ANALYSIS AND COMMENT

LATE PAYMENT OF FREIGHT AND HIRE – POWER TO AWARD INTEREST UNDER THE 1998 ACT

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Martrade Shipping & Transport GmbH v United Enterprises Corporation
[2014] EWHC 1884 (Comm)

Introduction

Suppliers of goods and services are always keen to ensure that they receive prompt payment. Late payment in commercial transactions can have adverse consequences (particularly economic ones) for creditors. The Late Payment of Commercial Debts (Interest) Act 1998 (1998 Act) addresses this concern by imposing interest on late payment of certain commercial debts.[1] It applies in the United Kingdom (UK).[2] Section 12 of the Act addresses the conflict of laws that may arise in a contract governed by English law, and section 12(1) provides as follows:

> (1) This Act does not have effect in relation to a contract governed by a law of a part of the United Kingdom by choice of the parties if:
> (a) there is no significant connection between the contract and that part of the United Kingdom; and
> (b) but for that choice, the applicable law would be a foreign law.

Section 12(1)(b) of the Act brings into application the conflict of law rules that determine which country's law will apply to a contract in the absence of a choice of law having been made by the parties. Article 4(1) of the Rome Convention[3] provides that the choice of law is to be determined by the law of the country that is most closely connected with the contract. Article 4(2) provides that, subject to Article 4(5): 'it shall be presumed that the law of the country that is most closely connected shall be the law of the place of the party who is to carry out the performance which is characteristic of the contract', that is, the place where the person carrying out the work has his habitual residence. Article 4(5) provides that the presumption in paragraph 2 shall not apply if the 'characteristic performance cannot be determined' and it shall also be disregarded 'if it appears from the circumstances as a whole that the contract is more closely connected with another country'.

The application of the interest provisions under the Act has been a matter of controversy in recent London arbitration owing to the requirements stipulated in section 12(1).[4] In *Bulk Ship Union SA v Clipper Bulk Shipping Limited*,[5] the claimant owners chartered their vessel to the defendant charterers on a time charterparty on an amended NYPE form. A dispute arose between the parties, upon which

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[1] See the long title or introductory text of the 1998 Act.

[2] The Act came into force on 1 July 1999 and has now been amended by the Late Payment of Commercial Debts Regulations 2013 (2013 Regulations), which came into effect on 16 March 2013 (SI 2013/95). The 2013 Regulations implement Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions.

[3] On the law applicable to contractual obligations [1980] OJ L266 and Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L177/6), which came into force on 17 December 2009. See Rome I art 29.

[4] Popplewell J in *Martrade Shipping & Transport GmbH v United Enterprises Corporation* [2014] EWHC 1884 (Comm) [1]; *Bulk Ship Union SA v Clipper Bulk Shipping Limited* [2012] EWHC 2595 [5]–[8].

[5] ibid.

the claimant made a claim in the tribunal in the sum of US$624,276.77 plus interest at 13.5 per cent per annum, based on the 1998 Act. The tribunal awarded the claimant the sum of $505,302.08 and interest on that sum, not under the 1998 Act but under section 49(3)(a) of the Arbitration Act 1996.

The claimant would have received a larger sum if interest had been awarded under the 1998 Act. However, the tribunal ruled that the 1998 Act was inapplicable because, as required by section 12(1), there was no significant connection between the charterparty contract and England in the absence of the parties' express choice of English law. The tribunal held that the only connection between the charterparty contract and England was that it was negotiated through London brokers. This finding was based on the undisputed facts that the claimant/owners were domiciled in the Bahamas, the parties' representatives were respectively from Greece and Denmark, the vessel never called at an English port and no services under the charterparty were provided in any part of the UK.

Popplewell J stopped short of interpreting section 12 of the Act, whereupon the claimant owners sought to argue that not permitting them to make representations that they were entitled to interest under section 12(1)(b) of the 1998 Act amounted to a violation of section 33 of the 1996 Arbitration Act. The claimant owners' case was that the tribunal only addressed section 12(1)(a), and its decision may have been different had the parties been granted an opportunity to address section 12(1)(b).

The appeal was dismissed. Popplewell J stated that: '. . .the structure of section 12(1) contemplates that where there is no significant connection with England, nevertheless the contract may, in some cases, be governed by English law, ignoring the choice of law' (paragraph [26]). Thus, section 12(1)(b) may make the Act applicable where section 12(1)(a) makes it inapplicable. In particular, Popplewell J refrained from making a decision on whether section 12(1)(b) required the parties only to ignore an express choice of law, or whether it also excluded factors relevant to an implied choice of law.

