Neutral Citation Number: [2014] EWHC 1884 (Comm)

2013 Folio 1459

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
7 Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 12/06/2014

Before :

THE HON. MR JUSTICE POPPLEWELL

- -

Between :

Martrade Shipping & Transport GmbH	**Claimant**
- and -	
United Enterprises Corporation	**Defendant**

- -
- -

John Bignall (instructed by **Winter Scott LLP**) for the **Claimant**
Neil Henderson (instructed by **Jackson Parton**) for the **Defendant**

Hearing dates: 23 May 2014

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE POPPLEWELL

The Hon. Mr Justice Popplewell:

Introduction

1. This is an appeal pursuant to s. 69 of the Arbitration Act 1996 from the Second Partial Final Award of William Robertson and Bruce Harris dated 10 September 2013, as further explained and clarified, pursuant to s. 57(3) of the 1996 Act and/or paragraph 25(a)(ii) of the LMAA Rules, by an email dated 11 October 2013 ("the Award"). It raises a short point in relation to the applicability of the Late Payment of Commercial Debts (Interest) Act 1998 to charterparties providing for English law and London arbitration. It is a point which the tribunal described as arising in an increasing number of cases and upon which the Court's guidance would be welcomed.

The Issue

2. At the material time the M/V Wisdom C ("the vessel") was owned by the Defendant, a Marshall Islands company ("the Owners"). The vessel was registered in Panama and managed by a Liberian company registered in Greece. The vessel was chartered by the Owners to the Claimant charterers ("the Charterers") for a time charter trip via the Mediterranean/Black Sea under a charterparty on an amended NYPE form dated 2 July 2005. The Charterers are a German company. The vessel was to be placed at the disposal of the Charterers on passing Aden, and was to be redelivered at one safe port or passing Muscat outbound/Singapore range in Charterers' option. In the event the vessel loaded cargoes of steel products at Tuapse (Russia), Odessa (Ukraine) and Constanza (Romania) and discharged them at Jebel Ali (UAE), Karachi (Pakistan) and Mumbai (India). Hire was payable in US$ to a bank account in Greece. The broker named in the charterparty as entitled to commission was Optima Shipbrokers Ltd who I was told were Greek. The charterparty recorded that it was made and concluded in Antwerp.

3. An additional typed clause of the charterparty provided for English law and London arbitration in the following terms:

> "**Clause 48 – <u>Arbitration</u>**
>
> All disputes arising out of this contract which cannot be amicably resolved shall be referred to arbitration in London. Unless the panics agreed upon sole arbitrator the reference shall be to 2 (two) arbitrators, one to be appointed by each parties (sic). The arbitrators shall be members of the LMAA, and the umpire, if appointed shall be a legal man, and shall be Members of the London Maritime arbitrators' Association otherwise qualified by experience to deal with commercial shipping disputes.
>
> The contract is governed by English Law and there shall apply to arbitration proceedings under this clause the terms of the

> London Maritime Arbitrators' Association current at the time when the arbitration proceedings are commenced.
>
> …
>
> In the event the amount of claim and counterclaim has not exceed US$ 50,000.00 (sic), the parties agree to refer any dispute to a sole arbitrator in accordance with the "LMAA Small Claims Procedure 1989" and any subsequent amendments thereof."

4. A number of disputes between the parties were referred to arbitration, including a claim by the Owners for unpaid hire, in respect of which the Charterers claimed to be entitled to deduct sums for alleged off-hire, bunkers used during off-hire, and a bunker price differential claim. By the Award the tribunal held that the Charterers had not made deductions from hire bona fide and on reasonable grounds (see the ***Kostas Melas*** [1981] 1 Lloyd's Rep 18); and that the Owners were therefore entitled to an award in respect of hire in the sum of US$ 178,342.73. The tribunal further held that the Owners were entitled to interest on that sum calculated at the rate of 12.75% per annum from 23 September 2005 until the date of payment under the 1998 Act.

