Flashairlines and Declaratory Relief Under French Law

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In this post, I would like to offer some brief thoughts on the Paris Court of appeal's judgment of the 6th of March 2008. It is my opinion that the legal foundation of the judgement as far as victims' right to sue is concerned is questionable and is not consistent with the French procedural system.

The court of appeal held:

> *le juge français n'est pas saisi par voie d'exception de sa compétence internationale mais par voie d'action ce qui rend inopérant le disposition de l'article 75 CPC… l'action ayant pour objet l'obtention d'une décision sur la compétence internationale française est inséparable du contexte judiciaire dans lequel la demande s'insère et qu'elle n'est pas contradictoire avec la saisine du juge pour qu'il se prononce …*
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> *le juge français ne peut être le seul à être exclu du débat sur sa compétence internationale dès lors que la question s'inscrit dans un contexte de confiance mutuelle qui appelle à une coopération et une coordination des systèmes judiciaires …*
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> *les victimes ont un intérêt légitime et actuel à obtenir une décision française sur la compétence internationale en raison de la décision du juge californien .*

This statement means that the issue of international jurisdiction in *Flash Airlines* is not referred to the French judge by way of defence but by way of action, so that article 75 CPC which deals with the defence of lack of jurisdiction is not applicable. Article 75 states that "*where it is alleged that the court seized lacks jurisdiction, the party who shall proffer the plea shall have, under penalty of it otherwise being inadmissible, to provide reasons thereof and to indicate, at all event, court before which the matter should be brought*".

Nevertheless the *Cour de cassation* has held that an action claiming that the court

lacks jurisdiction is not admissible since article 75 CPC indicates that the lack of jurisdiction is a matter of defence, not of action:

> *les exceptions d'incompétence figurant au nombre des moyens de défense, le demandeur n'est pas recevable à contester la compétence territoriale de la juridiction qu'il a lui-même saisie (Cass. 2° Civ., 7 December 2000, Bull. n°163).*

This sentence means that the issue of jurisdiction is a means of defence, therefore the claimant is not admissible to challenge the territorial jurisdiction of the court to which he submitted his case. The international jurisdiction is so close to the territorial jurisdiction, that rules of territorial jurisdiction are usually extended to international matter in French international litigation.

This case of the 7th of December 2000 is not a formalistic decision. The code of civil procedure is consistent. There are actions and defences. An action is defined by article 30: "*an action is the right, in relation to the originator of a claim, to be heard on the merits of the same in order that the judge shall pronounce it well or ill-founded*". An action deals with the main issue on the merits whereas the defences may be on the merits, on admissibility or on jurisdiction. Several scholars and judges wrote the code of procedural law with great attention (Motulsky, Cornu, Parodi, etc.). A defence of lack of jurisdiction has to be argued in limine litis (before the claim of non admissibility and before the defences on the merits).

An action is admissible if the claimant has a legitimate and present interest. It is why the declaratory action is not admissible, in principle, under French law. There are some rare exceptions especially in private international law but on the merits of the case not on procedural grounds. But the court of appeal does not consider that it is a declaratory judgment. The victim has a legitimate and present interest to sue. This interest to sue is the likeliness to obtain damages for the victims. Yet they don't claim damages, they submit a case to a judge in order to obtain from this judge that he refuses the case. The court of appeal indicates that there is no contradiction to declare admissible an action seeking that the court has no jurisdiction. It seems to me that it is not sufficient to say that there is no contradiction to avoid the contradiction (it looks like a "Competenz Competenz" rule or a preliminary reference to the French court). The risk is that lawyers try too often to use this new tool to determine jurisdiction. Courts would become on

this point legal consultants.

The word “legitimate interest” is rarely used in case law. It used to be applied to prevent concubine to seek damages when her concubine had been killed in a traffic accident. This case law was reversed in 1970. The condition of legitimate interest is a moral condition. In fact the court of appeal takes perhaps into account the victims’ interest to bring their action in California (because of discovery, punitive damages etc.). The equilibrium, the consistency and the integrity of French civil procedure is endangered by the court of appeal judgment.

The mutual trust and international cooperation is invoked by the court of appeal to justify its decision. But good willing does not make good decision. As a matter of fact the court of appeal does not like to be excluded of the debate concerning its own jurisdiction but that is a feeling, not a rule. There are other fields where the international cooperation and trust have not been taken into account (e. g. evidence matter in application of the Hague convention of 1970 in American and French case law etc.). The court of appeal’s judgment is more or less a unilateral disarmament. There is a need for an international convention which may be the new Lugano convention of the 30th October 2007 (JOUE n° L. 339, 21 déc. 2007, p. 3 ; Procédures 2008, n° 43, obs. Nourissat) which may be ratified by non European countries ! (nevertheless this convention is a copy of the Brussel regulation and so a European text).

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