Banking litigation, arbitration and regulation

Newsletter

October 2014

Contents

Clyde & Co's award-winning dispute resolution practice is the very heart of our firm. Recognised as an "elite" practice and the leading London disputes team, we have harnessed our deep sector knowledge to develop an enviable portfolio of banking litigation experience. Our specialist banking litigation and arbitration team is recognised in the legal directories as a "flourishing practice" and is almost unique in the City: an elite disputes firm that is rarely conflicted from acting for or against many of the major global financial institutions.

In this update, we summarise some of the key developments from the first half of 2014 in case law, arbitration and regulation affecting the financial sector.

Following on from allegations regarding LIBOR fixing (discussed in our banking litigation review of 2013), the Serious Fraud Office has opened a criminal investigation into allegations of fraudulent conduct in the foreign exchange market. The High Court has also provided guidance as to whether investment schemes constitute "collective investment schemes" under the Financial Services and Markets Act 2000.

In arbitration news, the LCIA has released new arbitration rules for the first time in 15 years.

We also review a decision flowing from the Lehman Brothers litigation in which the Court confirmed that application of the ISDA Master Agreement should be as straight forward as possible. The Commercial Court refused to strike out a claim for negligent miss-selling of an interest rate hedging product as time-barred whilst the High Court awarded Norwich Pharmacal relief against a foreign bank and confirmed the duty of confidentiality owed by lenders.

Case summaries

Court confirms ISDA Master Agreement to apply in many different situations and with as much straightforward application as possible.

Lehman Brothers Finance SA (In Liquidation) v Sal Oppenheim JR & CIE KGAA [2014] EWHC 26277

The claimant (Lehman) claimed for the balance of the sum which it argued was properly due from the defendant arising out of early termination of four option transactions governed by an English law ISDA Master Agreement (1992 version) (the Agreement), together with interest.

The transactions were put and call options by reference to the Nikkei 225 Stock Average Index. There was Automatic Early Termination of the Agreement by virtue of the Event of Default arising out of the entry into Chapter 11 bankruptcy proceedings by Lehman's Credit Support Provider (Lehman Brothers Holdings Inc) on 15 September 2008, such that the claimant was the Defaulting Party and the defendant the Non-Defaulting Party. The Tokyo Stock Exchange and Osaka Stock Exchange were closed for a Japanese holiday on 15 September 2008 and did not reopen until 9am the next day; between close on Friday 12 September 2008 and reopening of the market on 16 September 2008 there was a substantial fall in the Nikkei Index as of 16 September and continuing, with the consequence that the value of the four options rose. In the Schedule to the Agreement the parties chose the Market Quotation payment measure to apply on an Event of Default. As such, the Settlement Amount fell to be paid by the Non-Defaulting Party and to be calculated by the Market Quotation unless, by reference to the Settlement Amount provision, (a) Market Quotation could not be determined or (b) a Market Quotation would not produce a commercially reasonable result – in which case, the Loss method would apply.

By letter dated 30 April 2009, the defendant informed the claimant that it had determined that the amount to be paid by it to the claimant in respect of the transactions arising out of the Early Termination was EUR 1,849,968.99 (though this figure was at this stage unsupported by calculations). After an email dated 18 June 2009, by which it submitted calculations which it asserted supported such figure, the defendant paid the said sum on 14 July 2009, together with interest. The claimant claimed that this figure was wrongly calculated and there had been a substantial underpayment.

