it occurs because of the different aspects that the same reality presents, causing it to soften itself to the normative scopes of different laws. […] The Constitutional Amendment n. 40, as it conferred more vagueness on the constitutional discipline of the financial system [...], it made even greater this field that Professor Claudia Lima Marques called "Dialogues between Sources" – in this case, between the ordinary law (which regulates consumer relations) and complementary laws (which disciplines the national financial system) […]'. (Brazil, Federal Supreme Court. ADI 2.591. Claimant: Confederação Nacional do Sistema Financeiro. Reporting Judge for the final judge decision: Eros Grau. Brasília, 7 June 2006).

[90] The article says: 'Art. 7. The rights set forth in this Code do not exclude any others that may come as a result of international treaties or conventions ratified by Brazil, of internal legislation, regulations set forth by administrative authorities with jurisdiction, as well as any other rights that stem from the general principles of Law, analogy, traditions and fairness'.

[91] Marques, about the use of the theory to resolve consumer conflicts, refers that the dialogue assure to the human person a special and dignified guardianship, according to the values and constitutional principles of protection Special of the Federal Constitution (Claudia Lima Marques, "O 'diálogo das fontes' como método da nova teoria geral do direito: um tributo a Erik Jayme" In Claudia Lima Marques (coord.). *Diálogo das Fontes: do conflito à coordenação de normas do direito brasileiro* (São Paulo: Revista dos Tribunais, 2012) 21-24).

[92] Claudia Lima Marques, "O 'diálogo das fontes' como método da nova teoria geral do direito: um tributo a Erik Jayme" In Claudia Lima Marques (coord.). *Diálogo das Fontes: do conflito à coordenação de normas do direito brasileiro* (São Paulo: Revista dos Tribunais, 2012) 36. See as example the following cases: Brazil, Superior Court of Justice. REsp 156.240 Appellant: Gisele Resende Benevino. Appellee: Viação Aérea São Paulo S.A. Reporting Judge: Min. Ruy Rosado de Aguiar. Brasília, 23 November 2000; Brazil, Superior Court of Justice. REsp 196.031 Appellant: Viação Aérea São Paulo S.A. Appellee: Microtécnica Cema. Reporting Judge: Antônio de Pádua Ribeiro. Brasília, 24 April 2001.

[93] Three cases are mentioned as an example: in the first, the Court applied the dialogue between the Civil Code and the Consumer Protection Code to condemn the air carrier to compensate moral damages arising from the loss of professional commitments when losing connection due to flight delay caused by heavy rain (Brazil. Court of Justice of Rio Grande do Sul. Ordinary Appeal 71003677283. Appellant: Anita Helena Grigolo Pasternak. Appellee: VRG Linhas Aéreas S/A. Reporting Judge: Fabio Vieira Heerdt. Porto Alegre, 12 June 2012). In the second, the court removed the claim of force majeure resulting from aircraft inspection that caused the loss of passengers' connection to international flight through a dialogue between the Civil Code and the Consumer Protection Code (Brazil, Court of Justice of Rio Grande do Sul. Ordinary Appeal 71003766672. Appellant: Rafael Caprara Ferrari and others. Appellee: WEBJET Linhas Aéreas S.A. Reporting Judge: Heleno Rregnago Saraiva. Porto Alegre, 11 October 2012). And in the third, the airline was sentenced to the payment of moral damages due to the flight delay caused by the need to maintain the aircraft. The Court considered this to be an internal fortuitous case, conducting a dialogue between the Civil Code and the Consumer Protection Code. (Brazil, Court of Justice of Rio Grande do Sul. Ordinary Appeal 71003265048. Appellant: VRG Linhas Aéreas S/A. Appellee: Helena de Nadal Santana. Reporting Judge: Fabio Vieira Heerdt. Porto Alegre, 27 September 2011).

for understanding that article 178 of the Federal Constitution ensures the prevalence of international conventions[94].

The conclusion does not seem appropriate because it is necessary to harmonize international law with national legislation and that the best way to achieve such harmonization is through the method of the Dialogue of the Sources, since the application of Consumer Protection Code dispositions on a consumer relationship is mandatory. For this reason, it is proposed that the dialogue between the Montreal Convention and the Consumerist Code can be achieved. For this purpose, a parallel between these laws will be traced and how the apparent antinomies can be resolved will be analyzed.

With a brief comparative panorama between domestic and international regulations, it is concluded that the most significant differences relate to the liability of the air carrier and the period granted to the person to claim compensation resulting from damage occasioned during the provision of the service.

In accordance with national law, pursuant to article 5, V, of the Federal Constitution[95], article 6, VI, of the Consumer Protection Code[96] and the caput of article 944 of the Civil Code[97], the damage compensation must correspond to the damage caused (Principle of Full Compensation). Besides, according to article 14 of the Consumerist Code[98], the carrier liability is objective, that is, regardless of the existence of guilt.

