IN ANOTHER'S SHOES: SUBROGATED PARTIES AND THE BRUSSELS I REGULATION

Airbus SAS v Generali Italia SpA

Unless and until the United Kingdom leaves the European Union, jurisdiction of the English courts in civil and commercial matters will be governed by rules laid down in the recast Brussels I Regulation,[1] which for the most part take precedence over, and operate without reference to, local rules of private international law. As Professor Adrian Briggs has emphasised, the autonomy of the Brussels I and national regimes must be recognised and respected.[2] Rules and principles that apply within one system are not automatically to be transferred to the other.

This basic proposition would appear to have been overlooked, or at least underplayed, in *Airbus SAS v Generali Italia SpA*,[3] in which the English courts assumed jurisdiction to entertain claims for declaratory relief against Italian insurers of an aircraft on the basis of an English choice of court agreement concluded between the claimant and the insured. Although the claim to jurisdiction was ostensibly based on Art 25 of the recast Brussels I Regulation, the central question whether the insurers were bound by the choice of court agreement was treated as one of English law, neglecting principles of EU law concerning the effectiveness of such agreements against non-parties. The decision, focussed on question of interpretation of the choice of court provision in the warranties agreement,[4] should not be seen as setting a precedent for future cases of this kind.

On 29 September 2013, an Airbus A320-200 aircraft operated by Alitalia was forced to make an emergency landing at Fiumicino Airport in Rome due to a fault in its landing gear. Alitalia's Italian insurers, the appellants in the present action, indemnified the company for the damage suffered in an amount exceeding US$11 million. In July 2017, the insurers brought proceedings in Italy against Airbus to recover this amount, relying on rights of subrogation under the Italian Civil Code[5] to assert a claim for tortious negligence causing damage to Alitalia.

---

1 Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ([2012] OJ L351/1) ("recast Brussels I Regulation").

2 A Briggs, 'The Hidden Depths of the Law of Jurisdiction' [2016] LMCLQ 236.

3 [2019] EWHC 2737 (Comm) (Moulder J); [2019] EWCA Civ 805 (CA) ("*Airbus*").

A similar desensitisation to differences in jurisdictional regime at appellate level can be seen, for example, in decisions concerning the standard of proof in the jurisdictional enquiry (*Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10, noted A Briggs [2019] LMCLQ 195 and A Dickinson (2019) 135 LQR 369), anti-suit injunctions to protect the jurisdiction of the English court (*Petter v EMC Europe Ltd* [2015] EWCA Civ 828, [2015] 2 CLC 178) and damages for breach of choice of court agreements (*Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* [2014] EWCA Civ 1010, [2014] 2 Lloyd's Rep 544).

4 [2019] EWHC 2737 (Comm), [23].

The position of the insurers, as distinct from that of the insured, was apparently raised as an afterthought before Moulder J, see ibid, [68] but was more prominent in argument before the Court of Appeal.

5 Specifically, Arts 1916 (legal subrogation) or 1201 (contractual subrogation).

As part of the suite of contractual documents put in place to finance the acquisition of the aircraft, Airbus had entered into a warranties agreement with Alitalia. That agreement contained broadly worded English choice of law and choice of court provisions, each extending to non-contractual obligations connected with the agreement. In January 2018, Airbus commenced proceedings in the Commercial Court seeking declarations (1) that it was not liable to the insurers, and (2) that the Italian proceedings fell within the scope of the choice of court agreement, which bound the insurers. Subsequently, in February 2018, Airbus challenged the jurisdiction of the Italian Court, relying on Art 31.2 of the recast Brussels I Regulation to seek a stay of the Italian proceedings until the English court had decided whether it had jurisdiction under the agreement. The Italian court declined to stay its proceedings.[6]

The insurers challenge to the jurisdiction of the English court was rejected by Moulder J. After that decision, but before argument in the Court of Appeal, the insurers added a new claim in the Italian proceedings, asserting that Airbus owed them a direct tortious duty to prevent unjust damage in the insurers' contractual relationship with Alitalia, a claim not dependent on rights of subrogation.

The Court of Appeal (Males LJ, with whom Lewison and Davis LJJ agreed) affirmed the decision of Moulder J on the jurisdictional point.[7] The Court determined that the claims brought in the Italian proceedings fell within the scope of the choice of court provision, and that the insurers were bound in equity to respect that provision. Males LJ concluded that:[8]

> "If it is held that 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 is a breach of an equivalent obligation in equity which Airbus is entitled to enforce and that the English court has jurisdiction to grant a declaration to say so."

