

ENGLAND AND WALES / JUDGMENT

A1 & Ors v P

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Neutral Citation Number: [2025] EWHC 3372 (Comm) IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES KING'S BENCH DIVISION
COMMERCIAL COURT IN THE MATTER OF AN ARBITRATION CLAIM Case No: CL-2024-000260
Royal Courts of Justice Rolls Building, Fetter Lane, London, EC4A 1NL Date: 19/12/2025 Before :
THE HONOURABLE MR JUSTICE HENSHAW

- ----- Between:

- (1) A1
- (2) A2
- (3) A3 Claimants/Respondents in the arbitration
- and - P Defendant/Claimant in the arbitration
- -----

- ----- Mark Wassouf (instructed by Mayer Brown International LLP) for
the Claimants Mr Jamie Carpenter KC (instructed by W Legal Limited) for the Defendant
Hearing dates: 21 and 22 October 2025 Draft judgment circulated to parties: 12 December
2025

- ----- Approved Judgment Approved Judgment Mr
Justice Henshaw Mr Justice Henshaw: A v P (A)

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INTRODUCTION 1. 2. 3. This is a challenge under section 67 of the Arbitration Act 1996 (the “1996 Act”) to set aside an arbitration award dated 10 April 2024 (the “Award”) issued by a three- person tribunal (the “Tribunal”) sitting under the auspices of the London Court of International Arbitration (the “LCIA”). The First, Second and Third Claimants were held by the Award to be jointly and severally liable to pay the Defendant their claimed sum plus interest and costs for services provided to them by the Defendant. The First Claimant (“A1”) and the Second Claimant (“A2”) – are companies incorporated in Country 1. A1 has a direct and indirect interest in A2 totalling 50.4%. The Third Claimant (“A3”) – is a company incorporated in Country 2. Approved Judgment Mr Justice Henshaw A v P 4. 5. 6. The Defendant (“P”) – provides intelligence gathering services and analysis to support legal proceedings. C (“C”) is a US law firm who engaged P to provide services in connection with a dispute in which the Claimants were concerned. It is in dispute whether it did so as principal only, or as agent for each of the Claimants. The Claimants challenge the Tribunal’s jurisdiction on the ground that they were not parties to the contract by which P was engaged, because (a) C lacked authority to bind them to it and (b) (in the case of A1 and A3) as a matter of construction of the relevant agreement and/or C’s intentions. 7. For the reasons given below, I have reached the conclusions that:- i) ii) iii) The First and Third Claimants were not party to the agreement with P, or (therefore) the arbitration agreement contained in it, and the Tribunal lacked jurisdiction in respect of them. The Award stands in relation to the Second Claimant. To that extent, the Award must be set aside or varied. The text of this judgment includes certain passages which have been redacted in order to preserve the confidentiality of matters canvassed in the underlying (confidential) arbitration. (B) FACTS 8. 9. 10. The Port Authority (“D”) was owned by a Ministry of Country 2. It operated a container terminal at a port in Country 2 and intended to commission the

construction of a new container terminal. A2 successfully tendered to build the new terminal and operate it under a 40-year concession agreement (“the Project”). A2 caused A3 to be incorporated as a special purpose vehicle for the Project, shares in which were held by several investors, including D which had a 5% share. A3 was managed by A2, which had a 25% share in A3 by the time of P’s involvement. A3 and D accordingly entered into a concession agreement in May 2006 (“the Concession Agreement”). However, the Project was not a success. D accused A3 of failing to meet its obligations under the Concession Agreement and terminated the agreement in August 2015. The Claimants believed that that was the result of deliberate obstruction by D. Accordingly, A3 launched the A3 Arbitration against D, seeking damages for D’s alleged breaches and unlawful termination of the Concession Agreement. A3 was represented in the A3 Arbitration by C. C’s engagement letter dated 8 January 2016 was addressed to W, Chief Legal Officer at A1 (“the First A3 Engagement Letter”). In that letter, C described A1 as “the owner” of A2, which was said to be the majority shareholder of A3 and manager of the Project. The First A3 Engagement Letter provided for A1 to guarantee payment of C’s fees. The partners at C responsible for the matter were R and T. Approved Judgment Mr Justice Henshaw A v P 11. 12. 13. 14. 15. 16. 17. 18. 19. Revised engagement terms with A3 were sent to W by C on 27 September 2016 (the “Second A3 Engagement Letter”). A1 continued to guarantee the fees. On 4 April 2018, P was approached by R of C with a view to engaging it on behalf of his clients. On 5 April 2018, R sent P a draft agreement letter, prior to the meeting. The letter recorded that “Such services are being requested by the Firm in connection with its provision of legal advice to its respective clients, [A1] and [A3]”. C implemented two projects with P. The first was in relation to the dispute over the Project, and was codenamed “Project C” and later “Project T”. The second project concerned a dispute with K (“K”), codenamed “Project S” and later “Project D”. In an initial meeting between C and P, C explained that P would be engaged to investigate whether D deliberately sabotaged the Project and, if so, whether this had been on the instructions of the former Minister in the Country 2 government. Following that meeting, P’s Business Development Manager sent an internal risk assessment email, in which he recorded the name of the client as “[A3], a [Country 2] consortium of [investors], managed by [A2], a [Country 2] subsidiary of [A1] – a [Country 1] company”. On 11 May 2018, P sent a draft agreement to C for the purposes of Project C, i.e. the D investigation. On the same date, P also sent a draft agreement to C for Project S, the K matter. Both draft agreements provided for the contractual counterparty to be C itself. On 21 May 2018, R told P that his ‘proposed edits’ to the terms and conditions for the engagement of P “are under review by our firm, then by our client”. On 24 May 2018, T told P in an email that “On our side, we are close on the LOEs and Terms documents and we don’t see any major problems. We are also working to make sure we are engaged as well to make sure we can be of full assistance on the projects.” An email from T of 24 May 2018 also referred to R being in Country 1 with “the client”. Another email from T, of 25 May 2018, reported that “The client is reviewing our engagement letters”. That seems to have been a reference to proposed engagement letters which C had sent to W that day. One letter was addressed to W only in his capacity as Chief Legal Officer of A1 (“the A1 Engagement Letter”), providing for A1 to

