THE PREVALENCE OF THE MONTREAL CONVENTION AFTER THE 2017 STF DECISION; WHAT ABOUT JURISDICTION?

A PREVALÊNCIA DA CONVENÇÃO DE MONTREAL APÓS A DECISÃO DO STF 2017; QUE ACONTECE COM A JURISDIÇÃO?

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Abstract :

This article analyses the possible impacts of the 2017 Brazilian Supreme Federal Court (STF) decision, which put an end to the long-standing dispute regarding the prevalence of the Montreal Convention over the *Código de Proteção e Defesa do Consumidor* (CDC), on jurisdiction. Indeed, the Montreal Convention contains an article regulating jurisdiction in case of both delays (Article 33(1)) and death or bodily injury (Article 33(2)). This provision is mostly in line with Article 21 of the *Novo Código de Processo Civil* (CPC). However, in some situations a conflict might occur. The article first analyses the decision and then the conflicts between Article 33 Montreal and Article 21 CPC. It then looks at various interpretations of Article 33 around the world and the concept of *forum non conveniens*. It concludes that the conflicts might only be present in theory, as some interpretations of Article 33 would be in line with the manner Brazilian courts already decide cases.

Keywords: Montreal Convention; New CPC; CDC; Jurisdiction; STF judgment

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Resumo:

Este artigo analisa os possíveis impactos da decisão do Supremo Tribunal Federal (STF) de 2017, que encerrou a disputa de longa data sobre a prevalência da Convenção de Montreal sobre o Código de Proteção e Defesa do Consumidor (CDC), na jurisdição. Na verdade, a Convenção de Montreal contém um artigo que regula a jurisdição em caso de atraso (artigo 33 (1)) e morte ou lesão corporal (artigo 33 (2)). Esta disposição está essencialmente em consonância com o artigo 21.º do Novo Código de Processo Civil (CPC). No entanto, em algumas situações, pode ocorrer um conflito. O artigo primeiro analisa a decisão e, em seguida, os conflitos entre o Artigo 33 de Montreal e o Artigo 21 do CPC. Em seguida, analisa várias interpretações do Artigo 33 em todo o mundo e o conceito de *fórum non conveniens*. Conclui que os conflitos poderiam estar presentes apenas na teoria, uma vez que algumas interpretações do artigo 33 estariam em linha com a forma como os tribunais brasileiros já decidem os casos.

Palavras chaves: Convençao de Montreal ; Novo CPC ; CDC ; Jurisdição ; Julgamento STF

1. Introduction

The 2017 Brazilian Supreme Federal Court (STF) decision puts an end to the long-standing dispute regarding the prevalence of the Montreal Convention over the *Código de Proteção e Defesa do Consumidor* (CDC). While the STF decision is a victory, it is not a complete one. Indeed, the eleven ministers unanimously ruled that moral damages should not be subject to any limit which is not in line with the Convention's wording as moral damages are excluded from the Convention altogether.

This decision also raises other questions and potentially creates another problem; jurisdiction. Indeed, the Montreal Convention does not only tackle air carriers' liability, it also contains a provision on jurisdiction. With the recent STF judgment, one can wonder whether, in the Brazilian legal system, the Convention will be prevailing over national laws as a whole or whether the judgment will only remain applicable to the CDC. As such the discussion is whether international law should prevail over national law[3] or not and whether the STF judgment was one of a kind that should stay this way.

[3] BRASIL. Medida Cautelar na Ação Direta de Inconstitucionalidade ADI n°1.480-DF (1997), 1997

Up until now, Brazil assumed a broad jurisdiction in consumer cases[4], with cases being resolved in Brazil while the connecting factors pointing to another country. According to Article 21 *Novo Código de Processo Civil* (CPC), Brazilian courts have jurisdiction if (I) the person is domiciled in Brazil, (II) the place of performance is in Brazil or (III) the place of the occurrence of the damage is in Brazil.[5] Article 22(II) establishes that in relation to consumers, Brazilian assumes jurisdiction if the consumer has his domicile or residence in Brazil. For instance, a Brazilian, residing in Italy, encountering a delay on an Alitalia flight from Rome to Florence due to a strike in Italy could still claim in Brazil if he is domiciled in Brazil.[6] However, according to Article 33(1) of the Montreal Convention, "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." Applying the 2017 STF judgment by analogy, the Montreal would prevail and, therefore, the jurisdiction of Brazilian courts will be restricted in case the airlines does not have its place of business in Brazil. For instance, in the Alitalia example given above, if Alitalia does not have its place of business in Brazil, passenger X could only bring his case in Italy.

If the analogy is accepted, the STF judgment could, therefore, change more than just the relationship with the CDC. While the CDC and the *Novo* CPC have similar legal basis, the *Novo* CPC has been enacted much later than the CDC and after the Montreal was ratified. Consequently, courts might refuse to apply the Convention coupled with the STF judgment on the ground that the *Novo* CPC is a more recent norm, despite Article 13 CPC which establishes that the procedural norms in a treaty prevails. In most cases, Articles 33(1) Montreal and 21 CPC would give similar outcomes. However, in some situations, the Brazilian approach could lead to *forum shopping*; for instance, a Brazilian, residing temporarily in Sweden but maintaining his domicile in Brazil, traveling from Stockholm to Brussels with Brussels Airlines

[4] BRASIL. Codigo de Processo Civil. Lei 13.105 de 16 de março de 2015, Diário Oficial da União. [hereinafter Novo CPC]. Artigo 22(II)

[5] BRASIL. Codigo de Processo Civil. Lei 13.105 de 16 de março de 2015, Diário Oficial da União. O Artigo 21 dispõe *in verbis*:
Compete à autoridade judiciária brasileira processar e julgar as ações em que:
I - o réu, qualquer que seja a sua nacionalidade, estiver domiciliado no Brasil;
II - no Brasil tiver de ser cumprida a obrigação;
III - o fundamento seja fato ocorrido ou ato praticado no Brasil.
Parágrafo único. Para o fim do disposto no inciso I, considera-se domiciliada no Brasil a pessoa jurídica estrangeira que nele tiver agência, filial ou sucursal.