On the other hand, the Montreal Convention limits the liability of the carrier in case of damage caused by delay (4 694 SDR for each passenger)[99], in case of death or bodily injury of a passenger (113 100 SDR for each passenger)[100], in case of destruction or loss of, or of damage to baggage (1 131 SDR for each passenger, unless the passenger has made a special declaration

[94] See the excerpt of her vote: 'The theory of the Dialogue of the Sources, overcoming traditional models of conflict resolution of norms, turns to the best possible realization of a constitutional command, and in this perspective, although in general, under article 5, XXXII and article 170, V, of the Magna Carta, legitime the application of the microsystem impregnated with greater aptitude to promote the defense of the consumer, in discussion involving international carriage by air, I understand that, by injunction of article 178, a prevalence should be given to the fulfilment of the command of observance of the Warsaw and Montreal Conventions. It seems to me that although the abovementioned treaties do not see human rights, the constituent power conferred to them exceptional supralegal status by imposing that internal laws must observe international agreements on air, aquatic and terrestrial transport signed by the Federative Republic of Brazil'.

[95] Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: […] V – the right of reply is ensured, in proportion to the offense, as well as compensation for property or moral damages or for damages to the image;

[96] Art. 6. The following are basic consumer rights: VI - effective prevention and reparation for damage against pecuniary, moral, individual, collective, and diffused damage.

[97] Art. 944. The indemnity is measured by the extent of the damage.

[98] Art. 14. The service supplier will be responsible, regardless of the existence of guilt, for providing the necessary reparations for the damage caused to consumers due to any defects pertaining to service provision, as well as for insufficient or inadequate information about the nature of the service and the risks involved.

[99] Article 19: The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

[100] Article 21: 1. For damages arising under paragraph 1 of Article 17 not exceeding 100 000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability. 2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100 000 Special Drawing Rights if the carrier proves that: a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or b) such damage was solely due to the negligence or other wrongful act or omission of a third party. In Brazil, by virtue of the provisions of article 735 of the Civil code ('The contractual liability of the carrier by accident with the passenger is not elide by third party fault, against which it has regressive action') and the Precedent n. 187 of the Federal Supreme Court ('the Contractual liability of the carrier, by accident with the passenger, is not elide by third party fault, against which has regressive action'), the liability of the carrier is not elided by third party fault.

of interest)[101] and in case of destruction or loss of, or damage to, cargo[102] (19 SDR per kilogram, unless the consignor has made a special declaration of interest)[103].

In relation to the period to file a claim, the Consumer Protection Code establishes a period of five years from the knowledge of the damage and its authorship (article 27) and the Montreal Convention establishes a period of two years reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped (article 35).

Thus, if national law is applied, the main consequences are: (a) the air carrier liability is objective; (b) the compensation corresponds exactly to the damage caused; (c) the period to file a suit against the air carrier is five years. Also, if the judge finds that the accusation holds truth or if he verifies consumer's disadvantage, it is possible to shift the burden of proof in favor of the consumer[104].

If the Montreal Convention is applied, the main consequences are: (a) the air carrier liability is objective only in case of death or bodily injury not exceeding 113 100 SDR and in case of destruction or loss of, or damage to, checked cargo and baggage [105]; for the other cases, it is necessary to prove that the carrier and its servants and agents did not take all measures that could be reasonably required to avoid the damage; the compensation is limited to the values provided for in the Convention; (c) the period to file a suit against the air carrier is two years.

The harmonization of these laws is possible through the dialogue between them as follows: in relation to non-compensatory damages, such as moral damages, only national law is applied under the provision of article 29 of the Convention[106]. Likewise, the Convention does not apply

[101] Article 22(2): 2. In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1 000 Special Drawing Rights for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at destination. (Brazil, Decree 5.910 of 27 September 2006, http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/Decreto/d5910.htm, (visited 6 October 2018)).

[102] Article 22(3): 3. In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination. (Ibid).

[103] Updated values after ICAO readjustment in 2009.

[104] See article 6,VIII, of Consumer Protection Code: 'VIII - protection of consumer rights facilitated, by shifting the burden of proof in favor of the consumer in a civil action when the judge finds that the accusation holds truth or when he is unable to satisfactorily fulfill its obligations according to ordinary rules from experiences'.

[105] Article 20 — Exoneration: If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21. (Ibid).

[106] 'Article 29 — Basis of Claims: In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable'. According to Olivier Cachard, the Conventions have internal and external vacancies. The internal vacancies shall be fulfilled by the principles established by the Convention itself and by the general rules governing the interpretation of public international law, by reference to the conventional system whose exclusivity is protected. The external vacancies, which corresponds to the points that the parties deliberately chose not to regulate because they did not intend to unify, must be carried out by the national law. An example of external gap is the issue of reparable damages, such as moral damage, danger damage (*préjudice d´angoise*) and *Pretium Doloris (*Olivier Cachard, *Le Transport International Aérien De Passagers* (Haye: LPRecueils de Cours, 2015) 82-83).

to damages other than those expressly foreseen (e.g. for overbooking cases). In both situations, the judge must use a dialogue of complementarity or subsidiarity between national law and the Convention.

