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SAMPLE REPORT

Bulk & Metal Transport v. Voc Bulk

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Description of the Case:	Commencement of Arbitration – Interim Award – Time barred – Claims – Message of the Owner - Interpretation
Case name:	*Bulk & Metal Transport (UK) LLP v Voc Bulk Ultra Handymax Pool Llc*
Date of Judgment:	20th February 2009
Court:	Queen's Bench Division
Judge:	Judge Mackie QC
Citation:	[2009] EWHC 288 (Comm)

Background: This was an appeal about the question of when the arbitration was commenced within Section 14[1] of the Arbitration Act 1996 ("the Act"). By a charterparty on a New York Produce Exchange form the Owners chartered a vessel to the Charterers for a time charter trip from Jeddah to the Persian Gulf. The parties appointed Mr Brian Williamson and Mr Alan Oakley as arbitrators on LMAA terms. This appeal by Charterers was from the first interim award of 13th May 2008 by which the Tribunal held that Charterers were time-barred from advancing claims under Article III rule 2, because a message from the Owners' solicitors dated 2nd November 2006 ("the message") did not commence arbitration proceedings for the purposes of section 14 (4) of the Act.

The Charterers submitted that consideration of the objective meaning and intention of the message involved asking how it would be understood by an ordinary commercial man reading it without the close scrutiny of a commercial lawyer. Applying that test the Charterers suggested that the letter was the invocation of the right to refer the dispute described under the arbitration clause, subject to the acceptance of the settlement proposal, and was not a mere threat of possible future proceedings which if not responded to, would remain to be commenced by way of a further notification. The message invited Charterers to agree upon a sole arbitrator if they were not willing to pay up. The references to the possibility of a settlement at the beginning of the message should not affect that conclusion. The Charterers were "*hereby*" invited to agree the identity of a sole arbitrator "*in the absence of agreement to settle this outstanding claim*". The message was a more explicit notice than several of those which had been found in the cases to meet section 14 (4) and its predecessor.

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[1] *"14. Commencement of arbitral proceedings* (1) *The parties are free to agree when arbitral proceedings are to be regarded as commenced for the purposes of this Part and for the purposes of the Limitations Acts.* (2) *If there is no such agreement the following provisions apply.* (3) *Where the arbitrator is named or designated in the arbitration agreement, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties a notice in writing requiring him or them to submit that matter to the person so named or designated.*(4) *Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter …".*

The Owners submitted that read as a whole dispute to arbitration and that the reference to Clause 45 had to be read in the light of the earlier part of the message and was clearly a precursor to the carrying out of the threat to commence arbitration. The message recognised that the Charterers could not be required to agree a sole arbitrator and that if there was no voluntary agreement all that would remain would be an agreement to arbitrate before two arbitrators. The message contemplated that in that event the arbitration would be commenced precisely as happened on 13th November. The Owners also drew attention to the fact that the Charterers had identified three alternative dates as the date of commencement of the arbitration. The Owners contended that this was in itself a fatal flaw, given the principle that it must be possible to ascertain the time of commencement with certainty.

Issue: The main issue before the Court was whether on its true and proper construction did the message from Owners' solicitors of 2nd November 2006 take effect as a notice sufficient to commence arbitral proceedings within the meaning of section 14 (4) of the Act

Held: The Court took the view that the section was to be interpreted broadly and flexibly concentrating on substance not form. The issue was not whether a message "*commences*" arbitration in some broad sense but whether one party had served a notice requiring the other "*to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter …*". According to the Court, the message did that. The Court stated that the message started by referring to the sum said to be outstanding. It was claimed that alleged failure to pay was a breach of the charterparty and that if payment was not received within seven days the solicitors would commence arbitration under Clause 45, at which point interest and costs would also accrue. If the amount was not paid Charterers were invited to agree to a sole the message was merely a threat to refer the LMAA arbitrator otherwise Charterers would appoint their own arbitrator.

The Court held that it was important not to confuse commencing arbitration under section 14 (4) with taking a step towards constituting the Tribunal. The Court applied *The Baltic Universal* [2] and stated that the fact that a subsequent message, in this case that of 13th November, gave notice of appointment of Mr Williamson as arbitrator explicitly, did not, prevent an earlier communication complying with section 14 (4). The message of 2nd November stated that if payment was not made the dispute would be arbitrated, gave the opportunity explicitly envisaged by Clause 45 (b) for the parties to agree upon a single arbitrator, and made it clear that if that invitation was not accepted then Owners would appoint an arbitrator.

In those circumstances, it was held that it was clear that the message complied with section 14 (4) and therefore the Court allowed the appeal and answered the question of law "*yes*"..

[2] *The Baltic Universal* [1999] 1 Lloyd's Rep 497