INTERNATIONAL AND EUROPEAN COMMERCIAL AND COMPANY LAW

Transport Law

Disruption of flights and competent court(s): Severability of claims under the Air passenger rights regulation and the 1999 Montreal convention in Italy after *Guaitoli* C-213/18

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1. Introduction

In a recent decision deposited on 5th November 2020, the Italian Supreme Court with the *ordinanza 24632/2020* has returned to the competent court for legal actions started by air passengers delays in cases of disruption or cancellation of flights.

The case is quite straightforward and can be summarized as follows: (i) seven 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) the passengers had to buy a different flight from another air carrier to Hamburg, and from there they had to travel by taxi to their final destination – thus incurring additional sensitive costs.

As first instance proceedings, the seven passengers brought their claims against the air carrier before the Tribunal (*Tribunale*) in Perugia. Two different claims were brought before the court, namely a request for payment of the standardized lump-sum compensation to which they were entitled under the Air Passenger Rights Regulation[1] following the cancellation of the flight (Article 5 and Article 7), and for the additional damages sustained due to the cancellation.

2. The relevant legal framework: an overview

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

On the one hand, the specific right for standardized lump-sum compensation in the case of cancellation of a flight is established by the EU Air Passenger Rights Regulation. As is known, the level of protection ensured to passengers by EU law has created a regime whereby air carriers have, by operation of law, a duty to inform[2], assist[3] passengers and to pay compensation if the flight is cancelled, unless it is proven that the air carrier has taken all actions to prevent the cause of cancellation or the event is not imputable to the air carrier. Air passengers have an automatic right to compensation, whereby the entity of compensation is calculated on the distance between the airport of departure and arrival[4].

On the other hand, the additional damage for which the passengers 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[5]. As is known, this instrument of uniform material law,

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1 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing 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, in OJ L 46, 17.2.2004, p. 1, on which see *ex multis* CELLE P., MUNARI F., *Tutela del passeggero e concorrenza nella prospettiva comunitaria*, in *Diritto del commercio internazionale*, 2006, p. 25; TUO C.E., *Il trasporto aereo nell'Unione europea tra libertà fondamentali e relazioni esterne. Diritto internazionale e disciplina comunitaria*, Turin, 2008; LOPEZ DE GONZALO M., *La tutela del passeggero debole nel regolamento CE 261/2004*, in *Rivista italiana di diritto pubblico comunitario*, 2006, p. 203; FRAGOLA M., *Prime note sul regolamento CE 261/2004 che istituisce nuove norme comuni in materia di "overbooking" aereo*, in *Diritto comunitario e degli scambi internazionali*, 2005, p. 129, and G. PERONI, *In caso di cancellazione di un volo "privato", spetta al passeggero aereo la compensazione pecuniaria*, in *Il diritto marittimo*, 2017, p. 1099.

2 Regulation (EC) No 261/2004, cit., recital 20.

3 Regulation (EC) No 261/2004, cit., art. 5.

4 Regulation (EC) No 261/2004, cit., art. 7.

5 Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), in OJ L 194, 18.7.2001, p. 39.

which also contains rules on jurisdictions (Article 33), amongst other things governs the liability of air carriers towards passengers for the death and injury of passengers, as well as damage to baggage (Article 17); damage to cargo (Article 18), and damage occasioned by a delay in the carriage by air of passengers, baggage or cargo (Article 19), cases of cancellation of flights included[6].

In this sense a passenger has two autonomous rights against the air carrier, one derived from (and governed by) the Air Passenger Rights Regulation, that is the right to obtain the lump-sum standardized compensation which is not granted by any other law, and the right for compensation of the damage due to cancellation entirely governed by the Montreal Convention – if this is applicable (i.e., generally if the international flight is between State parties to the convention[7]).

As has already been clarified by the Court of Justice of the European Union in *Adriano Guaitoli*, the two rights are autonomous in nature and the competent courts must accordingly be addressed separately[8]. Provided that the Air Passenger Rights Regulation entails no rule on jurisdiction, the sole instrument to determine the competent court for the corresponding action is the Brussels I bis Regulation[9]. 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[10]). Hence, jurisdiction for the claim of compensation of the additional damage is entirely governed by the international convention[11], and not by the Brussels I bis Regulation[12].

