THE PRINCIPLE OF EQUITABLE REPARATION (REFUND) IN THE INTERNATIONAL AIR TRANSPORT CONTRACT: REFLECTIONS ON THE SCOPE OF BREAKING THE PARADIGM OF INTEGRAL REPAIR IN BRAZILIAN LAW

LE PRINCIPE DE RÉPARATION ÉQUITABLE (REMBOURSEMENT) DANS LE CONTRAT DE TRANSPORT AÉRIEN INTERNATIONAL: RÉFLEXIONS SUR LA PORTÉE DE LA VIOLATION DU PARADIGME DE LA RÉPARATION INTÉGRALE EN DROIT BRÉSILIEN

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ABSTRACT

This article aims to study the application of the Montreal Convention from the decision rendered by the Federal Supreme Court in Extraordinary Appeal 636.331 - RJ. In this sense, it is relevant to highlight how the incidence of the 'principle of equitable reparation' (principle of restitution) represents a partial paradigm shift in the jurisprudence of the Brazilian Constitutional Court in relation to the application of the principle of full reparation.

Keywords: Transport. Air. International . Principles. Equitable Reparation. Full Repair. Defense. Consumer. Federal Court of Justice.

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ABSTRACT

Cet article aimed at the application of the Convention of Montréal, on the basis of the decision rendered by the Cour Suprême Fédérale in extraordinaire appel 636.331 - RJ. En ce sens, il est pertinent de souligner comment l'incidence du principe de réparation équitable represents une rupture partielle de paradigm dans la jurisprudence de la Cour constitutionnelle brésilienne en ce qui concerns l'application du principe de réparation entégrale.

Mots-clés *: Transport a érien . International. princes. Equitable reparation. Integral Rep aration . defense. Consommateur. Cour Suprême Fédérale.*

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1. INTRODUCTION

Before addressing the legal issue addressed in this study, it should be noted that air transport has registered significant growth in Brazil in recent years, with the exception, of course, of the Covid 19 Pandemic period.

According to data from the National Civil Aviation Agency, in 2017 alone, 112.5 million passengers were transported, of which 90.6 million on domestic flights and 21.8 million on international flights, with the inclusion of 49 million passengers in last 10 years. The average growth of passenger transport from 2008 to 2017 was 7.1% per year, therefore, 5.5 times greater than that seen in the Brazilian Gross Domestic Product (GDP) (ANAC, 2017).

This brief digression shows the macroeconomic relevance of the air sector, which explains the significant increase in lawsuits where flight delays and cancellations, lost luggage, among other failures in the provision of the aforementioned services are reported.

In this step, the country's jurisprudence until the year 2016, including within the scope of the Federal Supreme Court, had established the prevalence of the principle of full compensation for property and non-property damages, anchored in the principle of consumer protection, inscribed in item V. , article 170 of the Constitution of the Republic (BRASIL, 1988).

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The matter was returned for examination by the Federal Supreme Court, through Extraordinary Appeal 636.331 - RJ (BRASIL, 2018), revealing continuity of the jurisprudential discussion, with a tendency to change the understanding previously constructed regarding the application of the Warsaw and Montreal Conventions.

In this context, it is intended to present a study on the principle of equitable reparation in cases of liability of passenger air carriers, the application of the Warsaw and Montreal Conventions and their relation to the Consumer Protection Code (BRASIL, 1990). Thus, the hypothesis of preservation of the constitutional principle of consumer protection will be examined.

For the development of the work, the method will be the deductive, based on doctrinal research, jurisprudence and examination of constitutional and legal texts, for a better angulation of the subject.

Finally, this article will be structured starting, initially, from the understanding of constitutional civil law and what is meant by hermeneutic turn. Next, the context of globalization and air transport. Continuing, civil liability and the principle of full reparation will be studied, in the light of Brazilian doctrine and jurisprudence. Next, the focus will be on the principle of consumer protection in international air transport. In the conclusions, an attempt will be made to summarize the theme and our position.

With the elaboration of this article, it is expected to contribute to the discussion about reparation in the international air transport contract, and to a critical reflection on the need for adequate application of legal-constitutional principles and modern hermeneutics, in the construction of judicial decisions. , in the case of civil liability for the air passenger transport service.