The Court held that, on the facts, the figures supplied on 18 June 2009 were based on a spot rate, obtained from three banks, which was the closing level of the Nikkei Index on 12 September 2008 (i.e. before the Automatic Early Termination). As such, they were retrospective valuations, and not quotations for a Replacement Transaction, as was required by the Market Quotation provision. Although the Nikkei Index was closed on 15 September, a price quotation could have been obtained on 16 September 2008, had it been requested from four market-makers. The Market Quotation provision required that a "live" quotation for a replacement transaction be obtained, not a historic valuation. Such quotations should be requested on or as soon as reasonably practicable after the relevant Early Termination Date. As the relevant quotations would have been obtained, had they been sought, and as there was no evidence that Market Quotation would not have produced a commercially reasonable result, the Loss method was not available. If the Market Quotation formula had been correctly applied, the gross figure at the close of the market on 16 September 2008 would have been around EUR 6,549,000. After accounting for credit for collateral etc, this would have led to a payment of EUR 2,963,081.18. Interest on the sum underpaid was also awarded.

The Judge proceeded on the basis that, whatever the rival positions and motives of the parties, he could and must simply construe the terms of the Agreement into which they entered and calculate the consequences. He emphasised that the ISDA Master Agreement is "intended to be normative, and to apply in many different situations and with as much straightforward application as possible". As such, this decision underlines the difficulty that a party would face in justifying any departure from the requirements concerning the obtaining of market quotations or otherwise from the clear terms of an ISDA Master Agreement.

The full text of the judgment can be found here: http://www.bailii.org/ew/cases/EWHC/Comm/2014/2627.html

Back to page 1

Court of Appeal considers meaning of "commercially reasonable manner".

***Barclays Bank Plc v Unicredit Bank AG* [2014] EWCA civ 302**

This case addressed the construction of a clause requiring a party to make a determination in a *"commercially reasonable manner"* in relation to an option for early termination.

The requirement for parties to commercial contracts to exercise their rights in a "commercially reasonable manner" is often seen in finance documents. This decision therefore has potentially wide reaching implications.

The High Court decided that it was commercially reasonable for Barclays to withhold its consent on the basis that it did. However, Unicredit challenged that decision in the Court of Appeal claiming that the Judge was incorrect to allow Barclays to give precedence to its own commercial interests and exclude the interests of Unicredit. Unicredit also challenged the sums sought. The appeal failed on all the issues.

The following key points come out in the judgment:

- It is the manner of the determination which must be commercially reasonable; it does not follow that the outcome has to be commercially reasonable although, if it is not, that would no doubt cause one to look critically at the manner of the determination
- A party is entitled to take account of its own interest in preference to the interest of the other party
- The Court decided that the entire agreement clause did not exclude evidence about the way in which the parties exercise their contractual rights

This case serves to remind parties that the Court will give effect to the ordinary meaning of the words in contractual provisions. In the judgment Longmore LJ said that it was not easy to set out an express test for commercial reasonableness but tentatively expressed it by saying that the party who has to make the relevant determination will not be acting in a commercially reasonably manner if he demands a price which is way above what he can reasonably anticipate, but stressed that the question of construction applied only to the particular contract in its particular context.

Although this decision leaves scope for further question as the Court did not take the opportunity to give clearer guidance as to the interpretation of "commercially reasonable manner" the decision will no doubt be welcomed by financial institutions as it shows the Court's unwillingness to interfere in a commercial contract at arm's length when the parties can *"look after their own interest and contract on different terms if they wish to do so"*.

The full text of the judgment can be found here: http://www.bailii.org/ew/cases/EWCA/Civ/2014/302.html

Back to page 1

Commercial Court refuses to strike out as time-barred a claim for negligent mis-selling of an interest rate hedging product.

Kays Hotels Ltd (T/A Claydon Country House Hotel) v Barclays Bank PLC (2014)

The claimant was a family-run company which operated a country house hotel. In 2005 it entered into a loan agreement with the defendant bank to borrow GBP 1.34 million repayable over 20 years at an interest rate of 1.5% above the defendant's base rate. It also entered into an interest rate hedging product, which was a collar with a ten-year term. If the Bank of England base rate increased above 5.5%, as it did in 2007, the bank would pay the claimant. If the rate fell beneath
4%, as it did in 2008, the claimant would pay the bank. If the rate remained between 4% and 5.5%, neither party would make payment.