3. The decision of the Italian court

Passengers started proceedings against the air carrier before the *Tribunale* in Perugia, the place where the flight ticket was bought through a travel agency. They cumulatively asked the court for both the payment of the stan-

[6] Even though the provision does not explicitly include cancellation of flights within its scope of application, part of the case law includes this scenario nonetheless – as this would be the "worst off" case of "delay" (see Cassazione civile, S.U., ordinanza n. 3561/2020, 13 February 2020, point 4.5., reasoning in law, where it can be read that "[a]*l di là del fatto che lo stesso dato testuale non consente di condividere l'opzione interpretativa propugnata dalla controricorrente (la convenzione si occupa solo del ritardo del volo, e non anche delle ipotesi di soppressione) è per contro evidente che l'interpretazione complessiva dell'articolo, volto a coprire le principali ipotesi di danni alle persone e alle cose connesse con il trasporto aereo internazionale rimarrebbe incongruamente limitata se si ritenesse che la più grave ipotesi di inadempimento (la soppressione del volo) ne rimanga estranea, mentre sarebbe attinta da essa la più tenue, quella del ritardo (questa Corte si è già pronunciata, recentemente, nel senso di ritenere ricadenti sotto l'ambito di applicazione della Convenzione entrambe le ipotesi, del ritardo e della soppressione del volo (v. Cass. S.U. n 18257 del 2019, e Cass. n. 1584 del 2018)*").

[7] Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), cit., art. 1(2).

[8] Judgment of the Court (First Chamber) of 7 November 2019, Adriano Guaitoli and Others v easyJet Airline Co. Ltd, Case C-213/18, in part. para. 44. On the decision, see RIELÄNDER F., *Internationale und örtliche Zuständigkeit bei Geltendmachung von Ansprüchen nach der Fluggastrechte-VO und dem MÜ in kumulativer Klagehäufung*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2020, p. 59.

[9] Cf Judgment of the Court (Sixth Chamber) of 11 April 2019, ZX v Ryanair DAC, Case C-464/18, para. 24. Commenting on the decision, DOMINELLI S., SANNA P., *Sulla determinazione dell'autorità giurisdizionale competente a conoscere di una domanda di compensazione pecuniaria per ritardo di un volo: certezze, dubbi e riflessioni sul coordinamento tra strumenti normativi a margine della causa Ryanair C-464/18 della Corte di giustizia dell'Unione europea*, in *Il Diritto marittimo*, 2020, II, p. 398. In the Italian case law, also refusing the idea that the Air Passenger Rights Regulation contains any rules on jurisdiction, see Cassazione civile, S.U., ordinanza n. 3561/2020, cit., point 4.1., reasoning in law, where it can be read that "[p]*reliminarmente, va detto che il Regolamento CE n. 261 del 2004 che istituisce 'Regole comuni in materia di compensazione ed assistenza ai passeggeri in caso di negato imbarco, cancellazione del volo o ritardo prolungato e che abroga il Regolamento n. 295 del 1991', sulla base del quale hanno agito i due acquirenti dei biglietti aerei del volo soppresso, non contiene criteri riguardanti la competenza giurisdizionale ma detta esclusivamente la griglia minima di tutela in favore di viaggiatori aerei che si trovino nelle peculiari situazioni in esso indicate e quindi le sue disposizioni non sono funzionali alla risoluzione della questione di giurisdizione sollevata*".