5. The Charterers do not appeal from the award of principal. The appeal is against the award of interest under the 1998 Act. The Charterers contended before the tribunal, and contend on this appeal, that the 1998 Act has no application by reason of s. 12(1) which provides:

> "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."

6. The tribunal addressed whether there was a "significant connection" under s.12(1)(a) in their clarificatory email of 11 October 2013 in which they said:

> "Our view is that the same factors that we listed in paragraph 21, and possibly also those mentioned in paragraph 22, are sufficient to show that there was a significant connection with this country."

7. Paragraphs 20-23 of the Reasons, which formed part of the Award, addressed the question of applicable law under s.12(1)(b) in the following terms:

> "20. On the basis that they were entitled to the Award they sought, the owners asked for interest on the balance of hire awarded to them under the Late Payment of Commercial

Debts (Interest) Act 1998. The charterers sought to rely on section 12(1) of that Act, arguing that if the charterparty had not been expressly amended to make it subject to English law (as happened in clause 48 of the charter), the New York arbitration provision in the printed clause 17 would have remained and there would thus have been a clear choice of US law, so English law would not have applied but for the specific choice in clause 48, and therefore the Act could have no application. However, it does not seem to us to follow at all that if the parties had not expressly chosen English law, as they did, they would also not have opted for London arbitration. The presumption must, in fact, be to the contrary.

21. The question then would be what law was to govern, and the choice of London arbitration would be a very powerful indication in favour of English law. The owners also pointed to other factors which, certainly cumulatively, seem to us to reinforce that indication, namely the use of the English language, the fact that the logs to which the charterers were entitled were to be in English, that GA was to be adjusted in London (and English law was to apply to it), that the ship was entered in the London P&I Club, and that the Inter-Club Agreement was incorporated which would be subject to English law. These, in our view, and contrary to the charterers' suggestion that individually and collectively these considerations were "beyond hopeless" are wholly persuasive in favour of a conclusion that English law would have governed absent an express choice. One final consideration: if one asks the question "What other system of law might the charter have been subject to?" there is simply no plausible answer - yet it would have to have a governing law.

22. The owners also sought to say that the fact that the standard for classification purposes was set by Lloyd's Register, and that basic war risk coverage was to be as defined by Lloyd's of London supported their case, but we do not think those are factors to which any weight can be given. However, that does not affect our conclusion on the basis of the other matters we have mentioned.

23. Accordingly, we have no hesitation in concluding that the Act does apply and therefore the owners are entitled to interest at the prescribed rate of 12.75% per annum (being 4.75%, the official rate in June 2005, plus the enhancement of 8%), and we have so awarded."

The arguments

8. Mr Bignall submitted on behalf of the Charterers that:

   (1) The choice of London arbitration was an irrelevant consideration under either limb of s. 12(1) of the 1998 Act. Section 12(1)(a) requires important factors connecting England to the commercial transaction itself which cannot include choice of jurisdiction or any other indicia of an implied choice of law. Section 12(1)(b) requires the application of Article 4 of the Rome Convention ignoring any indicia of choice of law whether express or implied.

   (2) The other factors relied on by the tribunal were not capable of amounting to significant connecting factors under s. 12(1)(a) either singly or cumulatively.

   (3) The application of Article 4 of the Rome Convention to the inquiry under s. 12(1)(b) led to the conclusion that the charterparty would be governed by foreign law absent the express choice of English law in clause 48.

9. On behalf of the Owners Mr Henderson submitted that:

   (1) The Tribunal's finding that there was a significant connection between the charterparty and England for the purposes of s.12(1)(a) was a finding of fact which is not subject to review upon an appeal (***The Baleares*** [1993] 1 Lloyd's Rep 215, 228).

   (2) The London arbitration clause was capable of amounting to a significant connection between the charterparty and England under s.12(1)(a). When considering whether there is a significant connection, there is no need to disregard factors which might be indicia of an implied choice of law such as the arbitration clause.

