BEN MACFARLANE & CO
INSURANCE SHIPPING AND TRADE SOLICITORS

4 LOMBARD STREET
LONDON EC3V 9HD

T +44 (0)20 7190 2988
F +44 (0)20 7190 2989
www.bjm-co.com

THE APPLICABILTITY OF THE LATE PAYMENT OF COMMERCIAL DEBTS (INTEREST) ACT 1998 TO CHARTERPARTIES PROVIDING FOR ENGLISH LAW AND LONDON ARBITRATION

MARTRADE SHIPPING & TRANSPORT GMGH

-V-

UNITED ENTERPRISES CORPORATION [2014] EWHC 1884

BY FRANCISCO GOZÁLVEZ, REGISTERED EUROPEAN LAWYER AT BEN MACFARLANE & CO

INTRODUCTION

In the present case Mr. Justice Popplewell, sitting in the Commercial Court, had to examine a short point in relation to the applicability of the Late Payment of Commercial Debts (Interest) Act 1998 (the "1998 Act") to charterparties providing for English law and London arbitration. This was an appeal pursuant to s. 69 of the Arbitration Act 1996 from the Second Partial Final Award of William Robertson and Bruce Harris dated 10th September 2013.

The arbitrators held that the Owners were entitled to an award in respect of hire of US$178,342.73 and that they were also entitled to interest on that sum calculated at the rate of 12.75% under the 1998 Act. Popplewell J's interpretation of the law has thrown some light on this area which gives important guidance to Charterers and Owners as to when this statute will apply.

This newsletter examines (1) s. 12 (1) of the Act 1998 and (2) Popplewell J's reasons for holding that the 1998 Act should and should not be applicable.

BACKGROUND

The dispute arose out of a time charter trip on an amended NYPE form dated 2nd July 2005 (the "Charterparty"). The Owners of the m/v "Wisdom C" (the "Vessel"), were a Marshall Islands company. Although the vessel was registered in Panama, she was managed by a Liberian company registered in Greece. Under the terms and conditions of the Charterparty, the vessel was to be placed at the disposal of the Charterers (a German company) on passing Aden and was to be employed to load cargoes of steel products at Tuapse (Russia), Odessa (Ukraine) and Constanza (Romania) and to be discharged at Jebel Ali (UAE), Karachi (Pakistan) and Mumbai (India).

The parties had agreed in an addition to the Charterparty that all disputes arising out of the contract should be referred to arbitration in London and that the contract was governed by English law. The Charterers did not appeal from the award of principal but instead appealed against the award of interest under the 1998 Act. In order to explain the position in greater detail, we set out the provision referred to in the judgment. Section 12 (1) of the 1998 Act provides as follows:

"*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 of the 1998 Act clearly states that the penal interest provision would only apply if one or both of the requirements are fulfilled. The starting point would be, therefore, to determine if there was a 'significant connection' between the contract and England (s. 12 (1) (a)) or if the contract, save for the choice of English law, would be governed by foreign law (s. 12 (1) (b)).

Popplewell J therefore had to consider: (1) which factors are capable of fulfilling the s.12 (1) (a) criterion of 'significant connection' and (2) which factors were relevant in determining whether the charterparty may be governed by foreign law in accordance with s.12 (1) (b). For reasons of logical progression, Popplewell J addressed the questions in that order: (1) and (2).

JUDGMENT

- **Section 12 (1) (a) of the 1998 Act**

The first point of law discussed by Popplewell J was whether the choice of English law is of itself sufficient to attract the application of the 1998 Act where parties to a contract with an international dimension have in fact chosen English law to govern the contract. He concluded that it was not. In the present case it was common ground that what is required by the 1998 Act is a 'significant connection' factor. In other words, the party seeking to impose a deterrent penal provision must prove a real connection between the contract and the application of the 1998 Act.

On the basis that the provision could be applicable, a further issue was whether this section might have a considerable economic value to shipping and to the United Kingdom. Popplewell J asserted that many parties, in their charterparties, often inserted an English law provision accompanied by a choice of English jurisdiction, either to be referred to Arbitration in London or to be decided in the High Court. That had the effect of protecting the rights and obligations of the parties by tribunals with extended expertise in the shipping industry. However, Popplewell J was of the view that s. 12 (1), by subjecting parties to a penal rate of interest on debts, might discourage those who would have otherwise chosen English law to govern their charterparty.

Popplewell J stated in his judgment that a London arbitration or English jurisdiction clause cannot be a relevant or determinant connecting factor for the purpose of s. 12(1) (a). The mere choice of England as the place where all the incidents of the contract are to be resolved does not connect the substantive transaction to England.