[6] BRASIL, Codigo de Processo Civil. Lei 13.105 de 16 de março de 2015, Diário Oficial da União. Artigos 21 and 46

could still claim under Brazilian law according to Article 46 CPC.[7] Brazilian law differentiates domicile from residence; the domicile is where a person usually exercises his legal acts while the residence is where the person lives.[8]

This article first discusses the 2017 STF decision and its possible effects on jurisdiction. It then analyses the interpretations of courts around the world regarding Article 33 of the Montreal Convention. This analysis will demonstrate that the only real conflict between Articles 21 CPC and 33 Montreal could be circumvented by Brazilian courts by following a specific interpretation found in Italy and the US. Finally, the role of *forum non conveniens* in general and in the Brazilian legal system in particular could have in these cases.

2. STF decision

Although Brazil is a party[9] to both the Warsaw[10] and the Montreal Conventions, Brazilian courts have in the past regularly avoided the application of the Convention regimes where such provisions granted less extensive protections than national law, especially the *Código de Proteção e Defesa do Consumidor* (CDC). One of these conflicts is linked to the fact that both Conventions established a fault-based system of responsibility while CDC establishes a strict and unlimited liability regime.[11] The burden of proof is on the service provider invoking one of the exemptions, namely that the fault is solely due to the passenger or that there is no defect on the side of the service provider.[12] Surprisingly, the CDC does not refer to *force majeure* or Act of God, adopting a similar system to maritime or road conventions.[13] This omission is in direct contradiction with the "extraordinary circumstance"

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[7] A person can have various domicile according to Article 71 of the Law 10.406. BRASIL. Lei n° 10.406, de 10 de Janeiro de 2002. Codigo Civil. Diario Oficial da União. Artigo 70-. O domicílio da pessoa natural é o lugar onde ela estabelece a sua residência com ânimo definitivo. Articgo 71. Se, porém, a pessoa natural tiver diversas residências, onde, alternadamente, viva, considerar-se-á domicílio seu qualquer delas.

[8] DENIZ, Maria Helena. **Curso De Direito Civil Brasileiro** - Vol. 1 - 38ª Edição 2021: Volume 1

[9] BRASIL. Decreto No. 5.910, de 27 de Setembro de 2006, Diario Oficial da União.

[10] IATA. Convention for the Unification of Certain Rules Relating to International Carriage by Air, *opened for signature* Oct. 12, 1929, 137 L.N.T.S. 11, 49 Stat. 3000 (entered into force Feb. 13, 1933) [hereinafter Warsaw Convention].

[11] BRASIL. Lei No. 8.078, de 11 de Setembro de 1990, art. 14, Diario Oficial da União. [hereinafter CDC]. O Artigo dispõe *in verbis* : O fornecedor de serviços responde, independentemente da existência de culpa, pela reparação dos danos causados aos consumidores por defeitos relativos à prestação dos serviços, bem como por informações insuficientes e inadequadas sobre a fruição e risco.

[12] I - que, tendo prestado o serviço, o defeito inexiste; ou II - a culpa é exclusiva do consumidor ou do terceiro.

[13] The same exclusions exist in the Convention on the Contract for the International Carriage of Goods by Road, *opened for signature* May 19, 1956, 399 U.N.T.S. 189, as amended by Protocol to the CMR, *opened for signature* July 5, 1978 [CMR], 1208 U.N.T.S. 427; International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, *opened for signature* Aug. 25, 1924, 120 L.N.T.S. 155 [The Hague Convention], and the Protocol to Amend the International Convention for the Unification of Certain Rules of

embodied in both the Warsaw and Montreal Conventions, and widely used under the European Regulation.[14] This omission renders the CDC stricter than the other systems.

Despite the existence of a specific federal agency with its own rules to govern civil aviation, the services rendered by airline companies are made subject to the CDC. Because the CDC reiterates the principles of integral refund, moral damages, and objective responsibility – which, along with principles of economic order, are rooted in the Brazilian Constitution[15] – the Code was considered the exclusive law applicable to consumers' cases. The main argument for the use of the CDC rather than the Warsaw Convention was that the Convention was appropriate for its time but does not fit modern reality. The objective of the Convention is predominantly economic, which was fundamental for the development of civil aviation, while the objective of the CDC is the protection of consumers. Therefore, the two instruments have different objectives, leading to the CDC being more appropriate to regulate cases involving consumers.[16]

Similarly to the situation with the Warsaw Convention, the Brazilian judiciary long established the prevalence of the CDC over the Montreal Convention. Even though the Montreal Convention entered into force after the CDC and is a more specific law, the Brazilian judiciary took a constitutional approach resulting in the prevalence of the CDC. However, in May 2017, the appeals brought by Air France and Air Canada were decided by the Brazilian STF, which came to the conclusion that the Conventions prevail in cases involving international carriage by air.[17] Minister Rosa Weber noted that the failure to apply the Conventions would prejudice the market, create judicial uncertainty, and increase prices to the detriment of consumers.[18] This means that claims arising from international carriage by air must be brought within two years of the event rather than the five years allowed by the Consumer Code.