   (3) In any event the other factors relied upon by the tribunal were capable, singly or cumulatively, of amounting to a significant connection between the charterparty and England.

   (4) Further or alternatively Section 12(1)(b) was not fulfilled because the Charterers failed to prove that the charterparty would not have been governed by foreign law absent the express choice of English law in clause 48.

Discussion and conclusions

Section 12(1)(a)

10. Mr Henderson's argument that the tribunal's conclusion under s.12(1)(a) is a finding of fact which is not subject to review begs the question whether the factors upon which the tribunal relied are capable in law of providing a significant connection, either singly or cumulatively.

11. A useful starting point is to consider the policy which underlies the 1998 Act. It applies to qualifying debts arising under commercial contracts for the supply of goods and services (section 2) and implies a term into such contracts that such debts are to carry statutory interest in the same way as interest carried under an

express contractual term (section 1). Since the coming into force of the Act, the rate of statutory interest has been set by successive statutory instruments at 8% above base rate from time to time, pursuant to section 6, which provides:

> "**6. Rate of statutory interest.**
>
> (1) The Secretary of State shall by order made with the consent of the Treasury set the rate of statutory interest by prescribing—
>
> (a) a formula for calculating the rate of statutory interest; or
>
> (b) the rate of statutory interest.
>
> (2) Before making such an order the Secretary of State shall, among other things, consider the extent to which it may be desirable to set the rate so as to—
>
> (a) protect suppliers whose financial position makes them particularly vulnerable if their qualifying debts are paid late; and
>
> (b) deter generally the late payment of qualifying debts."

12. The interest rate is not intended to be compensatory. It exceeds the rate at which most commercial creditors would be likely to have to borrow whilst being kept out of their money. It can properly be regarded as a penal rate which is intended to act as a deterrent so as to promote the purposes of the Act reflected in section 6. Two purposes are identified. One is the need to protect commercial suppliers whose financial position makes them particularly vulnerable if their debts are paid late. The other is the general deterrence of late payment of commercial debts. The application of the rate is not limited to commercial debtors or creditors of a particular size or kind. It is not discretionary, save to the extent that the conduct of the parties may justify its disapplication in whole or in part (section 5). The Act is intended to promote prompt payment of all commercial debts and discourage the use of delay in payment as a business tool for commercial advantage, not only in order to protect the vulnerable but also as a matter of general policy. The Act gives effect to domestic socio-economic policy and seeks to promote the benefit of prompt payment of debts on the economic life of the United Kingdom.

13. Section 12 of the Act provides that where parties to a contract with an international dimension have chosen English law to govern the contract, the choice of English law is not of itself sufficient to attract the application of the Act. Section 12 mandates the application of the penal interest provisions only if one or both of two further requirements are fulfilled. There must be a significant connection between the contract and England (s. 12(1)(a)); or the contract must be one which would be governed by English law apart from the choice of law (s.

12(1)(b)). Either is sufficient. There is a gateway to the application of the Act under either s.12(1)(a) or s.12(1)(b).

14. Why is it that section 12 provides that where parties to a contract with an international dimension have chosen English law to govern the contract, the choice of English law is not of itself sufficient to attract the application of the Act? Two explanations may be given.

15. First, the Act reflects domestic policy considerations which are not necessarily apposite to contracts with an international dimension, and are not made so merely by the parties' choice of English law to govern such international contracts. There must therefore be an additional connection between England and the contracts, either by English law being the applicable law under established conflict of laws principles irrespective of the parties' choice (s12(1)(b)), or by some other connecting factor or factors which singularly or cumulatively are significant (s.12(1)(a)). This suggests that what is required by the significant connecting factor(s) is something which justifies the extension of a deterrent penal provision rooted in domestic policy to an international transaction. Put another way, 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.

