

# Change Is in the Air in the US and Canada....but what about Brazil?

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## 1. Introduction

Tom Bingham, the preeminent English jurist and scholar, once stated, “cross-border problems call for cross-border solutions.”<sup>1</sup> This might be true, but in the aviation industry, national and bilateral solutions are kings. Interestingly, while passengers in Europe have enjoyed the protection of Regulation 261/2004<sup>2</sup> for well over a decade, across the Atlantic passengers have had to fight a good fight for their rights to be recognized and enforced. However, everything began to change in 2019, with the Federal Government of Canada implementing new air passenger protection regulations and U.S. Congress introducing an Airline Passengers’ Bill of Rights proposal. Meanwhile, in Brazil, a 2010 Bill to modernize the nation’s passenger rights scheme has languished, and its most recent Resolution is silent on delays and cancellations, leaving these situations to be resolved by the courts. While the Brazilian system offers one of the highest levels of passenger protection, its approach is detrimental to both airlines and passengers because of its lack of legal certainty.

The trend toward a greater balance between passengers’ rights and airlines’ needs seems to have increased. The Canadian regulations and the U.S. proposal both reflect lessons learned from the deficiencies in the EU Regulation. Having a fixed amount of compensation increases legal certainty for airlines and passengers.<sup>3</sup> Even the U.S. proposal includes fixed amounts for delays and cancellations, in stark contrast to the current scheme, which has never had any legal requirement obliging airlines to compensate. Brazil could learn from these models and introduce its own legislation, instead of leaving the judiciary to decide on the amount of compensation. Indeed, the current situation regarding the amount of compensation for passengers is extremely fragmented in Brazil and largely depends on the court and the judge. In that sense, the Canadian approach, although it is too soon to know its real-life effects, seems to better balance the rights of passengers and the needs of airlines.

This article first analyzes Brazilian passenger rights legislation. Then it will focus on both the Canadian and U.S. regulations.

## 2. Brazil: ANAC Resolution 400 of 2016

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<sup>1</sup> TOM BINGHAM, *THE RULE OF LAW* 115 (2010).

<sup>2</sup> Council Regulation 261/2004, Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights, and Repealing Regulation (EEC) No. 295/91 (Text with EEA relevance), 2004 O.J. (L 46) 1 [hereinafter EU Regulation 261/2004].

<sup>3</sup> Unlike argued by some opponents, the cost of the EU regulation is not so disproportionate. According to the EU Commission impact assessment of the Regulation established that the “average cost of the Regulation [...] was €1.63 per passenger.” See: Steer Davies Gleave, “Exploratory study on the application and possible revision of Regulation 261/2004 Final report,” Report July 2012, <https://ec.europa.eu/transport/sites/transport/files/themes/passengers/studies/doc/2012-07-exploratory-study-on-the-application-and-possible-revision-of-regulation-261-2004.pdf>

The Brazilian system governing passengers' rights changed following a 2017 decision of the Brazilian Supreme Federal Tribunal (STF).<sup>4</sup> Indeed, until this ruling, Brazil did not rely on the Montreal Convention,<sup>5</sup> even though it had ratified it. Instead, judges applied the Código de Proteção e Defesa do Consumidor (CDC), the country's consumer protection statute.<sup>6</sup> In 2018, the Terceira Turma do Superior Tribunal de Justiça (STJ) reaffirmed the applicability of the Montreal Convention in passenger rights cases.<sup>7</sup> The decision is, however, not a complete victory for the Convention, as the eleven ministers unanimously ruled that moral damages should not be subject to any limit. This means that moral damages, which are regarded as a fundamental right in Brazil, can be granted on top of the damages awarded under the Convention.

The current system, therefore, leaves much discretion to judges in the awarding of damages. This also results in the problem of inconsistency of damages, and the significant variation in the amounts granted by different tribunals – even in the same city. Indeed, Brazilian courts seem not to differentiate between non-economic damages that are inherent to air travel and unreasonable losses. As Macara and Lima noted:

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.<sup>8</sup>

The reason for maintaining the status quo on moral damages seems to flow from the fact that the Warsaw and Montreal Conventions do not provide any right to moral damages, while such right is enshrined in Brazil's Federal Constitution.<sup>9</sup> However, a case decided in September 2019 by the STJ established that delays or cancellations do not constitute *in re ipsa* moral damages.<sup>10</sup> The judgment made it clear that compensation will only be allowed if it is proven that the passenger actually suffered from a form of psychological injury as a result of the delay or cancellation. It is hoped that Brazilian lower courts will embrace this new approach to moral damages, which could result in great changes in the manner in which these cases are resolved.

The fight against moral damages in aviation is not new, with some members of the Brazilian parliament having suggested in 2010 some amendments to the aeronautic law<sup>11</sup> to offer

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<sup>4</sup> Rosolem v. Société Air France, S.T.F., Ap. Civ. No. RE 636.331/RJ, Relator: Min. Gilmar Mendes, 25.05.2017.

<sup>5</sup> Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, T.I.A.S. No. 13,038, 2242 U.N.T.S. 350 [hereinafter Montreal Convention].

<sup>6</sup> Lei No. 8.078, de 11 de Setembro de 1990, D.O.U. de 12.09.1990 (Braz.) [hereinafter CDC].

<sup>7</sup> UPS do Brasil Remessas Expressas Ltda. v. SMA Technologies Ltda., S.T.J., Ap. Civ. No. Re No. 1.615.981 – SP, 2014/0247524-7, Relator: Min. Paulo de Tarso Sanseverino, 24.04.2018. See Press Release, STJ, Convenção de Montreal é Aplicável a Contrato de Transporte Aéreo mesmo após Descarregamento (May 17, 2018), [http://www.stj.jus.br/sites/STJ/default/pt\\_BR/Comunica%C3%A7%C3%A3o/noticias/Not%C3%ADcias/Conven%C3%A7%C3%A3o-de-Montreal-%C3%A9-aplic%C3%A1vel-a-contrato-de-transporte-a%C3%A9reo-mesmo-ap%C3%B3s-descarregamento](http://www.stj.jus.br/sites/STJ/default/pt_BR/Comunica%C3%A7%C3%A3o/noticias/Not%C3%ADcias/Conven%C3%A7%C3%A3o-de-Montreal-%C3%A9-aplic%C3%A1vel-a-contrato-de-transporte-a%C3%A9reo-mesmo-ap%C3%B3s-descarregamento).

<sup>8</sup> Peter Macara & Alexandre Lima, *The Brazilian Supreme Court Upholds the Application of the Warsaw and Montreal Conventions*, 43 AIR & SPACE L. 505, 507 (2018).

<sup>9</sup> CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 5(X) (1988).

<sup>10</sup> Robson da Silva Balbe v. Gol Linhas Aéreas Inteligentes S/A, S.T.J., Ap. Civ. R. Esp. No. 1.796.716, Relator: Min. Nancy Andrichi, 27.8.2019.

