Some remarks on the fragmentation of international liability regimes of air carriers: an European perspective

Pr. Dr. Vincent CORREIA
Professeur de Droit public

1431
Université de Poitiers
"Des savoirs & des talents"

Introduction

- The fragmentation of the liability regimes is exactly what the Warsaw and Montreal Conventions wanted to avoid
- There is a paradoxical situation where two instruments aiming at the unification of liability regimes are coexisting at the same time
- Nevertheless, as stated by Martti Koskenniemi, the multiplication of different international conventions:

« *should not be understood as legal-technical "mistakes". They reflect the differing pursuits and preferences that actors in a pluralistic (global) society have.* ***In conditions of social complexity, it is pointless to insist on formal unity*** »

Introduction

- **Multiple causes of fragmentation of liability regimes**
- The major source of fragmentation is the coexistence of the Warsaw and the Montreal conventions and also the fact that some countries are not parties to any of these instruments.
- It is far from being the most problematic issue
  - The principle of the relative effect of the Treaties and article 55 of the Montreal Convention solve the major problems: Ex. Cour d'Appel de Paris, 14 March 2013
- **The issue of fragmentation is most accurate and must be tackled among States which are parties to the same conventions**
- In this respect, there are two major sources of fragmentation : **conflicting norms and conflicting interpretations**.

Conflicting norms

Université de Poitiers

Conflicting norms

- The major threat to uniformity comes from the multiplication of national or regional legislations dealing with air passengers's rights
  - EU Regulation 261/2004 after the *IATA and ELFAA*, *Sturgeon* and *Nelson* cases
  - According to IATA, more than 50 countries have adopted passenger rights legislations
- These air passengers' rights legislations do not automatically conflict with the Warsaw and Montreal conventions, since they are endowed with exclusivity only for the questions covered. **But yet, they participate to a tendency of blurring some traditional legal concepts**.

Conflicting norms

- **The blurring of some traditional legal concepts**:
  - The very ambiguous distinction **between "damages" and "inconveniences"**
    - Ex. Audiencia Provincial Civil de Madrid, 23 June 2014: A delay can be compensated in accordance with Reg. 261/2004 (as an inconvenience) and the Montreal Convention (for the damage caused)
  - The determination of the **competent jurisdiction** is different under Reg. 261/2004 (Reg. 44/2001) and Warsaw/Montreal Conventions (ECJ, 9 July 2009, Rehder vs Air Baltic)
  - **Time-limits** to bring actions before Courts (CJEU, 22 November 2012, Cuadrench More)
  - "Extraordinary circumstances" vs. traditional defense
  - The definition of **flights**:
    - National judges tend to apply Regulation 261/2004 to situations only covered by the Warsaw or Montreal Conventions (ex. French Cour de Cassation on 21 November 2012)

Conflicting norms

- **The blurring of some traditional legal concepts**.
  - This situation is induced by the mere fact that the Warsaw and Montreal conventions do not deal with all aspects of liability of airlines
  - They are exclusive but not complete
  - This opens the door for some **overlapping instruments and legislations**
    - UK Supreme Court ruling in the Stott v. Thomas Cook case (5 March 2014): Montreal Convention vs. Regulation 1107/2006 on PMR

Conflicting norms

- **The blurring of some traditional legal concepts**.
  - The proliferation of air passengers' rights legislations raises the question of **conflicting laws from different legal orders**
    - The traditional rules (*lex posterior derogat priori*, *lex specialis derogat legi generali*) are not applicable
    - Determined in accordance with internal rules
    - According to the principle *lex superior derogat legi inferiori* normative conflict will always be solved in favour of the superior rule
    - The Italian Constitutional Tribunal ruled that the Warsaw convention's limits were contrary to the Constitution (T. Const, 2 May 1985)
  - When national judges are asked to apply different norms arising from international conventions and domestic law, they will naturally tend to favour the latter
    - Ex. Brazil, Superior Tribunal de Justiça, 24 October 2013