Law Relating to Bills of Lading, *opened for signature* Feb. 23, 1968, as amended, 1412 U.N.T.S. 127 [The Hague-Visby Convention], all of which deal with the carriage of goods.

[14] IATA. Convention for the Unification of Certain Rules Relating to International Carriage by Air, *opened for signature* Oct. 12, 1929, 137 L.N.T.S. 11, 49 Stat. 3000 (entered into force Feb. 13, 1933). Artigo 20; IATA. The Convention for the Unification of Certain Rules for International Carriage by Air, *opened for signature* May 28, 1999, Artigos 19 & 20. [hereinafter Montreal Convention].

[15] BRASIL. Constituição (1988). Emenda Constitucional No. 9, de 9 de Novembro de 1995, Lex, Legislação Federal e Marginália, v. 59, p. 1966, out./dez. 1995. Artigos 5 XXXII e 170 v.

[16] REBELLO PINHO, Rodrigo César. Ministério Público do Estado de São Paulo, **O Transporte Aéreo e o Código de Defesa do Consumidor**. 12 June 2006. Disponível em: http://feeds.folha.uol.com.br/fsp/dinheiro/fi1207200605.htm. Acesso em: 24 Janeiro 2021.

[17] BRASIL. *Rosolem v. Société Air France, S.T.F.,* Ap. Civ. No. RE 636.331/RJ, Relator: Min. Gilmar Mendes, 25.05.2017.

[18] *Id.* at 66.

The decision is, however, not a complete victory for the Conventions, as the eleven ministers unanimously ruled that moral damages should not be subject to any limit. Indeed, Article 22 CDC imposes a certain threshold on companies that offer public services, with airlines definitely falling within this category.[19] On top of that threshold, if the company fails to meet the required standards, it is under the obligation to fully and integrally compensate the consumer for both material and non-material damages.[20] This obligation exemplifies the compensation culture that exists in Brazil and was initially embodied in the CDC to "protect the dignity of the ordinary citizen, against so-called powerful corporations and other institutions."[21] Over the years, the initial aim was lost, resulting in the normalization of any awards for moral damages, which today are granted even for simple breaches of contract. However such interpretation goes against Article 29 of the Montreal Convention which clearly establishes that non-compensatory damages are not recoverable.

Furthermore, Articles 25 and 51 CDC greatly restrict any limitation of liability that the carrier could have tried to invoke. Article 51 also renders void no-show clauses.[22] The CDC creates a balance between the parties but contrary to the situation in the European Union, this balance favors the consumer. Indeed, Article 39 of the CDC prohibits any situation that leaves the consumer in excessive disadvantage. Therefore, if any alteration to the flight occurs before the check-in time, the airline must contact the passengers by all possible means available, such as e-mail, company website, and telephone contact. In order to avoid falling within the prohibition of Article 39, airlines are required to seek confirmation that passengers had knowledge of the alteration. Passengers may refuse the alteration to their flight. The position of Brazilian law is that the contract previously established had been altered and therefore the customer has a right to refuse the changes. Similarly, if the passenger feels that the alternative

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[19] BRASIL. Código de Defesa do Consumidor. Lei nº8.078 de 11 de setembro de 1990. Artigo 22 Os órgãos públicos, por si ou suas empresas, concessionárias, permissionárias ou sob qualquer outra forma de empreendimento, são obrigados a fornecer serviços adequados, eficientes, seguros e, quanto aos essenciais, contínuos.

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

[21] MACARA, Peter; LIMA, Alexandre. **The Brazilian Supreme Court Upholds the Application of the Warsaw and Montreal Conventions**, Air & Space Law, vol. 43, 505–514, 2018, 507.

[22] BRASIL. Código de Defesa do Consumidor. Lei nº8.078 de 11 de setembro de 1990. Artigo 6 São direitos básicos do consumidor: VI – a efetiva prevenção e reparação de danos patrimoniais e morais, individuais, coletivos e difusos.

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

Artigo 51. São nulas de pleno direito, entre outras, as cláusulas contratuais relativas ao fornecimento de produtos e serviços que: I – impossibilitem, exonerem ou atenuem a responsabilidade do fornecedor por vícios de qualquer natureza dos produtos e serviços ou impliquem renúncia ou disposição de direitos. Nas relações de consumo entre o fornecedor e o consumidor-pessoa jurídica, a indenização poderá ser limitada, em situações justificáveis .

is not viable, he/she could refuse the changes and start a compensation action for both material and moral damages. Of course, most of these cases are negotiated with the airline or sent for administrative adjudication to the National Agency of Civil Aviation (ANAC) and never reach the court system. When one does, the courts are even harsher than the CJEU and tend to fine companies much greater amounts than in Europe.

This decision consolidates the theory that airline lawyers in Brazil have been advocating for years: to balance two protections, Articles 5 XXXII and 178 of the Brazilian Constitution. Although this decision tries to make these two protections compatible – with the Supreme Tribunal noting in the *Air France* case that "consumer protection is not the sole directive that frames the economic order nor the sole constitutional imperative that must be observed by the law maker" – these two principles are *per se* incompatible due to the highly protective strict liability rules of the CDC and the compensation culture existing in Brazil. To find compatibility between these two norms, several STF judges have expressly noted that the right to award non-economic damages is not precluded by the Convention limits, meaning that Brazilian courts will still award moral damages for pain, discomfort, inconvenience, suffering, or stress. While Brazil will be more in line with international practice, the possibility of awarding non-economic damages on top of the damages provided by the Conventions partially safeguards the compensation culture in Brazil. The compensation culture in Brazil flows from Articles 159 and 186 of the Civil Code in conjunction with a broad interpretation of Article 5X of the Brazilian Constitution. Indeed, Article 5X of the Constitution refers to moral damages in cases of violation of human dignity, privacy, intimacy, or honor.[23]