In the case under consideration here, *Martrade Shipping & Transport GmbH v United Enterprises Corporation*, Popplewell J was again directly confronted with the issue of the applicability of the Act based on section 12(1). It seems that this is the first reported case in which the High Court has had to determine the applicability of the 1998 Act based solely on section 12(1). In *Bulk Ship Union SA*, Popplewell J's remarks on section 12(1) of the 1998 Act had been restricted to only a few words (paragraph [26]). Indeed, in his decision in *Martrade Shipping* Popplewell J observed that: '[I]t is a point which the tribunal described as arising in an increasing number of cases and upon which the court's guidance would be welcome' (paragraph [1]). As it turns out, the facts in the two cases are strikingly similar.

The facts in *Martrade Shipping*

The case before the High Court was an appeal from the decision of the London arbitration tribunal on a partial award. The claimant at the material time was a Marshall Islands company owner of a vessel registered in Panama, which was managed by a Liberian company registered in Greece. The defendant (a German company) had chartered the vessel under a charterparty contract dated 2 July 2005. The contract was an amended form of the NYPE standard contract. An additional clause in the charterparty expressly provided for English law and London arbitration.

In the tribunal the owners had claimed that the defendant charterers refused to make payment in full on completion of the charterparty contract, on the basis that the defendant charterers were entitled to make deductions for alleged off-hire, bunkers used during off-hire and a bunker price differential claim. The tribunal found in favour of the owners in respect of the unpaid hire in the sum of $178,342.73, together with a further award of 12.75 per cent interest under the 1998 Act for the period from 23 September 2005 until the date of payment. The defendant charterers did not dispute the principal award of the tribunal, but challenged the award of interest under the 1998 Act, in reliance on section 12(1) of the Act.

The defendant charterers argued that if the parties had not expressly amended the standard form NYPE contract to English law, it would have been governed by US law, which would have rendered the 1998 Act inapplicable. The tribunal rejected the argument of the defendant charterers and agreed

with the position of owners. The tribunal held that English law would have governed the charterparty contract in the absence of an express choice of law clause, based on the cumulative connecting factors that:

- the parties' had expressly stipulated London arbitration
- they had used the English language in drafting the transaction documentation
- the logs to which the charterers were entitled were in English
- the General Average (GA) was to be adjusted in London under English law
- the vessel had been entered into the London P&I Club an
- the Inter-Club agreement was incorporated subject to the express choice of English law in the charterparty.[6]

The High Court overturned the tribunal's decision, based on two principal grounds in its interpretation of section 12(1) of the 1998 Act. First, in interpreting section 12(1)(a), the court held that the factors relied upon by the tribunal in reaching the conclusion that the charterparty contract had a significant connection with England in reality had very little significant connection with England. Secondly, in interpreting section 12(1)(b), the court held that English law would have been inapplicable to govern the charterparty contract had the parties not made a choice of English law.

Analysis

Popplewell J reaffirmed the view he had expressed in *Bulk Ship Union SA v Clipper Bulk Shipping Limited*[7] that either (or both) of the requirements in the sub-paragraphs of section 12(1) is sufficient to bring the 1998 Act into application. He held that here must be a significant connection between the contract and England and that the charterparty contract would be governed by English law if the parties had not made a choice of English law. Further, he addressed the issue of whether the claimants were entitled to interest under the 1998 Act separately by taking the two sub-sections in turn.

In respect of section 12(1)(a), the court was principally concerned with the commercial policy objective of section 12(1) of the 1998 Act, which is to protect suppliers against late payments in commercial transactions. The interest rate (which Popplewell J regarded as penal) was not to be used to encourage a choice against the application of English law in international contracts <correct – sense of original not clear?>. Popplewell J stated that the significance of the connecting factor(s) assessed singly or cumulatively must be such that: 'the Englishness of the connection must be capable of justifying an English domestic policy of imposing penal rates of interest on a party to an international commercial contract. It must provide a real connection between the contract and the effect of prompt payment of debts on the economic life of the United Kingdom' (paragraph [15]).

In order to give some tangibility to the vague concept of 'significant connection' under the 1998 Act, Popplewell J suggested that factors connecting the contract to a part of the UK include the place for performance of the contract, the nationality of the parties, the place where the parties carried out their business and the place where the economic consequences of the delay is felt (such as related contracts, related parties, insurance arrangements or tax consequences of the transaction). Popplewell J did not consider the factors upon which the tribunal relied as having any real connection with England for the purposes of the Act.

A significant point of Popplewell J's decision is that he regarded considerations of the choice of law and choice of forum as having no bearing when interpreting section 12(1)(a). Popplewell J emphasised that the choice of which party's national law should apply to an international commercial contract was not relevant to the interpretation of section 12(1). This was justified on the basis that if English law was to apply simply through choosing that London arbitration should govern the charterparty,

[6] However, the tribunal did not give weight to other connecting factors suggested by the respondents that favoured the application of English law such as the fact that the standard of classification purposes was set by Lloyd`s Register and the basic war risk coverage was to be as defined by Lloyd`s of London.

