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International Arbitration Update

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International Arbitration Update

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- Prescription and management processes in the standard forms
- Dispute escalation clauses
- Witness evidence
- Experts: conflicts of interest
- Impartiality of arbitrators

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Prescription & management processes in the standard forms

Top causes of disputes on construction projects in the UK

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Rank	Cause
1	Failure to properly administer the contract
2	Failure to understand (or comply with) contractual obligations
3	Failure to serve the appropriate notice under the contract

Arcadis - Global Construction Disputes Report 2019

Maeda Corporation & Anr v Bauer Hong Kong [2020] HKCA 830

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The contract provided that:

> *"21.2. If the Sub-Contractor wishes to maintain its right to pursue a claim for additional payment or loss and expense under Clause 21.1, the Sub-Contractor shall as a condition precedent to any entitlement, within twenty eight (28) Days after giving of notice under Clause 21.1, submit in writing to the Contractor:*
>
> *21.2.1. the contractual basis together with full and detailed particulars and the evaluation of the claim…"*

The importance of notices

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At first instance, the Hon Mimmie Chan J said:

> *"In any event, however much sympathy the contractor may deserve, Clause 21 employs clear and mandatory language for the service and contents of the notices to be served, …There is no basis for a court or tribunal to rewrite the Sub-Contract or Clause 21 for the parties after the event."*

The Hong Kong Court of Appeal said:

> *"It is not permissible to interpret clause 21.2.1 in such a manner as to re-write the plain language of the provision."*

Maeda Corporation & Anr v Bauer Hong Kong

[2020] HKCA 830

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- *Republic of Sierra Leone v. SL Mining Ltd* [2021] EWHC 286 (Comm)

Olivia Liang, Associate, Fenwick Elliott LLP

Republic of Sierra Leone v. SL Mining Ltd [2021] EWHC 286 (Comm)

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Relevant background

- The dispute arose after Sierra Leone purported to suspend and subsequently cancel a mining licence ("MLA") it had granted to SL Mining.
- The MLA contained a multi-tier dispute resolution provision, under which the parties could not commence arbitration proceedings until three months had elapsed after a written notice of dispute:

> *"b) The parties shall in good faith endeavour to reach an amicable settlement of all differences of opinion or disputes which may arise between them in respect to the execution performance and interpretation or termination of this Agreement, and in respect of the rights and obligations of the parties deriving therefrom.*
>
> *c) In the event that the parties shall be unable to reach an amicable settlement within a period of 3 (three) months from a written notice by one party to the other specifying the nature of the dispute and seeking an amicable settlement, either party may submit the matter to the exclusive jurisdiction of a Board of 3 (three) Arbitrators who shall be appointed to carry out their mission in accordance with* [ICC Rules]."

Republic of Sierra Leone v. SL Mining Ltd [2021] EWHC 286 (Comm)

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Timeline

- On 14 July 2019, SL Mining issued a formal notice disputing the cancellation.
- On 30 August 2016, SL Mining served its Request for Arbitration on 30 August 2016 (approximately 6 weeks before expiry of the 3 month period).
- Sierra Leone unsuccessfully challenged the tribunal's jurisdiction.
- On 6 March 2020, the tribunal issued a partial award concluding that it did have jurisdiction to hear SL Mining's claims.
- Sierra Leone applied to set aside the award under Section 67 of the Arbitration Act 1996.

Republic of Sierra Leone v. SL Mining Ltd [2021] EWHC 286 (Comm)

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The Arbitration Act 1996

67 Challenging the award: substantive jurisdiction.

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court -

(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction

30 Competence of tribunal to rule on its own jurisdiction.

(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to -

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, and

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement

Republic of Sierra Leone v. SL Mining Ltd [2021] EWHC 286 (Comm)

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Was Sierra Leone's challenge to the alleged prematurity of the arbitral proceedings a matter of substantive jurisdiction?