<sup>11</sup> Lei No. 7.565, de 19 Dezembro de 1986, D.O.U. de 20.12.1986.

a more uniform protection to passengers. As a result, a Bill was introduced (*Projeto de Lei* or PL 6960 of 2010) which applies to any cancelled or delayed flights departing Brazil, as long as the delay exceeds two hours, as well as to denial of boarding.<sup>12</sup>

The Bill would amend the aeronautic law to establish the various alternatives airlines could propose to passengers. For instance, one provision refers to the obligation of reimbursement,<sup>13</sup> while another relates to the possibility of using an alternative mode of transportation with reimbursement for the possible difference in price.<sup>14</sup> If a flight is cancelled or delayed, or if boarding is denied at a connecting airport, the passenger can decide to return to the initial departure point at no cost and can request reimbursement of the ticket.<sup>15</sup> In addition to the refund of the ticket price, the passenger is also entitled to compensation of 50 percent of the value of the ticket if the delay or cancellation is greater than two hours.<sup>16</sup> Even if the passenger chooses another option, s/he is still eligible for the compensation of 50 percent of the value of the ticket, if the new flight departs more than two hours before the initial departure time or arrives more than two hours after the original arrival time.<sup>17</sup> The airline may limit its compensation if it proves: (I) the passenger knew about the cancellation at least seven days in advance; (II) the cancellation, delay, or denial was caused by *force majeure*, Act of God, or regular exercise of policy power; or (III) if the passenger arrived at the final destination not later than two hours after the initially contracted arrival time.<sup>18</sup> This provision is equivalent to Article 5(1)(c) of EU Regulation 261/2004. Additionally, a passenger has the right to snacks, telephone calls, Internet access (or other communication means), proportional to the waiting time, only for cancelled flights or in the case of denial of boarding for those with confirmed reservations.<sup>19</sup> Carriers must also provide accommodations and means of transportation to and from the airport or to the passenger's home address if the passenger lives close to the departure place, in cases of cancellation or denial of boarding for those with confirmed reservations.<sup>20</sup>

However, if another carrier partially or entirely caused the delay or cancellation, the latter is obligated to reimburse the carrier that compensates the passenger.<sup>21</sup> If the authority in charge of the airport or airplane services partially or entirely caused the delay or cancellation, the carrier could offset the amount compensated from the fees it owes to that authority.<sup>22</sup> Finally, the carrier is required to inform affected passengers of their rights.<sup>23</sup>

Obviously, this proposal, which regulates both passenger assistance and air carrier obligations, is greatly influenced by the EU Regulation. However, the PL is more rigid and grants more rights to passengers. For instance, the minimum time before a passenger could rely on the

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<sup>12</sup> Código Brasileiro de Aeronáutica alterado, 07.12.2009, art. 229.

<sup>13</sup> PL 6960/2010, Draft law to amend and add provisions to Law No. 7,565 of December 19, 1986, and to provide for the protection and defense of the rights of users of public air transport services, and other provisions, art. 229, para. IV.

<sup>14</sup> *Id.* para. III.

<sup>15</sup> *Id.* art. 229(3).

<sup>16</sup> *Id.* art. 230.

<sup>17</sup> *Id.* art. 230(1)(III).

<sup>18</sup> *Id.* art. 230(1).

<sup>19</sup> *Id.* art. 230-B I.

<sup>20</sup> *Id.* art. 230-B II.

<sup>21</sup> *Id.* art. 230-A I.

<sup>22</sup> *Id.* art. 230-A II.

<sup>23</sup> *Id.* art. 230-D.

PL is shorter than under EU law and, unlike in the EU, the proposed law takes into consideration the delay at departure and not the delay upon arrival. Consequently, flights that leave on schedule but arrive late would not result in any compensation to the passengers. The Brazilian proposal further establishes a category of delay that excludes several other situations leading to waste of time, inconvenience, and damages to passengers. However, no fixed compensation amounts were included in the proposal.

Brazil's National Agency of Civil Aviation (ANAC) recently enacted Resolution 400/2016, a soft law instrument, which provides a robust framework for consumer protections while increasing the legal certainty of airlines regarding the possible compensation costs. Similar to its predecessor,<sup>24</sup> this Resolution obliges airlines to provide means of communication, such as Internet, telephone access, or others to the passengers after one hour of delay, cancellation, or denial of boarding.<sup>25</sup> After two hours, catering should be offered, which needs to involve at least water and snacks, or a voucher for same.<sup>26</sup> After four hours, passengers should be taken to another facility or even provided accommodations.<sup>27</sup> Transportation to and from the site of the accommodations is at the airline's expense after four hours. If the passenger resides in the airport city, the airline may merely offer transportation between the airport and the residence. Also after four hours, passengers have the right to choose between a full refund or an alternative travel plan with that carrier or with another airline. The new Resolution also obliges airlines to inform affected passengers every 30 minutes about the new estimated departure time.<sup>28</sup>

In cases of denied boarding, the Resolution requires airlines to compensate the passengers up to 250 Special Drawing Rights (SDRs) for domestic flights and 500 SDRs for international flights.<sup>29</sup> However, the Resolution is silent regarding compensation for delays or cancellations. The amount of compensation is, therefore, left to the judge's or airline's discretion, which can lead to significant disparities. Indeed, there is no national consensus as to the amount that should be compensated. Thus, similar situations could lead to different damages depending on the judge or city in which the judgment is rendered.

For instance, in January 2018, the STJ 2<sup>a</sup> Turma rendered a decision obliging Gol to compensate two passengers for moral damages from a delay that resulted in problems affecting their work.<sup>30</sup> At first instance, Gol was required to pay R\$6000 per passenger (roughly 1500 euros). Gol appealed the decision, arguing that assistance was given and that the delay was caused by network restructuring by ANAC or Infraero and, therefore, it should not be held responsible. Curiously, the court held that network restructuring was an "internal circumstance," even though

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<sup>24</sup> ANAC Resolution No. 141/2010, Mar. 9, 2010, D.O.U. de 15.03.2010. For a discussion of Resolution 141/2010, see Delphine Defossez, *I Wish My Mum Was Brazilian: The Regulation of Passenger Liability in the EU and Brazil*, 18 ISSUES AVIATION L. & POL'Y. 333, 358 (2019).

<sup>25</sup> ANAC Resolution No. 400/2016, art. 27 I, Dec. 13, 2016, D.O.U. de 14.12.2016, [https://www.anac.gov.br/assuntos/legislacao/legislacao-1/resolucoes/resolucoes-2016/resolucao-no-400-13-12-2016/%40%40display-file/arquivo\\_norma/RA2016-0400%2520-%2520Retificada.pdf&prev=search](https://www.anac.gov.br/assuntos/legislacao/legislacao-1/resolucoes/resolucoes-2016/resolucao-no-400-13-12-2016/%40%40display-file/arquivo_norma/RA2016-0400%2520-%2520Retificada.pdf&prev=search).

<sup>26</sup> *Id.* art. 27 II.

<sup>27</sup> *Id.* art. 27 III.

<sup>28</sup> *Id.* art. 20 (1).

<sup>29</sup> *Id.* art. 24. See Montreal Convention, *supra* note 4, art. 23 (defining Special Drawing Rights).

<sup>30</sup> *Correa v. VRG Linhas Aereas S.A.*, S.T.J., Ap. Civ. R. Esp. No. 1.616.079, Relator: Min. Herman Benjamin, 22.8.2017.

it is clearly outside the airlines' control.<sup>31</sup> A similar case was adjudicated in 2014 by the 5ª Câmara Cível do Tribunal de Justiça do Maranhão, which reaffirmed the judgment of the 10ª Vara Cível de São Luís, fining Gol R\$10,000 for an eight-hour delay. In this case, the passenger was unable to sit for a scheduled examination at the Universidade de Brasília due to the delay.