engage C for the purposes of Project S. The other letter was addressed to W as Chief Legal Officer of A1 and as Chief Legal Officer of A2 (“the A2 Engagement Letter”). It provided for A2 to engage C for the purposes of Project C. That letter recorded – like the A3 Engagement Letters – that A1 was the “owner” of A2, which was the manager of A3. It also recorded that “This agreement is in connection with the continued representation by [C] as lead counsel in the conduct of the [A3 Arbitration]”. Under this engagement letter, A1 agreed to guarantee payment of C’s fees and expenses. However, the letter also stated that: “Although it is acknowledged that [C] provides separate representation to [A1] in unrelated and separate matters, [A1] and [A2] further acknowledge that [C]’s client for [the] purposes of this engagement is [A2] only”. Approved Judgment Mr Justice Henshaw A v P There appears to have been no evidence in the arbitration that that limitation was brought to P’s attention. 20. On 27 May 2018, C sent mark-ups of the draft P agreements to P. In both agreements, C had made a series of amendments introducing references to “the Firm” and “the Client”. For instance, the opening words, which originally referred only to P and C, now amended the counterparty to be “[C] (hereafter “the Firm”) on behalf of the Firm’s client and its subsidiaries (the ‘Client’)”. [Text redacted – see Confidential Schedule] now read:- [Text redacted – see Confidential Schedule] 21. The final agreement for Project C/Project T was dated 28 May 2018 and had been signed by V of P and by T by 31 May 2018 (“the P Agreement”). The following parts of the P Agreement are potentially relevant to the jurisdiction issues: i) ii) iii) iv) v) vi) As per the revisions noted above, by clause 1 P was retained by “[C] (hereafter ‘the Firm’) on behalf of the Firm’s client and its subsidiaries (the “Client”)” to provide services “to the Firm”. Clause 1 also incorporated the attached Terms and Conditions (“the Ts & Cs”). By clause 6, the primary objective of the project was to provide intelligence and evidence “to support the Firm’s reasonably contemplated litigation efforts on behalf of the Client...”. Clause 6(a) referred to “[D]’s stubborn position in refusing any reasonable solution for The Project or its derailing of any effective negotiations with the Client” and “a larger collusion against the Client”. Clause 6(c) referred to “other players who may have colluded against the Client” and “any competitors either local or foreign, who may have conspired with the Targets against the Client”. [Text redacted – see Confidential Schedule] Clause 8 provided that “[t]he Firm” would provide certain information to P, and that “[t]he Firm will also disclose, after obtaining consent of the Client” certain other information to P. vii) [Text redacted – see Confidential Schedule] viii) Clauses 17 and 18 provided for regular updates to the given to “the Firm” and for relevant information to be provided to “the Firm” as soon as it becomes available. ix) Clauses 20 to 23 provided for P’s fees as follows:- a) Clause 20 provided for fees to be paid to P in any event. Approved Judgment Mr Justice Henshaw A v P b) c) d) Clause 21 provided for an additional fee to be paid to P in the event that the Client made use of intelligence obtained by P, including where P provided a witness statement on behalf of the Client which contained that intelligence. Clause 22 provided that, if the Client used intelligence obtained by P in any current and/or future civil proceedings, inter alia against any of the Targets, then P would be paid in addition a percentage of any recovery in those proceedings. Clause 23 provided that any fee payable under clause 22 would be net of any fees previously paid to P under the P

Agreement. The P Agreement was signed on behalf of P and by T of C. The attached Ts & Cs contained the following provisions [Text redacted – see Confidential Schedule]:- In relation to Project S/Project D, P and C entered into an agreement dated 28 May 2018 (“the Project S Agreement”). The essential structure was materially identical. On 1 June 2018, a “kick off” meeting took place, which was attended by X and Y on the client side. The invitation to that meeting was sent to email addresses for both of them at “[A1].com”. On 2 August 2018, P gave a first presentation of its findings in relation to both projects. The sole client representative at that meeting was X. On 28 September 2018, P presented its final findings in both Project T and Project D. The client attendees were Y, X and Z. P’s investigation established that D had not wanted the Project to succeed, because it was a threat to the old container terminal at the port and that D’s then chairman had been instrumental in obstructing the Project. Thereafter, there were discussions between P and C as to how best to deploy P’s findings, which included the possibility of submitting evidence in the A3 Arbitration and/or launching a BIT arbitration. V produced a witness statement, to be submitted on behalf of A3 in the A3 Arbitration, for which the fee due under clause 21 of the P Agreement was paid, but the statement was ultimately not used in the Arbitration. Instead, on 25 November 2018, A2 sent a notice of dispute to the government of Country 2 under a bilateral investment treaty (“BIT”) between Country 2 and Country 1, in which P’s findings were set out (“the BIT Notice of Dispute”). A3 subsequently submitted the BIT Notice of Dispute into the record in the A3 Arbitration. A2 ultimately entered into a settlement with Country 2 and D under which it received damages (“the A2 Settlement”), and D entered into a settlement agreement with A3 and subcontractors who had obtained arbitration awards against A3, under which A3 settled with the D for a payment to A3 and a payment to the subcontractors (the “A3 Settlement”). 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. Approved Judgment Mr Justice Henshaw A v P 32. A2 accepted that it was liable to make a payment to P under clause 22 of the P Agreement in respect of the A2 Settlement, and so paid P the amount due. A1 and A3 denied liability in respect of the A3 Settlement. P’s invoice for the sum it claimed was due, the “Claimed Sum”, was issued on 14 June 2022. It claimed that sum from each of the Claimants in the Arbitration. (C) THE ARBITRATION

- (1) Commencement and stages 33. 34. P commenced the arbitration by a Request for Arbitration dated 18 October 2022. The Arbitration was commenced pursuant to clause 11.7 of the Ts & Cs attached to the P Agreement (the “Arbitration Agreement”):- “Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be three. The seat, or legal place, of arbitration shall be London. The language to be used in the arbitral proceedings shall be English. The governing law of the contract shall be the substantive law of England.” 35. The Parties filed written memorials and evidence in accordance with the Tribunal’s directions. In particular: i) ii) iii) iv) v) P filed its Statement of Case on 13 February 2023, its Statement of Reply on 23 June 2023 and a Surrejoinder on 15 September 2023. P filed three witness statements by V

and one by U. A1, A2 and A3 filed a Statement of Defence on 13 March 2023, their Statement of Rejoinder on 25 July 2023 and a Surrejoinder Response on 19 September 2023. A1, A2 and A3 served two witness statements by X. The parties exchanged document production requests in accordance with the Timetable and the Tribunal's directions.