- The starting point was the distinction between admissibility and jurisdiction.
- Jurisdiction is the power of the tribunal to hear a case, whereas admissibility goes to whether it is appropriate for the tribunal to hear it.
- Only issues which go to jurisdiction are subject to recourse under s 67 of the Arbitration Act.

Republic of Sierra Leone v. SL Mining Ltd [2021] EWHC 286 (Comm)

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International authorities have concluded that pre-conditions to arbitration are not jurisdictional

- The Court noted that "*the views of leading academic writers…are all one way*".
- The Court considered Gary Born's view in International Commercial Arbitration (3rd Ed 2021):

> *"In interpreting the parties' arbitration agreement, the better approach is to presume, absent contrary evidence, that pre-arbitration procedural requirements are not "jurisdictional"…*
>
> *The rationale for this presumption is that requirements for cooling off, negotiation or mediation inherently involve aspects of the arbitral procedure, often requiring interpretation and application of institutional arbitration rules or procedural provisions of the arbitration agreement. Equally important, the remedies for breach of these requirements necessarily involve procedural issues concerning the timing and conduct of the arbitration. In both cases, these issues are best suited for resolution by arbitral tribunal, subject to minimal judicial review, like other procedural decisions.*
>
> *Similarly, parties can be assumed to desire a single, centralised forum (a 'one-stop shop') for resolution of their disputes, particularly those disputes regarding the procedural aspects of their dispute resolution mechanism."*

- The Court also considered the views of the US Supreme Court (in *BG Group v Republic of Argentina* 34 S.Ct.1198 (2002)), and two appellate decisions in the Singapore Court of Appeal (*BBA v BBZ* [2020] 2 SLR 453 and *BTN v BTP* [2020] SGCA 105).

Republic of Sierra Leone v. SL Mining Ltd [2021] EWHC 286 (Comm)

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Sierra Leone's challenge to the prematurity of SL Mining's proceedings was a matter of admissibility

- The Court noted that "*at the end of the day the matter comes down at English law to an issue as to whether the question of prematurity falls within s 30(1) (c) of the 1996 Act*."
- The Court concluded that:

  "[I]f the issue relates to whether a claim could not be brought to arbitration, the issue is ordinarily one of jurisdiction and subject to further recourse under s 67 of the 1996 Act, whereas if it relates to whether a claim should not be heard by the arbitrators at all, or at least not yet, the issue is ordinarily one of admissibility, the tribunal decision is final and s30 (1) (c) does not apply…The issue for (c) is, in my judgment, whether an issue is arbitrable. The issue here is not whether the claim is arbitrable, or whether there is another forum rather than arbitration in which it should be decided, but whether it has been presented too early. That is best decided by the Arbitrators."

- The Court also concluded that two previous High Court cases concerning challenges under section 67 were not binding: *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd* [2015] 1 WLR 1145 and *Tang v Grant Thornton International Limited* [2013] 1 All ER (Comm) 1226.

Republic of Sierra Leone v. SL Mining Ltd [2021] EWHC 286 (Comm)

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Three month period was not an absolute bar to bringing proceedings

- The negotiation window was mandatory, not directory.
- However, the Court concluded that "*this is not an absolute bar to bringing proceedings for three months…it gives a window during which the parties can explore settlement, but always subject, as the Arbitrators concluded, to earlier proceedings if the objective of amicable settlement could not be achieved*".
- The Court noted that it is *"significant that the time scale in clause 6.9 (c) is subsidiary to the obligation to attempt an amicable settlement, set out first, in (b)."*
- The tribunal was best placed to decide whether the parties would objectively have been able to reach an amicable settlement if they had another 6 weeks (i.e. the full negotiation period).
- But the Court did note that "a*s at 30 August there was not a cat's chance in hell of an amicable settlement by 14 October*".

