The Italian Supreme Court on Competence and Jurisdiction in Flight Cancellation Claims

The case

In a recent decision deposited 5 November 2020 (ordinanza 24632/20), the Italian Supreme Court has returned on the competent court in actions by passengers against air carriers following cancellation of flights.

The case is quite straightforward and can be summarized as follows: (i) passengers used a travel agency in Castello (province of Perugia) to buy EasyJet flight tickets; (ii) the Rome(Fiumicino)-Copenhagen fight was cancelled without any prior information being given in advance; (iii) passengers had to buy a different flight from another air carrier to Hamburg, and travel by taxi to their final destination – thus sustaining additional sensitive costs.

Before the Tribunal (*Tribunale*) in Perugia, the passengers started proceedings against the air carrier asking for both the standardized lump-sum compensation they were entitled under the Air Passenger Rights Regulation following the cancellation of the flight (art. 5 and art. 7), and for the additional damages sustained due to the cancellation.

The relevant legal framework: an overview

Passengers requested Italian courts to adjudicate two different set of claims, each of which has its own specific legal basis.

One the one side, the specific right for standardized lump-sum compensation in case of cancellation of flight is established by the EU Air Passenger Rights Regulation; on the other side, the additional damage for which they sought compensation did fall within the scope of application of the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air.

As it has already been clarified by the Court of Justice of the European Union (see *ex multis* Case C-464/18, para. 24), the Air Passenger Rights Regulation entails no rule on jurisdiction – with the consequence that this is entirely governed by the Brussels I bis Regulation. On the contrary, to the extent the Brussels I bis Regulation and the 1999 Montreal Convention overlap in their respective scope of application, the latter is to be granted primacy due to its *lex special* character (under the *lex specialis* principle). Hence, the questions of jurisdiction for the two claims have to be addressed separately and autonomously one from the other – each in light of the respective relevant instrument (see CJEU Case C-213/18, para. 44).

The decision of the Italian court

Focusing on international civil procedure aspects of the decision, claimants did start one single proceedings against the air carrier before the *Tribunale* in Perugia, the place where the flight ticket was bought though a travel agency.

The air carrier contested this jurisdiction and competence (as the value of individual claims rather than the value of aggregated claims pointed to the competence *rationae valoris* of the Giudice di pace – Justice of the peace – of Castello in the province of Perugia) up to the Supreme court invoking the Brussels I bis Regulation.

The air carrier supported the view that the competent courts where either those having territorial competence over the airport of departure (i.e. the court in Civitavecchia, under art. 7, Brussels I bis) or arrival (in Copenhagen, always under art. 7 Brussels I bis; cf CJEU Case C-204/08), or courts in London (under art. 4 Brussels I bis).

The passengers insisted on their position invoking the 1999 Montreal Convention assuming that proceedings were brought at the "*place of business through which the contract has been made*", one of the heads of jurisdiction under art. 33 of the Convention. Moreover, the passengers argued that the Convention only contained rules on international jurisdiction and not on territorial competence, this aspect being entirely governed by internal civil procedure.

a. On UK Companies

As a preliminary matter, the Italian Supreme court acknowledges 'Brexit' and the Withdrawal Agreement, yet proceeds without sensitive problems in the evaluation and application of EU law as the transition period has not expired at the time of the decision according to artt. 126 and 127 of the agreement (*point 1, reasoning in law*).

b. Autonomous actions: the proper place for starting proceedings

Consistently with previous case law (CJEU Case C-213/18, para. 44), the Italian Supreme court concludes for the autonomy of the legal actions brought before the courts, arguing that jurisdiction has to be autonomously addressed (*point 3, reasoning in law*).

Actions based on lump-sum standardized compensation in cases of cancellation of flights deriving from the Air Passenger Rights Regulation do entirely and exclusively fall under the scope of application of the Brussels I bis Regulation – art. 7 being applicable. In this case, the Italian territorial competent court is the one having territorial jurisdiction over the airport of departure – (Rome Fiumicino), i.e. the *Giudice di pace* of Civitavecchia.

Actions for additional damages connected to long delays or cancellation of flights, the right for compensation deriving from the Montreal Convention, remain possible before the courts identified under art. 33 of the 1999 Montreal Convention (*point 3, reasoning in law*).

Here, two elements are of particular interests.