- (2) The parties' arguments before the Tribunal 36. P's case before the Tribunal was that: i) By the Agreement, through their solicitors C acting or apparently acting on their behalf, A1, A2, and A3 engaged P to obtain intelligence in support of legal disputes in which they were engaged or contemplating. P reasonably believed that A1, A2 and A3 were clients under the Agreement. Approved Judgment Mr Justice Henshaw A v P ii) iii) iv) v) P had obtained intelligence which supported A2, A1 and A3's case and claims. The intelligence was deployed in the BIT Notice of Dispute by which A2 threatened arbitration against Country 2, and in the A3 Arbitration in which a witness statement was prepared by V for use (though it was never submitted). P was entitled under clause 22 of the Agreement to recover a success fee. The "Targets" referred to in clause 22 were the Country 2 Minister and D. On the basis that there was "use" in proceedings against a "Target" and a Settlement was achieved, was due a success fee by reference to the total sum provided for in the A1 and A3 settlements, of which the Claimants had to date paid only the A1 settlement amount. P was also entitled to interest at 8% over the Bank of England Base Rate, pursuant to the Late Payment of Commercial Debts (Interest) Act 1998, either as a matter of law or as incorporated by the Ts & Cs. 37. A1, A2 and A3 argued before the Tribunal that:- i) ii) iii) iv) v) The A3 Arbitration and the P Agreement were two separate and discrete matters. A3's claim against D in the A3 Arbitration was not relevant to the P Agreement. It commenced in 2015, long before P was engaged. A3's claim against D was settled on 15 February 2022. Intelligence sourced by P was not used in the A3 Settlement, so clause 22 was not engaged. The claim of such use was inherently implausible considering that the final pleading filed by A3 in the A3 Arbitration was filed on 20 June 2018, as a responsive pleading, and after four previous pleadings had been filed already. The only client of C for the purpose of the P Agreement was A2. The Agreement was entered into in order to assist A2 with its potential BIT claim against Country 2. A2 was not a party to the A3 Settlement, and the A3 Settlement is not within the scope of the Agreement. C entered into the Agreement on behalf of its client and its subsidiaries. A3 and A1 were not clients of C nor subsidiaries of A2, and thus not parties to the Agreement. Accordingly, the Tribunal had no jurisdiction over them, and they had no liability under the Agreement. After P had claimed success fees in March 2022, on 11 April 2022 X of A1 explained over the phone to P that the A3 Settlement was irrelevant, and that P was only entitled to a success fee for the A2 Settlement. P accepted this and on the same day issued an invoice for the A2 Settlement success fee minus the amounts which had already been paid under clauses 20 and 21 of the P Agreement. However, P decided it was not happy with that fee, and issued a further invoice on 14 June 2022.

(3) The Tribunal's findings 38. The Tribunal identified five issues for its consideration:- Approved Judgment Mr Justice Henshaw A v P i) ii) Were the requirements of clause 22 of the Agreement satisfied? Were A1 and A3 parties to the Agreement? iii) Which Respondent or Respondents, if any, were liable under clause 22? iv) v) If any Respondent was liable, what was the amount of liability? If there was liability, what, if any, interest should the Claimant receive? 39. 40. In the Award, the Tribunal found that, as a matter of construction of the P Agreement, A1, A2 and A3 were all parties to it. Further, C had the authority of both A1 and A3 to bind them to the Agreement: apparent authority in respect of A1, and implied actual and apparent authority in respect of A3. The Tribunal also concluded that the submission of the BIT Notice of Dispute in the A3 Arbitration constituted use of intelligence for the purposes of clause 22. The requirements of clause 22 were met in relation to the A3 Settlement, and P was entitled to a success fee by reference to all sums payable under the A3 Settlement, including those paid to the subcontractors. 41. A1, A2 and A3 were held to be jointly and severally liable to pay P the outstanding Claimed Sum plus interest and costs. (D) GROUNDS OF CHALLENGE 42. A1, A2 and A3 seek an order to set aside and/or to declare the Award to be of no effect, on two grounds:- i) ii) Ground 1 : The Tribunal did not have jurisdiction over A1 or A3 because they were not parties to the P Agreement, nor the Arbitration Agreement contained within it. Ground 2 : The Tribunal did not have jurisdiction over A1 or A2 because neither entity granted C authority to enter into an arbitration agreement in accordance with the Country 1 Civil Code, and an article found therein relating to authorisation (the "Authorisation Article"). The effect of the Authorisation Article is that a legal act on behalf of a company going beyond an ordinary act of management requires a special mandate (specific power of attorney), and that this requirement applies to, among other things, entering into an arbitration agreement and legal representation in arbitration proceedings. The Articles of Association can grant the Chairman of the Board or other person authority to take actions covered by the Authorisation Article, in which case that person can take such steps personally or issue a special power of attorney authorising a further person (such as the CEO or an external lawyer) to do so on the company's behalf. Approved Judgment Mr Justice Henshaw (E) LEGAL PRINCIPLES

(1) De novo review A v P 43. On a jurisdiction challenge under section 67 of the 1996 Act, the court conducts a de novo review: *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 ("*Dallah*") at [25] and [26]. The arbitral proceedings commenced before the effective date of the Arbitration Act 2025. 44. In a de novo review, as summarised by Butcher J in *Republic of Korea v Dayyani*

[2019] EWHC 3580 (Comm) at [26]:- "The award of the arbitrators has no automatic legal or evidential weight. Nevertheless, and given that the arbitral tribunal has considered the same issues, the Court will examine the award with care and interest. If and to the extent that the reasoning is persuasive, then there is no reason why the Court should not be persuaded by it."

- (2) Loss of the right to object 45. Section 73(1) of the 1996 Act provides:- “(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—
- (a) that the tribunal lacks substantive jurisdiction,
 - (b) that the proceedings have been improperly conducted,
 - (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or
 - (d) that there has been any other irregularity affecting the tribunal or the proceedings, he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.” 46. Foxton J in *Czech Republic v Diag Human SE* [2024] EWHC 708 (Comm) provided this helpful summary of the principles:- “25. It is common ground that the burden is on the Czech Republic to establish that, at the time it took part or continued to take part in the arbitral proceedings, it did not know and Approved Judgment Mr Justice Henshaw *A v P* could not with reasonable diligence have discovered the grounds for the objection it now seeks permission to advance.
26. The authorities on the "reasonable diligence" proviso to s.73 establish a number of propositions:
- i) Where a party neither believes nor has grounds to suspect the existence of particular facts, it would usually be wrong to find that it could with reasonable diligence have discovered those facts: *Sumukan Ltd v Commonwealth Secretariat* [2007] EWCA Civ 1148, [36] and [38] , particularly where it could reasonably think that the other party had taken all appropriate steps to address the issue which is relied upon to challenge the award ([62]). This conclusion can be seen to reflect the two- stage analysis which has come to be adopted under s.32 of the Limitation Act 1980 as set out at [29] below. ii) "It is incumbent on a party seeking to bring a claim based on new materials to condescend to real particularity" in its evidence, and "normally incumbent upon the applicant to adduce evidence which explains his conduct, unless circumstances make it impossible. Thus if an applicant does not do this, the court is entitled to count any periods where no good excuse is established as being periods lacking in good reason. So too may it draw an inference when issues go un-dealt with" (*ZCCM Investments Holdings plc v Kansanshi Holdings Plc* [2019] WHC 1285, [218]).
27. Authorities dealing with the "reasonable diligence" requirement in s.32 of the Limitation Act 1980 are also of assistance. While Mr Webster suggested that the context of s.32 (which determines when what is usually a 6-year period for commencing proceedings will start to run) and s.73 (which decides whether a legitimate objection has already been lost) differ, the policy of "speedy finality" reflected in the strict time limits underpinning the 1996 Act does

not support the conclusion that "reasonable diligence" involves a lesser standard in the latter context. The relevance of the authorities addressing s.32 of the Limitation Act 1980 to s.73 of the 1996 Act is supported by Mr Justice Robin Knowles in *Federal Republic of Nigeria v Process & Industrial Developments Limited* [2023] EWHC 2638 (Comm), [536].