In November 2012, the claimant issued proceedings alleging that it had been mis-sold the product. The bank alleged that the claims were time-barred and applied for strike out. The claim was, however, stayed pending review of the sale as part of a wider process agreed between the FSA and banks in 2012 in relation to the sale of interest rate hedging products to non-sophisticated business customers, as a result of which the defendant paid compensation to the claimant. The stay expired and the bank renewed its strike-out application. In relation to the claim concerning the bank's common law duty of care, the claimant relied on section 14A of the Limitation Act 1980 for a three-year time extension to bring proceedings, on the basis that it had not had the requisite knowledge to enable it to bring an action before November 2009 (i.e. three years before proceedings were in fact issued). The bank argued that the claimant knew or ought to have known that it had a claim before proceedings were issued, since by that date it had made substantial payments to the bank in relation to the product over a considerable period of time.

The Court considered the case law regarding the knowledge required for the claimant to rely on section 14A. It held that the test was whether the claimant had been alerted to the factual rudiments of its claim and whether it knew the facts needed to know how to take advice and mount proceedings if so advised. To start time running, it had to know the essence of the negligent act or omission to which its damage was attributable. Where a claimant acted on professional advice, and suffered loss, it must have had some reason to question the advice and to think that something must have gone wrong with it. The crucial moment was when it knew enough to make it reasonable to begin to investigate whether or not it had a case.

The claimant alleged that the bank had not explained the risks of the product as a whole; that it had not told the claimant that the product was not suitable for the claimant, who was not a professional or sophisticated investor; that it had said that the claimant was required to take out the product if there was to be a loan or draw down under the loan; and that it had not adequately explained how the product worked. The present claim was one of mis-selling, key to which was the suitability of the product. The claimant knew that there would be some risk associated with the product, but its complaint was that there was excessive risk, and so the mere fact that there had been some loss (as indicated by the claimants having been required to make payments to the bank) was not enough to indicate to the claimant that the product was unsuitable. The Court held that the claimant had a real prospect of establishing that it could rely on section 14A for a time extension and its claim could not be summarily dismissed as bound to fail on the basis of limitation. Furthermore, the issue whether the claimant had the relevant constructive knowledge to start an investigation was dependent on the facts and required a full consideration – at trial – of the claimant's circumstances.

The full text of the judgment can be found here:
http://www.bailii.org/ew/cases/EWHC/Comm/2014/1927.html

Back to page 1

High Court grants Norwich Pharmacal relief against foreign banks.

Credit Suisse Trust v Intesa Sanpaolo & Anor. High Court (Ch D), 6 March 2014:

The applicant, Credit Suisse Trust, applied for Norwich Pharmacal relief in two separate but connected actions against two Italian Banks; Banca Monte Dei Pasche Di Siena SPA (BMP) and Intesa San Paulo SPA (Intesa). Relief was sought in order to expose the assets of Mr Nemni, a former fiduciary agent of Credit Suisse. After a full trial in Guernsey, Mr Nemni was held to be in breach of his fiduciary duty by reason of dishonestly taking money from the trust. Nemni was ordered by the court to pay substantial sums and costs in respect of this breach.

In order to assist in the enforcement of the order, a worldwide freezing order was issued against Mr Nemni's assets and steps were taken to discover the identification and location of any bank accounts. An earlier application for Norwich Pharmacal Relief against Amex revealed two Italian banks that had been used by Mr Nemni. Credit Suisse initiated applications for Norwich Pharmacal relief against these banks in order to obtain information held by the bank regarding Mr Nemni's assets. While neither bank sought to contest the proceedings, both questioned whether information could be released by an Italian Bank, whose activities are governed by Italian law, under an order from an English court.

The position of BMP and Intesa with regards to the applications for relief was slightly different. In relation to BMP at least some of the information that Credit Suisse sought could be obtained by the London branch of the Bank from its Italian branches. However, Intesa raised the issue as to whether information could be obtained in England since the activities of the Bank were governed by Italian law, and thus any order would have to be recognised by an Italian court.