In a similar manner, Judge Barroso indicated that "if we determined that the Warsaw Convention leaves the consumer wholly exposed, then, yes, I think we would have to declare the Convention unconstitutional," which demonstrates the unwillingness of the Court to leave a consumer defenseless, even if this defenselessness is due to his own actions, such as in the case of *Air Canada*.[24]

This decision is a step toward a more "conventional" application of the Conventions, which will allow airlines to rely on defenses that were not available under the supremacy of the

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[23] CREMONEZE, Paulo Henrique**. Dano Moral: Quantificação da Indenização Segundo a Doutrina do "Punitive Damage,"** JUS.COM.BR. Disponível em: https://jus.com.br/artigos/18529/dano-moral-quantificacao-da-indenizacao-segundo-a-doutrina-do-punitive-damage. Acesso em: 24 Janeiro 2021.

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

CDC. As previously recognized by both the STF and the Brazilian Superior Court (STJ), this decision would have general relevance to over 400 cases and it can be expected that this decision will open the floodgates.[25] At the same time, the reluctance of the Court to give up non-economic damages affords an additional protection, which seems unreasonable regarding checked bags and controversial regarding delay, but which also means that Brazilian passengers will never experience the difficulties of recovering psychological damages in cases of bodily injury. The compensation culture was facilitated in the 1990s by the establishment of a small claims court system with low access costs. As Macara and Lima noted in relation to moral damages: "In claims against airlines, the situation was exacerbated by the view (often held by the Brazilian judiciary) that air travel is a special experience for most people, often connected with an important business or family event, or a well-earned holiday. This resulted in moral damages habitually being awarded for all types of claims by passengers, including even minor delays."[26]

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

This approach makes Brazil a very attractive forum compared to Europe for instance. Brazilian living in Europe might start litigation in Brazil even if the connecting factors point to another jurisdiction as occurred in a 2018 case.[27] Latam was condemned to compensate a couple who missed their New Year's Eve celebration with their family because of a delay. They were granted R$ 20.000 (more or less 4600 euro) by the 24 Chamber of the SP first instance tribunal for a 19-hour delay. The couple travelled from London to Florianopolis on the 30th of December. From the facts of the case, it is not clear whether the couple really lives in Brazil,

[25] MACARA, Peter; LIMA, Alexandre. The Brazilian Supreme Court Upholds the Application of the Warsaw and Montreal Conventions, **Air & Space Law**, vol. 43, 505–514, 2018, at 506.
[26] *Id.* at 507.
[27] BRASIL. Acordão, 2017.000098416/SP, jul.14/12/2017.

as the tickets in question where brought in Europe. While Latam is not subject to the EU Directive 261/2004, both were valid fora with Brazil being more generous than the UK in damages.

3. Article 33 Montreal vs Article 21 CPC

Since the STF ruled in favour of the application of the Montreal and Warsaw Conventions over the CDC, it could also mean that the provisions on jurisdiction contained in the Montreal Convention will prevail over the *Novo Código de Processo Civil* (CPC). One major difference between the CDC and the *Novo* CPC is that the latest entered in force after the Montreal Convention was ratified. This could be an argument to set aside the STF judgment and the Montreal Convention to continue applying the CPC. If, on the contrary, the judgment and the Convention prevails, following the application of Article 46 CPC, then depending on the interpretation given to Article 33 Montreal, the Convention might be incompatible with the CPC and would limit the broad jurisdiction assume by Brazilian courts.

Article 33 of the Montreal Convention provides treaty jurisdiction for claims falling within Montreal's liability provisions and, therefore limits the for a in which the plaintiff may bring an action. It incorporates the original four jurisdictions of Article 28 Warsaw Convention. Therefore, claims for damages under Article 33 MC can be brought in four different jurisdictions at the option of the plaintiff; 1) the domicile of the carrier, 2) carrier´s principal place of business, 3) where the contract of carriage was made and carrier has a place of business, and finally 4) the destination. The place of residence is recognised as an option only in case of death or injury of the passenger, Article 33 (2). One obvious reason for such provision is to avoid conflicts of jurisdictions.[28] As Mendelsohn and Lieux already pointed out regarding Article 28 of the Warsaw Convention, "these sites are all carrier-oriented, rather than plaintiff-oriented."[29] This approach runs contrary to the Brazilian approach which is overly plaintiff-oriented.

According to Article 21 Novo CPC, Brazilian courts have jurisdiction if (I) the person is domiciled in Brazil, (II) the place of performance is in Brazil or (III) the place of the

[28] DEMPSEY, Paul S.; MILDE, Michael. **International Air Carrier Liability: The Montreal Convention of 1999**, McGill University Centre for Research in Air & Space Law, 2005, p. 217
[29] MENDELSOHN, Allan I.; LIEUX, Renee. The Warsaw Convention Article 28, the Doctrine of Forum Non Conveniens, and the Foreign Plaintiff, **Journal of Air Law and Commerce**, vol 68, 75-113, 2003, p.79

occurrence of the damage is in Brazil. In theory, therefore, the STF judgment could mean that the jurisdiction of Brazilian courts will be restricted in case the airlines does not have its place of business in Brazil. For example, Brussels Airlines does not have its place of business in Brazil, therefore, in the situation of a Brazilian living outside Brazil and wanting to claim under Brazilian law, Brazilian courts would not have jurisdiction over the matter.