16. Secondly it is of considerable economic value to this country that international parties, including notably those involved in shipping, regularly choose English law and jurisdiction to govern their contracts. In charterparties, and many other contracts of international trade, a choice of English law is often accompanied by a choice of English jurisdiction, whether by arbitration in London or in the High Court. They are often found in a single composite clause, as in clause 48 of the instant charterparty. They go hand in hand because parties recognise that it is in general desirable that rights and obligations should be adjudicated upon by tribunals with expertise in the principles of law which determine such rights and obligations. Section 12 recognises that subjecting parties to a penal rate of interest on debts might be a discouragement to those who would otherwise choose English law to govern contracts arising in the course of international trade, and accordingly does not make such consequences automatic. If the additional requirements in section 12 would always be met by a choice of English jurisdiction, whether by arbitration or in the High Court, this purpose would be defeated.

17. In my judgment factors which are capable of fulfilling the s.12(1)(a) criterion of "significant connection" must connect the substantive transaction itself to England. Whether they provide a significant connection, singly or cumulatively, will be a question of fact and degree in each case, but they must be of a kind and a significance which makes them capable of justifying the application of a domestic policy of imposing penal rates of interest on a party to an international commercial contract. They must provide a real connection between the contract and the effect of prompt payment of debts on the economic life of the United Kingdom.

18. Such factors may include the following:

(1) Where the place of performance of obligations under the contract is in England. This will especially be so where the relevant debt falls to be paid in England. But it may also be so where other obligations fall to be performed in England or other rights exercised in England. If some obligations might give rise to debts payable in England, the policy considerations underlying the Act are applicable to those debts; and if some debts under the contract are to carry interest at a penal rate, it might be regarded as fair and equitable that all debts arising in favour of either party under the contract should do so.

(2) Where the nationality of the parties or one of them is English. If it is contemplated that debts may be payable by an English national under the contract, the policy reasons for imposing penal rates of interest may be engaged; and if only one party is English, fairness may again decree that the other party should be on an equal footing in relation to interest whether he is the payer or the payee.

(3) Where the parties are carrying on some relevant part of their business in England. It may be thought that persons or companies who carry on business in England should be encouraged to pay their debts on time and not use delayed payment as a business tool even in relation to transactions which fall to be performed elsewhere. Moreover a supplier carrying on business in England may fall within the category identified in s.6(2)(a) of those whose financial position makes them particularly vulnerable to late payment of their debts, although these are not the only commercial suppliers for whose benefit the Act is intended to apply. The policy of the Act may be engaged in the protection of suppliers carrying on business in England, whether financially vulnerable or not, even where the particular debts in question fall to be paid by a foreign national abroad.

(4) Where the economic consequences of a delay in payment of debts may be felt in the United Kingdom. This may engage consideration of related contracts, related parties, insurance arrangements or the tax consequences of transactions.

19. On the other hand, a London arbitration or English jurisdiction clause cannot be a relevant connecting factor for the purposes of s.12(1)(a). A choice of England as the place where disputes are to be resolved does not connect the substantive transaction itself to England. Choice of law considerations must be ignored for the purposes of s.12(1)(a), because the section will only be engaged in the first place where there has been a choice of English law. A London arbitration clause, once shorn of its significance as ancillary to the choice of law, has no relevance or significance to the substantive rights and obligations of the parties. Choice of forum governs procedural rights and remedies, not the substantive obligations which would arise under an implied term by virtue of the operation of the 1998 Act. If the contract would, absent choice, be a foreign law contract (which is when s.12(1)(a) will be determinative), a choice by the parties of an English forum to determine and apply their rights under that foreign law could provide no logical justification for subjecting them to the domestic policy considerations justifying penal interest under the 1998 Act or indeed to any other substantive obligations