2. CONSTITUTIONAL CIVIL LAW

As Fernando Whitaker da Cunha recalls, “Constitutional Civil Law focuses on the rules of Civil Law contained in the Constitution, despite every right, of course, finding its primordial sources, its “ tête de chapitre ” in the “Lex Magna”” (CUNHA, 1998, p. 228).

In this step, according to Teresa Negreiros, “The process of constitutionalization of civil law implies the replacement of its value center - instead of the individual comes the person”. And she concludes: “And where before, absolute individual freedom reigned, social solidarity gains meaning and legal force” (NEGREIROS, 2006, p. 11).

In this way, civil law, previously focused on its purely privatist character, where the autonomy of the will and the individualist character reigned, starts to receive, as a contribution of its constitutionalization, the emergence of a new evaluative conformation that shelters the principles of the dignity of the person, privacy and the social function of property, among others.

Thus, when it comes to civil, contractual and non-contractual liability, there are currently a series of constitutional provisions that will lead to the application of civil law, sometimes limiting the autonomy of the will, as is the case with the principle of consumer protection inserted in item XXXII, article 5, of the Constitution of the Republic (BRASIL, 1988).

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This new evaluative approach and principles of a legal-constitutional aspect was born, as will be seen below, with the overcoming of legal positivism, making an important contribution to the science of law.

3. OF THE HERMENEUTIC TURN

As Paulo Nader recalls, legal positivism was characterized by the law studied evaluatively, by the coercibility of the law as a source of law, by the imperative derived from state power and by the belief that the legal system would be endowed with completeness and coherence. In this scenario, the law was marked by a mechanistic interpretation, where the jurist would be able to declare the law without getting involved in creative processes (NADER, 2018, p. 226-227).

Nevertheless, in the legal community, especially after the second world war, there was a strong perception of disagreement with legal positivism, which had been used by authoritarian regimes such as Nazism and fascism to justify the atrocities that had once been practiced in strict legality.

Therefore, in Paulo Nader's view, the criticisms of Hans Kelsen's Pure Theory were not unreasonable, mainly because of the conception that the interpretation of law could be limited to the possible solutions provided for in the normative "frame" or that from which there was no need to seek teleological, axiological, historical or sociological subsidies for the application of the legal system (NADER, 2018, p. 252-253).

There was no room for an evaluative, aseptic right, whose claim to completeness was no longer sustained in the face of an increasingly complex society in its social and economic constitution.

This environment gave rise to the so-called hermeneutic turn from positivism to post-positivism, in which legal hermeneutics resumes its central place in the application of law, starting to contemplate, alongside constitutional and infraconstitutional legislation, the application of legal principles. This work has as its precursor the German jurist Josef Esser , with the publication in 1960 of the work "Principle and Norm in the Jurisprudential Elaboration of Private Law", says Juliana Magalhães (MAGALHÃES, 2005).

According to Juliana Neuenschwander Magalhães, it is with the hermeneutic turn that the process of overcoming the limits of legal formalism imposed by positivism begins, re-entering the legal discourse as central characteristics: hermeneutics at the center of legal discussions; the right not limited to normative positivity; the clarification of the role of values in the construction of law; placing the interpreter as a catalyst in overcoming the paradox established between law and society; and, still, the law as an interpretive practice that must find meaning in the context where it is applied (MAGALHÃES, 2005).

Opening modern hermeneutics, with a strong impact on the legal community, the philosophical production of Hans-Georg Gadamer is evident, especially in the Work Truth and Method, volumes I and II, published for the first time also in the fruitful year of 1960.

Josef Esser and Hans-Georg Gadamer were followed by several other jurists who began to dedicate themselves to legal principles, including Chaïm Perelman , Ronald Dworkin and Robert Alexy (SOARES, 2010, p. 56-57).

In this context, civil law, previously limited to the dogmatics of codifications, begins to receive the broad and profound impact of values and principles brought by the Constitutions, as Pietro Perlingieri emphasizes, when commenting on the advent of the 1948 Constitution on Italian civil law:

> The set of values, assets, interests that the legal system considers and privileges, and even its hierarchy, translate the type of system with which it operates. In the abstract, there is no legal system, but there are legal systems, each of which is characterized by a philosophy of life, that is, by values and fundamental principles that constitute its qualifying structure (PERLINGIERI, 2002, p. 5).

