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SHIPPING E-BRIEF
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Serving notice of arbitration on agent: a fair conclusion on unusual facts

Dana Shipping and Trading PTE Singapore & Another v. Sino Channel Asia Ltd [2017] EWCA Civ 1703

The Court of Appeal has recently revisited the question of whether an arbitration award was made without jurisdiction because a notice of arbitration was not validly served. This case provides a helpful reminder of the legal framework behind implied actual authority and ostensible authority.

The background facts

This case involves three main parties: Dana Shipping ("Dana"), Sino Channel ("Sino") and Beijing XCty Trading Limited ("BX"). Whilst the reference is between Dana and Sino, it is the relationship between Sino and BX which is really of interest.

In around 2009, BX approached Sino, requesting that Sino perform various "services" on its behalf. Essentially, Sino was to conclude back-to-back sale and purchase agreements in its own name and handle the financial arrangements, whereas BX was to deal with the operational side of the contracts.

In 2013, BX asked Sino to enter into a contract of affreightment (COA) for the carriage of iron ore from Venezuela to China with Dana. Aside from being named in the contract, Sino then had nothing further to do with the COA. In short, Sino was "fronting" for BX.

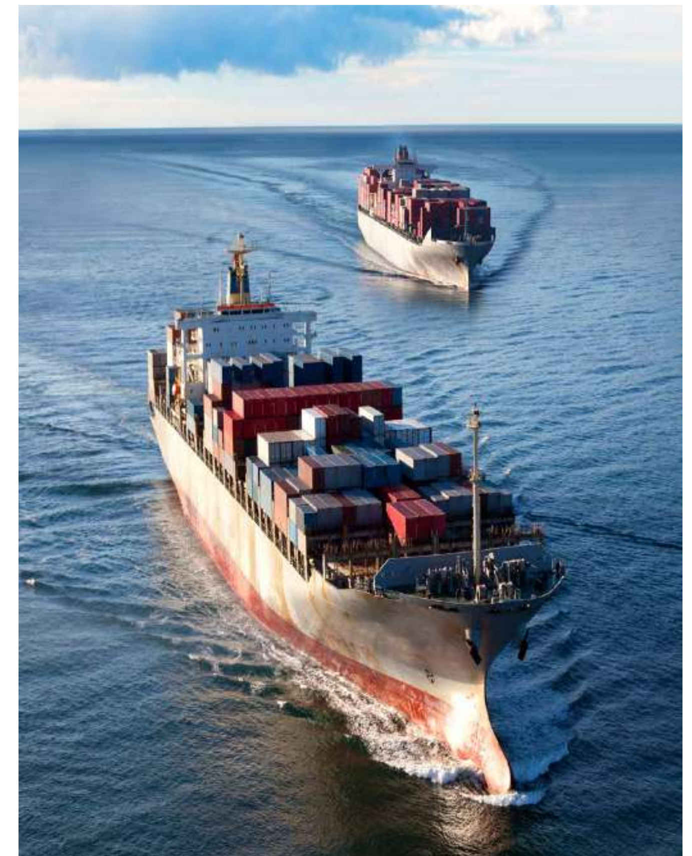
Dana was, however, unaware of the fronting arrangements. Whilst all the communications (bar one message) during the operation of the COA were actually between BX (a Mr Cai) and Dana, Dana understood that Mr Cai was employed by Sino.

In 2014, and further to various disputes arising under the COA, Dana purported to commence arbitration against Sino (via an email to Mr Cai and Sino's brokers); that being the party with which Dana understood it had contracted. Sino, however, did not positively engage with the arbitration, neither appointing its own arbitrator, nor participating in the arbitration. The award was subsequently handed down in Dana's favour and, in 2015, Dana served the same on Sino at Sino's registered address in Hong Kong.

According to Sino, this was the first that they had heard of the arbitration. Sino refused to accept the award and applied, in 2016, to the English Court for a declaration that the award was not valid.

The court at first instance set aside the arbitration award, finding in favour of Sino and declaring that *"the arbitral tribunal was not properly constituted and... the Award was made without jurisdiction"*.

Unsurprisingly, Dana disagreed and the case was appealed.



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The Court of Appeal decision

The question on appeal was whether service of Dana's notice of arbitration was effective. The Court of Appeal considered two legal principles in particular:

1. Whether BX had implied actual authority to receive the notice on behalf of Sino; and
2. Whether BX had ostensible authority to receive the notice on behalf of Sino.

The Court of Appeal first examined the issue of actual authority. Actual authority can either be express, i.e. given by express words, or (as contended by Dana in this matter) implied, i.e. inferred from the conduct of the parties.

The Commercial Court had drawn a distinction between an agent having "general authority" to act on behalf of his principal and an agent having "specific authority" to accept service of notice of arbitration. The Court of Appeal disagreed with this distinction.

The Court of Appeal instead considered that the key question was to look at the relationship between the principal and the agent. The starting point, therefore, must be to examine the arrangements between the parties as they were in reality.

The relationship between Sino and BX was highly unusual. Sino had played no part, and had shown no interest, in the negotiation or performance of the COA. BX were, therefore, dealing with every aspect of the COA. Therefore, in the Court of Appeal's view, it was unrealistic to suggest that Sino, at the time that the notice was served, could have required or expected the notice to have been served on themselves, rather than on BX. The Court accordingly concluded that BX must have had implied actual authority to receive the notice on behalf of Sino.

Secondly, and although further examination of this issue was not strictly necessary due to its first finding, the Court of Appeal considered the question of ostensible authority. It helpfully clarified that ostensible authority is a form of estoppel that arises from a representation made by the principal to a third party that the agent has authority to act on its behalf.

The appearance given to Dana by Sino was that Sino's representative, BX, was to be dealt with for all purposes relating to the COA, which must include the receipt of notice of arbitration. As such, and whilst ostensible authority is conceptually different to implied actual authority, this was, as the Court of Appeal remarked, an instance where the two coincided. The Court, therefore, also found for Dana on the issue of ostensible authority.

Comment

The Court of Appeal's decision in this matter seems to be the fair and just result. It would be surprising if, in these circumstances, BX had been allowed to hide behind its agency relationship.

This judgment does make clear, however, that the issue of authority is heavily dependent on the facts. One would not usually expect a principal to show such a lack of interest in the contracts that his agent enters into on his behalf. As such, we think it unlikely that most cases involving a notice of arbitration disputed for being served on an agent, as opposed to its principal, will be so clear cut. We thus caution that, despite this welcome judgment, it remains important to ensure that an agent's authority to accept notice of commencement of proceedings has been sufficiently demonstrated.

