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Construing inconsistent jurisdiction clauses

In *Airbus v Generali & Ors*, the Court of Appeal outlined the principles applicable to interpreting inconsistent jurisdiction clauses under different contractual agreements.

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Contact	Jonathan Chambers

Summary

We consider the principles applicable to interpreting inconsistent jurisdiction clauses under different contractual agreements, each of which might apply to a given claim. These were examined recently by the English Court of Appeal in the context of aviation law, in *Airbus SAS v (1) Generali Italia Spa (2) Axa Corporate Solutions Assurance (3) Allianz Global Corporate & Speciality Se Representation For Italy.*

The Court of Appeal's analysis has wide general application to other areas of law, including construction and insurance contracts where multiple contracts are often agreed between the same parties, each containing inconsistent jurisdiction clauses. The Court of Appeal also confirmed that Insurers exercising rights of subrogation to make a non-contractual claim are bound by an English arbitration or jurisdiction clause to the same extent as their insured would have been.

The decision in *Airbus SAS v (1) Generali Italia Spa (2) Axa Corporate Solutions Assurance (3) Allianz Global Corporate & Speciality Se Representation For Italy*

Airbus sold aircraft under a purchase agreement, which contained warranties expressly stated to be enforceable by arbitration in Geneva. The aircraft was operated by an Italian airline, Alitalia Compagnia Aerea Italiana S.p.A. (Alitalia) under a sub-lease governed by English law. Airbus and Alitalia also concluded a further warranties agreement which contained an English exclusive jurisdiction clause.

Following an incident during which an aircraft sustained damage in Italy, Alitalia's insurers brought warranty claims against Airbus in Italy in exercise of their subrogation rights under Italian law, having indemnified Alitalia for its losses. Insurers added a non-contractual claim which was not dependent on subrogated rights.

In turn, Airbus commenced English proceedings and objected to the jurisdiction of the Italian court. Article 25 of the Brussels Regulation Recast (EU Reg 1215/2012) provides relevantly as follows

> "Article 25
> 1. If the parties… have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction…"

At first instance in the English proceedings, Moulder J had decided that the English court had jurisdiction under Article 25 in respect of both the contractual and non-contractual claims. This was upheld by the Court of Appeal on the basis that there was at least a good arguable case that the claim commenced by the appellants in Italy was sufficiently closely connected with the warranties to fall within the scope of the jurisdiction clause in the Warranties Agreement. Even though the Italian claim was for breach of non-contractual obligations under articles the Italian Civil Code, it was sufficiently connected to the warranties agreement to be within the scope of the exclusive jurisdiction clause. Therefore there was a good arguable case that the commencement and pursuit of those Italian proceedings was contrary to the terms of that clause and that the English court had jurisdiction to determine that claim.

Principles at play when construing different jurisdiction clauses in related agreements

The Court of Appeal in Airbus summarised the following high-level principles from the relevant authorities:

- When reliance is placed on an Article 25 jurisdiction agreement the standard of proof is "a good arguable case" ie a party relying on such a clause had to show that it had "the better of the argument".
- Where parties have entered into a number of agreements with different dispute resolution clauses, a "broad and purposive construction" had to be applied to identify the meaning of a jurisdiction clause *(Deutsche Bank AG v Sebastian Holdings Inc* [2010] EWCA Civ 998 followed).
- The construction of a jurisdiction clause is to be ascertained primarily from the terms of the jurisdiction clause and the contractual agreement itself, applying the following guiding principles (taken from *BNP Paribas S.A. v Trattamento Rifiuti Metropolitani S.p.A.* [2019] EWCA Civ 768):
    - where the parties' overall contractual arrangements contain two competing jurisdiction clauses, the starting point is that a jurisdiction clause in one contract is probably not intended to capture disputes more naturally seen as arising under a related contract
    - however, a broad, purposive and commercially-minded approach is to be followed
    - where the jurisdiction clauses are part of a series of agreements they should be interpreted in the light of the transaction as a whole, taking into account the overall scheme of the agreements and reading sentences and phrases in the context of that overall scheme
    - it is presumed that sensible business people are unlikely to have intended that similar claims should be the subject of inconsistent jurisdiction clauses
    - the starting presumption will therefore be that competing jurisdiction clauses are to be interpreted on the basis that each deals exclusively with its own subject matter and they are not overlapping, provided the language and surrounding circumstances so allow
    - the language and surrounding circumstances may, however, make it clear that a dispute falls within the ambit of both clauses. In that event the result may be that either clause can apply rather than one clause to the exclusion of the other, and
    - fragmentation of dispute resolution fora might have to be accepted in some cases if that was what the parties had expressly agreed, but it was not a conclusion to be reached lightly.

Effect of subrogation

The Court of Appeal was asked to decide in Airbus whether the English court can make a declaration in circumstances where, as insurers, the appellants were never parties to the agreement in question, and did not found their claim in Italy upon it. The Court of Appeal made clear that the position is as follows:

- insurers exercising rights of subrogation to make a non-contractual claim are bound by an English arbitration or jurisdiction clause to the same extent as their insured would have been
- whereas the commencement and pursuit of proceedings contrary to the terms of an arbitration or jurisdiction clause by the insured would constitute a breach of contract, the commencement and pursuit of such proceedings by insurers constitutes a breach, not of the contract but of an equivalent equitable obligation which the English court will protect, and
- the remedies available in such a case include the grant of a declaration in an appropriate case.

Where commencement of the Italian proceedings by Alitalia would have been a breach of the jurisdiction clause in the Warranties Agreement, it follows that their commencement by the appellant insurers would also be a breach of an equivalent obligation in equity which Airbus would be entitled to enforce, and that the English court has in principle a jurisdiction to grant a declaration to say so.

Commentary

The Court of Appeal applied general principles of contractual interpretation to achieve a very sensible commercial result. The principle of “non-fragmentation” of dispute resolution procedures unless the parties have agreed otherwise, so that inconsistent decisions in different jurisdictions on the same subject matter are avoided, is an important one.

Insurers, although not themselves parties to the warranties agreement, nevertheless were bound in equity by the English jurisdiction clause contained in the warranties agreement. This was because an English arbitration or jurisdiction clause gives rise to an equitable right, enforceable against subrogated insurers.

elexica Limited, CityPoint, One Ropemaker Street, London EC2Y 9SS