

# AIRBUS S.A.S. V GENERALI ITALIA S.P.A.: CAN INSURERS ENJOY DUTY FREE FORUM SHOPPING?

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The recent decision of the English Court of Appeal in *Airbus S.A.S. v Generali Italia S.p.A. et al* [1] has confirmed the interpretation of an exclusive jurisdiction clause in an airframe warranties agreement as part of a sale and leaseback/sub-lease transaction. The court further held that it had jurisdiction to make declarations against an insurer even where it was not a party to the jurisdiction clause in the underlying contract and was bringing a claim in tort in light of equivalent equitable duties to act consistently with the clause.

This case will be of interest generally to parties involved in transactions with multiple parties and related agreements where widely drafted jurisdiction clauses can be critical in order to prevent fragmentation of disputes. It is of particular interest to parties in aircraft lease finance transactions, where insurers are often located in the same foreign jurisdiction as the lessee airline.

## The background

Airbus was seller of an A320-200 aircraft under a purchase agreement, which set out the warranties it would give on delivery. The buyer's rights under the purchase agreement were then assigned to Mainstream Aircraft Leasing Ltd, who sold and leased back the aircraft before sub-leasing it to Alitalia.

The purchase agreement provided for ICC arbitration in Geneva. The assignment, sale and leaseback agreement and sub-lease were each subject to exclusive English court jurisdiction.

Shortly before the delivery of the aircraft, the parties with potential interests in the warranties under the purchase agreement entered into a separate airframe warranties agreement (the "Warranties Agreement"), which reproduced Airbus' warranties under the purchase agreement. The Warranties Agreement provided that "*the courts of England shall have exclusive jurisdiction to settle any disputes arising out of or in connection with [the warranties] or any non-contractual obligations connected with it...*".

On 29 September 2013 the aircraft was forced to make an emergency landing in Rome due to defective landing gear, resulting in significant damage. Alitalia was indemnified by its insurers, who paid over US\$11m and sought to recover that loss from Airbus.

The insurers first commenced a subrogated claim against Airbus in Italy under the Italian Civil Code, claiming that Airbus failed to take preventative action in light of previous similar incidents involving the same model of aircraft. However, after Airbus obtained an English court declaration confirming its own jurisdiction, the insurers added to their Italian claim a similar but purportedly ‘independent’, non-subrogated claim in tort. Having added the non-contractual claim in the Italian proceedings, the insurers appealed the first instance decision of the English court.

## Interpreting the jurisdiction clause

Whilst maintaining the right to sue in Italy, the insurers argued in any event that Alitalia’s warranties claim derived from assigned rights under the purchase agreement, and that any dispute over those rights should therefore be heard by the ICC. They said that the jurisdiction of the English courts under the Warranties Agreement was limited to disputes as to which party had the benefit of the warranties, or the validity of the Warranties Agreement itself.

Airbus argued that the Warranties Agreement’s jurisdiction clause was wider, capturing the Italian claim as that claim was “*connected with*” the warranties claim. It also argued that the Warranties Agreement created a free-standing agreement, granting equivalent warranties to the purchase agreement. Consequently, it was the jurisdiction clause in the later Warranties Agreement which should apply.

The Warranties Agreement was the only contract to which all parties interested in the warranties were party. Although an assignee will generally be bound by a dispute resolution clause in a contract from which its assigned rights derive, that position can always be altered by agreement. The court concluded that, to a large extent, the Warranties Agreement had superseded the purchase agreement. It was therefore necessary to approach the construction of the jurisdiction clause under the Warranties Agreement without reference to the assigned rights under the purchase agreement. The court went on to observe that:

- The Warranties Agreement was the only contract to which all parties interested in the warranties were party. Although an assignee will generally be bound by a dispute resolution clause in a contract from which its assigned rights derive, that position can always be altered by agreement.
- The jurisdiction clause in the Warranties Agreement was extremely wide.
- If the parties intended to reserve ICC arbitration for a substantive warranty claim or incorporate it by reference, they would need to make that clear, and they had not done so.
- While fragmentation of dispute resolution is possible, such an outcome should not be construed lightly.

Accordingly a final declaration that the jurisdiction clause in the Warranties Agreement applied to all disputes arising out of or in connection with the Warranties Agreement and any non-contractual obligations connected with it was granted.

## The Italian proceedings

The insurers submitted that the Italian claim was not a warranty claim or connected with a warranty claim, but an independent claim in tort under Italian law. Airbus submitted that the claim in Italy was that Airbus had supplied a defective product to the airline which it failed to remedy or recall, and that such a claim was within the warranties or at least so connected with the Warranties Agreement so as to fall within the scope of the jurisdiction clause.

The court found that Airbus had at least a good, arguable case on this point. To the extent that Airbus had an obligation to take preventative action, that obligation was at least connected with the post-delivery obligations set out in the purchase agreement and Warranties Agreement.

## Declaration against the insurers

The final issue was whether the English courts had jurisdiction to make a declaration against the insurers, in circumstances where they were not party to the Warranties Agreement and did not found their Italian claim upon it.

## Comment

Relying upon the earlier shipping cases of *The Jay Bola*<sup>[2]</sup> and *West Tankers*<sup>[3]</sup> the court concluded that, if the commencement of the Italian proceedings by Alitalia would have been a breach of the jurisdiction clause in the Warranties Agreement, then it followed that their commencement by the appellant insurers was a breach of an equivalent obligation in equity. Airbus was entitled to enforce that obligation, and the English court had jurisdiction to grant a declaration to say so.

This case provides useful analysis of different dispute resolution provisions in a series of related agreements involving multiple parties. It suggests that the English courts will generally enforce widely drafted jurisdiction clauses in airframe warranties agreements where these are found to supersede earlier warranties agreements in order to avoid fragmentation of disputes. Conversely any intention (i) to preserve the jurisdiction clause of the earlier agreement, (ii) to incorporate an arbitration clause into the later agreement by reference, or (iii) to apply different jurisdictions to different rights and obligations, would need to be very clearly expressed.

The case also confirms the ruling in the earlier shipping decisions of *The Jay Bola* and *West Tankers* concerning equivalent equitable obligations for insurers acting contrary to jurisdiction clauses in an aviation context.

[1] [2019] EWCA Civ 805

[2] [1997] 2 Lloyd's Rep 279

[3] [2005] EWHC 454 (Comm)

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