Commencement of Arbitration: Form of notice and reiteration of the "broad and flexible" approach following the "Biz" and the "Voc Gallant"

Introduction

The validity of notices purporting to commence arbitration has come under the spotlight before the English High Court in two recent decisions which consider the proper interpretation of section 14 of the Arbitration Act 1996 (the "1996 Act"). Section 14 provides as follows:

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 Limitation 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.

(5) Where the arbitrator or arbitrators are to be appointed by a person other than a party to the proceedings, arbitral proceedings are commenced in respect of a matter when one party gives notice in writing to that person requesting him to make the appointment in respect of that matter.

Whilst the Act allows parties to agree how such notices are to be served, the LMAA terms make clear that section 14 of the 1996 Act applies for the purpose of determining the date that arbitral proceedings are to be regarded as having been commenced.

This is of particular significance where the time limit for commencement of arbitration is limited by statute, the express wording of the contract or the incorporation and operation of the Hague or Hague-Visby Rules.

What notice is required to commence arbitration?

In the absence of any other agreement, a party will only have effectively protected time if he gives the other side "notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of the matter". The English Court has demonstrated an unwillingness to take a strict or overly technical or legalistic approach to the interpretation of a notice purporting to commence arbitration. Subject to compliance with the requirements of the Act, there are otherwise no specific requirements as to the form of the notice. Notice must be served via "effective means" reflecting modern communication techniques but should be interpreted using a common sense approach.

Easybiz Investments v Sinograin and Another (The "Biz")

[2010] EWHC 2565 (Comm); [2011] 1 Lloyd's Rep. 388

Background

The vessel carried cargo under 4 Tanker bills of lading and a further 6 Congenbills. All of the bills incorporated the terms and conditions of a Tanker charterparty, incorporating an arbitration clause which provided for London arbitration and English law to apply. The vessel lost her rudder in transit and was towed to Cape Town for repairs, whereupon General Average was declared. In December 2009, close to one year after their claims arose in December 2008, recovery agents acting on behalf of cargo interests purported to commence arbitration under all of the bills by appointing an arbitrator. The notice was headed "Notice of Appointment of Arbitrator" and was addressed both to the vessel owners (through their London solicitors) and their P&I Club. The notice referred to each of the bills of lading, as well as to the charterparty and set out a brief summary of the dispute. It then named an arbitrator and called upon the other side to appoint an arbitrator in response. The owners' objection was that the notice purported to commence a single composite arbitration, rather than addressing each bill of lading individually and commencing 10 separate arbitrations. The tribunal held that the notice was nevertheless

effective to commence arbitration and to interrupt any time bar. The notice was held to have commenced 10 separate references, one in respect of each bill.

The appeal

The owners challenged the tribunal's decision on the grounds that section 14 of the 1996 Act had not been complied with and the notice was not effective to commence arbitration. However, the Court upheld the tribunal's decision and asserted that the requirements of section 14 had been met. The Court considered that the provisions of section 14 should be interpreted "broadly and flexibly" and that a strict or technical approach should be avoided, especially where the notice had been drafted by non-lawyers. The requirements of section 14 would generally be satisfied if the notice sufficiently identified the dispute to which it related and made clear that the person giving notice was intending to refer the dispute to arbitration. In considering whether those requirements were met the Court took the view that one should concentrate on the substance rather than the form of the notice and consider how a reasonable person in the position of the recipient would have understood the notice.

Bulk & Metal Transport (UK) LLP v Voc Bulk Ultra Handymax Pool LLC (The "Voc Gallant")

[2009] EWHC 288 (Comm); [2009] 2 All E.R. (Comm) 377; [2009] 1 Lloyd's Rep. 41

Background

The parties had entered into a charterparty containing a London arbitration clause. Disputes arose, with the owners claiming outstanding hire for a period deducted by the charterers whilst reloading and discharging cargo at two ports. The time limit for the commencement of any cargo claim by the charterers was 11 November 2006. On 2 November 2006, the owners' solicitors sent a message setting out a claim for hire against the charterers and demanding payment within 7 days. The notice stated that if the charterers failed to pay within the 7 days allowed, the owners' solicitors were instructed to commence arbitration proceedings under the charterparty, at which point interest and costs would also be claimed. The notice then invited the charterers, in the absence of agreement to settle the claim, to agree to the appointment of one of three arbitrators. The

notice concluded by saying that if payment was not made within 7 days or the charterers did not agree to the appointment of a sole arbitrator, the owners would appoint an arbitrator themselves. The charterers had not at that point asserted any cargo claims.

The arbitrators held that in their opinion on any view the message sent by the owners' solicitors did not take effect as a notice of commencement of arbitral proceedings within the meaning of section 14(4) of the 1996 Act. The Tribunal considered that notice was instead given via a further email of 13 November notifying the charterers that the owners had appointed an arbitrator. However, by then the time limit for the commencement of arbitration proceedings had expired with the result that the charterers' claim was time-barred.

The Appeal

The charterers appealed on two questions of law:

1) on its true construction did the message from the owners' solicitors of 2 November 2006 take effect as a notice sufficient to commence arbitral proceedings with the meaning of section 14(4) of the Arbitration Act?; and
2) if so, was such notice from the owners sufficient to protect time for the charterers in relation to their cargo claims?

On the first point, the High Court overturned the tribunal's decision and held that the initial message of 2 November 2006 satisfied the requirements of the 1996 Act and of commercial life. The Court considered that the first notice made sufficiently clear that the contractual arbitration clause was being invoked and that the charterers were required to take steps accordingly. The Court also highlighted the distinction between the commencement of arbitration and the constitution of a tribunal. What was held to be important was not whether a notice contained a particular form of words but whether it made it clear that the arbitration agreement was being invoked and that a party was required to take steps accordingly.

On the second point the Court decided that the charterers, despite having not served a notice themselves, would not be barred from relying upon in their defence of the owners' claims, cargo claims which would otherwise have been time barred but for the commencement of arbitration by the owners.

Conclusion

Both cases exemplify the Court's continuing endeavour to construe language and actions in a flexible and broad commercial sense. The Court has recognised that these types of notices are regularly used by non-lawyers, often international traders, reflecting the breadth of the London arbitration procedures. Whilst clarity remains important, it is now well established that as long as it objectively clear that a communication is intended to refer a dispute to arbitration and to require a party to take steps in that regard, adequate notice will have been given.

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