[10] In the scholarship, see MANKOWSKI P., *Art. 67 Brüssel Ia-VO*, in RAUSCHER T. (ed), *Europäisches Zivilprozess- und Kollisionsrecht, Band I, Brüssels Ia-VO*, Cologne, 2016, p. 1215; ID, *Article 67,* in MAGNUS U., MANKOWSKI P. (eds), *European Commentaries on Private International Law, Volume I, Brussels Ibis Regulation,* Cologne, 2016, p. 1020; MAGRONE M.E., *Trasporto merci: Convenzione ad hoc applicabile solo se prevedibile e in grado di limitare liti parallele*, in *Guida al Diritto*, 2010, 21, p. 96; KUIJPER P.J., *The Changing Status of Private International Law Treaties of the Member States in Relation to Regulation No. 44/2001 - Case No. C-533/08, TNT Express Nederland BV v. AXA Versicherung AG*, in *Legal Issues of Economic Integration*, 2011, p. 89; TUO C.E., CARPANETO L., *Connections and Disconnections Between Brussels Ia Regulation and International Conventions on Transport Matters*, in *Zbornik Pravnog fakulteta u Zagrebu*, 2016, 2-3, p. 141. MANKOWSKI P., *Article 71*, in MAGNUS U., MANKOWSKI P. (eds), *European Commentaries on Private International Law, Volume I, Brussels Ibis Regulation*, Cologne, 2016, p. 1044; CARBONE S.M., *From Speciality and Primacy of Uniform Law to its Integration in the European Judicial Area*, in CARBONE S.M. (ed), *Brussels Ia and Conventions on Particular Matters. The case of Transports*, Rome, 2017, p. 17; TUO C.E., *Brussels Ia and International Transports Conventions: the Regulation's «Non Affect» Clause through the Lens of the CJEU Case Law*, in *idem*, p. 33; CARPANETO L., *On Collisions and Interactions between EU law and International Transport Conventions*, in *idem*, p. 63; ESPINOSA CALABUIG R., *Brussels Ia Regulation and Maritime Transport*, in *idem*, p. 107; PUETZ A., *Brussels Ia and International Conventions on Land Transport*, in *idem*, p. 141; SOLETI P.F., *Brussels Ia and International Air Transport*, in *idem*, p. 181; CELLE P., *Jurisdiction and Conflict of Laws Issues between Contracts of Transport and Insurance*, in *idem*, p. 215; CARREA S., *Brussels Ia and the Arrest of Ships: from the 1952 to the 1999 Arrest Convention*, in *idem*, p. 237; TUO C.E., *Alcune riflessioni sulla portata applicativa della CMR*, in *Rivista di diritto internazionale privato e processuale*, 2004, p. 193; RUBIO Á, *La regla de especialidad en el artículo 57 del Convenio de Bruselas de 1968*, in *An Der Mar*, 1995, p. 273; BARIATTI S., *La giurisdizione e l'esecuzione delle sentenze in materia di brevetti di invenzione nell'ambito della C.E.E.*, in *Rivista di diritto internazionale privato e processuale*, 1982, p. 484; BELMONTE A., *Sul coordinamento tra l'art. 57 della Convenzione di Bruxelles del 1968 e le altre convenzioni disciplinanti la competenza giurisdizionale*, in *Giustizia civile*, 2005, p. 586; CARBONE S.M., *La nuova disciplina comunitaria relativa all'esercizio della giurisdizione e il trasporto marittimo*, in *Rivista di diritto internazionale privato e processuale*, 1988, p. 633; CERINA P., *In tema di rapporti tra litispendenza e art. 57 nella Convenzione di Bruxelles del 27 settembre 1968*, in *Rivista di diritto internazionale privato e processuale*, 1991, p. 953; GAJA G., *Sui rapporti fra la Convenzione di Bruxelles e le altre norme concernenti la giurisdizione e il riconoscimento di sentenze straniere*, in *Rivista di diritto internazionale privato e processuale*, 1991, p. 253; GUADAGNA F., *Il sequestro di nave e lo spazio giudiziario europeo*, in *Il diritto marittimo*, 2005, p. 1424; VASSALLI DI DACHENHAUSEN T., *I rapporti tra Convenzione di Bruxelles con le altre convenzioni sulla competenza giurisdizionale e l'esclusione delle sentenze in materia civile e commerciale*, in *Jus*, 1990, p. 119; BORRÁS A., DE MAESTRI M.E., *Articoli 67-72*, in HAUSMANN R., QUEIROLO I., SIMONS T. (eds), *Commentario al Regolamento «Bruxelles I»*, Munich, 2012, p. 928; ID, *Articolo 67, in idem,* p. 928, and ROSAFIO E., *Il problema della giurisdizione nel trasporto aereo di persone e nei pacchetti turistici*, in *Rivista del diritto della navigazione*, 2016, p. 107, at p. 114.

[11] See CARBONE S.M., *Criteri di collegamento giurisdizionale e clausole arbitrali nel trasporto aereo: la soluzione della Convenzione di Montreal del 1999*, in *Rivista di diritto internazionale privato e processuale*, 2000, p. 5.