One may, with respect, doubt the proposition that the legal basis in English law for giving effect to the exclusive choice of court provision in the warranties agreement involves an "obligation in equity" that is "equivalent" to the contractual obligation assumed by Alitalia. Instead, the authority principally relied on by Males LJ, the Court of Appeal decision in *The Jay Bola*,[9] supports the view that the equitable intervention rests upon a finding that a subrogated insurer has acted unconscionably in seeking to enforce the subrogated right without following the mechanism agreed between the insured and its contractual counterparty for the resolution of disputes between them.[10] The mandatory terms of the

---

6 *Airbus* (CA), [39]-[40], giving no further details of the reasoning adopted by the Italian court. The judgments of the English courts do not specifically address the question of *lis pendens* (cf. Brussels I Regulation, Recital (22) and Art 29(1)).

7 The Court set aside as premature the final declaration made by Moulder J as to the scope and effect of the choice of court provision (see *Airbus* (CA), [47], [98]).

8 *Airbus* (CA), [97].

9 *Schiffahrtsgesellschaft Detlef Von Appen GmbH v Wiener Allianz Versichrungs AG (The Jay Bola)* [1997] EWCA Civ 1420, [1997] 2 Lloyd's Rep 279.

10 *The Jay Bola*, 286 (Hobhouse LJ).

dispute resolution provision generate an "equity" affecting the subrogated rights, which the English courts are willing in appropriate cases to protect by an injunction[11] or by declaratory relief.[12] This is, however, "not a 'cause of action' of the same character as the right to sue for damages for breach of contract or tort or to collect a legal debt".[13] There is no equivalence, substantively or remedially, between insured and insurer.

The reasoning of the Court of Appeal (reflecting the way in which the case was apparently argued before it) did not sufficiently distinguish the substantive basis for the grant of an equitable remedy from the logically prior question whether the English courts had jurisdiction under the recast Brussels I Regulation to entertain that claim. The Court, following the structure of the appellants' argument,[14] presented the matter as involving, first, a series of questions bearing upon the interpretation of the choice of court provision in the warranties agreement,[15] and, secondly, a question whether the English court could make a declaration concerning the application of that provision to the insurers' Italian proceedings even though the insurers were not parties to the warranties agreement.[16]

This approach sidestepped the critical jurisdictional question under the Brussels I regime. The defendant insurers were domiciled in Italy and the events giving rise to their tortious claims had occurred there. Absent prorogation of jurisdiction by appearance,[17] the choice of court provision in the warranties agreement provided the only conceivable basis for the English court to assert jurisdiction over Airbus' claims for declaratory relief.[18] The insurers were not, however, "parties" to that agreement and had not consented to the choice of court. In the circumstances, one would have the expected the submissions and judgments in *Airbus* to address the sizeable body of case law of the European Court of Justice, which establishes that a non-party which has not consented to a choice of court agreement to which Art 25 of the Regulation applies will be bound by it only if (1) that non-party has succeeded to the rights and obligations of one of the parties to the relevant contract or other instrument, and (2) the non-party had the opportunity to acquaint itself with the content of the clause.[19] This line of case law was developed in relation to bills of lading,[20] but the European Court has hesitated to extend it beyond this to other categories of case in which there is no common ground among the legal systems of the Member States that the legal situation involves a relationship

---

11 As in *The Jay Bola*.

12 *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA (The Front Comor)* [2005] EWHC 454 (Comm), [2005] 2 Lloyd's Rep 257 and [2012] EWHC 854 (Comm), [2012] 2 Lloyd's Rep 103.

13 *The Jay Bola*, 286 (Hobhouse LJ). See also *Masri v Consolidated Contractors International (UK) Ltd* (No 3) [2008] EWCA Civ 625, [2009] QB 503, [46]-[52] (Lawrence Collins LJ).

14 *Airbus* (CA), [48].

15 Ibid, [62]-[76], [80]-[84].

16 Ibid, [89]-[97].

17 A possibility precluded by the insurers' challenge to the jurisdiction of the English court (Recast Brussels I Regulation, Art 26).

18 Recast Brussels I Regulation, Art 25. See *Airbus* (CA), [43], [49], addressing the standard of proof.

19 *Profit Investment Sim Spa v Ossi* (Case C-366/13) [2016] ECLI:EU:C:2016:282, [36]-[37].