In Popplewell J's judgment the party seeking to apply s.12 (1) (a) must provide a real connection which justifies the imposition of penal rates of interest. The connecting factors are in outline:

a) That the place of performance of obligations under the contract is in England;

b) Where the contract contemplates the debt may be payable by an English national;
c) Where the parties to the contract may be carrying out business in England;
d) Where the late payment of the debt may have an impact in England, such as when there are related contracts or even tax consequences involving payment in England.

However, Popplewell J was of the opinion that these factors were not applicable in the present case. On that basis, Popplewell J identified the factors referred to by the tribunal in their award and concluded that these were not capable, as a matter of law, of constituting a 'significant connection' for the purpose of s.12 (1)(a), either separately or cumulatively. These factors were as follows:

a) The English language used in the drafting of the charterparty was not a significant connexion, especially when many countries use English as their first language.
b) Secondly, to the extent that the adjustment of general average was in London and in accordance with English law, this fact would certainly not be a relevant connection which will involve the application of the 1998 Act.
c) Thirdly, even the entry of the vessel in a London P&I Club or the NYPE Interclub Agreement providing at paragraph 9 that where this agreement was incorporated into a charterparty its governing law must have been that of the charterparty, were not significant factors.

- **Section 12 (1) (b) of the 1998 Act**

Having defined the scope of s.12 (1) (a), the key question became the effect of s. 12 (1) (b). The purpose of this section is to apply the Act 1998 in the event that English law applies as an express choice. The court confirmed that the London arbitration clause was irrelevant to the inquiry under s. 12 (1) (b)[1] (including whenever English law would apply apart from that express incorporation). Popplewell J made a number of comments on the meaning of the legislation based on the wording and on earlier authority.

First, the arbitration clause should be disregarded because it was only relevant to on inquiry under Article 3 (choice of law), not to the inquiry under Article 4 (applicable law in the absence of express choice) of the Rome Convention. This reasoning was supported by the decision of Toulson J in **Surzur Overseas Limited v Ocean Reliance Shipping Company Limited**[2].

Articles 3 and 4 state as follows:

"Article 3 "Freedom of Choice"

A contract shall be governed by the law chosen by the parties. The choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select

[1] *Surzur Overseas Limited v Ocean Reliance Shipping Company*, 18 April 1997 Transcript ref 1997-F-83
[2] *Ibid*

the law applicable to the whole or a part only of the contract.

Article 4 "Applicable law in the absence of choice"

(1) To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected…

(2) Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence or, in the case of a body corporate or unincorporated, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

(4) A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.

(5) Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country."

Secondly, the defendant argued that the parties had agreed a contract for the carriage of goods and for this reason the Article 4 (2) presumption would not be applicable. The defendants further submitted that the presumptions under Article 4(4) were not applicable either in the present case, so the only relevant factors in determining the proper choice of law were those identified by the arbitrators (i.e. those pointing to English law). On that approach, the arbitrators concluded in their award that Owners were entitled to the interest on the sum awarded under the 1998 Act because the London arbitration clause was a very powerful indication in favour of English law.

Popplewell J did not accept the defendant's submission because Article 4(4) only applies to charterparties when the main purpose of the owner's undertaking is to perform the actual carriage of goods[3] and not to make available a means of transport. In the present case, the Owners had not agreed to carry goods from and to specific ports, but instead to make the

[3] *Intercontainer InterfrigoSc (ICF) v Balkenende Oosthuizen BV* [2010] QB 24

vessel and her crew available to the Charterers. It is trite law in England that the defining characteristic of a time charter is that the vessel would be under the directions and orders of the charterers in respect of its employment[4].

The authorities indicated, therefore, that the undertaking by owners in a time charterparty is to make available to charterers a vessel and employ her in transporting goods[5]. The fact that the Charterparty was a trip time charter did not change the nature of this contract, which remained that of making the vessel and her crew available to the Charterers.

The outcome of this reasoning is that the presumptions in Article 4(2) applied in this case and that the governing law of the Charterparty was to be determined according to those presumptions. In Popplewell J's view the tribunal was led into error in considering the London arbitration clause as a powerful indication that the contract might be governed by English law (leaving aside the express choice of law clause).

This article is intended only to give general guidance and it is recommended that you always consult a solicitor with any particular problem or query you may have.

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[4] *The Scaptrade* [1983] 2 Lloyd's Rep 253
[5] *Ibid*