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Court of Appeal upholds liability without fault under the Inter-Club Agreement

Transgrain Shipping (Singapore) Pte Ltd v. Yangtze Navigation (Hong Kong) Co Ltd (Yangtze Xing Hua) [2017] EWCA Civ 2107

This recent Court of Appeal decision reaffirms the view that the word *"act"* in the phrase *"act or neglect"* in Clause 8(d) of the Inter-Club Agreement ("the ICA") does not stretch to *"culpable act"*. The Court of Appeal, upholding the first instance decision, held firm to the reasoning that the intention behind Clause 8 was to provide a mechanical apportionment of liability based on causation without comprising a fault-based analysis.

History or 'archeology' of the ICA

The purpose and history of the ICA has been to provide for a degree of certainty as between owners and charterers, and their respective insurers, as to who is liable for cargo claims, and in what proportion. This 'knock-for-knock' agreement between P&I Clubs has been in place since the first version of the ICA in 1970, with the aim of settlement occurring in line with the ICA terms and in order to avoid lengthy and costly litigation. As such, the intention of the ICA is to solve insurance problems swiftly without consideration of *"hardship or moral culpability"* as cited in the Court of Appeal case, *The Strathnewton* [1982] 2 Lloyd's Reports 296.

The ICA was amended in 1984 to deal with the time limit in which to make a claim and again in 1996, with a more comprehensive overhaul, but without any fundamental deviation from the overall purpose or nature of the ICA. Most recently, the ICA has been amended in the 2011 version to include provision of security.

The background facts

The Owners had time chartered the vessel *Yangtze Xing Hua* to the Charterers for the carriage of soya bean meal from South America to Iran. The NYPE charterparty provided for cargo claims to be settled under the 1996 ICA. Upon arrival in Iran, the Charterers ordered the vessel to wait off the discharge port for over four months.

In subsequent arbitration proceedings, the Tribunal deemed it clear that the vessel was being used as a floating storage by the Charterers to avoid the cost of storing the cargo ashore. Part of the cargo started to overheat and, once the vessel was brought alongside to commence discharge, damage was found in two holds.

The cargo claim was settled by the Owners for approximately €2.6 million, which was then in turn claimed by the Owners against the Charterers, together with hire of approximately €1 million.

The arbitration proceedings

Clause 8(d), the applicable clause of the ICA, states as follows:

> *"(d) All other cargo claims whatsoever (including claims for delay to cargo):*
>
> *50% Charterers*
>
> *50% Owners*
>
> *unless there is clear and irrefutable evidence that the claim arose out of the act or neglect of one or the other (including their servants or sub-contractors) in which case that party shall then bear 100% of the claim."*

The Tribunal looked to the cause of the damage, including whether the Owners had failed to monitor properly the cargo temperatures. It found that the cause of the damage was a combination of the inherent nature of the cargo, together with the prolonged period at anchor. The delay was too long given the moisture content and, therefore, liability did not fall to the Owners.

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Importantly the arbitrators distinguished between *"act"* and something suggesting fault, breach of contract or neglect. It deemed the Charterers' decision to delay discharge as an *"act"* falling within Clause 8(d).

The Commercial Court decision

On appeal, the Charterers argued that the arbitrators' construction of *"act"* was wrong and that an *"act"* must be a *"culpable act"*, implying fault.

The Commercial Court rejected the Charterers' argument and upheld the Tribunal's decision on the basis that the ICA is primarily concerned with a causation-based approach and provides a mechanism for which liability for cargo claims can be apportioned regardless of fault.

The Court of Appeal decision

The Court of Appeal upheld the decisions of the Tribunal and of the Commercial Court:

1. The Court of Appeal rejected the Charterers' argument that the first two (1970 and 1984) versions of the ICA were fault-based and that, if it was the intention to do away with the concept of fault, the 1996 version would have expressly stated this. The 'archaeology' of the ICA was of no use in determining the meaning of the 1996 ICA.
2. The Court of Appeal also disagreed with the Charterers that sub-clauses (a) and (b) of the 1996 ICA require fault such that *"act"* must be construed as requiring fault. They do not.
3. The Charterers had also argued that if an *"act"* did not require 'fault', then the mere act of ordering the loading of the cargo would constitute an *"act"* for which the Charterers would be 100% liable under sub-clauses (c) and (d) of the ICA. This, they said, cannot be right and is why an *"act"* requires 'fault' in order for clauses (c) and (d) to be workable. The Court disagreed. An act will only constitute an *"act"* under sub-clauses (c) and (d) if it was the *effective cause* of the cargo damage/shortage. There was, therefore, no reason to introduce 'fault' to limit the scope of what would constitute an *"act"*. Causation itself is the limiting factor, as was the additional need for *"clear and irrefutable evidence"*.
4. In short, *"act"* should be given its natural meaning within the context of the ICA – restricting it to *"culpable act"* is incorrect. *"Act"* is just that – something which is done. It does not connote culpability. By contrast, *"neglect"*, which is separately mentioned in sub-clause (d), does connote culpability.

Comment

This decision, it is submitted, reinforces the purpose of the ICA, namely to provide a mechanism that regulates the settlement of cargo claims between owners and charterers by providing a particular formula and thereby doing away with protracted and costly litigation. The decision settles the debate surrounding the meaning of sub-clause (d) in the context of the foregoing sub-clauses and confirms that the sub-clauses are not interdependent. Despite being deemed as a 'sweep up' clause, the wording of sub-clause (d) is to be read alone and taken on its own standing, and the word *"act"* should be given its common sense meaning.

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Due diligence: what is the standard expected of owners?

MT "Cape Bonny" Tankschiffarhts GmbH & Co KG v. Ping An Property and Casualty Insurance Company of China Limited, Beijing Branch (Cape Bonny) [2017] EWHC 3036 (Comm)

The Commercial Court has considered whether the Owners in this case had exercised due diligence to make the vessel seaworthy in circumstances where the vessel suffered an engine breakdown mid-voyage from uncertain causes.

The background facts

On 14 July 2011, on the course of a laden voyage from Argentina to China and while seeking to avoid tropical storm Ma-On, the *Cape Bonny* suffered an engine breakdown. The cause of the breakdown was discovered on inspection to be damage to main bearing no. 1, which was not repairable at sea and so towage assistance was required.