The main clash between Articles 33 Montreal and 21 CPC would be when all the factors point toward another jurisdiction, except the domicile of the plaintiff. In these situations, under the Montreal Convention, Brazil would not have jurisdiction while under the CPC it would. For instance, a Brazilian, residing temporarily in Sweden but maintaining his domicile in Brazil, traveling from Stockholm to Paris could still claim under Brazilian law just because he is domiciled in Brazil. In these situations, the willingness of Brazilian courts to declare themselves competent could result in further court proceedings to determine jurisdiction. This is especially true as Brazilian courts often are more generous in compensation, to the dislike of airlines.[30]

This approach is exemplified in a 2018 case; a coupled travelled from London to Florianopolis to spend New Year's Eve with their family. In addition to all the connecting factors pointing toward the UK, it seems that the couple was in fact domiciled in the UK and not in Brazil at the time of the lawsuit.[31] For instance, the tickets in question were brought in Europe. This did not stopped the 24 Chamber of the SP first instance tribunal to condemn Latam to compensate R$ 20.000 (more or less 4600 euro) for a 19-hour delay. The main reason they could bring such claim is Article 46 CPC, which allows claimants with various domicile to choose where to claim, resulting in forum shopping.

By possibly disregarding Article 33, Brazilian courts will, yet again not comply with international norms. However, it seems that in practice Article 33 has been subject to interpretation by courts around the world, with some interpretations in line with the tendency of the judiciary in Brazil. Consequently, the clash between Articles 33 Montreal and 21 CPC might only be a theoretical one.

[30] DEFOSSEZ, D. I wish my mum was Brazilian: The regulation of passenger liability in the EU and Brazil, **Issue in Aviation Law and Policy**, vol. 18, 2019
[31] BRASIL. Acordão, 2017.000098416/SP,jul.14/12/2017.

4. Interpretation of Article 33 around the world

Article 33 of the Montreal Convention has been subject to interpretation by courts around the world. For instance, a US judgment maintained that 'the place of destination' should be interpreted in the same manner as it was under Article 28(1) of the Warsaw Convention; in a round trip, the place of destination is the same as the place of origin.[32] In a 2018 Argentinian case, the judge took a more restricted approach to the place of destination. The court dismissed the lawsuit on the basis of Article 33. Interestingly, the judge held that the Montreal Convention took precedence over the Argentinian Consumer Protection law, which provides jurisdiction as does the CDC.[33]

In 2018, the Court of Justice of the European Union, following the reasoning of the Advocate General, establishes that the Convention not only establish jurisdiction at international level but also jurisdiction within a State.[34] In 2015, the Court already noted that Article 33 constitute a *lex specialis* and therefore, would prevail over the then Brussels I Convention.[35]

One of the major points of contention is the concept of 'place of business through which the contract has been made', especially in an online setting. In 2018, a court in Quebec, sticking to the wording of the Convention, rejected the argument that the place of business could be where the tickets were brought.[36] "The court held that it would be a misinterpretation of Article 33(1) to hold that the location of a personal computer should be a place of business through which a contract was made."[37] Similarly, in *Noble Caledonia Ltd v Air Niugini Ltd*, a UK court ruled that the airline was not "carrying on its activities" in England by virtue of having an agreement with a local agent, upon whom a claim was served.

In 2019, the Italian Supreme Court ruled that 'place of business through which the contract has been made' must be understood broadly and not be restricted to the location of the

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[32] USA. Baah v. Virgin Atlantic Airways Limited, 2007 WL424993 (S.D.N.Y. 2007); Klos v. Polskie Linie Lotnicze, 133 F.3d 164, 167-8 (2d Cir. 1997); In re: Air Crash at San Francisco, California, on July 6, 2013, 2017 WL 3484643 (August 14, 2017)

[33] FREIDENBERG, Elizabeth Mireya. **Federal court dismisses passenger claim based on Article 33 of Montreal Convention**. Feb. 2019. Disponível em: https://www.internationallawoffice.com/Newsletters/Aviation/Argentina/Freidenberg-Freidenberg-Lifsic/Federal-Court-dismisses-passenger-claim-based-on-Article-33-of-Montreal-Convention#Decision. Acesso em: 24 Janeiro 2021.

[34] EU. Case C-213/18, *Adriano Guaitoli and others v easyJet Airline Co. Ltd*, ECLI:EU:C:2019:927, para 51

[35] EU. Case C-240/14, *Eleonore Prüller-Frey v Norbert Brodnig, Axa Versicherung AG,* ECLI:EU:C:2015:567

[36] CANADA. *Charbonneau et al v Scoot Pte Ltd* 2018 QCCQ 1645

[37] CMS. **Aviation: e-ticketing jurisdiction under the Montreal Convention 1999.** 19 June 2018. Disponível em: https://www.cms-lawnow.com/ealerts/2018/06/aviation-eticketing-jurisdiction-under-the-montreal-convention-1999. Acesso em: 24 Janeiro 2021.

server used to buy a ticket. The court was of the opinion that otherwise it would create uncertainty and would, therefore, not be consistent with the Convention's intentions. Indeed, it would be difficult, if not impossible, for passengers to know where the server is based.[38] Consequently, Article 33 has to be interpreted, so that in online purchases, the place of business corresponds to the place where the purchase order is made and the payment is likely to have taken place, which, in the Court's opinion, is the domicile of the passenger.[39] This position was reaffirmed by the Supreme Court in February 2020.[40] Latvian courts follow a similar approach by constructing the term 'place of business through which the contract has been made' to cover both physical and online business, operated either by the carrier itself or its agent or representative.[41]