In 2018, LATAM was ordered to compensate a couple who missed a New Year's Eve celebration with their family because of a 19-hour delay. They were granted R\$20,000 (roughly 4600 euros) by the 24 Chamber of the SP first instance tribunal.<sup>32</sup> Once again, the compensation seems unreasonable in light of the facts. This compensation is, however, much higher than that granted in another case, decided in Rio at the end of 2017, where a family of four received the same amount – R\$20,000 in total – after suffering a much longer delay of 61 hours.<sup>33</sup>

In 2016, Delta Air Lines was required to pay R\$15,000 in moral damages to a man who, because of a delay, missed a Valentine's Day date with his girlfriend.<sup>34</sup> The man bought a ticket to arrive at 5 a.m. on February 14 to see his girlfriend, who was in New York and had booked a romantic lunch. However, the flight was delayed by eight hours, rendering the lunch date impossible. Delta argued that the delay was caused by verification and repair of a failure of the airplane. However, the tribunal in Rio did not recognize this circumstance as exonerating the airline from its liability. The man, in fact, arrived in New York at 12:56 p.m., meaning that he still could have had lunch with his girlfriend. In the decision, the appellate judge even referred to "human dignity" as a reason for such high damages, without explaining in which sense this passenger's "dignity" had been violated.<sup>35</sup> This case demonstrates an abuse in compensation, especially when compared with a case where two sisters who missed their father's funeral because of a delay received the same amount, R\$15,000 each.<sup>36</sup>

In 2014, a tribunal in Rio Grande do Sul ordered Emirates to compensate R\$15,000 in moral damages and R\$2,803.42 in material damages to an athlete who lost her opportunity to compete in the Aquathlon World Championships in New Zealand.<sup>37</sup> Due to a 6-hour delay in Porto Alegre, the athlete missed her connecting flight in Rio and was informed that all of the next flights to New Zealand were fully booked. Emirates only proposed to buy a ticket in business

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<sup>31</sup> Guzzi da Luz v. LATAM, T.J.S.P., Ap. Civ. No. 1009640-14.2017.8.26.002, Relator: Jonize Sacchi De Oliveira, 14.12.2017 ("Não poderia a apelante eximir-se de sua responsabilidade civil, pois eventual reestruturação da malha aérea, noticiada nos autos, caracteriza-se como fortuito interno, inerente ao risco da atividade profissional, inapto, portanto, a romper o nexo causal ensejador do dever de indenizar os danos suportados pelos autores.").

<sup>32</sup> *Id.*

<sup>33</sup> Alexandre Chalita Braz v. Aerolineas Argentinas SA, T.J.R.J., Ap. Civ. No. 0079396-62.2016.8.19.0001, Relator: Marisa Simões Mattos Passos, 13.12.2017.

<sup>34</sup> Ferreira v. Delta Air Lines Inc., T.J.R.J., Ap. Civ. No. 0247949-09.2015.8.19.0001, Relator: Des. Antonio Carlos Dos Santos Bitencourt, 15.04.2016.

<sup>35</sup> Desembargador Antonio Carlos Dos Santos Bitencourt ("Referida indenização pretende compensar a dor do lesado e constitui um exemplo didático para a sociedade de que o Direito repugna a conduta violadora, porque é incumbência do Estado defender e resguardar a dignidade humana. Ao mesmo tempo, objetiva sancionar a lesante, inibindo-a em relação a novas condutas, e por isso, deve corresponder a um valor de desestímulo, que não pode ensejar enriquecimento sem causa, nem pode ser ínfimo, a ponto de não coibir a reincidência em conduta negligente.").

<sup>36</sup> Frazão de Oliveira v. Azul Lines Aéreas Brasileiras SA, Ap. Civ. No. 1022153-03.2016.8.26.0114, Relator: Pedro Kodama, 17.07.2014.

<sup>37</sup> Apelação Cível nº. 70060060670

class which, as such, was not an alternative. The athlete then decided to fly back to Porto Alegre with a ticket which she had to buy on her own.

In 2016, the 3ª câmara de Direito Público do TJ, Santa Catarina upheld a judgment against Gol for a four-and-one-half hour delay, which resulted in a grandmother missing her granddaughter's first birthday.<sup>38</sup> The passenger, who also alleged that she was not even offered a meal during the delay, received R\$5,000, later reduced to R\$4,000.<sup>39</sup> Also in 2016, a passenger who lost part of her honeymoon due to the cancellation of her initial flight caused by meteorological conditions, was rebooked after a 28-hour delay on a flight to her final destination. Although she lost more than a full day of her seven-day honeymoon, she was only awarded R\$5,000 in moral damages and R\$671.28 in material damages, reaffirmed by the 1ª Turma Recursal dos Juizados Especiais do Distrito Federal.<sup>40</sup>

Contrary to these “iconic” cases, there are others where the damages awarded seem ridiculous. For instance, in 2010, a family that suffered a 40-hour delay was granted only R\$6,000 by the tribunal in Rio.<sup>41</sup> They were only taken to a hotel 30 hours after being informed of the delay. A passenger who suffered a 20-hour delay on an international flight to Lisbon and who was offered neither hotel nor vouchers for food received R\$8,000.<sup>42</sup> In another case, in 2011, a passenger received only R\$4,000 for a 12-hour delay on her way to New York, and was offered neither hotel nor vouchers for food.<sup>43</sup>

Comparing these cases, there seems to be no logic in the damages awarded; missing a romantic lunch is valued at the same level as missing a funeral or an opportunity for a world championship, while missing a granddaughter's first birthday does not even bring half the amount of the other two situations. However, looking objectively, the missing of a funeral, championship, a day of a honeymoon, and a first birthday are events that cannot be replaced, while a romantic lunch with a girlfriend on February 14 can.

Finally, there is an understanding that delays of less than four hours are not compensable;<sup>44</sup> airlines are only required to rebook the passengers on a later flight.<sup>45</sup> The judge in a 2019 case decided in Guará, reflecting the passive understanding of the tribunal, found that delays of up to four hours are tolerated and do not trigger a right to moral damages.<sup>46</sup> The Brazilian system is less

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<sup>38</sup> Demarque v. Gol Linhas Aéreas Inteligentes S/A, T.J.S.C., Civ. Ap. No. 001661751.2012.8-24.0008, Relator: Des. Ronei Danielli, 29.03.2016.

<sup>39</sup> *Id.*

<sup>40</sup> Matos v. VRG Airlines S/A, T.J.D.F., Civ. Ap. No. 0700077-95.2016.8.07.0014, Relator: Robson Barbosa de Azevedo, 28.07.2016.

<sup>41</sup> Ana Lúcia de Sá v. Aerolineas Argentinas, T.J.R.J., Civ. Ap. No. 0283028-59.2009.8.19.0001, Relator: Alexandre Freitas Câmara, 31.10.2010.

<sup>42</sup> X v. X, T.J.R.S., Civ. Ap. No. 70055293542, Relator: Ana Lucia Carvalho Pinto Vieira Rebout, 19.03.2015.

<sup>43</sup> Luiz Mauricio da Silva v. American Airlines, Inc., D.J.P.E., Civ. Ap. No. 0185692-21.2010.8.19.0001, Relator: Karina Albuquerque Aragão de Amorim, 27.03.2015.