On 18 July 2011, the vessel was taken in tow by *Koyo Maru.* The vessel was not permitted to enter a Japanese port of refuge or to discharge her cargo in the Chinese port of discharge, and so proceeded to Yosu, South Korea where her cargo was transferred into another vessel on 2 and 3 August 2011. The port authorities then required the vessel to be taken back out to sea in view of the approach of another tropical storm (Muifa). The vessel returned to Yosu on 9 August 2011, following which *Koyo Maru* was released and the vessel was berthed for repairs.

General average (GA) was declared and, on 28 July 2011 cargo insurers provided a guarantee by which they promised to pay any contribution to GA *"which may hereafter be ascertained to be properly due"*. Cargo's contribution to GA was assessed at about US$2.1 million in the average adjustment published on 13 March 2013.

Cargo underwriters denied any liability under the guarantee, alleging that no amount was 'properly due' from cargo. Alternatively, in the event that a contribution was properly due, cargo underwriters disputed the quantum of the claim.

The Commercial Court decision

Liability

Cargo's basis for denying liability to contribute in GA was Rule D of the York-Antwerp Rules, which provides as follows:

> *"Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault".*

There was no dispute as to the true construction of Rule D and how it operates: both parties accepted the effect of Rule D is that a loss, which is in principle allowable in GA, will not be recoverable if it arises from the actionable fault of the party claiming contributions. In this case, the actionable fault alleged by cargo was a failure by the Owners to exercise due diligence to make the vessel seaworthy.

Cargo's case was that the damage to main bearing no.1 was caused by the presence of metal particles in the luboil system, which had been generated by spark erosion or by damage to the vessel's chain drive gear or had been permitted to enter the engine by poor procedures when the crew were cleaning the filters. In addition, cargo argued that there was progressive wear to the no.1 bearing shells caused by damaged luboil filters failing to remove these particles from the luboil, and that crankshaft deflection readings taken by the ship's crew about a month prior to the voyage indicated "abnormal wear" of the bearing which, in turn, should have resulted in the bearing being opened up such that the existing wear would have been detected prior to the commencement of the voyage.

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The Owners accepted that the vessel was unseaworthy at the commencement of the voyage by reason of the metal particles present in the luboil system, but denied that there had been any failure to exercise due diligence because (on their case) the foreign particles were weld slag, which had been present in the luboil piping from the date of build and had broken off during the voyage in a period of bad weather.

The Court ruled that the bearing suffered from abnormal wear; that the luboil filters were damaged and that foreign particles were present in the luboil: the presence of all three rendered the vessel unseaworthy at the beginning of the voyage. The Court then went on to consider whether the Owners had nevertheless exercised due diligence to make the vessel seaworthy.

The Court was unable to reach any firm conclusions on the source of the metal particles in the luboil. Regarding the damaged luboil filters, the Court found that this could have been discovered by examination of the candles inside the filters, and that *"a skilled and prudent chief engineer would have ensured that a proper visual check was made of at least a representative sample of the candles"*. The Owners had not carried out such a check last time the candles were examined, and were, therefore, unable to prove that they exercised due diligence to make the filters seaworthy. However, as only a proportion of candles were found to be damaged, the damage would not necessarily have been detected by such an inspection, and the failure to exercise due diligence was not causative (it is possible that the representative sample of candles inspected may not have included any of the damaged candles).

In relation to the worn bearing, this should have been detectable from the crankweb deflection readings taken shortly before the voyage, which showed a -0.14mm increase from the readings taken six months earlier. A prudent engineer or superintendent would have decided, in the light of these readings, that bearing clearing measurements should be taken (which would likely have revealed abnormal wear to the bearings). The failure to do so was a failure to exercise due diligence and was causative of the engine breakdown.

Therefore, the GA expenditure was incurred by the Owners due to an actionable fault, and cargo were not liable to make a GA contribution.

Quantum

Cargo interests advanced arguments that various items of expenditure had not been reasonably incurred, including: the hire of the *Koyo Maru* (rather than a less expensive vessel); the diversion to Korea and transhipment of the cargo, and the continued hire of the *Koyo Maru* after arrival in Korea.

Although it was not necessary for the Court to make any ruling on quantum given its findings on liability, it nevertheless considered cargo's arguments on this point, and found that the expenditure had been reasonably incurred in each case. The Court stressed that, while the burden of proving that expenditure was reasonably incurred lies upon owners, owners and managers when making such expenditure are also entitled to the benefit of the doubt if the circumstances are such that a prompt decision is required: there is no reason why hindsight should be taken into account in such circumstances.

Comment

This case emphasises the high standard that owners must meet in order to show that due diligence has been exercised to make a vessel seaworthy, especially in relation to incidents arising out of engine breakdowns/ machinery malfunctions. Owners must not only carry out appropriate inspections on a regular basis, but must also ensure that the results of those inspections are subject to sufficient scrutiny to identify any problems that may be brewing.

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Commencing arbitration effectively: is the recipient an employee with authority to accept service?

Glencore Agriculture B.V. v Conqueror Holdings Limited (m/v Amity) [2017] EWHC 2893 (Comm)

The Commercial Court has recently allowed an application to set aside an arbitration award on the grounds that the arbitration notice had not been properly served as it was sent to the email address of a junior employee. The Court held that the employee had neither actual (whether express or implied) authority, nor ostensible authority, to accept service.

The background facts

The Claimants voyage chartered the vessel from the Owners. A dispute arose between the parties in relation to delays at the load port, with the Owners seeking to claim damages for detention and the Charterers refusing to pay. The Owners purported to commence arbitration by serving notice on the email address of one of the Charterers' employees, who had sent a few operational email messages to the Owners at the time that the delays at the load port had arisen. The claim submissions and several other messages were also subsequently sent to his email address, notwithstanding that no response whatsoever was received to any message. Subsequent evidence from the Charterers indicated that that individual was a relatively junior employee in the operations department with a largely back office role. It also later transpired that the employee had left the Charterers' employ sometime after the notice of arbitration had been sent to his email address.

The Charterers did not engage with the arbitration and the Owners obtained an award in their favour. The Charterers subsequently sought to have the award set aside on the grounds that the arbitration notice had not been properly served on them.

The Commercial Court decision

The Court found in favour of the Charterers and set aside the award.