The court highlighted two main concerns. Firstly, whether it was appropriate to give relief against a Bank whose activities take place abroad. The court concluded that in analogous circumstances the remedy was exceptional and granted with care, but that it had been granted in relation to fraud cases. Secondly, they questioned whether there was any point in granting relief since the Banks may be unable to provide the required information. It was clear that in relation to BMP at least some of the required information could be obtained, although a court order would likely be needed to ensure its release. While the situation was less clear with regards to Intesa, the court found that it was not unrealistic that the London branch would attempt to receive the required information from its Italian branches in order to comply with the order. Should either of these orders not bear fruit, it was the intention of Credit Suisse to have the order recognised by the Italian courts under the Brussels Convention 1968 art.26. Any arguments against recognition of the order could then take place in the Italian courts.

Accordingly, the court granted an order for relief against both banks.

The full text of the Judgment can be found here: http://www.lawtel.com/UK/AC9301386

Back to page 1

Court rules that a lender owes a duty of confidentiality to its borrowers, and should be held liable for damages in the event that such a duty is breached.

Primary Group (UK) Limited & Others v Royal Bank of Scotland Plc & Another [2014] EWHC 1082 (Ch)

Primary Group Limited (Primary) entered into a loan facility ("**the Agreement**") with the Royal Bank of Scotland (RBS) in 2006. During initial discussions Primary expressed concern about potential conflicts arising from RBS's relationship with Direct Line Insurance Group plc (Direct Line). At the relevant time Direct Line was a subsidiary of RBS and a direct competitor of GBI (Holdings) Limited (trading as Swiftcover), one of Primary's subsidiaries. Primary contend that RBS gave them various assurances that all information provided to RBS would be kept confidential and not passed on to Direct Line. Additionally the Agreement imposed confidentiality obligations on RBS restricting how information provided to it by Primary could be used.

Primary defaulted on its obligations under the Agreement. RBS consequently instructed KPMG to conduct an independent business review of Primary, known as the "Medway Reports". RBS also consulted with Direct Line, which involved disclosing parts of the Medway Reports to Direct Line without first obtaining the permission of Primary.

Primary brought a claim against RBS for breach of a contractual obligation of confidence and against Direct Line for breach of an equitable obligation of confidence. RBS denied committing any breach of its contractual obligations and, in the alternative, argued that any such breach gave rise only to nominal damages.

Mr Justice Arnold readily found that RBS had given Primary assurances of confidentially. He noted that terms may be incorporated into a contract through written and oral agreements, and also through conduct. In addition, he considered that it is *"common ground that a banker owes his customer a duty of confidentiality"*. Further he thought that, viewed as whole, the Medway Reports contained information which was confidential to Primary. Consequently he held that RBS was in breach of its contractual obligations.

Mr Justice Arnold went on to consider the amount of damages sought by Primary. He found that only nominal damages were owed by RBS to Primary. This was partly due to the fact that Direct Line only used the Medway Reports in order to provide RBS with an insurance industry perspective on Primary, which otherwise RBS would have had to pay a third party for. In addition, Mr Justice Arnold took into account the strong negotiating position of RBS at the time any negotiations varying the confidentiality of the Medway Reports would have taken place, since Primary had breached the Agreement. Consequently Mr Justice Arnold ordered an award of GBP 5,000 to be paid to Primary, being the value of the time Direct Line spent on the project and the amount RBS should have paid an independent third party.

The claimants contended that a reasonable person in the position of Direct Line should have realised that RBS was not entitled to disclose the Medway Reports or, at the very least, should have made enquiries of Primary before reading these reports and using the confidential information. On a subjective test Mr Justice Arnold found that Direct Line thought RBS had the right to disclose the Medway Reports; on an objective test he found that Direct Line was entitled to assume RBS would comply with its duty of confidentiality. He therefore did not find Direct Line in breach of its equitable duty of confidentiality.