[12] Judgment of the Court (First Chamber) of 7 November 2019, Adriano Guaitoli and Others v easyJet Airline Co. Ltd, Case C-213/18, para. 44.

dardized lump-sum compensation they were entitled to under the Air Passenger Rights Regulation, and for the additional costs linked to the cancellation of the flight, i.e. the purchase of a new flight with a different air carrier, and the travel by taxi from Hamburg to Copenhagen to reach their original final destination with a one-day delay.

The air carrier contested up to the Supreme Court both the jurisdiction and the local competence.

In the first place, for the air carrier the competence *rationae valoris* was not for the Tribunal, but for the Justice of the Peace. Passengers identified the Tribunal taking into consideration the aggregated value of all their claims – yet the judicial office within the court must be identified based on the value of the single claim. On this aspect the passengers agreed with the air carrier, thus agreeing that the Tribunal in Perugia was wrongfully seised, and the competence would eventually be for the Justice of the Peace within the district of the Tribunal of Perugia.

Moreover, the air carrier challenged the jurisdiction and competence of the courts in the district of Perugia, where the contract was concluded, supporting the view that the competent courts were either those having territorial competence over the airport of departure (i.e. the court in Civitavecchia, under Article 7, Brussels I bis) or arrival (in Copenhagen, always under Article 7 Brussels I bis[13]), or courts in London (under Article 4 Brussels I bis).

On their side, the passengers insisted on 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 Article 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[14], 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 Articles 126 and 127 of the agreement[15].

b. ***Autonomous actions: the proper place for starting proceedings***

Consistent with previous case law of the Court of Justice of the European Union[16], the Italian Supreme Court concludes for the autonomy of the legal actions brought by the passengers, arguing that jurisdiction has to be autonomously addressed[17]. 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 – Article 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 to compensation deriving from the Montreal Convention, remain possible before the courts identified under Article 33 of the 1999 Montreal Convention[18].

Here, two elements are of particular interest.

In the first place, the Italian Supreme Court apparently changed its previous understanding of the Montreal Convention as it concedes that rules on jurisdiction therein enshrined are not merely rules on international jurisdiction, but are also rules on territorial competence[19].

In the second place, the court dwells – in light of domestic law – on the notion of "*place of business through which*

[13] Other than the already quoted case law, see Judgment of the Court (Fourth Chamber) of 9 July 2009, Peter Rehder v Air Baltic Corporation, Case C-204/08, on which see LEIBLE S., *Zuständiges Gericht für Entschädigungsansprüche von Flugpassagieren*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2009, p. 571; WITTWER A., *Erfüllungsortsgerichtsstand bei internationalen Dienstleistungen*, in *European Law Reporter*, 2009, p. 403; DANISI T., *Sull'indennizzo per la cancellazione del volo decide il giudice della città di partenza o arrivo*, in *Guida al diritto*, 2009, 35, p. 72; ADOBATI E., *I passeggeri di un volo intracomunitario possono richiedere l'indennizzo forfetario tanto al giudice del luogo di partenza quanto a quello di arrivo dell'aereo in caso di annullamento del volo*, in *Diritto comunitario e degli scambi internazionali*, 2009, p. 545; LEHMANN M., *Gerichtsstand bei Klagen wegen Annullierung einer Flugreise*, in *Neue juristische Wochenschrift*, 2010, p. 655; STAUDINGER A., *Streitfragen zum Erfüllungsortsgerichtsstand im Luftverkehr*, in *Praxis des internationalen Privat- und Verfahrensrechts*, 2010, p. 140, and WAGNER R., *Die Entscheidungen des EuGH zum Gerichtsstand des Erfüllungsorts nach der EuGVVO - unter besonderer Berücksichtigung der Rechtssache Rehder*, in *Praxis des internationalen Privat- und Verfahrensrechts*, 2010, p. 143.

[14] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, in OJ L 29, 31.1.2020, p. 7.

[15] Cassazione, ordinanza 24632/2020, cit., point 1, reasoning in law.

[16] Judgment of the Court (First Chamber) of 7 November 2019, Adriano Guaitoli and Others v easyJet Airline Co. Ltd, Case C-213/18, para. 44.

[17] Cassazione, ordinanza 24632/2020, cit., point 3, reasoning in law.