The Court indicated that sending the notice of arbitration to the email address of an employee of the Charterers would not of itself constitute sufficient service. There was a distinction to be drawn between an email address that is a personal business address of an individual, and one that is generic – for instance, one that has been promulgated by the organisation or identified on its own website (e.g. info@domainname.com). Where an individual email address is used, the sender will reasonably expect the email to be opened and read by the named individual. A promulgated generic email address gives rise to the legitimate

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expectation that communications relating to that business will come to the attention of a person internally authorised to deal with them. However, as in this case the notice of arbitration was sent to an individual, the Court had to consider whether that individual had authority to accept service of legal process. This brought into play agency principles.

Reference was made to the recent Commercial Court and Court of Appeal decisions in *Sino Channel Asia Ltd v. Dana Shipping and Trading PTE Singapore*, in which it was emphasised that accepting service of originating process is a serious matter and that there was a clear distinction between general authority to conduct business and particular authority to accept service of legal process.

Actual authority may be express or implied. It is express when it is given by expressed words. As to implied authority, an agent has (1) authority to do whatever is ordinarily incidental to what he is expressly authorised to do; and (2) such authority as is to be inferred from the conduct of the parties and the circumstances of the case.

The Court here held that the Commercial Court reasoning in Sino Channel (a case that was reversed on appeal on the facts) was correct, namely that

"even where an employee or agent has a wide general authority to act on behalf of his employer/principal, such authority does not (without more) generally include an authority to accept service of a notice of arbitration".

In this case, the Charterers' employee had no actual authority (whether express or implied) to accept service of legal process because his role within the company was related to the conduct of the company's ordinary commercial activities, which are different and distinct from those functions involving dispute handling or dispute resolution. On the facts, the Court found also that the employee had no ostensible authority to accept service of the notice of arbitration.

Comment

This decision is a particularly useful reminder of the importance of identifying whether the party or individual being served with a notice of arbitration has authority to accept service of legal process. The fact that a certain individual has handled the matter at the time of the dispute does not necessarily imply that the individual has authority to accept service. When in doubt, it is advisable to serve the notice of arbitration by post at the company's registered address and/or on generic email addresses that have been promulgated by the organisation as the company's email address.

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Court dismisses appeal against tribunal's findings of fact dressed up as appeal on law

ST Shipping & Transport Pte Ltd v. Space Shipping Ltd (CV Stealth) [2017] EWHC 2808

This case is an example of how a routine charterparty can go horribly wrong, with nightmares for the owners and the charterers, even if they are both innocent of any wrongdoing. On the legal side, it provides a useful summary of the test of causation – the cause of a loss – where there is more than one potential factor. It also takes an interesting "wait and see" approach to dealing with potential savings where it is too soon to assess them. And it shows again the courts' refusal to re-open issues of fact that have been put by the parties to arbitration. Unless the arbitrators make errors of law, their decision on factual issues is for them and them alone.

The background facts

In 2014, the disponent owners (the Owners) let the vessel to the Charterers for a period of eight months. The sub-charterers ordered the vessel to load cargo at the port of Puerto La Cruz in Venezuela. The vessel arrived at the load port in September 2014 and remains there. She has not loaded any cargo and has been detained for more than three years by the Venezuelan authorities.

The sub-charterers were responsible for the ongoing detention. It transpired that the loading documents were not genuine, so the authorities detained the vessel and ordered a criminal investigation. As the Commercial Court records in its judgment, there is nothing to suggest that the Owners or the Charterers had any involvement in any wrongdoing.

The arbitration award

The award is the fourth award in the story. And it appears from the Court judgment that there may be more to come.

The arbitrator was asked to look at two main issues. First, the Owners claimed continuing losses – hire, and expenses caused by the detention. Secondly, the Charterers said that any sums nominally payable to the Owners should be offset by a saving that the Owners would make. As disponent owners, they would become liable to pay drydocking costs of more than US$1 million when they redeliver the vessel to the head owners under the bareboat charter. The Charterers maintained that because there were issues about whether the vessel had been abandoned to her underwriters, or had become a CTL, or simply because the head charterparty had become frustrated, the disponent owners might never have to pay those drydocking costs.

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The Commercial Court decision

Charterers' appeal – whether their employment order could still be said to be the cause of the continued arrest of the vessel

The arbitrator had ruled in one of his earlier awards that the cause of the detention was the Charterers' order to send the vessel to Puerto La Cruz. Reviewing it in this latest award, he held that the position had not changed.

The parties did not disagree on the legal test of causation. It is whether the employment order was *an* effective cause of the continued detention. It need not be *the* cause, i.e. the sole cause.

Where different causes exist, and one has to be selected as an effective cause, the choice is one of fact. So there is only room for appeal if the arbitrator could not have ruled as he did had he applied the law correctly.

Even the Charterers did not contend that the arbitrator would necessarily have reached a different conclusion if he had applied the correct test. They said merely that he might have done – that he might have decided that the Venezuelan authorities' continued detention had replaced the employment order as the effective cause.

The Commercial Court ruled that the arbitrator had not misunderstood or misdirected himself on the law. His ruling was perfectly sound and not open to review. This was really an appeal against findings of fact, dressed up as an appeal on law. There was no need and no room to overturn the award.

Owners' appeal – whether the saving of drydocking costs resulting from the vessel's detention should be deducted from their claim for damages

Early on in the case, the arbitrator set aside a sum of US$1.4 million, taking a "wait and see" approach. He maintained this decision in the latest award. He said that the drydocking expenses would be a saving for the Owners in the event that the vessel is never released – but if she is and the Owners incur the drydocking costs, then it would be open to them to ask for a further award.

The ruling had great significance for the parties. In his latest award, the arbitrator ruled that the Owners were entitled to a sum of US$800,000 for expenses incurred during the detention. So if the likely drydocking costs are offset against those expenses, the Owners will be entitled to nothing.

The Court endorsed the arbitrator's ruling, saying that it was principled and sound. Under the principles governing interim awards, he was entitled to defer a final ruling on issues that he thinks are best resolved in the light of the outcome of future happenings.

Comment

Our main comments are at the beginning of this article. The case also reminds us that arbitration awards should only be challenged under Section 69 of the Arbitration Act 1996 on points of law.

The Court's endorsement of the arbitrator's "wait and see" approach, where quantum is dealt with in stages, is interesting. Usually you bring one claim for the entirety of the damages suffered. You may not always be entitled to bring a second action for future losses later on, so you sometimes have to assess those future losses even before they arise, even if that involves a degree of speculation about future contingencies. The approach taken here is different.

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When is a guarantee an on demand bond?

Ultrabulk A/S v. Jagatramka [2017] EWHC 2792 (Comm)

The Commercial Court has indicated when a guarantee might give rise to a primary liability arising independently and upon demand, as opposed to a secondary liability where the guarantor's liability mirrors the liability of the debtor.