In the first place, the Italian Supreme court apparently changes its previous understanding of the Convention as it concedes that rules on jurisdiction therein enshrined are not merely rules on international jurisdiction, but are also rules on territorial competence (*point 6, reasoning in law*; consistent with *Case C-213/18*; overrules Cassazione 3561/2020 where territorial competence was determined according to domestic law).

In the second place, the court dwells – in light of domestic law – on the notion of "*place of business through which the contract has been made*" *ex* art. 33 of the Convention, which grounds a territorial competence (*point 6.3, reasoning in law*). Distinguishing its decision from cases where passengers directly buy online tickets from the air carriers, it is the court's belief that a travel agency operates under IATA Sales Agency Agreements, hence as an authorized "representative" of the air carrier business for the purposes of the provision at hand. According to the court, the fact that a travel agency may be considered as a ticket office of the air carrier for the purposes of art. 33 of the 1999 Montreal Convention is nothing more than a *praesumptio hominis*; yet such a circumstance was not challenged by the air carrier and thus, under Italian law, considered proven and final. This, with the consequence that competence for damages related to the cancellation of the flight, other than the payment of compensation under the Air Passenger Rights Regulation, is reserved to the Justice of the peace (giudice di pace) competent *rationae valoris* of the place where the travel agency (in Castello, near Perugia) is located, as this place is the "*place of business through which the contract has been made*".

c. Connected actions

The Italian Supreme court acknowledges the impracticalities that may follow from the severability of closely related actions grounded on same facts (*point 6.3, reasoning in law*), in particular where compensation for damages granted from one court under the 1999 Montreal Convention must deduct compensation already granted by another court under the Air Passenger Rights Regulation. In this sense, *in fine* the court mentions the possibility to refer to art. 30 Brussels I bis Regulation, presumably having in mind also art. 30(2).

Open questions

Whereas the decision of the Italian Supreme court largely follows indications of the Court of Justice of the European Union, some passages appear to leave room for discussion.

Firstly, even though correctly primacy to the 1999 Montreal Convention over the Brussels I bis Regulation is granted, the proper disconnection clause is not analyzed at all in the decision. In a number of previous decisions, the court did address the disconnection clause, arguing in favor of the *lex specialis* invoking art. 71 Brussels I bis Regulation – a provision that grants priority to international conventions in specific matters to which Member States are party to (cf *Cass 18257/2019, and Cass 3561/2020*). However, given that the EU has become part to the 1999 Montreal Convention by way of a Council Decision in 2001, other courts have invoked art. 67 to solve the coordination issue – as this provision is destined to govern the relationship between Brussels I bis and rules on jurisdiction contained in other "*EU instruments*" (cf *LG Bremen, 05.06.2015 – 3 S 315/14*). A position, the latter, that appears consistent with art. 216(2) TFEU, according to which "*Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States*". In this sense, the Italian Supreme court could have dwelled more on the proper non-affect clause to be applied when it comes to the relationships between the Brussels I bis Regulation and the 1999 Montreal Convention.

Secondly, the final remarks of the Italian Supreme court on related actions in the Brussels I bis also should impose a moment of reflection. In the case at hand there were no parallel proceedings, so the "indications" of the court were nothing more than that.

However, recourse to the rules on related actions of the Brussels I bis Regulation should be allowed only so far no specific rule is contained in the *lex specialis*. Again, an evaluation on the existence of such rules is completely missing in the decision.

More importantly, even though it is generally accepted that Brussels I bis rules on coordination on proceedings can be subject to a somewhat "extensive" interpretation (as current art. 30 on related actions has been deemed applicable regardless of whether courts ground their jurisdiction on domestic law or on the regulation itself – cf Case C-351/89, para. 14), it remains that art. 30 refers to parallel proceedings pending "*in the courts of different Member States*". A circumstance that would not occur where proceedings are pending before two courts of *the same Member State*, as the one dealt with by the Italian supreme court in the case at hand.

The present research is conducted in the framework of the En2Bria project (Enhancing Enforcement under Brussels Ia – EN2BRIa, Project funded by the European Union Justice Programme 2014-2020, JUST-JCOO-AG-2018 JUST 831598). The content of the Brussels Ia – EN2BRIa, Project, and its deliverables, amongst which this webpage, represents the views of the author only and is his/her sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.