28. Professor Andrew McGee *Limitation Periods* 9th Ed

(2022) summarises the applicable law relating to s.32 as follows:

- i) "[A] claimant is not required to do everything possible but only to do what an ordinary prudent person would do having regard to all the circumstances." ([20-004]. Approved Judgment Mr Justice Henshaw *A v P* ii) The issue is whether the relevant matter "could" be discovered, not "should" (ibid). iii) The concept of "reasonable diligence" carries with it the notion of a desire to know and, indeed, to investigate (ibid). iv) Citing *Paragon Finance Plc v DB Tharekar & Co* [1999] 1 All ER 400, the party must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take.
29. It is clear that while the requirement of reasonable diligence is a continuing one, the duty will become more exacting in what it requires if there has been what has sometimes been referred to as a "trigger", an event or fact which ought reasonably to lead that party to undertake some form of active investigation: *OT Computers Ltd v Infinoeon Technologies AG* [2021] EWCA Civ 501, [47]:- "although the question what reasonable diligence requires may have to be asked at two distinct stages, (1) whether there is anything to put the claimant on notice of a need to investigate and (2) what a reasonably diligent investigation would then reveal, there is a single statutory issue, which is whether the claimant could with reasonable diligence have discovered (in this case) the concealment. Although some of the cases have spoken in terms of reasonable diligence only being required once the claimant is on notice that there is something to investigate (the "trigger"), it is more accurate to say that the requirement of reasonable diligence applies throughout. At the first stage the claimant must be reasonably attentive so that he becomes aware (or is treated as becoming aware) of the things which a reasonably attentive person in his position would learn. At the second stage, he is taken to know those things which a reasonably diligent investigation would then reveal. Both questions are questions of fact and will depend on the evidence. To that extent, an element of uncertainty is inherent in the section." 47. As Foxton J noted, it may be helpful to consider by way of analogy the position under section 32(1) of the Limitation Act 1980, under which in specified cases of fraud, concealment and mistake, the limitation period does not begin to run until the claimant has discovered, or could with reasonable diligence have discovered, the fraud, concealment or mistake. In *FII Group Test Claimants v Revenue & Customs Commissioners* [2020] UKSC 47, Lords Reed and Hodge (with whom Lords Lloyd-Jones and Hamblen agreed) said at [213(13)]:- "The purpose of the postponement effected by section 32(1) is to ensure that the claimant is not disadvantaged, so far as limitation is concerned, by reason of being unaware of the circumstances giving rise to his cause of action as a result of Approved Judgment Mr Justice Henshaw *A v P* fraud, concealment or

mistake. That purpose is achieved, where the ingredients of the cause of action include his having made a mistake of law, if time runs from the point in time when he knows, or could with reasonable diligence know, that he made such a mistake "with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice and collecting evidence"; or, as Lord Brown put it in *Deutsche Morgan Grenfell*, he discovers or could with reasonable diligence discover his mistake in the sense of recognising that a worthwhile claim arises ..."

- (3) Agency 48. 49. The identity of parties to a contract is generally a factual question which does not give rise to any questions of legal principle: Chitty on Contracts, 33rd edition (2018), at §18-004. An exception to that general approach is in circumstances where an agent is acting or purporting to act on behalf of a principal. As per Bowstead and Reynolds on Agency, 23rd Ed. §2-001, the relationship of principal and agent may be constituted: i) ii) by the conferring of authority by the principal on the agent, which may be express, or implied from the conduct or situation of the parties. It may or may not involve a contract between them; retrospectively, by subsequent ratification by the principal of acts done on the principal's behalf. 50. The burden of establishing a conferral of authority rests on the party asserting its existence: Bowstead & Reynolds on Agency, §3-001.
- (a) Actual authority 51. 52. "Actual" authority arises where an agent has been expressly or impliedly authorised to act on behalf of a principal: *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at [502-503] (per Diplock LJ). Though actual authority derives from the principal's consent, its existence is judged objectively "by application of ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties": *Freeman & Lockyer v Buckhurst Park Properties* at [502].
- (b) Apparent (ostensible) authority 53. Apparent authority "can be said to be no authority at all", and applies where a principal has not authorised the agent to act but a third party is entitled to assume that the principal has: Bowstead & Reynolds on Agency, §1-014. Approved Judgment Mr Justice Henshaw A v P 54. There are two categories of apparent authority cases, as distinguished in Bowstead & Reynolds on Agency, at §3-005(ii): "Apparent authority seems to involve two types of case: cases where there can be said to be something like a specific representation by the principal of the agent's authority, on which the third party relied, which could be called cases of "genuine apparent authority"; and cases where the only representation made by the principal lies in putting the agent in a position carrying with it a usual authority as described above." 55. The leading case on apparent authority is *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* at [503] in which Diplock LJ said:- "An 'apparent' or 'ostensible' authority ... is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him

by such contract.” The representation creates an estoppel. As summarised in *Law Debenture Trust Corp Plc v Ukraine* [2023] UKSC 11 at [39]:- “For the estoppel to operate the representation must be one upon which the contractor could and did reasonably rely. The doctrine protects a contractor who is entitled to assume that the person with whom he is dealing has the authority which he appears to have. But the principle cannot be relied upon by a contractor who is put on inquiry, by which we mean that the contractor fails to make the inquiries that a reasonable person would have made in all the circumstances to verify that the person with whom he is dealing does indeed have authority...”

- (c) Usual authority 56. 57. 58. Usual authority is “generally used to refer to the authority of a person, the agent, to enter into transactions of a type that are ordinarily undertaken by a person appointed to a particular position...” *Law Debenture Trust Corp Plc v Ukraine* [2023] UKSC 11 at [42]. The term “usual authority” can refer to implied actual authority. In those circumstances, the agent’s authority is implied by virtue of the position it occupies, unless authority is withdrawn by the principal: *Bowstead & Reynolds on Agency*, §3- 005. The term can also refer to the second type of apparent authority identified in *Bowstead & Reynolds on Agency* at §3-005(ii), quoted above, where the principal gives a representation as to the authority with which the agent is imbued, or is taken to have done, so by virtue of appointing the agent to a position which usually carries such authority: *AMB Generali Holding AG v SEB Trygg* [2005] EWCA Civ 1237 at [32]. Thus Diplock LJ said in *Freeman & Lockyer* at [503-4]:- Approved Judgment Mr Justice Henshaw A v P “The representation which creates " apparent " authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has usually " actual " authority to enter into.”
59. I return later to the usual authority of solicitors.
- (d) Ratification 60. The principles governing ratification were summarised as follows by Andrew Smith J in *Sea Emerald SA v Prominvestbank v Joint Stockpoint Commercial Industrial and Investment Bank* [2008] 1 Lloyd’s Rep 96 (also quoted in *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2015] EWHC 718 (Comm) at [88]):- “102. The principles governing ratification by a purported principal of an act done in his name were considered by Waller J in *Suncorp Insurance and Finance v Milano Assicurazioni SPA* [1995] 2 Lloyd’s Rep 225 especially at page 234 and by Moore-Bick J in *Yona International Limited v La Reunion Francaise SA* [1996] 2 Lloyd’s Rep 84 especially at pages 103 and 106. Ratification may be implied as well as express, and there is no requirement that it be communicated to either the agent or the person with whom the agent entered into the contract: it operates as a unilateral manifestation of will. Mere acquiescence or inactivity may be sufficient to constitute ratification. However, it involves a conscious decision to adopt an unauthorised act, and in order for there to be ratification:

- (i) The act of ratification must be that of the principal or of someone competent at the time of ratification to make the contract in question or to do the relevant act for the principal. (ii) The person ratifying the agent's conduct must know of all the material circumstances, unless he evinces an intention to ratify the contractual or other act regardless of them. (iii) In a case of ratification through silence and inactivity, it must be such as to manifest unequivocally an intention to adopt the act in question.
103. In the Yona International case, Moore-Bick J said this (at page 106), which to my mind has some application to this case: 'The essence of ratification is a decision by the principal to adopt the unauthorized act as his own. It does not therefore Approved Judgment Mr Justice Henshaw A v P depend on communication with or representation to the third party and is thus in principle distinct from estoppel, but since the intention to ratify must be manifested in some way it will in practice often be communicated to and relied upon by the other party to the transaction. Ratification can no doubt be inferred without difficulty from silence or inactivity in cases where the principal, by failing to disown the transaction, allows a state of affairs to come about which is inconsistent with treating the transaction as unauthorized. That is probably no more than a form of ratification by conduct. Where there is nothing of that kind, however, the position is more difficult since silence or inaction may simply reflect an unwillingness or inability on the part of the principal to commit himself. For that reason it will not usually be sufficient to evidence ratification, nor will it amount to an unequivocal representation sufficient to give rise to an estoppel.'" 61. 62. An act of ratification can be implicit (and usually is), but it must be unequivocal: the words or conduct in question must not be such that they could be accounted for by other interpretations: Bowstead & Reynolds on Agency, §2-077. As to knowledge of the relevant circumstances, Toulson J said in *Ing RE (UK) Ltd v R&V Versicherung AG* [2006] EWHC 1544 (Comm):- "If a principal knows the essentials of what happened as between the agent and the third party (in this case, that the agent entered into a quota share treaty on behalf of the principal with the third party), I find it difficult to see as a matter of justice and principle why that should not be sufficient knowledge for the purposes of ratification of the agent's conduct vis-à-vis the third party." [153] (F) WITNESS EVIDENCE
- (1) Witness of fact 63. 64. 65. The only witness of fact heard in the jurisdiction challenge was Z, who has been chairman of A2 since 2009. He gave evidence via video link from the United States, listening to questions in English but answering in his first language via a translator. I regret to say that he was not a satisfactory witness, even allowing for the possible disadvantage of giving evidence remotely and in translation. His evidence on important matters was inconsistent, and at times appeared evasive. Z stated in his witness statement that he had been unaware of the restriction represented by the Authorisation Article until May 2024, when he sought Country 2 law advice following receipt of the Award. He also stated that he had personally confirmed that (a) no provision enabling arbitration was included in A2's constitution and (b) no shareholders' resolution was ever made in order to authorise any officer of the company to empower C to enter into arbitration agreements on its behalf. In cross-examination, Z was confronted with amendments made to the company's

Articles in 2014, one of which amended Article 25 to read:- Approved Judgment Mr Justice Henshaw A v P “The Board of Directors shall have the broadest powers to manage the company and carry out all works required to manage the company according to its purposes. This power may be only limited by what is stipulated by law, these Articles of Association, or the decisions of the General meeting. The Board of Directors may sell or mortgage the company’s properties, provide guarantees, conclude loan contracts, engage in arbitration and conciliation, and make donations as deemed necessary for the company’s interests.” Z had no credible explanation for why he had failed even to mention this provision in his witness statement, first saying he could not remember and then asserting, implausibly, that it had nothing to do with this case. He accepted that it gave the board of directors power, among other things, to engage in arbitration, and that that was a new power not contained in the original Articles. Z also confirmed that he was Chairman when the amendment was made, and at first said it was made “for reasons of the [Authorisation Article] of the law ... and it was for the best to amend the original law”; but then later appeared to retract this, saying the amendment was “on the basis of the proceedings requested from the authorities involved”. He nonetheless understood that the things listed in the new Article 25 were things covered by the Authorisation Article, and then went on to give this evidence:- “Q. What I am suggesting is the reason for this amendment in 2014 was obviously so that the board of directors could do those things and comply with [the Authorisation Article]. Do you understand that? A. (Not interpreted) Yes, I do. But to change the articles of association of a company we need to consult or to deposit or to submit this amendment to the authorities, which they require us with a special text and that text is either covering [the Authorisation Article] or other relevant articles of the law.” (Day 1/107/4-13) Nonetheless, Z denied that, when the amendment was made, he must have known that it was because of the Authorisation Article, saying that an in-house lawyer had told him that it was necessary to change the Articles because of a legal requirement, and that any change to the Articles would be as per the advice of an in-house lawyer. Later in his evidence, Z was asked about A2’s position in the arbitration that it, but not the other Claimants, had entered into an arbitration agreement with P. He maintained that A2 had never taken any such position, despite confirming that he had approved the Respondents’ Statement of the Defence in the arbitration and despite that Statement stating in clear terms that A2 (alone among the Claimants) was a party to the P Agreement. It seemed to me that Z was simply unwilling to face up to the fact that A2 had expressly and unequivocally accepted in the arbitration that it was a party to the Arbitration Agreement. I find it hard to believe he honestly believed that A2 had not taken that position in the arbitration. 66. 67. 68. 69. Finally, Z said in his witness statement that A2 regularly enters into arbitration agreements, and no issue had been raised with him about the Authorisation Article in Approved Judgment Mr Justice Henshaw A v P that context. In the context of the present arbitration, he said he did not believe A2 was a party to any arbitration agreement, did not consider the claim to be a serious one, and (bearing in mind that it was governed by English law) did not consider it proportionate to consult lawyers from jurisdictions other than England. In cross- examination, he said “By looking at the claim I took or we took a decision that we were not going to consult a lawyer

on that matter.” That was apparently the case even though the Claimants ultimately spent a significant sum on Mayer Brown’s fees defending the arbitration.