The full text of the Judgment can be found here:
http://www.bailii.org/ew/cases/EWHC/Ch/2014/1082.html

Back to page 1

Arbitration news

LCIA Arbitration Rule Update 2014.

The LCIA has released new LCIA arbitration rules for the first time in 15 years. These rules took effect in October 2014. Many of these amendments serve to bring the LCIA rules fully up to date with the revisions and updates that other international arbitral institutions, such as the ICC have implemented in recent years.

Generally, the key amendments address a few common issues focussing on a shortening of the timetable and speeding up the procedure. The key amendments are summarised briefly below:

Speed and procedure

Article 14.1 - The Tribunal must meet to discuss the conduct of the proceedings no later than 21 days after notification that the Tribunal has been constituted.

Article 15.10 - The arbitral Tribunal should render the award "as soon as responsibly possible". The Tribunal should set a timetable for this purpose and notify the parties and the registrar.

In general the timings and the rules have been slightly shortened and periods of time which previously ran for 30 days are now 28 days. By way of example, article 2.1 provides that the Response is due after 28 days not 30 days.

Article 5.4 - The arbitral candidate shall sign a written declaration stating that they are *"ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious conduct of the arbitration"*.

Formation of the tribunal

Article 5.8 allows the LCIA Court to appoint a Tribunal of more than three arbitrators in exceptional circumstances.

Article 7.3, the parties agree that no party can nominate a sole arbitrator or chairman.

Emergency relief

The parties are now able to apply to the LCIA for the urgent appointment of a sole arbitrator under Article 9b. The emergency arbitrator shall decide the claim no later than 20 days following their appointment under Article 9.7. The arbitrator is not required to hold a hearing but may decide the emergency relief on any available documentation. It should be noted that this provision is only available in exceptional circumstances.

Default seat

The parties are still free to choose the seat of the arbitration and there has been no change to the default seat in the absence of agreement by the parties, which remains London, England. However, in the absence of choice the default seat will now apply up to and until the formation of the Tribunal, thereafter the Tribunal may order that a different seat is more appropriate after seeking written submissions from the parties (Article 16.2).

Conduct of legal representative and parties

The new rules contain a number of provisions and amendments relating to the conduct of legal representatives.

Under Article 18.3 the parties must now notify all other parties if there are any changes or additions to their legal representatives and any such changes are conditional upon the Tribunal's approval. Article 18.4 states that the Tribunal may withhold approval where any such change could compromise the composition of the arbitral Tribunal or the finality of any award.

General Conduct Guidelines that will apply to all legal representatives appearing before the Tribunal are contained in an Annex to the draft rules. The Tribunal has powers to rule on whether or not the guidelines have been violated and has an express power to take the parties conduct into account when awarding costs under Article 28.4.

In general the amendments to the LCIA Rules are welcomed due to their emphasis on promoting procedural efficiently and improving the conduct of the parties for better handling of complex commercial disputes.

Back to page 1

Regulatory news

Serious Fraud Office investigating FOREX rigging.

On 21 July 2014, the Serious Fraud Office (SFO), which has been collecting information over the past few months, opened a criminal investigation into allegations of fraudulent conduct in the foreign exchange (Forex) market. This investigation will target individuals, who risk imprisonment, and banks who risk fines similar to those imposed following the LIBOR scandal, in relation to which banks and inter-dealer brokers have paid out more than USD 6 billion so far. The SFO has the power to investigate both anti-trust and fraud offences.

Around 15 international agencies are currently investigating claims of collusion and price manipulation in Forex, the abuses allegedly having been coordinated using online chatrooms. The SFO will work together with both the Financial Conduct Authority (FCA) and the US Department of Justice (DoJ), which launched its own criminal investigation in October last year. The DoJ is examining, among other allegations, whether traders from different banks colluded to share information over the spread they were charging large investors, and whether they used knowledge of upcoming client orders to “front run” trades (i.e. to use information about client orders to trade in advance to improve the trader’s own position).