Republic of Sierra Leone v. SL Mining Ltd [2021] EWHC 286 (Comm)

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Implications of the decision

- Any disputes as to compliance with pre-conditions to arbitration in a multi-tier dispute resolution clause will be decided by arbitral tribunals, and will not be subject to further recourse under section 67 of the Arbitration Act.
- The Court's conclusion that the negotiation window was not an absolute bar to proceedings suggests that it is willing to take a commercial approach to interpretation of multi-tier dispute resolution clauses.
- However, the decision does not provide permission to ignore escalation requirements – the consequences of any non-compliance will depend on the wording of the multi-tier dispute resolution clause.
- The consequences of any failure to comply could be costly, in terms of time and money.

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Reliance upon witness evidence?

Reliance upon witness evidence

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"67. In the light of these considerations, I expressed the opinion in the Gestmin case (at para 22) that the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts."

Leggatt J

Blue v Ashley

[2017] EWHC 1920 (Comm)

ICC Report: *The Accuracy of Fact Witness Memory in International Arbitration*

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"In modern arbitration proceedings, such interaction starts when potential witnesses first receive information about what ultimately turns out to be a material fact. For instance, memory may be influenced by discussions between the potential witnesses as co-workers. Such interaction continues when the potential witness provides information to in-house counsel or external counsel for the purposes of drafting submissions. The level of interaction even increases when it comes to the stage of preparing witness statements, preparing - to the extent permissible - witnesses for the evidentiary hearing, and finally the examination of witnesses. If one applies the existing research to international arbitration proceedings, there undoubtedly is a high risk of memory distortions."

How to reduce distorting influences and their effect on witness evidence

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- Establish procedures for teams to keep contemporaneous written or oral notes of issues being discussed at the time the relevant events unfold, especially in a potentially or actually contentious situation.
- Emphasise to witnesses the importance of their own recollection being presented to external counsel.
- Interview witnesses at the earliest opportunity. The memory is likely to be more accurate (i) the closer to the event that is being recalled and (ii) the less it has been exposed to contamination from other sources of information.
- Consider what extrinsic or neutral contemporaneous evidence supports or conflicts with the witness' recollection.

ICC Report: *The Accuracy of Fact Witness Memory in International Arbitration*

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"5.32 Basic practices such as good recordkeeping and contemporaneous notes during the course of a transaction or project (pre-dispute) serve both to provide evidence of what happened at a time when the witness' memory was fresh and unaffected by information learned subsequently and to help the witness later to recall facts."

Witness evidence v Documents

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- Close examination of actual evidence of what was happening on the ground will reveal if delay in approving the sewerage design actually delayed the project.
- Court should apply common law, common sense approach to causation.
- Rejected generalized statement from site foreman.
- Judge preferred primary, contemporaneous source of evidence: site diary.

White Constructions Pty Ltd v PBS Holdings Pty Ltd
[2019] NSWSC 1166

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- *Secretariat Consulting PTE Ltd & Ors v A Company* [2021] EWCA Civ 6