Perlingieri's doctrine, whose work was first published in 1975, remains current, by supporting the concept that each legal system seeks its anchor in the Constitution and values of a given society.

In contrast to this view, with the advent of globalization that began in the 1990s, there is an increase in situations where supranational law begins to produce significant impacts on the application of interstate law, such as, for example, in the regulation of international air transport.

Therefore, the present study is justified to clarify aspects related to the constitutional and interpretative parameters and limits so that the so-called transnational law can be applied to international passenger air transport contracts.

It is also relevant to appreciate the implications of the jurisprudence of the Federal Supreme Court on the subject, from the analysis of Extraordinary Appeal 636.331 - RJ (BRASIL, 2017), especially in a social fabric where the constitutional principle of consumer protection continues to have central relevance in the affirmation of constitutional principles and values.

4. GLOBALIZATION AND AIR TRANSPORT

It is necessary to understand, initially, what can be conceived as "globalization".

This is a controversial expression, according to an authoritative study by Boaventura de Souza Santos:

> Globalization is very difficult to define. Many definitions focus on the economy, that is, on the new world economy that emerged in the last two decades as a consequence of the dizzying intensification of the transnationalization of the production of goods and services and of the financial markets — a process through which multinational companies rose to a unprecedented pre-eminence as international actors. (SANTOS, 2001).

Regarding this reflection, Boaventura de Souza Santos (2001) defends that globalization and its definition is "more sensitive to social, political and cultural dimensions", therefore:

> What we usually call globalization are, in fact, differentiated sets of social relations; different sets of social relationships give rise to different phenomena of globalization. In these terms, there is not strictly a single entity called globalization; there are instead globalizations; strictly speaking, this term should only be used in the plural. Any broader concept must be procedural and not substantive. (SANTOS, 2001).

Asseveres Boaventura de Souza Santos, on the other hand, "as bundles of social relations, globalizations involve conflicts and, therefore, winners and losers". In Boaventura's summary: "Often, the discourse on globalization is the story of the winners told by themselves. In fact, the victory is apparently so absolute that the defeated end up disappearing completely from the scene" (SANTOS, 2001).

Despite the fragmentary character of the word "globalization", it is possible to find in Sygmunt Bauman the description of this phenomenon as if mirrored in the radiography of the weakening of the Constitutional State, in a society marked by the intensive use of information technology and consumption as a social value, in times that he does not call postmodernity, but 'liquid modernity'. What is observed in Bauman is the crisis of the State in the face of the expansion of demands arising from society in the face of a weakened State (BAUMAN, 2016).

In this context, it is relevant to resume in Boaventura de Souza Santos the approach of globalization as "the process by which a given condition or local entity manages to extend its influence to the entire globe and, in doing so, develops the ability to designate as local another social condition or rival entity" (SANTOS, 2001).

It is opportune to identify in legal hermeneutics whether the constitutional and infra-constitutional principles that structure contemporary civil law are being observed in internationalization processes, especially when segments of global economic activity are regulated, as is the case of air transport of cargo and passengers.

It is reminded that the Council of the European Union, in a decision of April 5, 2001, approved, within the scope of its Member States, the Montreal Convention of May 28, 1999.

In Brazil, in turn, the Montreal Convention was internalized a few years later, through Legislative Decree no. September 2006 (BRAZIL, 2006).

In this way, given the scenario of strong growth in international passenger air transport in Brazil, as already explained in the introduction, it is relevant to study, when talking about the Montreal Convention, whether the interpretation currently developed in the jurisprudence of the Federal Supreme Court allows the preservation of the other principles foreseen in the Brazilian legal and constitutional order, including from the perspective of the globalization process and, above all, the defense of consumer rights and contractual and extra-contractual civil liability.

5. CIVIL LIABILITY

It is therefore necessary to make a brief incursion into civil, contractual and non-contractual liability, before returning to the topic of international air transport.

According to César Fiuza:

> Legally, the term liability is usually linked to the fact that we are responsible for the acts we practice. It reveals, then, a duty, a commitment, a sanction, an imposition resulting from some act or fact (FIUZA, 2006).