which arise as a matter of English law. The London arbitration clause is irrelevant in this context not because it is an indicia of an implied choice of law, but rather because choice of England as a forum for dispute resolution does not of itself provide any reason for subjecting those whose contracts would be governed by foreign law, absent choice of English law, to any substantive English law rights and obligations; and in particular it can provide no logical justification for subjecting parties whose international contract has no connection with England other than choice of English law to the domestic policy of deterrence embodied by the 1998 Act. If choice of English law is not a sufficient ground for doing so, which is the premise of section 12, why, one may ask, should a choice of dispute resolution in England do so? I can see no reason. The choice of London arbitration can have no connection with the effect of late payment of debts on the economic life of the United Kingdom. Moreover, if the additional requirements in section 12 would always be met by a choice of English jurisdiction, whether by arbitration or in the High Court, the efficacy of the section in encouraging international businessmen to choose English law and jurisdiction without fear of the application of penal interest rates would be undermined.

20. Mr Henderson submitted that even if London arbitration is to be put on one side, as I have held it must be, the tribunal was entitled to treat the other factors it identified as amounting, cumulatively, to a sufficient significant connection within the meaning of s.12(1)(a); and that the tribunal had done so. I do not read the Award as having treated the factors as sufficient in the absence of the London arbitration clause. In those circumstances Mr Henderson invited me to remit the matter to the tribunal for their further consideration. I decline to do so because I do not consider that the other factors identified are capable as a matter of law of constituting a significant connection for the purposes of s.12(1)(a), even cumulatively. Taking each in turn:

    (1) The charterparty being in the English language provides no relevant connection. English is the first language of many countries and a primary language employed in international trade, whose use betrays no significant connection between the transaction itself and England. If and to the extent that the use of English in a contract may cast light on a choice of law, either generally or by reference to specialist terms or forms, that is not a relevant consideration under section 12(1)(a). Similar considerations apply to the Charterers' entitlement to logs in the English language.

    (2) The adjustment of general average in London and in accordance with English law is also not a relevant connection. Insofar as the choice of English law to govern the adjustment might carry with it the application of the 1998 Act to allow penal interest on debts arising out of such adjustment, it is a choice of law clause which falls to be ignored for the purposes of s.12(1)(a), just as does a choice of law clause of more general application to the rights and obligations under the contract. Insofar as what is relied on is the place of adjustment, the provision is simply a choice of forum for the adjustment of a particular subset of potential disputes under the charterparty, and no more capable of being a significant connecting factor than a more general choice of forum clause. Outside the ambit of the subject matter of an average adjustment, its place and proper law have no relevance. Charterparties not infrequently provide for

adjustment of general average at a different place and under a different system of law from that which is chosen to apply to the remainder of the charterparty. A choice of England as the place of adjustment of general average, and of English law as its governing law, provides no relevant connection between England and the charterparty as a whole.

(3) The entry of the vessel in a London P & I Club (or perhaps more accurately a P & I Club with London managers who also have offices in Greece and Singapore) is of no real significance. Charterers under a time charter may be interested in the identity of the owners' Club because they may look to the Club to perform liabilities of the owners which fall within the scope of cover. But this does not make it akin to the obligations under a charter falling to be performed by an English party or in England. Of course the Charterers could expect that liabilities falling within the scope of P&I cover might be met directly by the Club. If, for example, the vessel were arrested, or an arrest threatened, the Club might put up security. If the security came to be enforceable the Club would have incurred a debt which might attract the provisions of the 1998 Act. But if so, that would be the result of the separate contract contained in the Club letter of undertaking (whose proper law need not be that of the charterparty).

(4) The NYPE Interclub Agreement provides at paragraph 9 that where it is incorporated into a charterparty, its governing law is to be that of the charterparty. It only has a connection with England by reason of the express choice of English law in clause 48 of the charterparty, which falls to be ignored for the purposes of the inquiry under s.12(1).

(5) The fact that the standard for classification purposes was set by Lloyd's Register (although the vessel was in fact described as Russian Class), and that basic war risk coverage was to be as defined by Lloyd's of London, are not capable of being relevant connecting factors to England.