20 *Tilly Russ v NV Haven- & Vervoerbedrijf Nova and NV Goeminne Hout* (Case 71/83) [1984] ECR 2417.

of substitution between the non-party and one of the parties in relation to the choice of court agreement.[21]

The European Court has yet to consider the application of Art 25 of the recast Brussels I Regulation to claims brought by or against an insurer asserting subrogated rights against a party with whom the insured has concluded a choice of court agreement. The author of this note is equally unaware of any English decision that specifically addresses that issue.[22] Full consideration of the point in *Airbus* would have required the English courts to consider the autonomous Regulation concept of "succession" ~~with respect~~ to a choice of court agreement and to determine whether, having regard to relevant rules of both Italian and English law,[23] the insurers were the successors of Alitalia with respect to the choice of court provision in the warranties agreement. It would also have been necessary for the English courts to consider whether the insurers had been given a sufficient opportunity to acquaint themselves with the content of the clause.[24]

The facts of *Airbus* raised a further question as to whether an Art 25 agreement between the insured and its contractual counterparty could extend to a claim by the insurer that it has a cause of action, in tort or otherwise, directly against the counterparty. There are persuasive arguments against such an extension. First, as an exception to the domicile based rule in Art 4 of the Regulation, Art 25 cannot be interpreted in a way that goes beyond the situations which it expressly envisages.[25] Secondly, Art 25 applies in terms only to "disputes which have arisen or which may arise in connection with~~to~~ a particular relationship", and does not apply to disputes which "stem from a relationship other than that in connection with which the agreement conferring jurisdiction was made".[26] If the "particular legal relationship" in this case is that between the insured and its counterparty, the obligation generating relationship between the counterparty and insurer may be seen as sufficiently distinct to fall beyond the grasp of Art 25. Thirdly, the European Court has drawn a distinction in its case law on another aspect of the Brussels I regime between an action brought by an insurer in its capacity as a representative of the insured and an action brought by the insurer on account of its own interests.[27] In the latter case, the Court held that the interests of the insurer could not be

---

[21] *Refcomp SpA v Axa Corporate Solutions Assurance SA* (Case C-543/10) [2013] ECLI:EU:C:2013:62, [35]-[41]. It may be that the concept of "substitution" provides a more useful working concept than that of "succession" used in earlier case law.

[22] In *OT Africa Ltd v Hijazy* [2001] CLC 148, it was common ground that the insurers must be regarded for this purpose as succeeding to the rights and liabilities of the shippers (see ibid, [66]-[68]). See A Briggs, *Civil Jurisdiction and Judgments,* 6th edn (Abingdon, 2015), [2.137].

[23] cf. Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) [2008] (OJ L177/6), Arts 14-15, although not applicable to choice of court agreements (see ibid, Art 1(2)(e)).

[24] In addition to *Refcomp* (fn.21 above), see *Powell Duffryn plc v Petereit* (Case C-214/89) [1992] ECR I-1745, [27]-[28].

[25] *Leventis v Malcon Navigation Co Ltd* (Case C-436/16) [2016] ECLI:EU:C:2017:497, [32].

[26] *Cartel Damage Claims Hydrogen Peroxide SA v Evonik Degussa GmbH* (Case C-352/13) [2013] ECLI:EU:C:2015:335, [68].

[27] *Drouot Assurances SA v Consolidated Metallurgical Industries* (Case C-351/96) [1998] ECR I-3075, [22].

considered to be identical to and indissociable from those of the insured so as to establish a relationship of substitution between them in the application of the "same parties" requirement in the *lis pendens* provisions of the 1968 Brussels Convention.[28]

The judgments of the English courts in *Airbus* did not engage with these questions of EU law. The only case law of the European Court of Justice referred to in the judgments concerned the non-availability of an anti-suit injunction to restrain proceedings before a Member State court, a point that was not controversial.[29] The Court of Appeal otherwise relied principally on English case law concerning the effectiveness of arbitration agreements against those bringing subrogated claims.[30] That case law was manifestly central to a decision on the *merits* of Airbus' claims for declaratory relief, and likely provided part of the legal framework in which the question of "succession" to the choice of court agreement would have fallen to be considered,[31] but it cast no useful light on the interpretation of Art 25 or its application to Airbus' claims. The appellants did not seek to argue that Art 25 could not apply to the insurers' claims, including its independent tort claim.[32]

In the cut and thrust of litigation, one cannot expect a case to be argued and determined as if the dispute were a problem question in an examination on the conflict of laws. Nevertheless, when the matter has been approached in a way that appears to leave significant stones unturned, there is reason for caution in treating the decision as a precedent for future cases. *Airbus* falls into this category, and should not be taken to support the proposition that Art 25 of the Brussels I Regulation extends to claims by or against the insurer of one of the parties to a choice of court agreement in circumstances where the insurer seeks to exercise rights of subrogation to the insured's rights against the counterparty.

Andrew Dickinson

* Fellow, St Catherine's College and Professor of Law, University of Oxford

28 Ibid, [23]-[25].
29 *Airbus* (CA), [87].
30 *The Jay Bola* and *West Tankers* (fn.9-13) above.
31 Text to fn.23 above.
32 *Airbus* (CA), [84], [86]