In this step, civil liability can also be considered as a duty to recover the damage resulting from the violation of an original legal duty (HUSID, 2014).

As is well known, in light of article 186 of the Civil Code, for the configuration of civil liability, the following requirements must be present: voluntary action (due to negligence or imprudence); the damage (material or moral); and the causal nexus (Brasil, 2002).

It should be noted that article 186 of the Civil Code, as a general and not typological or closed clause, serves the law as a whole, gaining a polysemic sense, governing the most diverse types of prohibited behavior (STOCO, 2014, p. 182).

Hence, although not expressly mentioned in article 186, intent and malpractice can also be admitted as generators of civil liability.

5.1 CONTRACTUAL AND EXTRA-CONTRACTUAL CIVIL LIABILITY

The extra-contractual or aquilian civil liability is one that arises from the general duty to repair the damage resulting from any events where there was moral or material injury to someone.

Contractual will, in turn, be the civil liability arising from the breach of the obligations agreed by the parties that subscribe to a certain agreement.

With regard to the air transport of passengers and cargo, civil liability can arise both from the transport contract (example: passenger subject to unreasonable cancellation of the contracted flight) and from the law (example: third person, hit on the ground by fragments detached from of aircraft).

There is, therefore, in the scope of civil liability, a huge range of cases and situations to be covered by the legal protection of rights, especially when practiced by economic agents or large companies.

Hence the importance that the principle of full reparation had been receiving, in national law, as will be seen below.

5.2 THE PRINCIPLE OF COMPREHENSIVE REPAIR

In Brazilian law, the principle of full reparation is provided for in item VI, article 6, of the Consumer Protection Code (BRASIL, 1990) and in article 944 of the Civil Code (BRASIL, 2002).

As Mariana Morato Stival reminds us , “Article 944 of the Civil Code provides that compensation is measured by the extent of the damage”. It also asserts, “although part of the doctrine understands that the theory of the extent of damage was adopted, whose compensation must be fixed based on the losses suffered by the victim”, there is “a greater expansion of this protection, that is, the victim of the illicit act must be compensated for all losses incurred. From this perspective, there is the principle of full compensation for damages” (STIVAL, 2013, p. 155).

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In this regard, there are several decisions of the Federal Supreme Court, recognizing the embodiment of the principle of full reparation in article 944 of the Civil Code:

> DECISION EXTRAORDINARY APPEAL – FACTUAL MATTERS – INTERPRETATION OF LEGAL RULES – UNFEASIBLE – INTERLOCUTORY ISSUE. 1. The Superior Labor Court, confirming the understanding formalized in the judgment of the appeal for embargoes in a review appeal, determined the maintenance of the benefits provided for in the collective rule. In the extraordinary case whose transit it seeks to achieve, the appellant alleges violations of articles 5, item II, and 7, item XXVI, of the Federal Constitution. It contradicts the principle of legality and the one relating to the observance of the collective agreement. He claims that the collective norm limited the provision of the health plan to five years after retirement due to disability, as well as the payment of housing assistance for 12 months. Discusses the lack of legal provision for the granting of said benefits. 2. First of all, observe the moment of filing, for the purpose of enforcing the procedural rule. The publication of the decision by which the appeal is inadmissible is after March 18, 2016, the date on which the Civil Procedure Code becomes effective, and the filing of the grievance is governed by this legal diploma. The extraordinary recourse is different from that revealed by a simple review of the decision, most of the times proceeded through the resource par excellence – the appeal. It operates in an exceptional case in the light of the factual framework sovereignly outlined by the Court of origin, considering the premises contained in the contested act. The settled jurisprudence is peaceful in this regard, and the entry No. 279 of the Supreme Court's Precedent should be kept in mind: For a simple re-examination of evidence, there is no extraordinary appeal. I take from the appealed judgment the following excerpt: From the appealed order and the judgments on pages 1065-1099 and 112-1115, note that e. The 7th Panel settled the controversy in question based on two basic premises, namely, (1) that the disability retirement resulted from an occupational disease and (2) that, due to this particularity, the plaintiff would be entitled to the health plan for the duration of the perception of the social security benefit, due to the principle of full compensation, enshrined in article 944, caput, of the Civil Code. […] Thus, once the application of the collective rule limiting the benefit to retirees due to disability has been ruled out, there is no mention of misapplication, but in line with the aforementioned entry. The reasons for the extraordinary are based on factual assumptions foreign to the judgment under consideration, seeking, in short, to reexamine the probative elements in order, based on a different scenario, to establish the viability of the appeal. In addition to this aspect, the contested pronouncement reveals an interpretation of strictly legal norms, not giving rise to access to the Supreme Court. At the mercy of articulation on violence to the Charter of the Republic, it is intended to submit to analysis a matter that does not fit into item III of article 102 of the Federal Constitution. 3. I am aware of the grievance and I despise it. I set the appeal fees at the level of 5% of the value of the conviction, pursuant to article 85, § 11, of the Code of Civil Procedure. 4. Publish. Brasília, March 3, 2017. Justice MARCO AURÉLIO Rapporteur" - ARE 1027058 / PA - PARÁ EXTRAORDINARY APPEAL WITH INTERLOCUTORY Rapporteur(a): Min. MARCO AURÉLIO Judgment: 03/03/2017 Publication ELECTRONIC PROCESS DJe-048 DISCLOSURE 03/13 /2017 PUBLIC 03/14/2017 (BRAZIL, 2017).