<sup>44</sup> ANAC Resolution 141/2010, art. 3, reaffirmed by ANAC Resolution 400/2016, *supra* note 24, art. 21(IV).

<sup>45</sup> Pedro Mello e Cross v. Gol Linhas Aéreas Inteligentes S/A, T.J.S.C., Civ. Ap. No. 0303994-53.2014.8.24.0090, Relator: Marcelo Pizolati, 23.08.2018; Daniel Duarte Abiorana v. Gol Linhas Aéreas Inteligentes S/A, T.J.D.F.T., Civ. Ap. No. 0706283-57.2018.8.07.0014, Relator: Paulo Cerqueira Campos, 02.06.2019. *See* Tadeu Rover, *Atraso de Até 4 Horas em Voo é Tolerável e Não Gera Dever de Indenizar*, CONSULTOR JURÍDICO, Feb. 19, 2019, <https://www.conjur.com.br/2019-fev-19/atraso-horas-voo-toleravel-nao-gera-indenizacao>.

<sup>46</sup> Abiorana v. Gol Linhas Aéreas Inteligentes S/A, *supra* note 44 (“O atraso de até quatro horas, em decorrência de reestruturação da malha aérea ou impossibilidade de decolagem do voo, configura atraso tolerável e mero

generous than the European system in this regard, as under the EU system passengers can be compensated after delays of three hours or more.<sup>47</sup>

Finally, the fines laid down in Resolution 141/2010, R\$4,000 and R\$10,000 for noncompliance by airlines, have been drastically increased under Resolution 400/2016 to as much as R\$50,000, and the assistance to passengers under the new Resolution is more extensive than that granted under EU law, as it starts after only one hour.

### **3. Canada: Air Passenger Protection Regulations (APPRs)<sup>48</sup>**

As of July 15, 2019, airlines were required to meet certain obligations under Canada's new Air Passenger Protection Regulations (APPRs), while the balance of these obligations became applicable on December 15, 2019. Before the introduction of APPRs Canada experienced an increase of 950% in passengers' complaints since 2012. "The rise in complaints began during the fall of 2016, when the CTA began modest public information efforts to help make Canadians aware of their rights as air passengers and ability to seek recourse through the CTA for issues that cannot be resolved directly with an airline."<sup>49</sup>

The APPRs apply to all flights within, from, or to Canada, whether operated by a Canadian or foreign airline. They impose obligations on carriers in cases of tarmac delays, denial of boarding, and delayed or cancelled flights, and require that the carriers inform passengers of their rights in a timely, clear, and accessible way.

Regarding tarmac delays, the APPRs create certain specific obligations. However, they do not set a minimum amount of time to define a "tarmac delay," stipulating instead that: "If a flight is delayed on the tarmac after the doors of the aircraft are closed for take-off or after the flight has landed."<sup>50</sup> If there is no possibility to disembark the passengers, airlines must allow access to lavatories,<sup>51</sup> provide proper cooling or heating of the aircraft,<sup>52</sup> food and drink "in reasonable quantities, taking into account the length of the delay, the time of day and the location of the airport,"<sup>53</sup> and the means to communicate with people outside the aircraft free of charge, if feasible.<sup>54</sup>

If the tarmac delay occurs at a Canadian airport, passengers have the right to disembark three hours after the aircraft doors have been closed for takeoff or three hours after landing "or at any earlier time if it is feasible."<sup>55</sup> This obligation will not be imposed if it is likely that takeoff will occur fewer than three hours and 45 minutes after the doors are closed, or after landing, provided that the airline can maintain the standard of treatment discussed in the previous

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aborrecimento, em razão da complexidade da vida moderna e das imprevisões das relações cotidianas, não sendo apto para caracterizar danos morais.").

<sup>47</sup> See EU Regulation 261/2004, *supra* note 2, art. 7.

<sup>48</sup> Air Passenger Protection Regulations (Transportation Act), SOR/2019-150 (Can.).

<sup>49</sup> Canadian Transport Agency, Annual Report 2017-2018, [https://otc-cta.gc.ca/sites/default/files/annual\\_report\\_2017-2018\\_en.pdf](https://otc-cta.gc.ca/sites/default/files/annual_report_2017-2018_en.pdf) p.23

<sup>50</sup> *Id.* sec. 8(1).s

<sup>51</sup> *Id.* sec. 8(1)(a).

<sup>52</sup> *Id.* sec. 8(1)(b).

<sup>53</sup> *Id.* sec. 8(1)(d).

<sup>54</sup> *Id.* sec. 8(1)(c).

<sup>55</sup> *Id.* sec. 9.

paragraph.<sup>56</sup> Airlines are not obliged to comply if disembarking would not be safe or for reasons relating “to air traffic or customs control.”<sup>57</sup>

Such provisions regarding tarmac delays are neither included in the EU Regulation nor the Brazilian bill. Another main difference from EU and Brazilian legislation is that the APPRs distinguish between small and large carriers regarding denial of boarding, delays, or cancellations. The idea behind this distinction is to avoid overburdening smaller airlines that operate less popular routes and fly to less populated parts of Canada. Accordingly, a “large carrier” is defined as one that “has transported a worldwide total of two million passengers or more during each of the two preceding calendar years,”<sup>58</sup> while a “small carrier” is one that has transported fewer than two million passengers in the previous two years. However, if a small carrier is carrying passengers “on behalf of a large carrier under a commercial agreement,” through codesharing for instance, then it will have the same obligations as a large carrier.<sup>59</sup>

More importantly, the APPR scheme seeks to avoid falling into the same traps as EU Regulation 261/2004 and the concept of “extraordinary circumstances.”<sup>60</sup> It therefore defines in detail which circumstances will result in which obligations and rights. It also distinguishes among three types of situations: those outside the carrier’s control; those within the carrier’s control but required for safety purposes; and those within the carrier’s control. One APPR section provides a non-exhaustive list of situations deemed to be outside the carrier’s control, such as war or political instability, weather conditions or natural disasters “that make the safe operation of the aircraft impossible,” instructions from air traffic control, airport operation issues, a bird strike or other collision with wildlife, labor disruptions “within the carrier or within an essential service provider,” and a manufacturing defect in an aircraft that reduces passenger safety, as identified by the manufacturer or a competent authority.<sup>61</sup> Airlines are required to provide passengers with certain information and, in cases of delay, denial of boarding, or cancellation of three hours or more, passengers are entitled to alternate travel arrangements.<sup>62</sup> Interestingly, some of these situations also fall within the exception under EU law but are not recognized by Brazilian courts, for instance. Indeed, in Brazil, carriers are still responsible if there are airport issues or network restructuring,<sup>63</sup> and even in cases of bad weather.<sup>64</sup> As in Europe, the inclusion of bad weather and mechanical problems could lead to abuse with airlines classifying problems under these categories to avoid compensation. The Canadian Transportation Agency (CTA) will have to closely monitor the situation to make sure airlines play by the rules and avoid situations like in Europe.

The second major type of situations – those within a carrier’s control but required for safety purposes – is dealt with in another section, which defines “required for safety purposes” as

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<sup>56</sup> *Id.* sec. 9(2).

<sup>57</sup> *Id.* sec. 9(4).

<sup>58</sup> *Id.* sec. 1(2).

<sup>59</sup> *Id.* sec. 1(4).