[18] Cassazione, ordinanza 24632/2020, cit., point 3, reasoning in law.

[19] Cassazione, ordinanza 24632/2020, cit., point 6, reasoning in law ("*Tale statuizione della Corte di giustizia rende non più sostenibile l'orientamento, in precedenza condiviso da questa Corte, secondo cui la Convenzione di Montreal non si occupa dei criteri di riparto della competenza, ma solo dei criteri di riparto della giurisdizione*"). This interpretation derives, and is thus consistent with, Judgment of the Court (First Chamber) of 7 November 2019, Adriano Guaitoli and Others v easyJet Airline Co. Ltd, Case C-213/18. It however supersedes prior case law of the Italian Supreme Court where territorial competence was determined according to domestic law; cf – most recently – Cassazione civile, S.U., ordinanza n. 3561/2020, cit., para. 4.8 where for the purposes of determining the local competence under art. 33 of the Montreal Convention in cases of direct online sales of flight tickets, the court recalls its previous case law (Cassazione civile, S.U., ordinanza 8 July 2019 n. 18257/2019) where it has been argued that art. 33 of the convention is only a rule on international jurisdiction.

the contract has been made" *ex* Article 33 of the Convention, which grounds (under the new understanding of the convention) a rule on territorial competence[20]. Distinguishing its decision from cases where passengers directly buy online tickets from the air carriers[21], 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 Article 33 of the 1999 Montreal Convention is nothing more than a *praesumptio hominis*; however, such a circumstance was not challenged by the air carrier and thus, under Italian law, considered proven and final. This has the consequence that the travel agency indeed becomes a "place of business through which the contract has been made", and it grounds international jurisdiction and territorial competence of the local court in Castello, near Perugia, for damages related to the cancellation of the flight, other than the payment of compensation under the Air Passenger Rights Regulation.

c. *Connected actions*

The Italian Supreme Court acknowledges the impracticalities that may follow from the severability of closely related actions grounded on the same facts[22], in particular where compensation for damages granted by 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 of referring to Article 30 Brussels I bis Regulation[23], presumably having in mind also Article 30(2). Yet, there is no contextualization in the court's decision that recourse to the provision should be excluded for parallel proceedings pending in the same Member State.

4. 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 primacy over the Brussels I bis Regulation is correctly granted to the 1999 Montreal Convention, the proper disconnection clause is not analyzed at all in the decision.

In a number of previous decisions, the Italian Supreme Court did address the disconnection clause, arguing in favor of the *lex specialis* invoking Article 71 Brussels I bis Regulation – a provision that grants priority to international conventions in specific matters to which Member States are party to[24]. However, given that the EU has become party to the 1999 Montreal Convention by way of a Council Decision in 2001[25], other courts have invoked Article 67 to solve the coordination issue[26] – as this provision

[20] Cassazione, ordinanza 24632/2020, cit., point 6.3, reasoning in law.

[21] See Cassazione civile, S.U., ordinanza 3561/2020, cit., and Cassazione civile, S.U., ordinanza 18257/2019, cit.

[22] Cassazione, ordinanza 24632/2020, cit., point 7.1, reasoning in law ("*Resta solo da aggiungere che le due domande sopra indicate presentano evidenti profili di connessione: sia quanto ai presupposti di fatto, che sono identici per entrambe; sia per pregiudizialità, dal momento che, in presenza di danni eccedenti l'indennizzo di cui al Regolamento 261/04, l'importo di questo, se già percetto, va defalcato dal risarcimento, giusta la previsione di cui all'art. 12, comma primo, secondo periodo, Regolamento (CE) n. 261/2004 del Parlamento europeo e del Consiglio, dell'11 febbraio 2004*").

[23] Cassazione, ordinanza 24632/2020, cit., point 7.1, reasoning in law, where the court also refers to the opinion of the Advocate General Saugmandsgaard Øe 20 June 2019, Case C-213/29, *Adriano Guaitoli et al*, para. 51.