The Superior Court of Justice had even admitted the prevalence of the application of the principle of full reparation provided for in article 944 of the Brazilian Civil Code in the face of the Warsaw Convention, according to the decision in " AgRg no REsp 1421155 / SP, STJ, rel. Minister Ricardo Villas Bôas Cueva, j. 4.12.2016 (BRAZIL, 2016).

However, upon the trial of Extraordinary Appeal 636.331 – RJ, the Federal Supreme Court would break with the aforementioned range of precedents.

Thus, as prior to the aforementioned decision, the principle of full compensation, provided for in item VI, article 6 of the Consumer Protection Code (BRASIL, 1990) and in article 944 of the Civil Code (BRASIL, 2002) had prevailed in international air transport contracts, it is relevant to analyze the scope of that decision, in particular, in view of the principle of restitution or equitable reparation provided for in Decree no. 5,910/2006 (BRASIL, 2006) which enacted the Montreal Convention in Brazil.

6. LIMITATIONS TO THE PRINCIPLE OF CONSUMER DEFENSE IN INTERNATIONAL AIR TRANSPORT

According to the provisions of item V, article 170 of the Constitution of the Republic:

> Art. 170. The economic order, founded on the valorization of human work and free initiative, aims to ensure a dignified existence for all, in accordance with the dictates of social justice, observing the following principles:
>
> [...]
>
> V - consumer protection... (BRAZIL, 1988).

It should be noted that the principle of consumer protection had already been recognized, several times as a structuring of the economic order, including by the Federal Supreme Court (ADI 4613 / DF, STF, rel. Minister. DIAS TOFFOLI, j. 9.20.2018) (BRAZIL , 2018).

There was, in the jurisprudence established by the Brazilian Constitutional Court, a perennial range of previous precedents, as mentioned, that guaranteed the prevalence of the principle of integral reparation, as a guaranteeing principle of the constitutional principle of consumer protection.

It so happens that after returning to the Federal Supreme Court the question regarding the scope of validity of article 178 of the Constitution of the Republic (BRASIL, 1988), partially reviewing the cited jurisprudence, the Court decided to give precedence to the parameters established by the Montreal Convention on the of Consumer Defense, thus removing the incidence of the principle of full reparation in cases involving civil liability covered by international air legislation.

In this sense, it is salutary to recover the grounds set out there in general repercussion in the judgment of Extraordinary Appeal 636.331 - RJ:

> General repercussion. Topic 210. Fixation of the thesis : " Pursuant to article 178 of the Constitution of the Republic, international norms and treaties limiting the liability of passenger air carriers, especially the Warsaw and Montreal Conventions, prevail in relation to the Defense Code of the Consumer ". 6. Concrete case. Judgment that applied the Consumer Defense Code. Indemnity greater than the limit provided for in art. 22 of the Warsaw Convention, as amended by later international agreements. Appealed decision reformed, to reduce the value of the conviction for material damage, limiting it to the level established in international law. 7. Appeal granted (ADI 4613 / DF, STF, Relating Minister. DIAS TOFFOLI, j. 9.20.2018) (BRAZIL, 2018).