The background facts

In June 2007, the Claimant, a Danish shipping company, entered into two cooperation agreements with an Indian coke producer (the "Company"). The Defendant was the chairman and managing director of the Company.

In early 2013, the Company was indebted to the Claimant for US$ 4,259,395 (the "Liabilities"). By a deed of agreement dated 2 July 2013, the Company agreed to repay the Claimant the Liabilities in instalments by 30 December 2013.

By a personal guarantee (the "Guarantee"), the Defendant agreed that he was aware of the Liabilities and guaranteed that if the Company did not pay the Liabilities to the Claimant by 31 December 2013, he would, on the Claimant's *"first written demand"*, personally pay a sum equivalent to the Liabilities plus interest.

The salient terms of the Guarantee provided as follows:

> *"...I am also aware of the liability due on date, i.e. USD 4,259,395/- to the Beneficiary by [the Company] under the Agreement (the '[Company] Liabilities').*
>
> *NOW, therefore, I, the Guarantor, hereby unconditionally and irrevocably guarantee that, if for any reason [the Company does] not repay the [Company] Liabilities latest by 31 December 2013 then I will on the Beneficiary's first written demand from the Beneficiary, pay a sum equivalent to the [Company] Liabilities plus the interest based on annual Libor plus 2% to the Beneficiary..."*

The Company failed to settle the Liabilities by 31 December 2013. On 16 June 2015, the Claimant demanded the amount due under the Guarantee from the Defendant. The Defendant failed to make any payment to the Claimant and the Claimant commenced proceedings.

The Commercial Court decision

The Claimant's lawyers submitted that the Guarantee gave rise to a primary liability akin to that under a performance bond, and that the Defendant was obliged to pay a sum equivalent to US$ 4,259,395 plus interest, in the event that the Company failed to discharge its liabilities.

The Defendant's main defence was that the Company had paid US$ 1.95 million towards the Liabilities and that, if the Guarantee was enforceable, the Defendant should only be liable for the US$ 2.31 million that remained outstanding, plus interest.

In a succinct judgment, the Court addressed whether the Guarantee:

i) provided for a primary liability arising upon demand, as contended by the Claimant, or

ii) whether the Guarantee was a true guarantee that provided for a secondary liability in the sense that the guarantor's liability mirrored the liability of the Company, as contended by the Defendant.

Ultimately, the issue of whether the instrument in question was a true guarantee, or an on demand bond, depended on construction of the actual document. The Court considered the following features of the Guarantee.

First, the Court concluded that by the use of the phrase *"a sum equivalent to"* US$ 4,259,395 plus interest, the Defendant did not agree to pay the actual outstanding

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liability of the Company at the relevant time, but specifically agreed to pay a stated amount.

Secondly, the Defendant agreed to pay the sum *"unconditionally and irrevocably"* and *"on demand"* if the Company did not pay the Liabilities by 31 December 2013. The Court found that such language was indicative of a primary liability and there was no dispute about the fact that the Company did not pay US$ 4,259,395 by 31 December 2013.

Thirdly, the words *"I irrevocably confirm that I will not contest and/or defend any application and/or proceedings to enforce this Personal Guarantee"* were indicative of a primary liability.

Although the Court acknowledged that there is English law authority for the general presumption that an instrument is not an *"on demand bond"* unless given by a bank or other financial institution, it nevertheless held that the wording of the Guarantee counteracted any such presumption in this case and that the Guarantee was in fact an on demand bond. The Defendant was accordingly liable for the whole sum of US$ 4,259,395 plus interest, regardless of the fact that a significant proportion of that amount had since been repaid by the Company.

Comment

This case shows how strictly the courts are prepared to interpret guarantees. It provides a useful illustration of the differences between a guarantee that creates primary and secondary liabilities. A true guarantee creates a secondary liability that mirrors the liability of the principal debtor, whereas an on demand bond creates a primary liability independent of the underlying contract. This decision indicates that the fact that an instrument is issued by an individual, and labelled as a guarantee, does not prevent it from being construed by the courts as an on demand bond.

For potential guarantors looking to enter into similar guarantees, great care should be taken to ensure that the guarantee refers to the outstanding amounts due as at the date upon which the guarantee crystallises, and that the wording is not akin to that of a performance bond, in order for the guarantor to avoid becoming liable for sums in excess of those that are actually owed.

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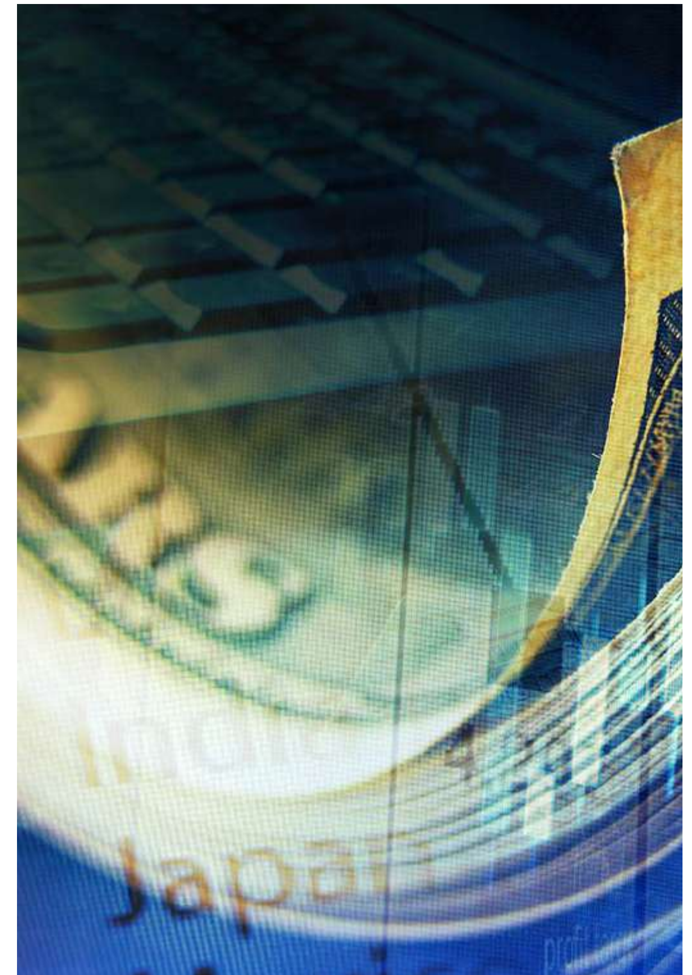

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New corporate criminal offence of failure to prevent the facilitation of tax evasion

The Criminal Finances Act 2017 ("the Act") came into force on 30 September 2017. Its target is the prevention of tax evasion, which is the deliberate and illegal circumvention of tax rules in order to escape a tax liability. This should be distinguished from tax avoidance, which is a legal method of minimising tax liability.