<sup>60</sup> For an extensive discussion of EU Regulation 261/2004 and the concept of “extraordinary circumstances,” see Vincent Correia, *Air Passengers’ Rights, “Extraordinary Circumstances,” and General Principles of EU Law: Some Comments After the McDonagh Case*, 13 ISSUES AVIATION L. & POL’Y 245 (2014).

<sup>61</sup> Air Passenger Protection Regulations, *supra* note 47, sec. 10.

<sup>62</sup> *Id.* sec. 10(3).

<sup>63</sup> *Correa v. VRG Linhas Aereas S.A.*, *supra* note 29.

<sup>64</sup> *Guzzi da Luz v. LATAM*, *supra* note 30.

anything “required by law in order to reduce risk to passenger safety.”<sup>65</sup> The definition specifically refers to “safety decisions made within the authority of the pilot or any decision made in accordance with the safety management system.”<sup>66</sup> The definition explicitly excludes “scheduled maintenance in compliance with legal requirements.”<sup>67</sup> In this category, the airline has the same communication obligations as in cases of flight disruptions that are outside its control, and nearly the same obligation to “provide alternate travel arrangements” except that this provision also includes the possibility of a refund.<sup>68</sup> Furthermore, the carrier may have an obligation of care, such as the provision of food, drinks, means of communication, accommodation, and transport,<sup>69</sup> if the passengers were informed less than 12 hours before the original departure time in cases of delay or cancellation. This obligation also applies to denial of boarding, but without a minimum time period before the obligation kicks in. These obligations differ from those in the EU. Indeed, mechanical or technical issues preventing the safe operation of the aircraft, which are discovered other than in the course of scheduled maintenance checks, will not result in an obligation to compensate passengers whose flights are delayed or cancelled. This means that a case like *van der Lans v. KLM*<sup>70</sup> would have a totally different outcome in Canada.<sup>71</sup>

Another section regulates situations within the carrier’s control. Airlines have the same obligations as under the previous section but may also be required to pay compensation to passengers suffering denial of boarding, delays or cancellation if they were not informed at least 14 days prior to the original departure time.<sup>72</sup> Passengers are entitled to compensation based on the length of delay at arrival at their final destination. For delay or cancellation between three and six hours, a large carrier is liable to pay \$400 while a small carrier is liable for \$125 in compensation.<sup>73</sup> For delay or cancellation between six and nine hours, a large carrier will have to pay \$700 in compensation while a smaller carrier must pay only \$250.<sup>74</sup> Finally, for delays at arrival destination of more than nine hours, passengers on a large carrier will receive \$1000 while passengers on a smaller carrier get \$500.<sup>75</sup> However, if the passenger on the delayed or cancelled flight accepts a refund,<sup>76</sup> large airlines are only liable for \$400 in compensation and small carriers for \$125.<sup>77</sup> Passengers have one year to make a compensation claim with the airline that operated the disrupted flight,<sup>78</sup> and the airline has 30 days to respond by issuing a payment or indicating why it believes compensation is not owed.<sup>79</sup> Finally, the Canada Transportation Act prohibits receipt of compensation under the APPRs if the claimant has already been compensated for the

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<sup>65</sup> Air Passenger Protection Regulations, *supra* note 47, sec. 11. *See id.* sec. 1(1).

<sup>66</sup> *Id.* sec. 11.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* sec. 11(3)(c), (4)(c) & (5)(c).

<sup>69</sup> As explained in *id.* sec. 14.

<sup>70</sup> Case C-257/14, *van der Lans v. KLM NV*, 2015 EU:C:2015:618.

<sup>71</sup> But not in Brazil, where airlines have extremely restricted defenses. *See Ferreira v. Delta Air Lines Inc.*, *supra* note 33.

<sup>72</sup> Air Passenger Protection Regulations, *supra* note 47, sec. 12(2)(d) & (3)(d).

<sup>73</sup> *Id.* sec. 19(1)(a)(i) & (b)(i).

<sup>74</sup> *Id.* sec. 19(1)(a)(ii) & (b)(ii).

<sup>75</sup> *Id.* sec. 19(1)(a)(iii) & (b)(iii).

<sup>76</sup> *See id.* sec. 12(2)(c) or (3)(c).

<sup>77</sup> *Id.* sec. 19(2).

<sup>78</sup> *Id.* sec. 19(3).

<sup>79</sup> *Id.* sec. 19(4).

same event under a different regime.<sup>80</sup> However, the APPRs provide that carriers may not refuse compensation on the grounds that the passenger is also eligible for compensation for the same event under a different regime. Compared to the EU Regulation, the amounts are much higher, but the delay is much longer.<sup>81</sup> Interestingly, the APPRs also use the “delay upon arrival” approach, which seems more appropriate than the “delay at departure” approach used in the Brazilian bill.

Length of the delay (cancellation and delay)	Amount in CAD for large airlines	Amount in CAD for small airlines
3-6 hours	\$400	\$125
6-9 hours	\$700	\$250
9+	\$1000	\$500

Previously, any airline could deny boarding to a passenger in cases of overbooking or for safety reasons. However, the APPRs now set out a procedure that airlines must follow in cases of overbooking. A carrier cannot deny boarding to any passenger unless it has first asked all passengers if any of them are willing to give up their seats.<sup>82</sup> If the airline offers a benefit in order to encourage volunteers, such benefit must be put in writing before the departure of the flight. To avoid cases as in the United States,<sup>83</sup> the APPRs make it clear that airlines cannot deny boarding to anyone who has already boarded the plane.<sup>84</sup> Additionally, airlines are obliged to provide passengers who are denied boarding with information, alternate travel arrangements, care or treatment, and monetary compensation, depending on the circumstances.<sup>85</sup> If the arrival time at the destination is delayed less than six hours, the passengers have a right to \$900, while if the arrival time is delayed by between six and nine hours, the compensation rises to \$1800. Finally, if the arrival time is delayed by more than nine hours, the compensation is \$2400. Where the APPRs anticipate an almost immediate payment of compensation in cases of denied boarding, passengers must file a request for compensation in cases of delayed and cancelled flights.

Length of the delay (denial of boarding)	Amount
0-6 hours	\$900

<sup>80</sup> Canada Transportation Act, 1996 S.C., ch. 10, sec. 86.11(3).

<sup>81</sup> Compare Air Passenger Protection Regulations, *supra* note 47, sec. 19(1), with EU Regulation 261/2004, *supra* note 2, sec. 7(1).

<sup>82</sup> Air Passenger Protection Regulations, *supra* note 47, sec. 15(1).

<sup>83</sup> See, e.g., Daniel Victor & Matt Stevens, *Man Is Dragged from a Full Jet, Stirring a Furor*, N.Y. TIMES, Apr. 10, 2017, at A1.

<sup>84</sup> *Id.* sec. 15(2).

<sup>85</sup> *Id.* sec. 15(3).

6-9 hours	\$1800
9+	\$2400

Similar to the EU situation, any kind of flight disruption obliges airlines to provide specified information to the affected passengers, such as the reason for the disruption, the compensation that passengers may be entitled to receive, the standard of treatment for passengers, and the recourse available against the airline.<sup>86</sup> This last obligation is not found in the EU legislation, but it appears in the ANAC Resolutions in Brazil. Interestingly, the obligation to update passengers every 30 minutes in cases of delay,<sup>87</sup> or as soon as the airline obtains new information,<sup>88</sup> is also found in Resolution 400/2016 in Brazil. Carriers are required to inform passengers via the “communication method that they have indicated that they prefer,”<sup>89</sup> and must display notices stating passengers’ rights in cases of denial of boarding or lost or damaged luggage.<sup>90</sup> This requirement can be found in both the EU Regulation and Brazilian Resolution.