21. It follows that the 1998 Act cannot apply through the gateway of section 12(1)(a).

Section 12(1)(b)

22. The governing law of the charterparty falls to be determined in accordance with the Rome Convention, given the force of law by the Contracts (Applicable Law) Act 1990, which provides:

> "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 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 unincorporate, 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."

23. A choice of London arbitration in accordance with LMAA Rules will generally be treated as a choice of English law demonstrated with reasonable certainty under Article 3 of the Rome Convention: see Dicey Morris & Collins *The Conflict of Laws* 15th Edn at paras 32-062 to 32-064, ***Egon Oldendorff v Libera Corporation*** [1996] 1 Lloyd's Rep 380. Where, as here, the clause provides also for the umpire to be legally qualified, the certainty of the choice is reinforced. That is not however a permissible route to treating the arbitration clause as relevant under s.12(1)(b) of the 1998 Act, which requires choice of law to be ignored in the exercise of determining the governing law. The words in section 12(1)(b) "but for that choice" require there to be ignored any choice of law, whether express or implied (to use a shorthand for what is more accurately a choice "demonstrated with reasonably certainty by the terms of the contract or the circumstances of the case"). Section 12(1)(b) directs the inquiry to Article 4, not Article 3: the question

is what would be the governing law by the application of Article 4, assuming no choice of law under Article 3.

24. This analysis, and the conclusion that the London arbitration clause is irrelevant to the inquiry under section 12(1)(b), is supported by the decision of Toulson J, as he then was, in ***Surzur Overseas Limited v Ocean Reliance Shipping Company Limited*** 18 April 1997 Transcript ref 1997-F-83. In that case he had to consider the application of the Unfair Contract Terms Act 1977 to a no set off clause in loan agreements between a foreign bank and foreign one ship companies, which contained an English choice of law and jurisdiction clause. Clause 27 of UCTA provides:

> "(1) Where the law applicable to a contract is the law of any part of the United Kingdom only by choice of the parties (and apart from that choice would be the law of some country outside the United Kingdom) sections 2 to 7 and 16 to 21 of this Act do not operate as part of the law applicable to the contract."

25. Toulson J said:

> "Mr Doctor challenges that approach. He says that one cannot look to the Rome Convention, and in particular to art 4, in the way that Mr Temple's argument does, because art 4 is expressly dealing with a situation where the parties have not made a choice of law, whereas here the parties have made a choice of law. But for the purposes of applying this part of s.27, one must ignore the actual choice made and deal with the matter on the hypothesis that no such choice had been made. On that hypothesis, art 4 would give the appropriate guidance. The argument advanced by Mr Doctor on that point seems to me, with respect, fallacious.
>
> ….
>
> Mr Doctor's initial submission was, that absent the parties express choice of English law the only factor connecting the contracts with England was the choice of jurisdiction clause, which he contended could be looked at separately from the choice of law clause. His argument was this: applying s.27, but ignoring the choice of law clause, the choice of this court for jurisdictional purpose would point to English law being the intended law of the contract.
>
> I cannot accept the argument. It seems to me that it involves an over-refined reading of s.27. Choice of law and choice of jurisdiction do not have to be the same, but it is normally logical and sensible that they should be. Here, the law and jurisdiction clause has in my judgment to be read as a whole. For the purposes of s.27, in determining what law would apply

> but for the parties' express choice, I must therefore ignore the whole of that clause.
>
> However, even if that clause is to be read as containing two separate and distinguishable parts, and if the right course for me is to ignore the choice of law clause but look at the choice of jurisdiction clause, the argument that the choice of jurisdiction clause amounts to or implies a choice of English law is self-defeating, for that clause would then still fall to be ignored on the principle that s.27 requires one at this stage of the exercise to ignore the choice made by the parties."