70. My overall impression was that Z was seeking to adhere to the line he had decided to take, and was not doing his best to give accurate evidence to the court. I felt unable to place any confidence in his evidence.
- (2) Expert evidence 71. 72. 73. 74. Both parties called experts on Country 1 law. Claimants' Expert was called by the Claimants, and gave evidence in English. He studied law in Country 2, France and England; and his knowledge of Country 1 law is derived from (a) the fact that Country 1 law is drawn from Country 2 law and (b) legal research and discussions with Country 1 judges who serve in Country 2's Court of Cassation. He has submitted an expert's report to a Country 1 court but has not argued a case before the Country 1 courts. Defendant's Expert was called by P, and gave evidence via one interpreter followed by another (a course apparently necessitated by their shift systems). He studied law in Country 3 and England, and also took the first year of a law course in Country 2. He explained that Country 3 and Country 1 law are in general the same, and that he had practised as a solicitor in Country 1 law. He accepted that Country 1 law is closer to Country 2 than to Country 3 law, and that Country 1 judges are mainly seconded from Country 2. I was satisfied that both experts had sufficient knowledge and experience to give expert evidence on Country 2 law, and were doing their best to assist the court. The evidence of Defendant's Expert was, though, somewhat marred by translation difficulties, particularly after a change of translator mid-way through his oral evidence. It emerged, for example, that the translator had been translating the English word 'ratification' into a word meaning 'invalidity'. I have therefore felt it necessary to be cautious about how much I can safely take from the latter part of his oral evidence. (G) ANALYSIS
- (1) C's authority to bind A1 and A3 75. P's primary case on authority, reflecting the approach taken by the Tribunal, was that C had: i) implied actual authority, alternatively ostensible authority, in the case of A3, and Approved Judgment Mr Justice Henshaw A v P ii) ostensible authority in the case of A1, to bind them to the P Agreement, on the basis that as the companies' lawyers in the arbitration C had 'usual authority' to do all the things ordinarily incident to acting as their lawyers. 76. In the arbitration, the Tribunal recorded P as having submitted that:- "In the present case, [C] had, at the very least, apparent authority to engage the Claimant because it is part of the usual authority of firms of solicitors to engage third parties to provide services in connection with litigation. The engagement of the Claimant in the [Agreement] was in connection with the [A3] Arbitration and, therefore, [C] had usual authority, in the form of apparent authority, to engage the Claimant." (Award § 112(2)) 77. The Tribunal essentially accepted that submission:- "In the circumstances, we consider that on an objective assessment of the facts, [C] would have usual authority to approach and engage third parties to assist it in collecting evidence. It is a necessary part of the solicitor's function to do this, and third parties are reasonably entitled to assume that solicitors, who are professionals, are acting on instructions, unless told otherwise." (Award § 115) 78. 79.

However, in my view that approach conflates two different things. One is whether it is within the solicitor's remit to enter into a contract, as principal, with a third-party service provider, and in due course to pass the cost on to the client as a disbursement. The other is the solicitor's authority to bind the client itself to a contract with a third party. It is the scope of the solicitor's authority in the latter sense that is critical to the present case. The case law, at least to date, has not recognised solicitors as having usual authority anywhere near as extensive as would be necessary for the present case. In relation to solicitors, the concept of usual authority has developed in the context of compromises in litigation. In *Waugh v H. B. Clifford & Sons Ltd* [1982] Ch 374, at [387B] Brightman LJ stated:- "The law thus became well established that the solicitor or counsel retained in an action has an implied authority as between himself and his client to compromise the suit without reference to the client, provided that the compromise does not involve matter "collateral to the action"; and ostensible authority, as between himself and the opposing litigant, to compromise the suit without actual proof of authority, subject to the same limitation; and that a compromise does not involve "collateral matter" merely because it contains terms which the court could not have ordered by way of judgment in the action..." 80. Brightman LJ went on to say:- Approved Judgment *Mr Justice Henshaw A v P* "In none of the cases cited to us has there been any debate on the question whether the implied authority of the advocate or solicitor as between himself and his client is necessarily as extensive as the ostensible authority of the advocate or solicitor vis-à-vis the opposing litigant. The possibility of a difference seems to have been adverted to by Byles J. in the *Prestwich* case. 18 C. B. N. S. 806 , 809. In my judgment there is every reason to draw a distinction." (p.387D) and:- "It is however said that there is authority that a solicitor does not have ostensible authority to sign a contract of sale or purchase of land on behalf of a client: *H. Clark (Doncaster) Ltd. v. Wilkinson* [1965] Ch. 694... Of course I agree that a solicitor in a non-contentious matter does not have such ostensible authority." (p.389D) 81. 82. As reflected in that last passage, a solicitor was held in *H. Clark (Doncaster) Ltd.* not to have usual authority to sign a contract of sale and purchase on behalf of a client. The usual authority recognised in *Waugh* relates specifically to the entering into by the solicitor, on behalf of his/her client, of a settlement of litigation. I was not shown any case law, and no evidence was adduced, supporting the view that a solicitor has usual authority to bind his/her client to a contract with a service provider, still less to a contract (such as the P Agreement) under which the client contingently agrees to share with the service provider a percentage of the client's recoveries in the litigation. 83. P cited *Nayyar v Denton Wilde Sapte* [2009] EWHC 3218 (QB), where Hamblen J said at [136]:- "Whether an action falls within the usual course of a solicitor's business falls to be considered objectively. Accordingly, it is necessary to consider how it would appear to reasonable and competent people in the Claimants' position and whether objectively it would appear to be business of a nature conducted by a solicitor performing her role." However, in applying that test it is important to be precise about precisely what is meant by the 'business' in question. The issue in *Nayyar* was whether the solicitor's firm was liable for alleged negligence by an individual solicitor in connection with a payment in connection with what turned out to be attempted bribery. There was no question about authority to bind

the client to a contract. It is true that solicitors commonly engage third-party service providers while acting for clients, but it does not follow that they have usual authority to place their clients into direct contractual relations with such service-providers: that would in my view have to be demonstrated by evidence or case law. 84. P invited me to take judicial notice of the fact that it is relatively common these days in heavy commercial litigation for large third-party expenses, such as e-disclosure costs, to be made the subject of a direct contractual relationship with the client, presumably because solicitors do not wish to bear the financial burden and risk of having to pay the third party and then seek to recoup the cost from their client. P submitted that it must be within a solicitor's usual authority to bind the client to such contracts. However, there was no evidence that, in such situations, the contract with Approved Judgment Mr Justice Henshaw A v P the service provider arises by reason of (a) the solicitor having authority as agent to enter into it on the client's behalf, as opposed to (b) the client executing the contract with the service provider direct; and there is no basis on which judicial notice could be taken of any practice of type (a). Accordingly, I do not consider that C have been shown to have had implied actual or ostensible authority to bind A1 or A3 to the P Agreement. P alternatively submitted that A1 represented to P that C had authority to act in that way, by engaging C to make a contract with P in relation to the Project S Agreement on 28 May 2018. P argued that that constituted a specific representation that C had the relevant type of authority, as the Project S Agreement was an identical type of contract to the P Agreement. Thus, the Tribunal stated at Award § 135:- 85. 86. "We agree with the Claimant's submissions. The critical issue is whether [A1] put [C] in a position where a person in the Claimant's position would consider that [C] had authority to engage the Claimant for [Project C]. We conclude that the answer is yes, for the following reasons:

- (1) [A1] was a client of [C] and had been authorised to act in connection with [Project S]. We do not consider that it is material that the Claimant's [agreement] for [Project S] was concluded after the [Agreement]. Although [C] formally engaged the Claimant for [Project S] after the conclusion of the [Agreement], [C] had in fact been authorised to approach the Claimant for [Project S], as the Respondents accept^{FN}, prior to the conclusion of the [Agreement]. Thus, the Claimant would have believed, and correctly, that [C] had authority on behalf of [A1] to engage them (and in due course did engage them)." FN: "Rejoinder, § 3.4.20 ..." 87. Paragraphs 3.4.19 to 3.4.21 of Claimants' Rejoinder in the arbitration stated:- "3.4.19 [P]'s position fails at the first hurdle. Apparent Authority requires a representation from the alleged principal, but [A1] never made a representation to [P] in relation to [Project S] prior to the conclusion of the [P Agreement] – therefore, no Apparent Authority can have arisen. 3.4.20 In particular, as is uncontested, at no point during the [Project S] engagement process did [A1] ever have contact with, or make any representation to, [P]. As a result, the [Project S] engagement process cannot form the basis of any Apparent Authority. Whilst it is uncontested that [A1] did grant Actual Authority to [C] to enter into [Project S], that is irrelevant – Apparent Authority can only arise through "a representation by the principal as to the extent of the agent's authority", and [A1] never made a representation to [P] in relation to [Project S]. 3.4.21 Furthermore, [P] signed the [P Agreement] before the [Project S

Agreement] was complete. As such, even the Approved Judgment Mr Justice Henshaw A v P completion of the [Project S Agreement] cannot have been a representation upon which [P] relied when it signed on to the [P Agreement], as it occurred after [P] had signed the [P Agreement].” (footnotes omitted) 88. 89. 90. That was in response to, among other things, P’s plea that “... [C] undoubtedly had actual authority to engage [P] on behalf of [A1] in relation to [Project S]” (Reply §47 in the arbitration). In fact, it appears that the Project S Agreement and the P Agreement were both signed by P on 28 May 2018, that the P Agreement was signed by C on 31 May 2018 and that (on P’s pleaded case) C also signed the Project S Agreement on 31 May 2018. In my view, however, the fact that C had been authorised to approach P for Project S, by the time the P Agreement was executed, does not amount to a representation by A1 that C had A1’s (or A3’s) authority to bind them to the Project S Agreement, still less the P Agreement. Further, the fact that C simultaneously signed agreements in relation to both projects, whilst in fact having actual authority in relation to one of them, does not in my view amount to a representation by A1 that C was authorised to bind A1 to either letter, or at any rate to the P Agreement. Once one concludes that it was not within C’s usual authority to bind its clients to such letters, it is not in my view possible to infer any representation by A1 as to C’s authority.

- (2) Did A3 ratify the Arbitration Agreement? 91. 92. P argued that A3 ratified the Arbitration Agreement in the P Agreement by having V produce a witness statement for the A3 arbitration and by attending the meetings referred to in §§ 25-27 above. P relied on the following matters as evidence of A3 possessing sufficient knowledge for ratification:- i) ii) iii) A3 knew the terms of the P Agreement, because C had provided them in draft before the letter was signed. Given that W was the common point of contact for C in respect of all three Claimants, it is likely that he saw the engagement terms and his knowledge of them should be imputed to all three Claimants. In any event, X’s evidence in the arbitration was that he had seen the P Agreement after it was signed. A3 was already a client of C’s, and a purpose of P’s engagement was to find material which A3 could use in the A3 Arbitration. The Agreement includes uses of the word “Client” that are apt to refer to A3, in particular paras 6, 6(a) and 6(c). By clause 6, the primary objective of the project was to provide intelligence and evidence “to support the Firm’s reasonably contemplated litigation efforts on behalf of the Client...”. Clause 6(a) referred to “[D]’s stubborn position in refusing any reasonable solution for The Project or its derailing of any effective negotiations with the Client” and “a larger collusion against the Client”. Clause 6(c) referred to “other players who may have colluded against the Client” and “any competitors Approved Judgment Mr Justice Henshaw A v P either local or foreign, who may have conspired with the Targets against the Client”. iv) v) P evinced a belief that A3 was a party to the P Agreement, most obviously through the provision of V’s witness statement for potential use by A3 in the A3 Arbitration, something which was believed by P – and accepted by Claimants – to give rise to a liability for an additional fee under clause 21 of the P Agreement, since the witness statement had been provided “on behalf of the Client”, i.e. A3. The payment of that fee by the Claimants (even if by A2, because A3 had no assets) is only consistent with affirmation that A3 was indeed a

“Client” under the P Agreement. The Claimants called no evidence that they were unaware that P believed itself to have contracted with A3. Indeed, they deliberately called no evidence from anybody who claimed to speak on behalf of A3. The Tribunal in Award § 129(4) said:- “We note that the Respondents did not advance a positive case as to who was instructing [C] on behalf of [A3] in connection with the [A3] Arbitration and [Project C]. This was a matter within the knowledge of the Respondents, and they did not seek to advance a positive case as to who was giving instructions. Whilst we draw no adverse inference from this lack of explanation, at the same time it means that we see no reason to depart from the obvious conclusions one reaches from the documents, namely that officers of [A1] and [A2] (some of whom had positions in [A3] as well, and some of whom did not) were giving instructions to [C] in connection with the [A3] Arbitration. This seems to us consistent with the oral evidence of [X] during the hearing, when he testified that the matter was handled by [A2] and [W] (of [A1]).” 93. 94. I do not accept those submissions. Clearly, there was conduct which at least arguably indicated A3’s approval of P having been instructed, including by using their work and attending meetings with P representatives. However, it does not follow that A3 ratified C having bound A3 itself, as opposed to C, to the P Agreement. That would require A3 to have known that C had purported to bind A3 itself to the Agreement, and an unequivocal act by A3 consistent only with A3 having adopted that course of action. In my view, the facts do not establish that. First, even on the assumption (the accuracy of which it is unnecessary for me to decide) that the P Agreement did purport to bind any of the Claimants, that was far from obvious. As noted earlier, it was signed only by C and P. It stated on the first page that it was being entered into by C “on behalf of the Firm’s client and its subsidiaries” but then immediately went on to say that it related to the provision of services to “the Firm”. The attached Ts & Cs, though incorporated into the P Agreement by reference, were not the primary contractual document: that was the Agreement. Whilst they contained a Preamble that might tend to suggest that there was a contract between P and “the Client”, the Ts & Cs went on, confusingly, to set out a non-recourse fee obligation enforceable against C only (§ 5) and later to use the words “Party” and “Client” as meaning different things (§ 7). In my view, it would Approved Judgment Mr Justice Henshaw A v P 95. 96. not be clear to a lay reader, or even necessarily a legal reader, that the Agreement purported to bind anyone other than C. Secondly, even if it did, it would not be clear to the reader which entity or entities were encompassed by the word “Client” or the term “client and its subsidiaries”, notwithstanding language relating to the dispute that could be read as referred to A3. Thirdly, and in any event, approval by A3 (e.g. by participation in meetings) of the use of P was not consistent only with A3 having become a party to the P Agreement. It was also consistent with P simply having been engaged by C to work on A3’s case. Further, V’s draft witness statement was amended (by C) to state that “[P] was contracted by attorneys for the Claimant to investigate ...” (§ 8.2). That is consistent with, and probably positively suggestive of, C having as principal engaged P to investigate. 97. For all these reasons, the elements of ratification are in my view not made out.