[7] Note 4 [26].

the GA and the use of the amended NYPE agreement, the commercial purpose of the 1998 Act would be defeated by discouraging international businesses having no geographical or commercial connection with England from choosing English law and English courts in order to avoid the English domestic penalties.

Popplewell J's decision might also be interpreted as a way of discouraging forum shopping should international companies select English law for their transaction as a form of security for payment. For example, the parties to a maritime charterparty contract who choose London arbitration or commercial dispute resolution (and presumably have not made a choice of English law) would expect that any delay in payment would be met by the English domestic penalty provisions, thereby encouraging prompt payment, particularly on the part of charterers.

Secondly, as regards the interpretation of section 12(1)(b), Popplewell J had the opportunity to make a decision on whether it was concerned only with the absence of an express choice of law, or whether it also excluded consideration of additional factors indicating an implied choice of law relevant under Article 3 of the Rome Convention. Popplewell J had refrained from making a decision on this point in *Bulk Ship Union SA v Clipper Bulk Shipping Limited*, despite the fact the counsel for the parties in that case debated the issue before him at some length. Popplewell J held that Article 12(1)(b) directs the inquiry to Article 4 of the Rome Convention rather than Article 3. Thus, Article 12(1)(b) deals only with the law that would applicable had the parties not made a choice of law, either expressly or impliedly.

Popplewell J also drew support from Toulson J's decision in *Surzur Overseas Limited v Ocean Reliance Shipping Company Limited*,[8] which by analogy construed clause 27 of the Unfair Contract Terms Act (UCTA) 1977 as excluding the operation of sections 2–7 and 16–21 of UCTA where the law that will apply to the contract is English law only consequent to the choice of the parties to the contract. If the parties do not specify that English law should govern the contract, then the law of a third country would govern the contract. Toulson J in that case had ruled that the choice of London arbitration was not relevant to the interpretation of section 27 of UCTA because, first, the choice of law and choice of forum elements were contained in the same clause and, secondly, the choice of forum element was only relevant to determining whether the parties had made a choice of law under Article 3 of the Rome Convention rather than to Article 4 of the Rome Convention.

Popplewell J applied the presumption in Article 4(2) of the Rome Convention by holding that Greek law would probably have been the applicable law in the absence of a choice of law. The governing law for the performance of the contract would usually be the principal place of business of the owners but where, as in this case, the owners had employed an agent whose principal place of business was in Greece, then the presumption was that the contract would be performed there. Clearly the contract was not to be performed in any part of the UK.[9]

The court did not assess the potential applicability of the escape clause[10] in Article 4(5) in the Rome Convention in favour of English law based on other connecting factors the tribunal had ruled as significantly connecting the charterparty contract to a part of the UK under section 12(1)(a). It appears that the court's interpretation of Article 12(1)(b) of the Act would most likely have been the same upon further consideration of Article 4(5). Despite the cumulative 'dint of numbers'[11] allegedly connecting the contract to the application of the English legal system, these factors were not significant enough to outweigh the presumption in Article 4(2).

[8] [1997] CLY 906.

[9] Popplewell J also held that Article 4(4) of the Rome Convention was inapplicable to displace Article 4(2) because the charterparty contract in this case was not a contract for the carriage of goods. Reliance was placed on *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen* [2009] ECR I–9687 at [34]–[35].

[10] Recital 20 of Rome I describes it as the 'escape clause'.

[11] Case C–64/12 *Schlecker t/a Firma Anton Schlecker v Boedeker* [2013] ILPR 2 at [40].

Conclusion

The 1998 Act clearly provides an opportunity for shipowners to obtain substantial rates of interest from charterers if there is delay in payment. However, section 12 presents a significant hurdle that must be overcome to achieve the desired result. If the charterparty contract has no commercial or geographical connection with the UK, owners cannot claim any benefit under the Act even by including a choice of forum agreement to litigate or arbitrate in any part of the UK. It seems that the only way to avoid a decision that section 12(1) of the 1998 Act should not apply would be to ensure that at least some aspect of the services to be performed should have a viable connection with some part of the UK. This might include using brokers in any part of the UK, taking out insurance or guarantees in the UK, making payments into UK bank accounts or setting up a place of business in any part of the UK for the purpose of carrying out part of the charterparty. Owners will need to decide whether to invite the benefits available under the 1998 Act against the potential burdens and costs that will inevitably arise in the maritime commercial context.