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It is quite relevant to study, with some accuracy, the repercussions of that judgment, which in a less attentive reading could point to an extension of its effects not consistent with the legal foundations that led to its delivery.

Thus, it should be noted that in the votes cast, the Ministers themselves made clear the delimitation of the litigious object as restricted to cases of compensation for material damages for lost luggage, according to the clarifications provided by Minister Gilmar Mendes during the judgment of ADI 4613/DF :

> MINISTER MARCO AURÉLIO - As for moral damages, Your Excellency...
>
> MINISTER GILMAR MENDES (REPORTER) - This is not stated. I'm saying that the Warsaw Convention rule only deals with property damage.
>
> MINISTER MARCO AURÉLIO - Because there is, in the Court, precedent from 1996, of the Second Panel, and it was unanimous, after a request from Minister Francisco Rezek, in the sense that, in the case, prevails, from the angle of the moral damages, the Federal Constitution.
>
> MINISTER GILMAR MENDES (REPORTER) - We can reach the same conclusion. I am saying that the Convention did not discipline..." (BRASIL, 2018).

In a following dialogue, Justice Marco Aurélio again asked the rapporteur of ADI 4613/DF to clarify the fact that compensation for moral damages is not covered there:

> MINISTER MARCO AURÉLIO – President, just to provide a clarification, since I have separated Justice Gilmar Mendes, the object of extraordinary number 636.331 is unique: compensation for material damage, including the contents of the suitcase. Liability for moral damages is not at stake here.
>
> MINISTER GILMAR MENDES (RAPPORTEUR) - I made a point of making it clear, in any case, that the Convention only limits for material damage. Therefore, we do not... as Your Excellency had already signed. (BRAZIL, 2018).

Therefore, in the light of the debate held in the discussion of the aforementioned judgment, it can be concluded that although the prevalence of article 178 of the Constitution of the Republic (BRASIL, 1988) in relation to material damage caused by the loss of luggage is established, the prevalence of Constitution of 1988 and, therefore, of item V, article 170 of the aforementioned Diploma, in cases where matters not expressly regulated by the Warsaw Convention are discussed, as is the case of moral damages, expressly mentioned by the Ministers in the judgment of ADI 46/13 (BRAZIL, 2018).

In this step, the aforementioned precedent cannot be interpreted beyond the matter covered therein, that is, in cases of fixing compensation for material damage resulting from the loss of luggage on international flights.

It is also necessary to understand in what terms and situations the principle of equitable reparation is applied, in order to avoid, in the interpretation of the Montreal Convention, understandings that, by way of affirming it, end up going beyond its own terms.

6.1 THE PRINCIPLE OF EQUITABLE REMEDY

As in relation to material damages resulting from the loss of luggage, the Federal Supreme Court affirmed the non-prevalence of the Consumer Protection Code, it can be concluded that in these cases, as a rule, the principle of equitable restitution or restitution principle prevails, not adopting, in these cases, the principle of integral reparation.

This is because the principle of equitable reparation (compensation) or the principle of restitution expressly of the Warsaw Convention, enacted by Decree No. 5.910, of September 27, 2006: "RECOGNIZING the importance of ensuring the protection of the interests of users of international air transport and the need for equitable compensation, based on the principle of restitution; [...]" (BRAZIL, 2006).

It should be noted that, as a general rule, the aforementioned treaty did not encompass the principle of full compensation for damages caused to passengers or cargo transported, contenting itself with it as a matter of course, with equitable compensation for any damages suffered by the consumer.

It should be noted that one of the most expressive manifestations of this principle is the admission of compensation amounts, as extracted from items 1 and 2, article 22 of the Montreal Convention:

> Article 22 – Limits of Liability Relating to Delay of Baggage and Cargo 1. In case of damage caused by delay in the carriage of persons, as specified in Article 19, the liability of the carrier is limited to 4,150 Special Drawing Rights per passenger. 2. In the carriage of Baggage, the liability of the Carrier in the event of destruction, loss, damage or delay is limited to 1,000 Special Drawing Rights per passenger, unless the Passenger has made the Carrier, when delivering the Checked Baggage, a special declaration of the value of its delivery at the place of destination, and has paid an additional amount, if applicable. In this case, the carrier will be obliged to pay a sum that will not exceed the declared value, unless it proves that this value is greater than the actual value of delivery at the place of destination. 3. In the carriage of cargo, the liability of the carrier in the event of destruction, loss, damage or delay is limited to an amount of 17 Special Drawing Rights per kilogram, unless the shipper has made the carrier, when delivering the volume, a special declaration of the value of its delivery at the place of destination, and has paid an additional amount, if applicable. In this case, the carrier will be obliged to pay an amount that will not exceed the declared value, unless it proves that this value is greater than the actual value of delivery at the place of destination. 4. In the event of destruction, loss, damage or delay of a part of the cargo or any object it contains, in order to determine the amount that constitutes the limit of liability of the carrier, only the total weight of the package or packages will be taken into account. affected. However, when the destruction, loss , damage or delay of a part of the cargo or an object it contains affects the value of other packages included in the same air waybill, or in the same receipt or, if none of these documents has been issued , in the records kept by other means, mentioned in number 2 of Article 4, to determine the limit of liability, the total weight of such volumes will also be taken into account (BRASIL, 2006).

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The aforementioned regulation proves to be extremely unfavorable and, in many cases, disproportionate to the damage caused to the consumer. It is possible to identify, in this case, a certain tendency of contemporary constitutionalism to admit the flexibilization of rights in national legal systems, through the admission of the validity of transnational regulations to which the constitutional text itself confers this regulatory force.

This is the case of article 5, § 2 of the Constitution of the Republic, according to which "the rights and guarantees expressed in this Constitution do not exclude others arising from the regime and principles adopted by it, or from the international treaties in which the Federative Republic of Brazil be a part" (BRASIL, 1988).

The repercussions in the case of lost luggage are very relevant. This is because, even if the passenger on an international flight is carrying luggage with a value greater than the value charged in the aforementioned Convention, he will not be entitled to effective compensation for lost goods, that is, he must be satisfied with equitable, partial and incomplete compensation for the damages supported.

6.2 EXCEPTIONS TO THE EQUITABLE REMEDY PRINCIPLE

A less reflective reading of the judgment rendered in Extraordinary Appeal 636.331 – RJ already mentioned, could even cloud the view on cases in which the Montreal Convention itself does not support the principle of equitable redress.

According to article 22 of the Montreal Convention prescribes in item 5:

> 5. The provisions of numbers 1 and 2 of this Article shall not apply if it is proven that the damage is the result of an action or omission of the carrier or its agents, with the intention of causing damage, or recklessly and knowing that it would probably cause damage. , whenever, in the event of an act or omission of an agent, it is also proved that he was acting in the exercise of his functions. (BRAZIL, 2006).

A simple reading of item 5 of article 22 of the Montreal Convention (BRAZIL, 2006), allows us to perceive that it encompasses some exceptions to the pricing of values in items 1 and 2 that may occur when: a) there is an intention to cause damage; and b) the harmful act was likely due to a reckless omissive or commissioned attitude by an agent.

Unlike the hypotheses in items 1 to 4, of the same article 22 of the Montreal Convention (BRAZIL, 2006), in the cases discussed in item 5 transcribed, the existence of intent causes the tariff to cease so that the reparation can be fixed in order to refund full damages caused to the consumer.

Pricing is also ruled out when the company, already aware of the agent's reckless attitude or omission, knows the probability of damage and does not undertake to avoid it.

It takes into account the Montreal Convention (BRAZIL, 2006), in these last two cases, the ' severity of the fault ' to increase the amount of compensation. Here, therefore, the gravity of the fault is an element of guarantee of full reparation.

Just for the purposes of comparison, it is interesting to note that in Brazilian law, in the sole paragraph of article 944 of the Civil Code, the evaluation of this criterion was expressly admitted,

not for the increase, but specifically, for the reduction of the indemnity when disproportionate to the seriousness of the fault in relation to the damage:

> Art. 944. Indemnity is measured by the extent of the damage. Single paragraph. If there is an excessive disproportion between the gravity of the fault and the damage, the judge may equitably reduce the compensation. (BRAZIL, 2002)

The fact is that the decision of the Federal Supreme Court, in the context of Extraordinary Appeal 636.331 – RJ (BRASIL, 2017), already transcribed, does not seem to have exhausted the entire issue of civil liability arising from international air transport contracts, and a decision that addresses other relevant topics such as, for example, the case of air accidents with fatal victims and the establishment of values related to the compensation of moral damages resulting therefrom.