Conflicting interpretations

Université de Poitiers

Conflicting interpretations

- **Courts tend to have significant different interpretations regarding core concepts of the Warsaw and Montreal conventions**
  - Notion of exclusivity
  - Concept of delay:
    - Some Courts interpret (or interpreted) the cancellation and rerouting as a delay (Ex. Cour d'appel de Paris, 10 December 1993 vs. Cour de Cassation 22 June 2004)
  - Concept of accident:
    - Cour d'appel de Paris, 9 July 2013 and Cour d'appel de Nouméa, 21 January 2014 vs. Cour de Cassation, 8 October 2014
  - Concepts of damages and bodily-injury
    - Ex. Audiencia Provincial de Barcelona, 22 May 2013: Moral damages for delays under the Montreal convention and amount calculated in accordance with Regulation 261/2004…
  - Limitations of actions
    - Ex. Audiencia Provincial de Bizkaia, 5 May 2014 vs. US District Court Southern District of Texas, Philippe Duay vs. Continental Airlines, Inc 21 December 2011

Conflicting interpretations

- **Regarding the *forum non conveniens* doctrine**
  - European and American Courts approaches are totally opposed
    - UK Court of Appeal, Milor SRL and Others v. British Airways Plc., 15 February 1996
    - ECJ, Andrew Owusu c/ N. B. Jackson, 1st March 2005
    - French Cour de Cassation, 1re civ., 7 December 2011
  - American Courts are sometimes dissenting:
    - US Court of appeals, 5th Cir., re Air Crash Disaster Near New Orleans, Louisiana on july, 21 july 1987, vs. US Court of appeals, 9th Cir., Hosaka v. United airlines, 18 September 2002
  - The very first sentence of this article says that the action « must be brought, at the option of the plaintiff » when one of the connecting factor is met
  - Some Courts rely on Article 33 para. 4 which states that « questions of procedure shall be governed by the law of the Court seized of the Case »

Conflicting interpretations

- **The *forum non conveniens* doctrine is not acceptable from a continental perspective for at least three reasons:**
  - Applying a systematic interpretation of Article 33, it is not possible to circumvent Article 33 para 1 and 2 by a mere reference to « questions of procedure »
  - According to Article 31 of the Vienna convention on the laws of Treaties, a Treaty shall be interpreted in good faith in accordance with the **ordinary meaning** to be given to the terms
  - **The questions of connecting factors and procedure operate at different times**
    - It is necessary to identify first the adequate jurisdiction, which will then operate in accordance with its procedural rules
    - If every States used their internal procedural rules to circumvent the material provision of a norm determining the basis of jurisdiction, it would mean that Article 33 is useless.

Conflicting interpretations

- **The problems induced by the fragmentation :**
  - The fragmentation tends **to favour *forum shopping***
  - Then, there is a clear problem of **legal certainty** for air carriers and for their insurers: EX. AF447 in Brazil
  - Finally, there is a problem of **equal treatment** of passengers aboard the same flight
    - Ex. The Yemenia disaster
  - **All these problems flow from the lack of a single interpretative authority**

Conclusion

Université de Poitiers

Conclusion

- Fragmentation is politically and legally impossible to avoid, because it reflects an increasing trend towards global legal pluralism
- The fragmentation of laws only reflects the fragmentation of the international aviation order, with different levels of development, different levels of protection of the passengers and of the carriers
- **The best short term solution would be to achieve the highest level of ratification of the Montreal convention**
- The major cause of fragmentation is the absence of a **common authority** to interpret these conventions
- At the same time, the different solutions or interpretations adopted within some jurisdictions can maybe pave the way for future evolutions

Thank you for your attention

Dziękuję za uwagę

Pr. Dr. Vincent CORREIA

vincent.correia@univ-poitiers.fr

Université de Poitiers