26. My conclusion in this case is not based on the first ground identified by Toulson J, that if the governing law agreement is to be disregarded, so too is the choice of forum because it is contained in the same clause. The arbitration clause in this case is to be ignored because it is only relevant to the inquiry under Article 3, not, as will be seen, to the inquiry under Article 4 which is the inquiry dictated by section 12(1)(b).

27. No authority was drawn to my attention which addresses the application of Article 4 to a time charter. This is perhaps not surprising, because, as the editors of Time Charters 6th Edn observe at paragraphs I.21-22, it will be a rare case in which there is no choice of law which determines the governing law under Article 3.

28. Mr Henderson argued that the presumption in Article 4(2) was disapplied because the charterparty was a contract for the carriage of goods falling within Article 4(4). I cannot accept that submission. Article 4(4) applies to a charterparty, other than a single voyage charterparty, only when the main purpose of the owner's contractual undertaking is to perform the actual carriage of goods, not merely to make available a means of transport: ***Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV*** (Case C-133/08) [2010] QB 24 at [37]. A time charter is not such a charterparty: the owner does not agree to carry goods from and to specific or nominated ports, but rather to make the vessel and her crew available to the charterer, in return for hire, as a means for the charterer to transport goods. The defining characteristic of a time charter is that the vessel is under the directions and orders of the charterer as regards its employment. It is the charterer who determines what voyages the vessel is to undertake and what cargo it is to carry, within the geographical and other constraints contained in the particular charterparty clauses. Typically the charterer pays for the cost of fuel in employing the vessel and her crew as he chooses. In ***The Scaptrade*** [1983] 2 Lloyd's Rep 253, 56-7 Lord Diplock said:

> "A time charter is a contract for services to be rendered to the charterer by the shipowner through the use of the shipowner's own servants, the master and the crew, acting in accordance with such directions as to the cargoes to be loaded and the voyages to be undertaken as by the terms of the charterparty the charterer is entitled to give them."

Mr Bignall pointed out that the charterer under this or any other time charter would be free not to use the vessel to carry cargoes at all. This largely theoretical

possibility does not assist. The main purpose of the charter will, save in exceptional cases, be to enable goods to be carried. But it is not sufficient that the main purpose of the contract is the carriage of goods in this sense. That was so in the ***ICF*** case. What matters is that the charterparty is not in nature an undertaking by the owner to carry goods, but an undertaking by the owner to make available to the charterer a vessel and crew for the latter to employ in transporting goods.

29. This is as true of a trip time charter, such as the charterparty in this case, as of a term time charter. Although the length of the period of hire is limited by a trip defined within a geographical range (and sometimes, though not in this case, by a maximum duration), the nature of the contract for the duration of the period remains that of making the vessel and her crew available to the charterers as a means for the charterers to transport goods, not a contract for carriage of the goods by the owners.

30. Accordingly the presumption in Article 4(2) applies. The performance which is characteristic of a contract for the supply of services is the performance of the supplier, not that of the person who pays for the services: see Dicey Morris & Collins 15th ed. at paras 32-75 to 32-77. In the case of a time charter this is the owner (see ***ICF*** at [34]-[35]). Accordingly Article 4(2) dictates that the governing law of the charterparty is determined by the principal place of business of the owner. Where a one ship company incorporated in a jurisdiction of convenience has the ship managed by another company with its principal place of business elsewhere, it will be the place of business of the management company which is determinative. In this case that was probably Greece. On any view it was not England. By application of Article 4(2) the charterparty would not have been governed by English law in the absence of the choice of English law by the parties.

31. In this case the tribunal did not make reference to the Rome Convention. It may have been as a result of failing to distinguish between Article 3 (choice) and Article 4 (connecting factors) that they were led into error in treating the arbitration clause as a powerful indication in favour of English law. However that may be, the facts identified in paragraphs 20-23 of the Award are not capable of supporting a conclusion that for the purposes of section 12(1)(b) the charterparty would have been governed by English law in the absence of the parties' choice of English law.

Conclusion

32. The appeal will be allowed.