

Fonte: Dr. Guilherme Dantas

Data: 22/02/2019

Versão: Online



São Paulo firm says Avianca creditor stay may breach Cape Town treaty

Declan Bush



Avianca Brazil is fighting to keep creditors from repossessing aircraft. (Credit: iStock.com/Fabricio Rezende)

Brazilian lawyers have raised concerns that a court ignored creditors' rights under an international treaty when it blocked creditors of bankrupt airline Avianca from repossessing aircraft.

On 1 February, São Paulo's First Bankruptcy Court suspended aircraft lessors from repossessing or deregistering their aircraft from Avianca in the company's judicial recovery proceedings.

Avianca, officially called Oceanair Linhas Aéreas, is Brazil's fourth biggest airline and filed for judicial reorganisation on 10 December. The case was recognised in the US on 23 January.

In a 12 February memo, Bernardi e Schnapp Advogados founding partner **Ricardo Bernardi** says the repossessions were allowed under the Cape Town Convention on International Interests in Mobile Equipment, a treaty which lets creditors of defaulting airlines repossess aircraft by having them struck off national registries.

Bernardi, who is not acting in the *Avianca* case, says while the decision recognised the Cape Town treaty's importance, it found the underlying principles of Brazil's bankruptcy law – preserving viable companies and protecting their social purpose – should prevail.

However, Bernardi says under article 199 of the Brazilian Bankruptcy Law, rights arising from aircraft and aircraft engine leases cannot be suspended or in any way affected by the judicial reorganisation of air carriers.

“The decision of the judge in Avianca’s judicial reorganization is a clear violation not only to the provisions set forth under the Cape Town Convention ... but also of the rules of the Bankruptcy Law itself,” Bernardi says.

“This outcome is one more example of a failure from Brazil to apply rules provided for under international conventions to which the country is a signatory.”

Bernardi e Schnapp associate **Lucas Augusto** tells GRR other lawyers and stakeholders in Brazil's aviation financing market share the firm's concerns that failure to comply with the convention could reduce trust in the Brazilian legal system, increasing costs for local aircraft operators seeking foreign finance.

Jerome Cadier, president of rival airline Latam, told Brazilian media the ruling violated the Cape Town Convention.

Siqueira Castro partner Guilherme Dantas worked on Avianca's initial filings before the company's recent change of counsel to Thomaz Bastos Waisberg Kurzweil Advogados (TWK). Dantas interprets the court's decision differently.

He says the decision did not “put on test” the application of Cape Town and did not state that domestic insolvency rules should prevail over the treaty.

“I understand that the judge was clear in affirming Cape Town, but with a recognition that it needs to harmonise with the domestic rules,” Dantas says. “It is a call to create the ‘co-existence’ of these two rules, and not a matter of admitting that one rule must prevail over the other.”

TWK partner **Iwo Waisberg** was unable to respond to inquiries by the publishing deadline.

On 7 December, a Brazilian court had ordered Avianca to return 11 aircraft to lessors in response to applications by Ireland's Constitution Aircraft Leasing. Constitution's US owner Aircastle also later terminated its leases with Avianca and tried to repossess its planes, while another Irish lessor, BOC Aviation, and the US's Infinity Transportation filed court applications for recovery of their aircraft.

Avianca filed for judicial reorganisation when it failed to agree amicable deals with the lessors and obtained a stay against them on 13 December.

A group of aircraft lessors and owner trustee Wells Fargo Trust Company unsuccessfully objected to Chapter 15 recognition of the Brazilian case on 15 January, arguing that by recognising the proceedings, the US itself would breach the Cape Town Convention.

The lessors have requested their appeal be sent to the New York Southern District Court.

Augusto says foreign financiers have also filed interlocutory appeals against the Brazilian decision, requesting an injunction order. He says a final decision on the appeal will take about two months on average.

Avianca announced on 4 February it would discontinue direct flights from São Paulo to New York, Miami and Santiago from 1 April.

In the US Bankruptcy Court for the Southern District of New York

Judge Sean Lane

Counsel to Oceanair Linhas Aéreas

Quinn Emanuel Urquhart & Sullivan

Partner **Eric Winston** in Los Angeles, with partner **Michael Carlinsky**, of-counsel **Scott Shelley**, associate **Samantha Gillespie** in New York

Foreign representative of Oceanair Linhas Aéreas

Chief executive officer **Frederico Miguel Preza Pedreira Elias Da Costa** in São Paulo

Counsel to Avolon Aerospace and Wells Fargo Trust Company

Holland & Knight

Partners **Arthur Rosenberg** and **Marc Antonecchia** in New York

In the First Bankruptcy Court of the Central Courthouse of the Judicial District of São Paulo State Capital

Judge Tiago Limongi

Counsel to Avianca Brasil

In-house counsel **Marcela Quental** in São Paulo

Siqueira Castro*

Partners **Guilherme Dantas** and **Andre Gondinho**, with senior associate **Emerson Soares Mendes** in São Paulo

Thomaz Bastos Waisberg Kurzweil Advogados

Partner **Iwo Waisberg** in São Paulo

*no longer advising on the case

<https://globalrestructuringreview.com/article/1180414/sao-paulo-firm-says-avianca-creditor-stay-may-breach-cape-town-treaty>