In the 2020 case, the Court, when establishing the relationship between Article 33 and EU Regulation 261/2004, established that "in the matter of international air carriage of persons, the jurisdiction on a claim compensation and damage reimbursement for flight cancellation, shall be deemed under Art. 33 of the Montreal Convention of 1999 criteria (ratified and in force in Italy with Law 12/004) even if the air carriage contract provides for a prorogation of jurisdiction. It is because Montreal Convention shall apply to all the hypothesis of delay during the execution of the transport contracts from the departure to the final destination [thus including the hypothesis of delays listed in EC Reg. 261/04]."[42] This judgment confirms the supremacy of the Convention. The Court also ruled that "in such cases the Court at the place of destination or at a place of air carrier business through which the contract has been made are competent. In case of online ticket purchase, the Joint Chambers of the Supreme Court confirmed that this latter place is the domicile of the passengers, where the latter received confirmation from the air carrier that their request to purchase a ticket has been accepted."[43] In

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[38] PADOVA Roberto; BRICCHI, Gabriele; SECCHIAROLI, Lucia. **Italian Supreme Court on Art.33 of Montreal Convention. Jurisdiction Criteria under EC261/2004 and Air Carrier General Terms and Conditions**. May 2020. Disponível em: https://www.expertguides.com/articles/italian-supreme-court-on-art-33-of-montreal-convention-jurisdiction-criteria-under-ec2612004-and-air-carrier-general-terms-and-conditions/argmoegf. Acesso em: 24 Janeiro 2021.

[39] ITALY. Order No 18257/2019

[40] ITALY. Order No 3561/2020

[41] MEKONS, Ivars. **Liability for international air carriage of passengers in Latvia**. December 2019, https://www.lexology.com/library/detail.aspx?g=0449b4d5-75df-44d8-8542-b98ae66837c5. Acesso em: 24 Janeiro 2021

[42] PADOVA Roberto; BRICCHI, Gabriele; SECCHIAROLI, Lucia. **Italian Supreme Court on Art.33 of Montreal Convention. Jurisdiction Criteria under EC261/2004 and Air Carrier General Terms and Conditions**. May 2020. Disponível em: https://www.expertguides.com/articles/italian-supreme-court-on-art-33-of-montreal-convention-jurisdiction-criteria-under-ec2612004-and-air-carrier-general-terms-and-conditions/argmoegf. Acesso em: 24 Janeiro 2021.

[43] Id.

light of this interpretation, in the case of a Brazilian living in Sweden, if he did not change his domicile to Sweden, then relying on this interpretation[44], Brazilian courts will have jurisdiction.

5. *Forum non conveniens* in Brazil

Article 33 establishes that the choice of forum is "at the option of the plaintiff". However, this sentence does not give the plaintiff an absolute right to decide which court will hear the case. In fact, airlines have the right, depending on the law of the forum, to challenge jurisdiction and venue.[45] While there has been discussion about the best interpretation in the US, it seems that courts agree that the intention of the Convention has never been to alter a country's forum selection process.[46] This claims seems substantiated by Article 33(4) stipulates that the questions of procedure are governed by the law of the court seized. As a result, the doctrine of *forum non conveniens* plays, in various countries, an important role in the interpretation and application of Article 33.

The doctrine of *forum non conveniens*, is a common law doctrine[47], which aims at preventing plaintiffs from choosing an inconvenient forum "when some significantly more convenient alternative forum exists."[48] The rational of the rule "was to stop a vindictive plaintiff deliberately harassing a defendant through legal action in a remote and inconvenient location. Since taking a company to court in its own country could not amount to harassment, local corporations had no escape from their home courts under the traditional rule."[49] The US Supreme Court established the test in *Piper Aircraft Co. v. Reyno*,[50] namely "(1) that an adequate alternative forum is available; (2) that relevant public and private interests weigh in favor of dismissal; and (3) that the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice."[51] José Alberto Silva notes that the decision of judges in the

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[44] While this interpretation will never be binding in Brazil, Brazilian judiciary could use it as an example and could follow a similar reasoning.
[45] MENDELSOHN, Allan I.; LIEUX, Renee. The Warsaw Convention Article 28, the Doctrine of Forum Non Conveniens, and the Foreign Plaintiff, **Journal of Air Law and Commerce**, vol 68, 75-113, 2003, p.80-81
[46] USA. In re Air Crash Disaster Near New Orleans, La. on July 9, 1982, 821 F.2d 1147, 1161 (5th Cir. 1987); USA. *Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989); USA. *Nolan v. Boeing Co*., 919 F.2d 1058, 1068-69 (5th Cir. 1990)
[47] It first appears in Scottish law. See: MAAG, Gordon E. Forum Non Conveniens in Illinois: a Historical Review, Critical Analysis, And Proposal For Change. **S. ILL. U. LJ**., vol. 25, 461, 2001, 463
[48] LEWIS, Melinda R. The Lawfare of Forum Non Conveniens: Suits by Foreigners in U.S. Courts for Air Accidents Occurring Abroad, **Journal of Air Law and Commerce**, vol. 78, 320-354, 2013, p. 327
[49] PETER PRINCE, **Bhopal 20 years on: forum non conveniens and corporate responsibility**, Law and Bills Digest Section, 8 February 2005
[50] USA. Case 454 U.S. 235 (1981).
[51] USA. Case 454 U.S. 235 (1981). at 241, 254-55; USA. *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052, 1059 (11th Cir. 2009)

US to invoke *forum non conveniens* rests on two assumptions: it is not convenient to continue the process in the US and there is another alternative forum that is more convenient to resolve the dispute.[52]