While the “standards of treatment” are similar among these three jurisdictions, Brazilian law offers greater protection, as the obligations of the carrier commence after one hour. Interestingly, only in Brazilian law is there a minimum waiting time in the airport before passengers must be taken to a hotel or are taken back home at the expense of the airline. Under both EU and Canadian law, this obligation exists, but there is no timeframe regarding its application. Furthermore, this obligation will not be implemented if it will cause further delay.<sup>91</sup>

There is another interesting aspect to Canada’s APPRs: the obligation to provide alternate travel arrangements partially depends on whether the flight disruption is within, or entirely outside, the carrier’s control. Indeed, if the disruption is within the airline’s control and the airline is a large carrier, then it must provide a confirmed reservation on the next available flight to each affected passenger, whether the flight is operated by it or by a carrier with which it has a commercial agreement.<sup>92</sup> If the carrier cannot provide such confirmed reservation, it is requested to provide a confirmed reservation for a flight that is operated by any carrier and which “departs within 48 hours of the departure time that is indicated on [the] original ticket.”<sup>93</sup> The final alternative is that the carrier transports the passenger to another airport “within a reasonable distance of the airport at which the passenger is located” and provides a confirmed reservation for a flight operated by any carrier.<sup>94</sup> In the case of a small carrier, a confirmed reservation on the next available flight, whether the flight is operated by it or by a carrier with which it has a commercial agreement, must be provided.<sup>95</sup> If the passenger does not agree with the alternate

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<sup>86</sup> Compare EU Regulation 261/2004, *supra* note 2, sec. 14, with Air Passenger Protection Regulations, *supra* note 47, sec. 13(1)(a)–(d).

<sup>87</sup> *Id.* sec. 13(2).

<sup>88</sup> *Id.* sec. 13(3).

<sup>89</sup> *Id.* sec. 13(5).

<sup>90</sup> *Id.* secs. 5 & 7.

<sup>91</sup> *Id.* secs. 14(3) & 16(3) (for denial of boarding).

<sup>92</sup> *Id.* sec. 17(1)(a)(i).

<sup>93</sup> *Id.* sec. 17(1)(a)(ii).

<sup>94</sup> *Id.* sec. 17(1)(a)(iii).

<sup>95</sup> *Id.* sec. 17(1)(b).

travel arrangement and the passenger is in transit but does not wish to continue the journey due to the delay, the airline must refund the ticket, provide a confirmed reservation for a flight to the original departure point, and accommodate the passenger's needs.<sup>96</sup> In any other circumstances, the airline is required to refund the unused portion of the ticket.<sup>97</sup> The alternate travel arrangements must, as much as possible, be comparable to those of the original ticket.<sup>98</sup> If the alternative flight does not include additional services purchased by the passenger for the original flight, the airline must reimburse these services.<sup>99</sup> Similarly, if the passenger paid twice for these services, the excess must be reimbursed.<sup>100</sup> If the alternate travel arrangements provide for a lower class of service, the airline must refund the difference in fare; however, if the alternative arrangements are of a higher class of service, the airline cannot request supplementary payment.<sup>101</sup> While the EU Regulation and the Brazilian Resolution also require reimbursement, the EU Regulation is silent regarding the obligation to reimburse additional services.<sup>102</sup> Notably, under the EU Regulation, airlines are not required to pay the actual difference in cases of downgrading, but rather, the difference is calculated according to distance.<sup>103</sup>

The obligation to provide alternate travel arrangements is slightly different where the flight disruption is entirely outside the carrier's control. A large carrier must provide a confirmed reservation on the next available flight operated by it or a carrier with which it has a commercial agreement that "departs within 48 hours of the end of the event that caused the delay, cancellation or denial of boarding."<sup>104</sup> If this is not possible, alternate travel arrangements on any carrier must be provided.<sup>105</sup> A small carrier must provide a confirmed reservation on the next available flight operated by it or by a carrier with which it has a commercial agreement. The main difference between this type of flight disruption and the previous one is that no mention is made regarding the refund of any downgrading or additional services.

Penalties range up to \$25,000 per violation per carrier. This amount is much higher than under the Brazilian approach and might lead to greater implementation of the rules than in Europe, for instance. Indeed, the EU Regulation only stipulates that the penalties must be "effective, proportionate and dissuasive"<sup>106</sup> and are left to Member States to decide. Given the growing

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<sup>96</sup> *Id.* sec. 17(2)(a).

<sup>97</sup> *Id.* sec. 17(2)(b).

<sup>98</sup> *Id.* sec. 17(3).

<sup>99</sup> *Id.* sec. 17(4)(a).

<sup>100</sup> *Id.* sec. 17(4)(b).

<sup>101</sup> *Id.* sec. 17(5)–(6).

<sup>102</sup> *Id.* art. 10. See EU Regulation 261/2004, *supra* note 2, art. 8.

<sup>103</sup> "(a) 30 % of the price of the ticket for all flights of 1500 kilometres or less, or  
(b) 50 % of the price of the ticket for all intra-Community flights of more than 1500 kilometres, except flights between the European territory of the Member States and the French overseas departments, and for all other flights between 1500 and 3500 kilometres, or  
(c) 75 % of the price of the ticket for all flights not falling under (a) or (b), including flights between the European territory of the Member States and the French overseas departments."  
*Id.* art. 10.

<sup>104</sup> Air Passenger Protection Regulations, *supra* note 47, sec. 18(1)(a)(i).

<sup>105</sup> *Id.* sec. 18(1)(a)(ii).

<sup>106</sup> EU Regulation 261/2004, *supra* note 2, art. 16(3).

number of claim management agencies and the number of cases that are dismissed, it seems that the EU penalties are not that effective.<sup>107</sup>

#### 4. *Senate Bill 2341*

In the United States, air passenger rights are derived from recently adopted regulations and legislation, including three final rules<sup>108</sup> and the FAA Extension, Safety, and Security Act of 2016.<sup>109</sup> July 2019 marked the introduction of the Airline Passengers' Bill of Rights<sup>110</sup> in the U.S. Senate. Unfortunately, U.S. regulations do not protect passenger rights the same way as Europe, especially in cases of flight delays or cancellations. However, the laws in place are beneficial to passengers facing denial of boarding, luggage problems, or tarmac delays. When passengers are entitled to compensation, the amount is often much higher than under EU law.