At least 15 banks have co-operated with regulators in London, Europe and the US, in addition to conducting their own internal investigations. Deutsche Bank has allegedly fired three Forex traders in New York as a result of the inquiry, and about 20 senior traders across the banking sector have been suspended. An official SFO investigation could protect some traders from any potential extradition to the US if they were charged in parallel proceedings by the DoJ.

The investigations are focussed around the WM/Reuters closing rate, which is calculated by taking the median rate of trades carried out in a 60 second window either side of 4pm daily. The fraudulent techniques varied, but allegedly included practices such as “front-running”, increasing trade activity around the 4pm window in order to influence the rate, and colluding with other banks to enter into false trades which were almost immediately unwound.

Since the WM/Reuters rate is based on actual trades, there will be a record of all trades made. Patterns and trends of banks undertaking increased activity around the 4pm window should therefore, in theory, be relatively easy to demonstrate. A positive finding of fraudulent conduct by the SFO would potentially assist those who suspect that they have suffered loss as a result of Forex manipulation who are considering bringing claims. In the meantime, customers who have engaged in large volumes of Forex transactions on a regular basis at the relevant WM/Reuters rate with any of the banks under investigation should take advice as to possible claims that may be available to them.

Back to page 1

The High Court considers whether certain investment schemes were "collective investment schemes" (CISs) for the purposes of section 235 of the Financial Services and Markets Act 2000 (FSMA).

Financial Conduct Authority (A Company Limited by Guarantee) v (1) Capital Alternatives & 15 Ors [2014] EWHC 144 (Ch)

The defendants promoted and operated four investment schemes. The first scheme, referred to as the African land scheme, concerned a rice farm in Sierra Leone. Investors bought sub-leases of plots of land at the farm, on the basis that they would receive the profit from the sale of the rice cultivated on the plot sub-leased to them. The other three schemes were carbon credit schemes relating to forest areas in Australia, Sierra Leone and the Amazon. They involved the sale to investors of sub-leases or licences, on the basis that the operators would seek accreditation by a relevant body, resulting in tradable carbon credits which could be re-sold at a profit.

FSMA, section 235 provides that an investment scheme will be classed as a CIS if the participants do not exercise day-to-day control over the management of the investment property and the scheme has one or both of the following attributes: (a) the contributions of the participants and the profits or income out of which payments are to be made to them are pooled; (b) the property is managed as a whole by or on behalf of the operator of the scheme.

The Court held that, on the facts, the investors in both types of scheme evidently did not exercise day-to-day control over the investment property. (a) pooling and (b) management as a whole were separate issues. An investment scheme might not involve pooling but might nonetheless be "managed as a whole" and, as such, would be a CIS.

Whereas investors' contributions were pooled to meet the costs of developing and running the rice farm in its entirety, there was no pooling of profits or income, as the rice from each plot was harvested separately, weighed and sold for sums representing the amount of rice grown. Accordingly, the Court found in favour of the scheme as regards pooling. As regards the Australian carbon credit scheme, the investors received revenues in accordance with the performance of their individual plots, and so there was no pooling of profits, whereas the evidence did point towards a pooling of contributions and profits in the Sierra Leone and Amazon carbon credit schemes.

The correct test for deciding whether property was "managed as a whole" was whether the elements of individual management, arising either from attention given by the management to the interests of individual investors or from participation by the investors themselves in the management of the property, was substantial. If so, the management by or on behalf of the operator was not to be regarded as management "as a whole".

On the facts, the only aspect of the management of the rice farm that was undertaken on an individual (as opposed to collective) basis was the harvesting and weighing of the rice for each investor's plot. However, this had no real commercial purpose, and it did not benefit investors. Further, the only purpose of the segregation of the land into plots was to generate individual returns simply to avoid categorisation as a CIS. The property was therefore managed "as a whole" and the Africa land scheme was a CIS.