There have been various cases in the US, where the US courts dismissed a case on ground of *forum non conveniens*.[53] For instance, in the TAM runaway accident, where the plane crashed into a warehouse and fueling station, killing all 187 passengers and crew and 12 ground personnel, the Eleventh Circuit Court of Appeals dismissed the case on the basis of *forum non conveniens*. Even though one of the victims resided in the US, and therefore according to Article 33(2), the Florida court was an adequate forum, the Court of Appeals ruled that Brazil was the most adequate forum. While the doctrine of *forum non conveniens* has been helpful to avoid multiple litigations in case of air collision, in Brazil the STJ has ruled that this principle is not available in Brazil.[54]

As noted above, *forum non conveniens* is Common law concept, it raises the question as to whether this concept has an equivalent in legal systems of the Romano-German tradition. by analogy, *forum non conveniens* is equated to the declining jurisdiction. Although both concepts approach the waiver of jurisdiction differently, the declination of jurisdiction is fundamentally based on the conflict of internal and not international jurisdiction. In civil law, the bases for jurisdiction are defined by subjects, amounts, degrees or territories, but all within the internal jurisdiction of a certain State, an example of this is Articles 21-25 of the Brazilian Civil Procedure Code of 2015.[55] By establishing specific connecting elements, the German

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[52] SILVA, Jose Alberto. **Declaratoria de forum non conveniens a Estados Unidos eligiendo como forno más conveniente el foro mexicano.** Jornadas ASADIP 2014. Porto Alegre. Edit Grafica RJR65 and ss.

[53] USA. *Pierre-Louis v. Newvac Corp*., 584 E3d 1052 (11th Cir. 2009); USA. *In re Air Crash Over The Mid-Atlantic* on june 1, 2009, 34 Avi. 15,546 (N.D. Cal. 2010); USA. *Tazoe v. Airbus S.A.S* (2011) WL 294044 11th Cir. February 1, 2011; USA. *King v. Cessna Aircraft*, Co., 562 F.3d 1374 (11th Cir. 2009); USA. *Leon v. Millon Air, Inc*., 251 F.3d 1305 (11th Cir. 2001); USA. *McDonnell Douglas Corp*., 244 F.3d 1279 (11th Cir. 2001); Da Rocha v. Bell Helicopter Textron, Inc., 451 F. Supp. 2d 1318 (S.D. Fla. 2006)

[54] BRASIL. Medida Cautelar 15.398/RJ, rel. Mina. Nancy Andrighi, j. em 02.04.2009, publicado no DJe em 23.04.2009

[55] BRASIL, Codigo de Processo Civil. Lei 13.105 de 16 de março de 2015, Diário Oficial da União. Artigo 21. Compete à autoridade judiciária brasileira processar e julgar as ações em que:
I - o réu, qualquer que seja a sua nacionalidade, estiver domiciliado no Brasil;
II - no Brasil tiver de ser cumprida a obrigação;
III - o fundamento seja fato ocorrido ou ato praticado no Brasil.
Parágrafo único. Para o fim do disposto no inciso I, considera-se domiciliada no Brasil a pessoa jurídica estrangeira que nele tiver agência, filial ou sucursal.
Artigo 22. Compete, ainda, à autoridade judiciária brasileira processar e julgar as ações:
I - de alimentos, quando:
a) o credor tiver domicílio ou residência no Brasil;
b) o réu mantiver vínculos no Brasil, tais como posse ou propriedade de bens, recebimento de renda ou obtenção de benefícios econômicos;
II - decorrentes de relações de consumo, quando o consumidor tiver domicílio ou residência no Brasil;

Roman system, makes it impossible to create a real analogy of the *forum non conveniens* due to the impossibility of the judge to exempt, by law, his responsibility to know and decide on a litigation submitted to him.[56]

In the Brazilian context, the application of the *forum non conveniens* is far removed from the Romano-German legal reality, not only due to the aspects of jurisdiction and competencies addressed here, but also because of the legislative inoperability of that legal figure. While Articles 64-66[57] refers to decline and the powers of the judge, the jurisprudence of the Superior Court of Justice leaves no room for doubts and interpretations on this matter. According to a decision of the 3rd Court of STJ[58], the *forum non conveniens* does not find legal support in the Brazilian procedural rules, which shows that it is impossible to match or resemble

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III - em que as partes, expressa ou tacitamente, se submeterem à jurisdição nacional.
Artigo 23. Compete à autoridade judiciária brasileira, com exclusão de qualquer outra:
I - conhecer de ações relativas a imóveis situados no Brasil;
II - em matéria de sucessão hereditária, proceder à confirmação de testamento particular e ao inventário e à partilha de bens situados no Brasil, ainda que o autor da herança seja de nacionalidade estrangeira ou tenha domicílio fora do território nacional;
III - em divórcio, separação judicial ou dissolução de união estável, proceder à partilha de bens situados no Brasil, ainda que o titular seja de nacionalidade estrangeira ou tenha domicílio fora do território nacional.
Artigo 24. A ação proposta perante tribunal estrangeiro não induz litispendência e não obsta a que a autoridade judiciária brasileira conheça da mesma causa e das que lhe são conexas, ressalvadas as disposições em contrário de tratados internacionais e acordos bilaterais em vigor no Brasil.
Parágrafo único. A pendência de causa perante a jurisdição brasileira não impede a homologação de sentença judicial estrangeira quando exigida para produzir efeitos no Brasil.
Artigo 25. Não compete à autoridade judiciária brasileira o processamento e o julgamento da ação quando houver cláusula de eleição de foro exclusivo estrangeiro em contrato internacional, arguida pelo réu na contestação.
§ 1º Não se aplica o disposto no caput às hipóteses de competência internacional exclusiva previstas neste Capítulo.
§ 2º Aplica-se à hipótese do caput o art. 63, §§ 1º a 4º .