The legislation impacts all service providers, including those operating internationally, as many shipping companies do, provided they have a presence and/or business operations in the UK and/or there is some other link to the UK.

The offences

The Act created two new corporate offences:

1. Failure to prevent facilitation of UK tax evasion.
2. Failure to prevent facilitation of foreign tax evasion.

The offences are not applicable to individuals. They can be committed only by "relevant bodies". A relevant body is a partnership, company or other body corporate which has either:

- been formed or incorporated in the UK; or
- been formed or incorporated anywhere else in the world, but which does business in the UK.

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The offences are committed when an "associated person" acting for or on behalf of a relevant body facilitates a tax evasion offence whilst performing services for that relevant body. An associated person is any person acting for or on behalf of a relevant body, including an employee, sub-contractor, manager, or local agent.

To anyone familiar with the corporate offence introduced by the Bribery Act 2010 (which exposes commercial organisations to criminal liability for failing to prevent bribery), this may appear to be 'more of the same'. In fact, there are important differences – likely leading to a need for more due diligence on your contracting network, updated internal training materials and preparation of updated compliance policies. Whilst existing compliance training and policies will form a good starting point for any changes, given the network of correspondents, sub-contractors, managers and local agents commonly adopted by those in the shipping industry, the impact of the new legislation should not be under-estimated.

Guidance issued by HMRC in September 2017 ("the Guidance") sets out the three stages of the corporate offence, as follows:

> **Stage 1:** There is criminal tax evasion by a taxpayer.

> **Stage 2:** There is criminal facilitation of the tax evasion by an associated person acting on behalf of a relevant body.

> **Stage 3:** The relevant body fails to prevent the associated person from committing the criminal facilitation act at Stage 2.

Extra-territorial effect

It is immaterial whether the relevant conduct takes place inside or outside the UK. The first offence applies to all businesses, wherever they are located, in respect of UK tax evasion offences. The second offence applies to businesses with a connection to the UK in respect of tax evasion offences committed outside of the UK. A company headquartered outside the UK but carrying on business in the UK, either through a permanent establishment (a branch), or another corporate body, could be subject to both corporate offences.

The foreign tax evasion facilitation offence requires 'dual criminality', meaning the actions of the taxpayer (Stage 1) and the associated person (Stage 2) must be a tax evasion offence under UK law and the overseas jurisdiction must have equivalent offences to those set out in Stage 1 and Stage 2.

The defences

The Act contains a defence where the relevant body has in place reasonable procedures designed to prevent associated persons from committing tax evasion facilitation offences. This follows a similar defence in the Bribery Act 2010, where the business has in place adequate procedures designed to prevent persons associated with the business from committing a bribery offence. A relevant body can also potentially rely on a defence to prosecution where it is not reasonable in all the circumstances to expect it to have any prevention procedures in place.

In the Guidance, "reasonable prevention procedures", means both that:

> formal policies have been adopted by a relevant body to prevent criminal facilitation of tax evasion by those acting on its behalf; and

> practical steps are taken to implement the policies, enforce their compliance and monitor their effectiveness.

According to the Guidance, to be reasonable, prevention procedures should be proportionate to the risks that the relevant body faces.

HMRC expects reasonable prevention procedures to be kept under regular review by a relevant body, which should evolve as it discovers more about the risks that it faces and lessons are learnt. HMRC will take into consideration the prevention procedures that were in place and planned at the time that the facilitation of tax evasion occurred.

The associated person must deliberately and dishonestly facilitate the taxpayer-level evasion. Where an associated person is proven to have committed an offence accidentally, ignorantly or negligently, the new offence is not committed by the relevant body.

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Principles to assist with compliance

The Guidance sets out the following six principles for relevant bodies to ensure compliance with the legislation:

1. **Risk assessment:** The relevant body should assess the nature and extent of its exposure to the risk of those who act for it, or on its behalf, engaging in activity during the course of business to criminally facilitate tax evasion. Having operations in jurisdictions known for criminality will present a higher risk profile.
2. **Proportionality of risk-based prevention procedures:** Prevention procedures should be proportionate to the risk of a relevant body's associated persons committing tax evasion facilitation offences. This will depend on the nature, scale and complexity of the relevant body's activities as well as the level of control and supervision exercised over associated persons. Those operating in high-risk jurisdictions should bear in mind that the bar for compliance will be accordingly higher.
3. **Top level commitment:** Senior management of the relevant body should be committed to preventing associated persons from engaging in criminal facilitation of tax evasion. They should foster a culture within the business in which activity intended to facilitate tax evasion is never acceptable.
4. **Due diligence:** The relevant body should apply, follow, and be able to demonstrate, rigorous due diligence procedures in respect of persons who perform or will perform services on its behalf, in order to identify risks and mitigate them.
5. **Communication (including training):** Prevention policies and procedures must be communicated and understood by all working for, and associated with, the relevant body.
6. **Monitoring and review:** The relevant body should regularly monitor and review prevention procedures and make improvements where necessary. Procedures should be updated as the risks change.

Penalties for breach

If convicted under the new offence, a relevant body faces the possibility of unlimited financial penalties as well as ancillary orders (such as confiscation orders or serious crime prevention orders). Potentially significant reputational damage is also a risk.

HMRC has acknowledged that deferred prosecution agreements might potentially be used to allow prosecution to be suspended for a defined period, provided that the relevant body meets certain specified conditions.

Next steps

We recommend that companies caught by the legislation review all existing training programmes and compliance policies and amend/supplement them as necessary to deal with the new legislation. It may be possible to update existing anti-bribery procedures to capture these new offences.

In case of any query arising out of this article or the new legislation, please contact Matthew Stratton or Peter Prendiville or your usual contact at Ince & Co.

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Singapore Court of Appeal re-emphasises pro-arbitration stance

Prometheus Marine Pte Ltd v. King, Ann Rita and another [2017] SGCA 61

In considering an appeal to set aside an arbitration award, the Singapore Court of Appeal has reinforced the judiciary's pro-arbitration stance and upheld a high threshold for setting aside. Separately, the Court of Appeal also warned that any allegation of bias, fraud and corruption should be credibly substantiated.

