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BULLETIN

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JUDGMENT: Sino Channel Asia Ltd v Dana Shipping & Trading Pte Singapore Ltd & Anr (A3/2016/2375)

Case Background

This case concerns whether a notice of arbitration passed to a counterparty's agent can be effective service on that counterparty if the agent is not authorised to receive the notice. The Court of Appeal held that in the circumstances of this case the agent had both implied actual and ostensible authority to receive the notice of arbitration.

A contract of affreightment (COA) was agreed between Dana as owner and Sino as charterer. The COA was negotiated on Sino's behalf by BX. BX agreed with Sino that it would enter into contracts in Sino's name and take the profit from those contracts, save that Sino would be entitled to $1 per metric tonne of cargo carried. Dana only ever communicated with either employees of BX or through the agreed broking channel. The evidence was that Sino's broker only ever communicated with employees of BX, never with Sino. The only involvement that Sino had was signing the COA arranged by and at the request of BX. Dana at all times believed that the employees of BX were representatives of Dana, being unaware that BX was a separate company (or even involved in the COA).

The Dispute

A dispute arose under the COA and Dana gave a notice of arbitration. The notice was passed to the BX employee with whom Dana had at all times communicated and who appeared to Dana to be the relevant person at Sino. The notice was also passed by Dana through the broking channel, and the evidence was that Sino's broker also passed the notice to the same BX employee. Sino took no part in the ensuing arbitration and an award was issued in Sino's absence.

When Dana sought to enforce the award, Sino brought a claim in the High Court to set the award aside on the basis that Sino had not been served with the notice of arbitration. At first instance, Sir Bernard Eder (sitting as a Deputy High Court Judge) upheld Sino's claim and held that BX had no authority to receive the notice of arbitration on behalf of Sino.

Dana appealed to the Court of Appeal on 3 grounds:

- Did BX have implied actual authority to receive the notice on behalf of Sino?
- Did BX have ostensible authority to receive the notice on behalf of Sino?
- If the answer to Issues i and ii is 'no', did Sino ratify BX's receipt of the notice?

Judgment

In a judgment handed down on 2 November 2017, Gross LJ (giving the judgment of the Court of Appeal, to which Flaux LJ contributed as the other presiding judge) upheld Dana's appeal on issues I & II and confirmed the validity of the service of the notice of arbitration, thereby confirming that the arbitration award was binding on Sino. The Court held that in this "*most unusual case*", the "*most unusual relationship*" between Sino and BX was such that the correct inference was that BX did have implied actual authority to receive a notice of arbitration on behalf of Sino. Given the complete delegation to BX of Sino's negotiation and performance of the COA, the Court of Appeal held that it was "*unreal*" to suppose that Sino required that an arbitration notice be served directly on Sino rather than on BX.

The Court also held that BX was, as a matter of ostensible authority, able to receive such notice because Sino was responsible for and had acquiesced in BX's ability to hold itself out 'as' Sino. This was said to follow from both the conduct of BX but also of Sino, in taking no part in the COA with Dana and in that Sino's broker dealt with BX in the apparent belief that BX was Sino. It is noteworthy that the Court of Appeal held that "*ostensible authority calls for even more caution than implied actual authority in the context of the service of originating process*".

The Court of Appeal dismissed the appeal on Issue III, ruling that there was no unequivocal action by Sino that evidenced an abandonment of a jurisdictional objection to the award. Although silent ratification is in principle possible, the fact that s.72 permits a party to take no part in an arbitration until enforcement – as was the case here – was said to be an "*unanswerable objection*" to such a claim in this instance.

The Court of Appeal made clear that this is a "*rare*" case, and that arbitrating parties would be well advised to also serve any notice of arbitration by the methods in s.76(4) Arbitration Act 1996 – "*as a matter of "belt and braces", whatever else was done*". However, the Court recognised that there are some circumstances where authority to accept service of originating process can be implied, and even be a matter of ostensible authority.

Matthew McGhee

Matthew is regularly instructed to advise or act in national & international litigation & arbitrations across chambers' practice areas, both as sole counsel and as a junior. He has often appeared on an urgent basis to obtain freezing orders and other similar interim relief. Recent instructions have had a particular focus on disputes concerning civil fraud, energy, shipping & commodities, and a wide range of other contractual and commercial disputes.

Matthew McGhee appeared on behalf of Dana, instructed by HFW.

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