[56] CASTILLO LARRANAGA, José. Instituciones de derecho procesal civil, 14a. ed., México: Porrúa, 1981, p. 87

[57] Da Incompetência.
Artigo 64. A incompetência, absoluta ou relativa, será alegada como questão preliminar de contestação.
§ 1º A incompetência absoluta pode ser alegada em qualquer tempo e grau de jurisdição e deve ser declarada de ofício.
§ 2º Após manifestação da parte contrária, o juiz decidirá imediatamente a alegação de incompetência.
§ 3º Caso a alegação de incompetência seja acolhida, os autos serão remetidos ao juízo competente.
§ 4º Salvo decisão judicial em sentido contrário, conservar-se-ão os efeitos de decisão proferida pelo juízo incompetente até que outra seja proferida, se for o caso, pelo juízo competente.
Artigo 65. Prorrogar-se-á a competência relativa se o réu não alegar a incompetência em preliminar de contestação.
Parágrafo único. A incompetência relativa pode ser alegada pelo Ministério Público nas causas em que atuar.
Artigo 66. Há conflito de competência quando:
I - 2 (dois) ou mais juízes se declaram competentes;
II - 2 (dois) ou mais juízes se consideram incompetentes, atribuindo um ao outro a competência;
III - entre 2 (dois) ou mais juízes surge controvérsia acerca da reunião ou separação de processos.
Parágrafo único. O juiz que não acolher a competência declinada deverá suscitar o conflito, salvo se a atribuir a outro juízo.

[58] MC n. 15.398-RJ, rel. Mina. Nancy Andrighi, j. em 02.04.2009, publicado no DJe em 23.04.2009. Disponível em: https://scon.stj.jus.br/SCON/ Acesso em : 24 Janeiro 2021.

this concept. This impossibility is also exemplified by the 2011 decision of the French Cour de Cassation, the highest court in France, which ruled that a US court could not use the doctrine of *forum non coveniens* to dismiss a suit. The Court established that because the plaintiff could decide which jurisdiction rule the dispute, that choice cannot be changed or defeated by the use of internal procedural rules.[59] The French court sticked to the literal wording of the concept of "at the option of the plaintiff" by granting this right a nearly absolute nature, which has been largely criticised.[60] In Brazil, a similar interpretation can be expected.

It is worth mentioning that *forum non conveniens* and its civil law counterpart are legal figures that do not find an absolute similarity, so their analogous use would lead to the existence of legal misfortunes in matters of jurisdiction and competence in the civil law system. The forum the court that is hearing the matter is competent and rejects by virtue of finding one with greater powers to understand the matter. In the declination of the judge rejects for not being competent to decide on the matter. The only agreement on these figures focuses on recognizing that there is another court that is competent to hear the matter.

6. Conclusion

The 2017 judgment could have more far-reaching consequences than expected. Up until now, Brazil assumed a broad jurisdiction in consumer cases[61], with cases being resolved in Brazil while most connecting factors pointing to another country. If the analogy is accepted, the STF judgment could, therefore, change more than just the relationship with the CDC. Indeed, the judgment would also restrict the scope of action of Brazilian's courts. While the CDC and the *Novo* CPC have similar legal basis, the *Novo* CPC has been enacted much later than the CDC and after the Montreal was ratified. Consequently, courts might refuse to apply the Convention coupled with the STF judgment on the ground that the *Novo* CPC is a more

[59] FRANCE. Cour de cassation [Cass.] [supreme court forjudicial matters] le civ., Dec. 7, 2011, Bull. civ. I, No. Q-10-30.919 (Fr.). See: MENDELSOHN, Allan I.; RUIZ, Carols J. **The United States vs. France: Article 33 of the Montreal Convention and the Doctrine of Forum Non Conveniens**, Journal of Air Law and Commerce, vol 77, 468-487, 2012

[60] MENDELSOHN, Allan I.; RUIZ, Carols J. **The United States vs. France: Article 33 of the Montreal Convention and the Doctrine of Forum Non Conveniens**, Journal of Air Law and Commerce, vol 77, 468-487, 2012; THOMPSON THORNTON, J. **United States: Forum Non Conveniens In The Age Of The Montreal** Convention, September 2016). https://www.mondaq.com/unitedstates/aviation/529618/forum-non-conveniens-in-the-age-of-the-montreal-convention. Acesso em: 24 Janeiro 2021

[61] BRASIL, Codigo de Processo Civil. Lei 13.105 de 16 de março de 2015, Diário Oficial da União. Artigo 22(II)

recent norm. It could still, however, be argued that the Montreal Convention prevails as it is a *lex specialis*. The prevalence of the *lex specialis* is also recognised by Article 13 CPC.

While in theory this could have a great impact, this article has demonstrated that the interpretation of Article 33(1) around the world varies. Consequently, even if Brazil assumes a broad jurisdiction, it will still be in line with some of the existing interpretations, especially regarding online sales. Moreover, in most cases, Articles 33(1) Montreal and 21 CPC would give similar outcomes. However, in some situations, the Brazilian approach could lead to *forum shopping*. The only remaining question is what would happen in situations similar to the Brazilian living in Sweden one. In that case, it seems that only a judgment by the STF will be able to settle such issue.

Finally, the non-recognition by Brazil of *forum non conveniens* might create a difficulty when dealing with Common law countries, at least in theory. A broad interpretation of the sentence "at the option of the plaintiff" can be expected, which will be in line with the French interpretation, although widely criticised. Until now, all bet are opened as it will require a decision from the STF to bring any certainty.

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