[24] See Cassazione civile, S.U., ordinanza 18257/2019, cit. The case concerned the online purchase of air online travel ticket from Copenhagen to Havana, where a flight was cancelled. Passengers started actions for damages in Italy where passengers were domiciled - yet the tickets were sold online but there was no branch or agency of the air carrier or tour operator in Italy. The first question the court assessed was which legal instrument governed jurisdiction, either the 1999 Montreal Convention (art. 33), or the provisions contained in the Brussels I bis Regulation. Focusing on art. 71 of the Brussels I bis Regulation, the court gave precedence to the Montreal Convention. However, in doing so, the court omitted to note that the Convention is also binding under EU law, as there is both a Council Decision 2001/539/EC on the conclusion by the European Community of the Montreal Convention, and Regulation (EC) No 2027/97 - amended - whose art. 1 "*implements the relevant provisions of the Montreal Convention in respect of the carriage of passengers and their baggage by air and lays down certain supplementary provisions. It also extends the application of these provisions to carriage by air within a single Member State*". Art. 33 of the Montreal Convention, where it allows the passenger to start proceedings before the courts of the place of business through which the contract has been made, in relation to direct online sales of tickets has been interpreted in the sense that such a place coincides with the place of domicile of the weaker party if the webpage is accessible in that Member State - with a solution that resembles options elaborated by the Court of Justice of the European Union in the field of "focalization" and "direction" of professional activities towards the Member State of the consumer. This, with the consequence that the application of the Montreal Convention might become more favourable - as the Brussels I bis Regulation does not contain protective rules for transport of passenger contracts. Always on the disconnection clause, see see Cassazione civile, S.U., ordinanza n. 3561/2020, cit. The case concerned again the online purchase of a flight ticket, in a case involving two Member States (Italy and Ireland). The contract contained a choice of court agreement designed to alter the rules on jurisdiction contained in art. 33 of the Montreal Convention. To argue in favour of the applicability of the Brussels I bis Regulation, thus to save the choice of court agreement, the Irish air carrier argued that under art. 71 Brussels I bis Regulation the Montreal Convention is only applicable between a Member State and a third State. The Italian Supreme Court applied the Montreal Convention in an intra-EU case under art. 71, which is not limited to extra-EU cases. In this sense, the choice of court agreement contained in the contract was quashed. However, the proper basis for the application of the Montreal Convention appeared to be art. 61 of the Brussels I bis Regulation, as the 1999 Montreal Convention is part of EU law. Secondly, the court interpreted the notion of "place of business" under art. 33 of the Montreal Convention in the case of direct online sales of flight tickets. As was done with previous case law, and consistently with the theory of focalisation developed by the Court of Justice of the European Union, this coincides with the place of domicile of the consumer, in terms of international jurisdiction. Local jurisdiction has been determined by the *lex fori*. Again, in the end, passengers have greater protection than in the Brussels I bis Regulation, that has no specific protective heads of jurisdiction.

[25] 2001/539/EC: Council Decision of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), in OJ L 194, 18.7.2001, p. 38.

[26] LG Bremen, 3 June 2015, 3 S 315/14 ("*Zur Entscheidung über den materiell-rechtlichen Schadensersatzanspruch ergibt sich die internationale Zuständigkeit deutscher Gerichte aus Art. 33 des Montrealer Übereinkommens zur Vereinheitlichung bestimmter Vorschriften über die Beförderung im internationalen Luftverkehr vom 28.5.1999 (ABl. L 194 vom 18.7.2001, S. 39). Dieses beansprucht gemäß Art. 67 EuGVVO (nicht Art. 71 EuGVVO, vgl. Oberhammer in Stein/Jonas, ZPO, 22. Aufl. [2010], Art. 71 EuGVVO Rz. 3 mit FN 36; vgl. auch Slonina in Burgstaller/Neumayr/Geroldinger/Schmaranzer, Internationales Zivilverfahrensrecht [18. Lfg., Wien 2015, i. Ersch.], Art. 67 Rz. 8 mit FN 21) Vorrang gegenüber der EuGVVO und verdrängt insofern die Zu-*

is destined to govern the relationship between Brussels I bis and rules on jurisdiction contained in other "*EU instruments*". A position, the latter, that appears consistent with Article 216(2) TFEU, according to which "*Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States*"[27]. 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 if no specific rule on the same topic is contained in the *lex specialis*. Again, an evaluation of the existence (or lack thereof) of such rules in the competing regime, the Montreal Convention, 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 Article 30 on related actions has been deemed applicable regardless of whether courts ground their jurisdiction on domestic law or on the regulation itself[28]), it remains that Article 30 (and the possibility to concentrate proceedings therein enshrined) refers to parallel proceedings pending "*in the courts of different Member States*"[29]. A circumstance that would not occur where proceedings are pending before two courts of *the same Member State*, as was the case dealt with by the Italian Supreme Court.