And, to the questions in apparent conflict, through the dialogue of systematic reciprocal influence, the following conclusion is reached: the Convention shall be applied within the limits of its compatibility with Brazilian law by virtue of articles 732 of the Civil Code, article 7, *caput*, of the Consumer Protection Code and especially considering the fact that this Code disciplines the public policy issue of consumer protection, and article 17 of Introduction Act to Brazilian Law Rules states that 'the laws, acts and sentences of another country, as well as any declarations of will, are not effective in Brazil, when they offend national sovereignty, public policy and good Customs[107]'.

Thus, when analyzing a situation relating to international carriage by air in which one of the parties is a consumer, the applicator of the law shall conduct a dialogue between the sources incidents on this relationship, that is, he must let them *talk*, and, in the end has to decide in order to achieve the *pro homine* Principle, because, according to Erik Jayme, the *leitmotiv* of contemporary juridical culture is the primordial role of human rights[108].

Unlike the thesis set by the Federal Supreme Court, instead of giving a prevalence to a single source of law, one must seek the coexistence of all sources in order to respect the commitments made by Brazil while, simultaneously respect the national tradition to the human person protection – including the protection of the consumer.

For these reasons, the method developed by the Dialogue of the Sources is the best mechanism to allow the harmonization between international conventions and national legislation, because it allows the judge to weigh the importance of respecting the commitments signed by Brazil and the need to protect the vulnerable part of a relationship, reaching a middle ground which allows the best application of the law, without withdrawing, in advance, the incidence of any normative source on the contractual relations of international carriage by air.

IV. Concluding remarks

The interest in standardizing certain rules relating to international carriage by air is compatible with the need to harmonize national and international sources of law. In fact, the international interest of cooperation to ensure minimum rules related to the issue is compatible with the respect to the laws of each country.

[107] The Vienna Convention on the law of treaties (with annex) concluded at Vienna on 23 May 1969, in its article 53 says: 'treaties conflicting with a peremptory norm of general international law ("jus cogens"): a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. (United Nations, *Vienna Convention on the law of treaties*, https://treaties.un.org/doc/public ation/unts/volume%201155/volume-1155-i-18232-english. pdf (visited 13 August 2018). The exact same reason can be adopted for cases where the Treaties or Conventions treaty countermeasure a national public policy law or determination.

[108] Erik Jayme, "Identité culturelle et intégration: le droit international privé postmoderne: cours général de droit international privé" in. *Recueil des cours:* collected courses of the Hague Academy of international law, tome. 251. (Haia: Martinus Nijhoff Publishers, 1995), 37.

Also mentioned by the former minister of the Federal Supreme Court Eros Roberto Grau, in the judgment of the Fundamental Precept 101, 'No law is interpreted in strips; Normative texts are not interpreted separately, but rather the right, as a whole[109]'.

In fact, the Brazilian legal system should be seen as a single body formed by different normative sources, of international and internal origin. And it is necessary, in the current context of the globalized, post-modern consumer society, strongly marked by pluralism and the right to difference, to foster the coexistence of different norms and to harmonize its provisions. Such harmonization should always aim to protect the human person, their dignity and interests, especially in consumer relations in view of the recognition of consumer vulnerability as a guideline principle of the national policy on consumer relations.

In international air carriage contracts that typically configure consumer relations, the idea cannot be different: it is necessary to respect the commitments made by Brazil. However, this does not mean that the implementation of national standards will be mitigated or withdrawn.

It is important to achieve a balance between the international economic integration and the respect for the cultural identity of each nation, as integration does not mean the annihilation of domestic legislation, since integrating does not necessarily imply an absolute standardization.

And that is precisely the idea behind the method proposed by the Theory of Dialogue of the Sources: to avoid the fragmentation of the legal system through its global analysis, allowing the dialogue between all incident sources on the same contractual relationship for the correct application of the law.

The major challenge in international air carriage is to apply the provisions of the Montreal Convention together with the provisions of the Consumer Protection Code, allowing their coexistence and through a dialogue between them, to conform their norms in favor of protecting the interests of the human person.

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[109] See what the Minister said: 'I follow the vote, but I understand to be another the justification of the assertion of unconstitutionality of the judicial interpretations that authorized the importation of tires. This on the one hand because I refuse to use the weighting between principles to decide on the issue of taking care of these documents. On the other because, as it seems to me, this decision must be defined since the interpretation of the constitutional totality, of the whole that the Constitution is. From that last aspect I have repeatedly treated in academic studies. The law is not interpreted in strips; It does not interpret normative texts in isolation, but rather the right, in its whole--- marked, in the diction of Ascarelli, by its implicit assumptions'. (Brazil, Federal Supreme Court. ADPF 101. Claimant: Presidente da República. Reporting Judge: Carmen Lúcia. Brasília, 24 June 2009).

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