The background facts and issues

The Respondent purchased a yacht from the Appellant pursuant to a sale and purchase agreement (the "Contract"), which was damaged before delivery. The Respondent commenced arbitration proceedings and the arbitrator eventually awarded damages to the Respondent for: (i) the cost of the necessary repairs to render the yacht compliant with Contract specifications; and (ii) the diminution in value of the yacht (in comparison to a brand new non-defective yacht).

The Appellant sought to have the award set aside and filed two High Court summonses under section 48(1) of the Arbitration Act ("AA") and section 24 of the International Arbitration Act ("IAA"), arguing that the award was "flawed and by reason of the arbitrator's failure to determine whether the AA or the IAA applied" (and thus impossible to determine under which statute the setting aside application should be brought). Section 24 of the IAA/Section 48(1) of the AA provides that the High Court can set aside an award if the making of the award was induced or affected by fraud or corruption, or a breach of natural justice occurred in connection with the making of the award. Article 34 of the UNICTRAL Model Law on International Commercial Arbitration, as incorporated into Singapore law, provides that the arbitral award can be set aside if the award conflicts with the public policy of the State.

At first instance, the High Court dismissed the summonses in their entirety. Among other things, the Court gave the following reasons:

i) The Court will not lightly set aside an award for breach of the rules of natural justice. A challenge on this ground had to meet a high threshold, which the Appellant had failed to meet. The arbitrator is not obliged to address every argument submitted, and the tribunal had indeed fully considered the submissions before issuing its award and, in fact, found in favour of the Appellant on some issues.

ii) The seat of arbitration invariably determines the *lex arbitri:* the seat is in Singapore. In any event, whether the AA or the IAA was applicable did not have a material bearing on the setting aside application because the grounds relied upon in both IAA / AA are very similar.

iii) The Appellant's allegations of bias on the basis of the arbitrator's mere rejection of the Appellant's submissions were completely unsubstantiated.

The grounds of appeal

The Appellant appealed against the above decision on the following bases:

i) The Judge was apparently biased against the Appellant;

ii) The Judge erred in finding that the arbitrator's failure to determine the *lex arbitri* was not contrary to public policy;

iii) The Judge erred in finding that there was no evidence that the making of the award was induced by fraud on the Respondent's part or non-pecuniary corruption on the arbitrator's part;

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iv) The Judge erred in finding that the arbitrator had neither acted in excess of jurisdiction nor in breach of natural justice when he held that the Appellant was liable for breaches of the Contract; and

v) The Judge erred in finding that the Appellant was the seller under the Contract (and was consequently a party to the arbitration agreement incorporated into the Contract) and, therefore, also erred in finding that the arbitrator had the requisite jurisdiction to hear the dispute.

The Court of Appeal decision

The Court of Appeal dismissed both appeals for the following reasons:

i) The Appellant argued that arbitration was delocalised. Given that the award did not specify whether it was made under the AA or the IAA, it should not be enforced as this was contrary to public policy. The Court of Appeal held that there was never an issue of the arbitration being a delocalised nullity, as the Appellant had accepted that the arbitration was seated in Singapore – the fact that relief was sought under both the AA and IAA meant that the Appellant accepted that at least one of them governed the arbitration. In addition, the failure to determine the *lex arbitri* was not a valid ground for setting aside an award.

ii) The Court of Appeal rejected the Appellant's arguments that the arbitrator's findings were irrational, in excess of his jurisdiction and breached natural justice. Any errors of law or fact were not a ground for setting aside, as it is a critical foundation principle in arbitration that parties choose their adjudicators and must also accept the consequences of their choices (policy of minimal curial intervention).

iii) The Judge's strong language in dealing with the Appellant's arguments and having pre-conceived notions about the case were not signs of apparent bias. Rather: (i) the Judge's strong words were justified as they aptly reflected the state of the Appellant's submissions; and (ii) the Judge was supposed to read the parties' submissions before the hearing and form a provisional view about the case before the hearing.

Notably, the Court of Appeal also cautioned counsel that it is irresponsible and an abuse of privilege of an advocate and solicitor to put forward serious allegations such as fraud, corruption or apparent bias without credible evidence.

Comment

Once again, the Singapore judiciary has demonstrated the principle of minimal curial intervention in arbitration proceedings by setting a high threshold for setting aside an arbitration award. Separately, this case also serves as a timely reminder to counsel that their duties are owed to the Court, especially to substantiate serious allegations with credible evidence.

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What will Brexit mean for the international shipping community choosing English law and jurisdiction?

English law, and the jurisdiction of the English courts or arbitration in England, remains the most frequent choice for parties throughout the shipping industry.

On Friday 8 December 2017, the UK and the EU announced that "sufficient progress" had been made in the first phase of Brexit negotiations, paving the way for discussions to shift to the UK's future relationship with the EU. As attention turns to the post-Brexit landscape, there has been considerable speculation about the potential implications for English law. The concerns of some that the uncertainty caused by Brexit could have consequences for the use of English law in international contracts, was recently powerfully rebutted by the English Court of Appeal Judge Lord Justice Hamblen, in a speech entitled *"Myths of Brexit"*.

We are of the same opinion as Lord Justice Hamblen. Irrespective of the outcome of negotiations between the UK and the EU, it is our view that the UK's pre-eminent role as an international dispute resolution centre will be unaffected. English law and jurisdiction will continue to be an attractive choice for commercial parties engaging in cross-border transactions and London will remain a global arbitration hub.

Use of English law

English law is the governing law of choice for many international businesses when entering into commercial contracts. Its attractiveness stems from a number of features:

> **Certainty:** Businesses require certainty and clarity when engaging in cross-jurisdictional commercial activity and English law, with its independent judiciary and established legal precedent, can provide this.

> **Flexibility:** The commercial landscape is in a constant state of change. English law is not restricted by a written code and is instead able to adapt to new developments in the business world.

> **Commerciality:** English law recognises "freedom of contract" and will aim to give effect to the contractual intention of commercial parties. Businesses value the commerciality of the English courts, in contrast to the overly legalistic approach of other jurisdictions.

After Brexit, English law will retain these key characteristics. The UK's membership of the EU has had very limited impact on English contract law, which is

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mainly derived from the common law, and there will be little change in this area of law once Brexit takes effect - as Lord Justice Hamblen eloquently puts it, *"the river of the common law of contract will flow on regardless."*

Businesses should also be confident that EU member states will continue to respect English governing law clauses, irrespective of the nature of the UK's future relationship with the EU. Under the Rome I Regulation, EU courts are required to give effect to governing law clauses – even if that clause specifies the laws of a non-member state. Further, the UK Government has confirmed that the principles of Rome I (and II, which governs non-contractual relations, i.e. tort/delict) will be incorporated into English domestic law.