An important aspect, little commented on, pertains to the requirement of reciprocity in the treatment of air transport within the scope of other nations.

This requirement is expressed in the wording of article 178 of the Constitution of the Republic, with the following content: "The law shall provide for the ordering of air, water and land transport, and, regarding the ordering of international transport, it must observe the agreements signed by the Union, complied with the principle of reciprocity." (BRAZIL, 1988).

Thus, in light of the aforementioned precept, it is also possible to expect, in addition to what was decided in RE 636.331 - RJ (BRASIL, 2017), that the Federal Supreme Court will assess, in other cases, the requirement to comply with the requirement of reciprocity, especially in the implementation of another principle of paramount importance, such as the constitutional principle of consumer protection.

7. CONCLUSIONS

The average growth of passenger transport from 2008 to 2017 was 7.1% per year, therefore, 5.5 times greater than that seen in the Brazilian Gross Domestic Product (GDP), which was accompanied by a significant increase in lawsuits where delays, flight cancellations, lost luggage, among other failures in the provision of said services have been reported.

In this sense, it can be seen how the phenomenon of economic globalization has brought the need to deal with conflicts whose regulation is sometimes transnational, as in the case of passenger air transport.

This framework requires the courts to be able to harmonize constitutional legislation with treaties and norms of international law, in order to consider, in the cases under trial, the values and principles at stake, as well as the greater or lesser prevalence of one over the other in the cases under trial, including to avoid violating the constitutional principle of consumer protection.

The post-positivist modern hermeneutics, based on the consideration of constitutional principles and norms, can allow greater decision-making and qualitative coherence of judicial decisions, with a view to improving the effectiveness of judicial provisions.

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In the field of civil, contractual and non-contractual liability, arising from the provision of air services, a legal understanding was consolidating where the prevalence of the Consumer Protection Code, including the guarantee of full reparation for consumers and victims of injuries committed by carriers.

This position remains intact in the case of national and local air transport.

However, with regard to the international transport of passengers, with the judgment of the Extraordinary Repetitive Appeal 636.331 - RJ, this understanding was substantially changed, affirming the inapplicability of the Consumer Protection Code in the face of the provisions of the limiting international norms and treaties liability for the carriage of passengers by air.

However, there is a need to pay attention to the contours and limits of this judgment, whose general repercussion is limited to cases where material damages arising from the loss of luggage are discussed, not covering claims for compensation for moral damages and other matters not regulated in the Montreal Convention (BRAZIL, 2006).

With the judgment of RE 636.331 - RJ by the Federal Supreme Court, therefore, in cases of lost luggage, the principle of equitable reparation (equitable compensation) also known as the principle of restitution, which makes up the text of the Montreal Convention to the detriment of the principle of integral reparation, with the exception of two studied exceptions.

The first exception is when there is intent on the part of the airline to cause the loss or delay in delivery, and the second, when the harmful act was likely due to reckless omissiveness or commission by the carrier's agent.

In these two exceptions, the Montreal Convention itself, enacted in Brazil through Decree No. 5.910/2006 (BRASIL, 2006) allows full reparation by qualifying the gravity of the fault as a justification for full compensation.

It is important to clarify that article 178 of the Constitution of the Republic of 1988, the basis of the decision rendered by the Federal Supreme Court, could only prevail when the constitutional presupposition contained therein of the existence of reciprocity in relation to the other signatory nations of the conventional acts of international law is fulfilled.

It is therefore expected that the prevalence of the Montreal Convention (BRAZIL, 2006) will not be admitted by national jurisprudence, when the requirement of reciprocity is not met or when other constitutional principles, such as the principle of consumer protection, are disproportionately affected.

In this sense, the proper application of legal-constitutional principles and modern hermeneutics, in the construction of judicial decisions, proves to be important in preserving the principle of consumer protection inserted in article 170, item V of the Constitution of the Republic (BRASIL, 1988), since it is possible, including, in this case, the weighting of values in relation to the rule of article 178 of the same Legal Diploma.

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