In 2009, after repeated media attention regarding long tarmac delays, DOT promulgated the first of three "Enhancing Airline Passenger Protections" final rules. Much like the new Canadian rule, it stipulates that airlines must disembark passengers after more than three hours on the tarmac for domestic flights and four hours for international flights. This rule only applies to tarmac delays occurring at U.S. airports and does not apply where the safety or security of the passengers is in jeopardy or if air traffic control instructs the carrier not to return to the gate.<sup>111</sup> This rule only applies to a "covered carrier," meaning airlines operating flights to, from, or within the United States, with a minimum capacity of 30 passengers.<sup>112</sup> Interestingly, if passengers decide to exit the plane during a tarmac delay, the airline is not required to allow them back in, nor is it obliged to disembark the passengers' luggage before the plane takes off to the original destination.<sup>113</sup> Airlines are required by DOT to provide access to water, bathrooms, and necessary medical care while passengers are on the tarmac for more than two hours, unless serving food is not deemed safe by the pilot. Airlines are not obliged to serve a full meal, even during lengthy delays, but they must have enough food and water to serve all passengers.<sup>114</sup> This rule decreased the number of tarmac delays, but because the exceptions for safety and security are relatively vague, some delays still occurred. JetBlue and American Eagle were heavily fined under this rule for keeping passengers on the tarmac longer than three hours without informing them of their rights.<sup>115</sup>

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<sup>107</sup> For a fascinating discussion of claim agencies and their impact, see Charlotte Thijssen & Lisa Williams, *U.K. Court of Appeal Confirms Airlines May Compensate Passengers Directly – The Beginning of the End of Ambulance-Chasing over Passenger Rights Claims in the EU?*, 18 ISSUES AVIATION L. & POL'Y 275 (2019).

<sup>108</sup> Enhancing Airline Passenger Protections, 74 Fed. Reg. 68,983 (Dec. 30, 2009) (codified at 14 C.F.R. pts. 234, 253, 259, & 399); Enhancing Airline Passenger Protections [II], 76 Fed. Reg. 23,110 (Apr. 25, 2011) (codified at 14 C.F.R. pts. 244, 250, 253, 259, & 399); Enhancing Airline Passenger Protections III, 81 Fed. Reg. 76,800 (Nov. 3, 2016) (codified at 14 C.F.R. pts. 234, 244, 250, 255, 256, 257, 259, & 399).

<sup>109</sup> Pub. L. No. 114-190, §§ 2305, 2308, 2309, 130 Stat. 615, 640, 648–49.

<sup>110</sup> S. 2341, 116th Cong. (2019).

<sup>111</sup> U.S. DEP'T OF TRANSP., *Tarmac Delays*, <https://www.transportation.gov/individuals/aviation-consumer-protection/tarmac-delays> (last visited Dec. 27, 2019).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* See *infra* text accompanying notes 106–07.

<sup>115</sup> Mary Forgione, *American Eagle Airlines to Pay \$900,000 in First Tarmac Delay Fine*, LATIMES.COM (Nov. 14, 2011, 12 :00 AM), <https://www.latimes.com/travel/la-xpm-2011-nov-14-la-trb-tarmac-rule-fine-20111114-story.html>; Chris Isidore, *JetBlue Fined \$90K for Violating Passenger Rights*, CNN.COM (Aug. 20, 2012, 6 :57 PM), <https://money.cnn.com/2012/08/20/news/companies/jetblue-passenger-rights/index.html>.

DOT permits airlines to oversell tickets; however, passengers who are involuntarily denied boarding have a right to compensation.<sup>116</sup> To be eligible for compensation, the passenger must have a confirmed reservation, check-in for the flight, and arrive at the gate on time, and the airline cannot get them to their destination within an hour of their flight's original arrival time.<sup>117</sup> The airline must first seek passengers who are willing to give up their seats for compensation.<sup>118</sup> The compensation might consist of vouchers, money, and/or reduced-rate tickets for another flight.<sup>119</sup> If there are not enough volunteers, airlines can select passengers and book them on an alternative flight.<sup>120</sup> This obligation is similar in Europe, Brazil, and Canada.<sup>121</sup> Airlines must give the unlucky passengers a written statement outlining the criteria and the passengers' rights.<sup>122</sup> Finally, DOT may initiate enforcement actions against airlines which improperly deny passenger boarding.<sup>123</sup>

The amount of compensation to which passengers are entitled in cases of denial of boarding depends on the arrival time at the destination and the price of the ticket. A refund equivalent to double the price of a one-way fare, up to \$675, applies if the passenger arrives at the final destination within two hours, rising up to four times the price of a one-way fare, up to \$1,350, if it takes longer.<sup>124</sup> However, there are many situations where the passenger is not entitled to compensation, such as in cases of aircraft change from a larger plane to a smaller plane due to safety reasons, or if safety-related weight and balance restrictions are necessary on planes seating up to 60 passengers.<sup>125</sup> Charter flights and small aircraft up to 30 passengers are not covered by the obligation to compensate. If the denial of boarding occurs on an international flight to the United States, passengers are not covered under U.S. compensation rules. Finally, if the passenger is downgraded, s/he is entitled to a refund only for the difference in price.<sup>126</sup> Under the proposed Senate Bill, the minimum compensation would be \$1,350 for passengers who have been involuntarily denied boarding.<sup>127</sup> It also stipulates that it, and any other new laws, would not preempt or supplant any actions for civil damages.<sup>128</sup>

One of the main differences between EU and U.S. law is that U.S. law does not provide for the payment of compensation in the case of delayed flights, no matter the reason. Indeed, DOT notes that "there are no federal laws requiring airlines to provide passengers with money or other compensation when their flights are delayed."<sup>129</sup> For "significant delays," passengers "may be

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<sup>116</sup> 14 C.F.R. § 250.5.

<sup>117</sup> 14 C.F.R. § 250.6.

<sup>118</sup> 14 C.F.R. § 250.2b(a).

<sup>119</sup> *Id.*

<sup>120</sup> 14 C.F.R. § 250.3.

<sup>121</sup> See EU Regulation 261/2004, *supra* note 2, art. 4; ANAC Resolution 400/2016, *supra* note 24, art. 23; Air Passenger Protection Regulations, *supra* note 47, sec. 13.

<sup>122</sup> 14 C.F.R. § 250.9.

<sup>123</sup> Under Part 20 and 49 U.S.C. § 41712.

<sup>124</sup> U.S. DEP'T OF TRANSP., *Bumping & Oversales*, <https://www.transportation.gov/individuals/aviation-consumer-protection/bumping-oversales> (last visited Dec. 27, 2019).

<sup>125</sup> 14 C.F.R. § 250.6(b)

<sup>126</sup> U.S. DEP'T OF TRANSP., *Bumping & Oversales*, *supra* note 122.

<sup>127</sup> S. 2341, § 102.

<sup>128</sup> *Id.* § 211.

<sup>129</sup> U.S. DEP'T OF TRANSP., *Flight Delays & Cancellations*, <https://www.transportation.gov/individuals/aviation-consumer-protection/flight-delays-cancellations> (last visited Dec. 27, 2019).

entitled to a refund, including a refund for all optional fees associated with the purchase of your ticket.”<sup>130</sup> However, the term “significant delay” has never been defined. For domestic flights, airlines are not required to compensate passengers for the distress created by the delay or cancellation. For international flights, the Montreal Convention applies.<sup>131</sup> In the case of cancellations, airlines are expected to rebook passengers, at no charge, on the next available flight. If a passenger cancels his or her trip because of a cancelled flight, DOT notes that the passenger is “entitled to a refund for the unused transportation – even for non-refundable tickets.”<sup>132</sup> The argument behind this lack of compensation is that “airlines don’t guarantee their schedules.”<sup>133</sup> Some of the problems that DOT considers beyond the airlines’ control are “bad weather, air traffic delays, and mechanical issues.”<sup>134</sup> Therefore, it recommends that passengers flying for important reasons book early flights in case of delay or cancellation. Compared with Brazilian case law, under which courts grant compensation to passengers planning to arrive on the day of an important event, in the United States the outcome is much harsher.<sup>135</sup> Nevertheless, DOT can initiate enforcement actions against airlines for unrealistic scheduling of flights which might result in a “chronically delayed flight”<sup>136</sup> to be deemed unfair and deceptive and in violation of 49 U.S.C. § 41712.