Similarly, in the Australian carbon credit scheme, the allocation of individual plots to investors had no economic purpose and there was management of the entire investment property (here, the forest) as a whole. On this basis, the Australian scheme was a CIS.

In the Sierra Leone and Amazon carbon schemes, the intention seemed to be that the property was managed as a whole. Therefore, on this basis and on the basis of pooling, the Sierra Leone and Amazon carbon schemes were held to be CISs.

This judgment is being appealed. Nevertheless, it provides useful guidance as to the meaning of section 235, and will be of interest to those who promote and operate a wide range of investment schemes, including those that facilitate investment in hotel rooms and buy-to-let apartments.

The full text of the judgment can be found here: http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Ch/2014/144.html&query="capital+and+alternative s"&method=boolean

Back to page 1

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Back to page 1

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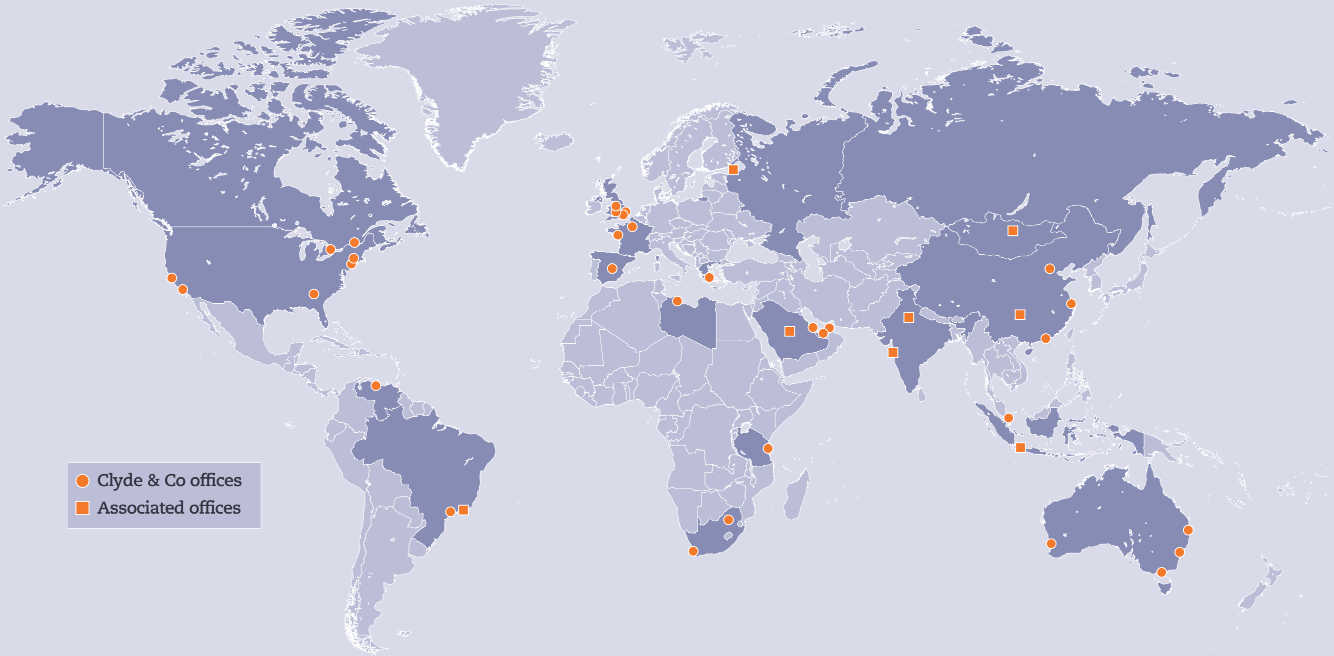

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