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Dispute Resolution
Case Law Update
Rosling King LLP

Vitol SA v Genser Energy Ghana Limited [2022] EWHC 1812 (Comm)

Case Summary

The English Commercial Court has ordered a defendant Ghanaian company to pay interest under the Late Payment of Commercial Debts (Interest) Act 1998 (the "**Act**"), on the basis that the parties' international propane contract was "*significantly connected*" with England. The decision was reached despite the fact that neither party was incorporated in the United Kingdom, and the propane under the contract was to be delivered to a buyer in Ghana. The judgment highlights the broad scope of the Act and application of statutory interest to contracts which on their face have little connection to England.

The Key Facts

The dispute involved an English law Sale and Purchase Agreement (the "**SPA**"), and subsequent addenda, for the sale of propane by Vitol SA ("**Vitol**") to Genser Energy Ghana Limited ("**Genser**"). One of the amendments to the SPA provided a contractual right for either party to terminate the SPA for breach by the other party, in which case the party in breach was to pay a "settlement amount" calculable by the non-breaching party in a "commercially reasonable manner". A claim was brought by Vitol for the unpaid balance of the settlement amount of circa USD 3.5 million and, in the alternative, a claim for circa USD 559,000 in respect of various unpaid invoices.

The settlement amount included contractual late payment interest at 8% above LIBOR which was detailed in the seventh addendum to the SPA. However, that addendum was not signed, and the court consequently held that there was no contractual basis for Genser to pay interest on the outstanding debts at the rate stated.

It was argued, however, that Genser would still be liable to pay interest under the Act, which provides for a rate of interest of 8% over the Bank of England base rate. Genser submitted that Vitol would not be entitled to interest, since section 12 of the Act precluded it:

"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"*

Genser submitted that the SPA did not have any, let alone a significant, connection with England. It argued that, but for the choice of the parties, the SPA would have been governed by the law of Switzerland since this was the place of Vitol's central administration. Alternatively, if the SPA was manifestly more closely connected with another country, this would be Ghana rather than England.

One of the key issues to be determined by the judge in this case was whether the SPA had a "*significant connection with England*" for the purposes of section 12 of the Act. Lesley Anderson QC (sitting as a Deputy Judge of the High Court) referred to the guidance set out by Popplewell

J in *Martrade Shipping & Transport GmbH v United Enterprises Corpn [2014] EWHC 1884 (Comm)* relating to the true purpose of the Act and in particular the non-exhaustive list of factors used to determine whether there is a "*significant connection*".

The True Purpose of the Act

Popplewell J noted that the interest rate specified in the Act was not intended to be compensatory, but rather should be properly regarded as a penal rate.

It is used for the purposes of (a) promoting the protection of commercial suppliers whose financial position makes them particularly vulnerable if their debts are paid late, and (b) deterring the late payment of commercial debts. Further, the Act gives effect to domestic socio-economic policy and seeks to promote the benefit of prompt payments of debts on the economic life of the United Kingdom.

It was reiterated that section 12 was included in the Act because the policy considerations are not necessarily apposite to contracts with an international dimension, requiring an "*additional connection*" between England and the relevant contract. Furthermore, section 12 recognises that subjecting parties to a penal rate of interest might discourage parties that would otherwise choose English law to govern contracts arising in the course of international trade.

A "Significant Connection"

Popplewell J stated that the "*significant connection*" must connect the substantive transaction itself to England. Although whether there is a significant connection is a question of fact and degree in each case, there must be some significance that is capable of justifying the application of a penal rate of interest on a party to an international commercial contract. Further, there must be a real connection between the contract and the effect of the prompt payment of the debt on the economic life of the United Kingdom.

The non-exhaustive list of relevant factors to consider, according to Popplewell J, include:

1. where the place of performance of obligations under the contract is in England (especially when the relevant debt falls to be paid in England);
2. where the nationality of the parties or one of them is English;
3. where the parties are carrying on some relevant part of their business in England;
4. where the economic consequences of a delay in payment of debts may be felt in the United Kingdom.

However, an English jurisdiction clause is not a relevant factor for the purposes of establishing a significant connection.

Analysis of the Factors in this Case

Vitol relied on three factors to establish that the SPA has a significant connection with England:

1. Numerous invoices specified that payment was to be made to Vitol in London.
2. Payments made under the SPA were in fact made to Vitol in London, and this is where

Vitol wanted payments to be sent.

3. Critical decisions in relation to the SPA were taken in, and the key commercial decision makers were based in, London.

Genser argued that the SPA did not establish a requirement for Genser to make payment to Vitol through its London bank. Furthermore, the usual obligation would be for the debtor to seek out the creditor, which would be in Switzerland.

Lesley Anderson QC ruled that Vitol was correct to point to (a) the ultimate payment obligation being payment of the debts in England, and (b) the fact that Vitol was carrying out major decisions on relevant parts of the commercial contract in London. These factors confirmed a significant connection between the UK and the SPA for the purposes of the Act.

The Judge went further to state that, had she not been persuaded by the arguments relating to the Act, Vitol would have been entitled to statutory interest under section 35 of the Senior Courts Act 1981.

Commentary

This judgment clearly shows the broad way in which statutory interest provisions are applied and also demonstrates the need for contracting parties to consider addressing in their English law contracts the issue of late payment remedies.

In particular, parties should be alive to the fact that they might need to contract out of statutory interest to avoid incurring penal rates of interest under the Act. As explained in the judgment, section 12 recognises that penal rates might be a discouragement to those considering English law to govern contracts arising in the course of international trade, and as such does not make such consequences automatic. Parties are therefore able to oust these rates by agreeing a "substantial" remedy for the late payment of debt in the contract under section 8 of the Act.

The judgment also flags that payment into London bank accounts, and the physical presence of managerial staff in the UK, could trigger the possibility of statutory penal rates, even when the international contract itself appears to have little to do with England.

For further information, please contact Hannah Sharp or the Partner with whom you usually deal.