Enforcement of English jurisdiction clauses and English judgments

There has been some discussion about the post-Brexit regime for the enforcement of exclusive English jurisdiction clauses and English judgments in the EU. Upon Brexit, the Recast Brussels Regulation, which provides for the mutual recognition and enforcement of jurisdiction clauses and civil judgments between EU member states, will cease to operate in relation to the UK.

However, in a position paper published earlier this year, the UK Government signalled its intention to agree a *"close and comprehensive framework of civil judicial cooperation with the EU... which would mirror closely the current EU system"*. While this is subject to negotiation, it is in the interests of both parties to agree to such a framework.

The UK Government has also stated that it intends to sign up to the 2005 Hague Convention, which provides for the recognition and enforcement of exclusive jurisdiction clauses by all parties (including the EU), and the 2007 Lugano Convention, which extends the Brussels regime to EFTA contracting states. The UK is, of course, already a party to these agreements by virtue of its membership of the EU. Significantly, the UK does not require the assent of the EU or other Convention states to accede to the Hague Convention. Even in the absence of a reciprocal agreement between the UK and the EU, which would be a worst-case scenario, the UK's accession to the Hague Convention will deal with the principal concerns of businesses seeking to agree English exclusive jurisdiction clauses and enforce English judgments in the EU.

Arbitration

The pre-eminent position of London as a global arbitration centre, particularly in international maritime arbitration, will most likely be unchanged after the UK's withdrawal from the European Union. Brexit will have no effect on arbitration clauses in contracts governed by English law and EU rules are not applicable in respect of the jurisdiction and enforcement of arbitral awards. Arbitral awards will remain enforceable across the EU by virtue of the 1958 New York Convention, to which all EU member states, including the UK, are parties in their own right.

Comment

Despite recent progress, there is still a long way to go in the Brexit process. Much remains uncertain, particularly in view of the political landscape on either side of the English Channel. However, it is encouraging that the leadership in both the UK and the EU appear to recognise the significance of continued judicial cooperation after Brexit. This, together with the fact that the existing advantages of English law and jurisdiction should be unaffected by the UK's withdrawal, should provide considerable reassurance to businesses. We are confident that the UK will retain its position as the leading international dispute resolution centre for parties in the shipping industry for many years to come.

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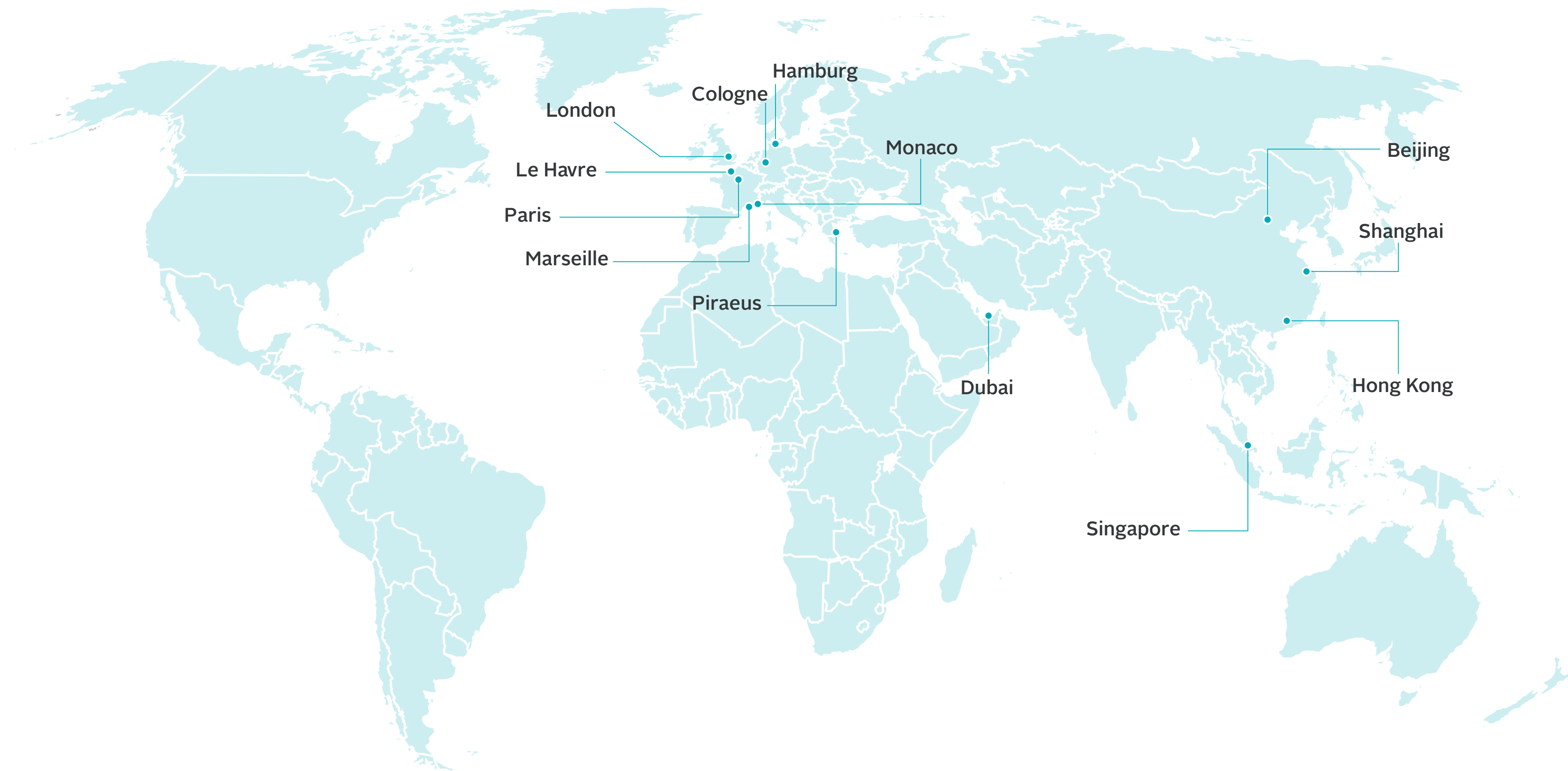

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