- (3) A2: loss of right to object 98. 99. Given my conclusion in section (G)(1) above, it is unnecessary to consider whether the Authorisation Article argument referred to earlier (section (D) above, Ground 2) benefits A1. As regards A2, it is common ground that it is a new point, A2 not having challenged the Tribunal's jurisdiction at all, and that A2 would have to overcome the restriction set out in section 73(1) of the 1996 Act.
100. A2 submits that it can do so on the ground that it did not know and could not with reasonable diligence have discovered the ground for the objection.
101. As noted earlier, the Authorisation Article introduced a requirement for a special mandate in a company's constitution or shareholders'/partners' resolution to permit it to enter into arbitration agreements. Both A1 and A2 amended their Articles of Association in 2015 and 2014 respectively, prior to any engagement with P, so that their boards of directors could enter into arbitration agreements. However, a special mandate is also required to instruct lawyers to represent a party in an arbitration. C were not given a special mandate by A2's board of directors.
102. By the time of trial, the experts and parties agreed that the Authorisation Article went to authority, not capacity. The parties also agreed that the effect of the Authorisation Article would be that C could not have had actual authority to bind A2 (or A1). 103. The essence of A2's argument was that they could not with reasonable diligence have been aware of the ground of objection, because the Court of Cassation of Country 1 did not confirm a strict approach to ratification of arbitration agreements until after February 2023: until then, there would have been no point in taking the Authorisation Article objection because A2 would have been held to have ratified the Arbitration Agreement by performing the main contract of which it formed part. 104. Those contentions are in my view entirely without merit. Approved Judgment Mr Justice Henshaw A v P 105. 106. First, it could not seriously be suggested that a substantial Country 1 company such as A2, with access to an in-house legal department, did not know and could not with reasonable diligence have discovered the potential ground of objection under the Authorisation Article. Indeed, the changes made to the Articles in 2014 show that the company was fully aware of the Authorisation Article. Moreover, it was a question of law, described by Claimants' Expert as an important provision of civil law, and the commencement of an arbitration claim against A2 provided a natural trigger for it to consider any legal defences it might have to the claim, including its assertion on P's part by way of arbitration. Secondly, any view as to how a Country 1 court would approach the question of ratification was irrelevant for these purposes. Under English conflicts of laws principles, which the Tribunal would be required to apply, questions as to ratification are governed by the law governing the contract, here English law: see *Banca Intesa Sanpaolo Spa v Comune Di Venezia* at [113] and [314]-[323], citing *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm) at [276] and *Deutsche Bank AG London v Comune di Busto Arsizio* [2021] EWHC 2706 (Comm) at [377] and [382]. In *Banca Intesa*, having found that a resolution by Venice which authorised entering into interest swap transactions (which were substantively subject to English law) did not meet the

requirements of Italian law (at [300]-[301]), Foxton J held that Venice was nevertheless bound by them because, as a matter of English law, the agent had ostensible authority and Venice ratified the transactions. That was so, even though the effect in Italian law of the failure to comply with the legislative requirements was that the transactions were void (see [316]-[317]). 107. Thirdly, and in any event, the upshot of the Country 1 law evidence was that:- i) ii) iii) iv) v) the Country 1 Court of Cassation had, in a series of cases between 2006 and 2023, reached different conclusions about whether an arbitration agreement had been ratified by the relevant party's performance of the main or matrix contract of which it formed part; the court had concluded that contracts had been so ratified in decisions in 2005, 2013 and 2019; the court had reached the opposite conclusion in two decisions in February and September 2023, as well as (arguably) in 2012; it was unclear when the 2023 decisions were published; and the Court of Cassation is not bound by its own decisions. As a result, looking at the position as at any point in time, it would have been open to the court to reach a different decision from that reached in the most recent previous cases.

108. Defendant's Expert at one point in his evidence appeared to say that, if asked to advise in 2022 or early 2023 (i.e. at the time of the arbitration) whether A2's performance of the main contract meant that it was bound by the Arbitration Agreement, he would have said the case law led to the conclusion that it was bound. I have some hesitation about this evidence, as it was given shortly before it became apparent that the translator was significantly mistranslating the questions. A little later in his evidence, Defendant's Expert agreed that, at the relevant time, a Country 1 lawyer advising on Approved Judgment Mr Justice Henshaw A v P the matter would have said that, having ratified the main contract, "you might still be able to challenge the arbitration agreement". On the other hand, he went on to say that no new principle had been established, merely a change of direction, and that there was no principle of "unity of the judgments" (which I understood to mean, broadly, binding precedent) in Country 1. 109. Even on the basis of that evidence, considered in its totality, I do not consider that A2 could not, by the exercise of reasonable diligence, have discovered the ground for the objection. There was clearly scope for argument on the point, and no binding precedent prevented it from being run as a matter of principle.
110. Applying the FII Group Test Claimants approach to the present case, there was clearly at all material times a worthwhile claim which justified taking advice and other preliminary steps, and indeed worth raising in the arbitration as part of a challenge to the Tribunal's jurisdiction. Instead, however, the evidence indicates that A2 simply chose not to take Country 1 law advice at all, apparently on the basis it did not consider it proportionate to do so. In these circumstances, I have no doubt that the objection now sought to be advanced is barred by section 73. 111. In those circumstances, it is not necessary to consider whether the objection arising from the Authorisation Article would have had any merit. I am inclined to think that it would not have done, because (1) English law would have governed questions of ostensible authority and ratification, and (2) even applying Country 1 law, and even if under that law performance of the main contract was insufficient to amount to ratification of the Arbitration Agreement, participation in the arbitration without objecting to the

Tribunal's jurisdiction would be sufficient to amount to ratification of both the P Agreement as a whole and the Arbitration Agreement which it contained. In that context, I mention for completeness that although Claimants' Expert appeared at one point in his oral evidence to suggest that there could be ratification only if the company's board itself (having been empowered by the Articles to commit the company to an arbitration agreement) attended the arbitration or was copied into letters to the arbitral tribunal, that seems to me to stray into the application of the principle to the facts. The principle established by the cases was that, absent a special mandate, the board would have to be shown to have ratified the entry into the arbitration agreement. What form that ratification might take would depend on the facts of the case. (H) CONCLUSION

112. A1 and A3's challenges to the Award succeed on the bases set out above. A2's challenge is precluded by section 73 of the Arbitration Act 1996. I shall hear counsel on the appropriate disposal of the matter. 26

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