Senate Bill 2341 would change this approach and stipulate the rights of the passengers. For delays longer than one hour and less than four hours that are within the control of the airline, the measure requires the airline to refund the amount of the ticket automatically and accommodate the passengers on another flight or any means of transportation that would arrive no more than four hours after the original scheduled arrival time.<sup>137</sup> If the delay is greater than four hours, the passenger has the additional right to \$1,350 cash compensation and an “amount equal to the cost of a meal.”<sup>138</sup> If the departure is delayed until the next day, the airline is liable for the above, plus an “amount equal to the cost of hotel lodging.”<sup>139</sup> If enacted, this measure would likely be one of the most extensive compensation regimes in the world. In cases of delay or cancellation within their control, airlines would face hefty compensation claims. This approach might be even more protective than that found in Brazil.

To avoid the problems plaguing the EU Regulation,<sup>140</sup> the Senate Bill contains a specific section entitled “unfair and deceptive attribution of delays and cancellations to force majeure

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<sup>130</sup> *Id.*

<sup>131</sup> Montreal Convention, *supra* note 4, arts. 19, 22(1).

<sup>132</sup> *Id.*

<sup>133</sup> U.S. DEP’T OF TRANSP., *Fly Rights: A Consumer Guide to Air Travel*, <https://www.transportation.gov/airconsumer/fly-rights> (last visited Dec. 27, 2019).

<sup>134</sup> *Id.*

<sup>135</sup> *See, e.g.,* Guzzi da Luz v. LATAM, *supra* note 30 (couple had suffered a 19-hour delay and was granted R\$20,000 (roughly 4600 euros) by the 24th Chamber of the São Paulo first instance tribunal). *See also* Ferreira v. Delta Air Lines Inc., T.J.R.J., Ap. Civ. No. 0247949-09.2015.8.19.0001, Relator: Des. Antonio Carlos Dos Santos Bitencourt, 15.04.2016 (passenger received R\$15,000 for missing a Valentine’s Day lunch).

<sup>136</sup> This refers to any domestic flight operated at least 10 times a month that arrives at least 30 minutes late more than 50 percent of the time.

<sup>137</sup> S. 2341, § 103(1).

<sup>138</sup> *Id.* § 103(2).

<sup>139</sup> *Id.* § 103(3).

<sup>140</sup> *See supra* note 58.

events.”<sup>141</sup> This section specifies that it is unfair or deceptive to attribute a delay or cancellation to *force majeure* unless the event is caused by a situation outside the control of the airline. A non-exhaustive list is provided and includes weather, Act of God, war, or other hostilities. This list is much more restricted than that found in the APPRs, for instance, or under the EU Regulation. In Brazil’s Projeto de Lei, a similar restrictive list is found which includes *force majeure*, Act of God, or normal exercise of policy power.<sup>142</sup> Even though these defenses exist, however, they are rarely successful in Brazilian courts. Therefore, consumers in Brazil are almost certain to be compensated.

The rule applicable to tarmac delays for flights departing from a U.S. airport states that airlines must “begin to move the airplane to a location where passengers can safely get off before three hours for domestic flights and four hours for international flights.”<sup>143</sup> A similar requirement applies for flights arriving at a U.S. airport. There are exceptions to these time limits for reasons of safety, security, or air traffic control. Airlines are required to provide passengers with a snack and drinking water after two hours of delay, and must also provide passengers with working toilets, comfortable cabin temperatures, and adequate medical attention if necessary. These obligations are similar to the ones found in the Canadian APPRs.<sup>144</sup> Carriers can be substantially fined for failure to comply.<sup>145</sup>

Interestingly, and contrary to the new trend, Senate Bill 2341 would require the enactment of a regulation “prohibiting an air carrier from imposing fees described in subsection (b) that are unreasonable or disproportional to the costs incurred by the air carrier.”<sup>146</sup> These fees include “any fee for a change or cancellation of a reservation for a flight in air transportation; any fee relating to checked baggage or carry-on baggage to be transported on a flight; any fee relating to seat selection or reservations on a flight.”<sup>147</sup> This prohibition, especially the last one, goes against the current trend where airlines attempt to force passengers to pay to select their seats. The measure offers an even greater protection regarding checked bags: if the baggage arrives damaged, the airline is obliged to refund the amount of the ancillary fee charged automatically.<sup>148</sup>

The measure requires training on passengers’ rights every 180 days for employees and representatives who directly interact with passengers.<sup>149</sup> It also contains various sections concerning the disclosure of information, such as transparency in pricing.<sup>150</sup> Passengers must be clearly informed of their rights as is required in the other jurisdictions. Other areas covered by the Airline Passengers’ Bill of Rights include rules about informing passengers of delays and cancellations promptly and of their rights thereunder. The Senate Bill also would remove the cap on the civil penalty for violations of passenger protection laws.<sup>151</sup>

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<sup>141</sup> *Id.* § 104.

<sup>142</sup> Código Brasileiro de Aeronáutica alterado, 07.12.2009, art. 230(1)(II).

<sup>143</sup> 14 C.F.R. § 259.4; U.S. DEP’T OF TRANSP., *Tarmac Delays*, <https://www.transportation.gov/individuals/aviation-consumer-protection/tarmac-delays> (last visited Dec. 27, 2019).

<sup>144</sup> Air Passenger Protection Regulations, *supra* note 47, sec. 8.

<sup>145</sup> Pursuant to 49 U.S.C. §§ 42301, 41712 & 46301.

<sup>146</sup> S. 2341, § 201(a)(1).

<sup>147</sup> *Id.* § 201(b)1–3.

<sup>148</sup> *Id.* § 206(a)(1).

<sup>149</sup> *Id.* § 109.

<sup>150</sup> *Id.* § 202–207.

<sup>151</sup> *Id.* tit. III.

As of this writing, Senate Bill 2341 is in committee.

## **5. Conclusion**

Brazil likely has the most protective laws regarding airline passengers, with minimal defenses available to carriers. Except for denial of boarding, no provisions in Brazilian law enumerate the amount of compensation for delays or cancellations. It is therefore left to the courts to decide, leading to great disparities in the amounts awarded, even within the same local jurisdictions. As clearly demonstrated by the cases cited *supra*, there is no logic in compensating someone who suffered a 61-hour delay less than someone who suffered an 8-hour delay. This approach is also unfair to similarly situated passengers, as they are most probably compensated differently depending on the judge in charge of the case. These cases also highlight the difficulty airlines face in relying on any defenses. In other words, airlines know that they will have to compensate, but they do not know the amount.

On paper, the Canadian regulations seem the most appropriate by reaching the “fairest” balance between airlines’ needs and passengers’ protection. The regulations might be a bit difficult to apply in practice at first, due to the divisions between situations within or outside the control of the airlines. The new regulations put Canadian law more in line with the regulatory framework in the EU and, to a certain extent, the United States.

The Canadian regulations seem the most interesting model for Brazil to follow, as they give some defenses to airlines, yet still protect passengers. Significantly, this trend toward fixed compensation amounts gives a glimpse of hope that Brazil could follow this path and, therefore, increase legal certainty for both passengers and airlines.