As mentioned, the Italian Supreme Court acknowledges the impracticalities that may follow from the severability of closely related actions grounded on same facts and suggest for the applicability of Article 30 Brussels I bis Regulation. To reinforce its position, it recalls the Opinion of the Advocate General in the Case C-213/29, *Adriano Guaitoli*.

Nonetheless, also taking into consideration that in the case at hand the court concluded for the competence of one Italian court for one claim, and for the competence of another Italian court for the second claim, a general suggestion to make recourse to Article 30 Brussels I bis seems inappropriate. At point 7 of the reasoning in law, the Italian court expressly refers to para. 51 of the AG's opinion, which tackles a completely different scenario, i.e. – that of *two* proceedings in *two different Member States*[30]. In these terms, the reference made by the Italian court to the AG's opinion appears to be wrong.

Of course, a different question is whether concentration of proceedings would still be admissible in such a scenario under domestic law – yet, the compatibility of EU law with national procedural mechanisms devoted to ensuring some fundamental principles, such as for example sound administration of justice and procedural economy, remains a prerogative of the Court of Justice of the European Union. Domestic courts, rather than "suggesting" an extension of the scope of application of EU law provisions which might clash with their immediate wording could perhaps seek, in the future, to raise a preliminary question to continue that dialogue between courts that has shaped, and is continuing to shape, the borders of judicial cooperation in the European judicial space.

ständigkeit aus Art. 5 Nr. 1 lit. b) EuGVVO (vgl. Geimer in Geimer/Schütze, Europäisches Zivilverfahrensrecht, 3. Aufl. [2010], Art. 5 Rz. 45)").

[27] Also, of the view that art. 67 Brussels I bis Regulation should find application for international agreements concluded by the European Union, cf KROPHOLLER J., VON HEIN J., *Europäisches Zivilprozessrecht: Kommentar su EuGVO, Lugano-Übereinkommen 2007, EuVTVO, EuMVVO und EuGFVO*, Frankfurt am Main, 2011, p. 719, and PUETZ A., *Rules on Jurisdiction and Recognition or Enforcement of Judgments in Specialised Conventions on Transport in the Aftermath of TNT: Dynamite or Light in the Dark?*, in *The European Legal Forum*, 2018, p. 117, at p. 125.

[28] Cf Judgment of the Court (Sixth Chamber) of 27 June 1991, Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd v New Hampshire Insurance Company, Case C-351/89, para. 14 ("*… it appears from the wording of Article 21 that it must be applied both where the jurisdiction of the court is determined by the Convention itself and where it is derived from the legislation of a Contracting State in accordance with Article 4 of the Convention*").

[29] Stressing the goal and objective to avoid inconsistent decisions *coming from different Member States*, thus the need for the Brussels I regime to adopt specific rules on coordination of proceedings between Member States, see *ex multis* FENTIMAN R., *Introduction to Articles 29-30*, in MAGNUS U., MANKOWSKI P. (eds), *European Commentaries on Private International Law, Volume I, Brussels Ibis Regulation*, Cologne, 2016, p. 713, at p. 724 f.

[30] Opinion of the Advocate General Saugmandsgaard Øe 20 June 2019, Case C-213/29, *Adriano Guaitoli et al*, para. 51 ("*I emphasise that in my view, if the Court were to adopt my proposed interpretation, the risk of jurisdiction to determine a hybrid action of this kind being fragmented between courts of different States would, in practical terms, be relatively limited. It can be seen that Regulation No 1215/2012 and the Montreal Convention have two jurisdictional criteria in common, namely the place of domicile of the defendant and the place of destination of the flight, (38) and that a passenger bringing an action against an air carrier has a free choice between those criteria, (39) which means that all the heads of claim can be dealt with by one and the same court. There is, moreover, scope for the rules on related actions contained in Article 30 of Regulation No 1215/2012 to operate, thus enabling multiple or concurrent actions to be avoided*").