Sam Thyne, Associate, Fenwick Elliott LLP

Secretariat Consulting PTE Ltd & Ors v A Company [2021] EWCA Civ 6

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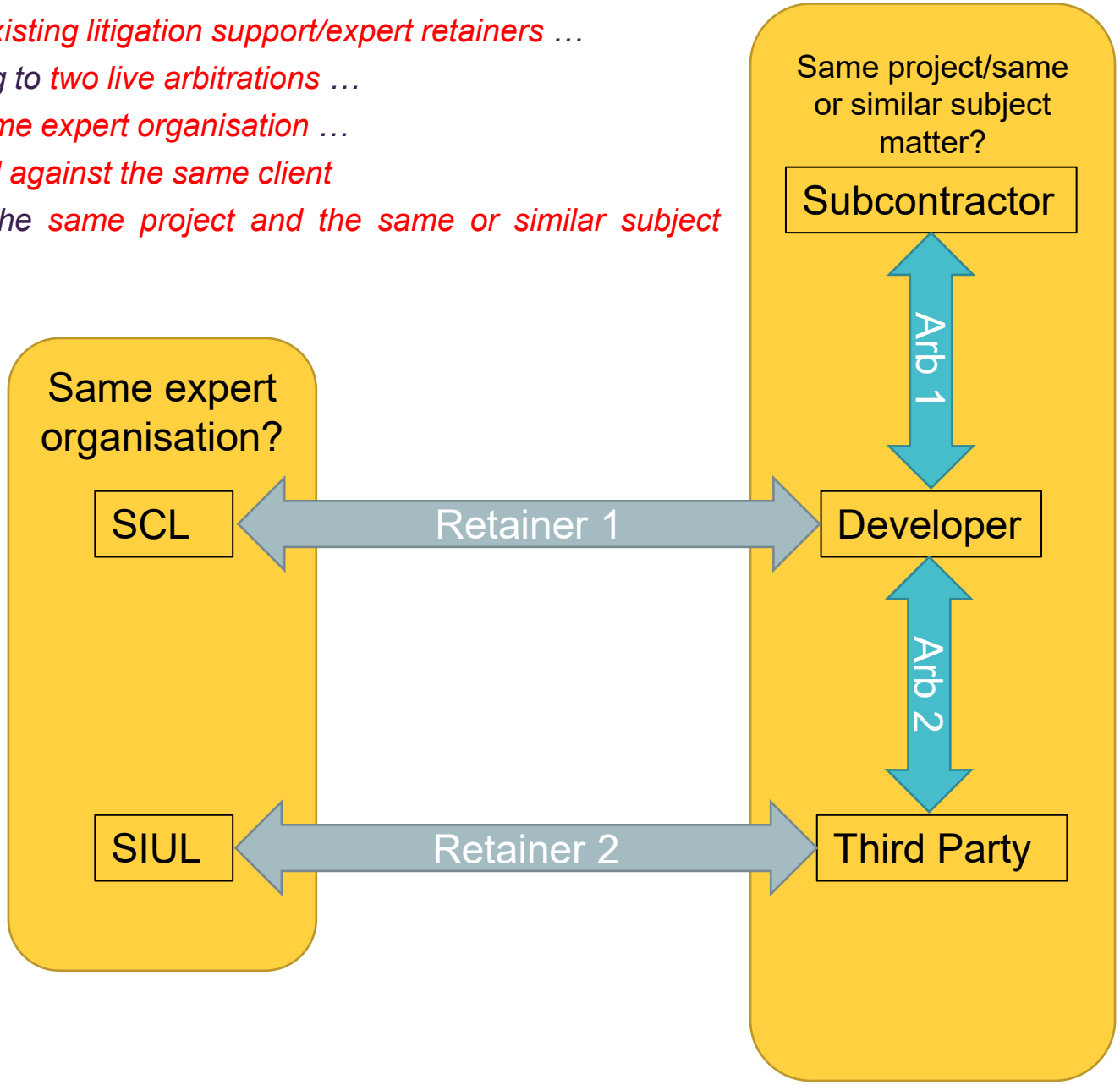
No English case has addressed head-on a dispute in which there are two existing litigation support/expert retainers, which each client wished to maintain, relating to two live arbitrations, where what the respondent says is the same expert organisation will be supporting, advising and giving evidence for and against the same client about the same project and the same or similar subject matter.

"… two existing litigation support/expert retainers …
… relating to two live arbitrations …
… the same expert organisation …
… for and against the same client
…about the same project and the same or similar subject matter."



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Why did the expert consider there wasn't a conflict?

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"Our firm has received enquiry from lawyers representing [the third party] on its potential dispute against [the respondent]… they have asked for quantum and delay experts (outside Asia) to assist them on the matter and have requested us to run a conflict check in relation to the same.

We have informed [the third party] that we (in Asia) are currently engaged by [the respondent] on a separate dispute on the same project (without revealing any further details) and they do not seem to consider it as a conflict. We told them that we would be speaking to you regarding the same as well.

Since [the third party's] contract with [the respondent] is for EPCM works for the full complex, and our engagement is in relation to the evaluation of delays on the construction sub-contract for non-process buildings, our view is that working on the two matters (in different offices) would not constitute a 'strict' legal conflict. Our firm also has the ability to set the engagements up in a manner that there is the required physical and electronic separation between the teams."

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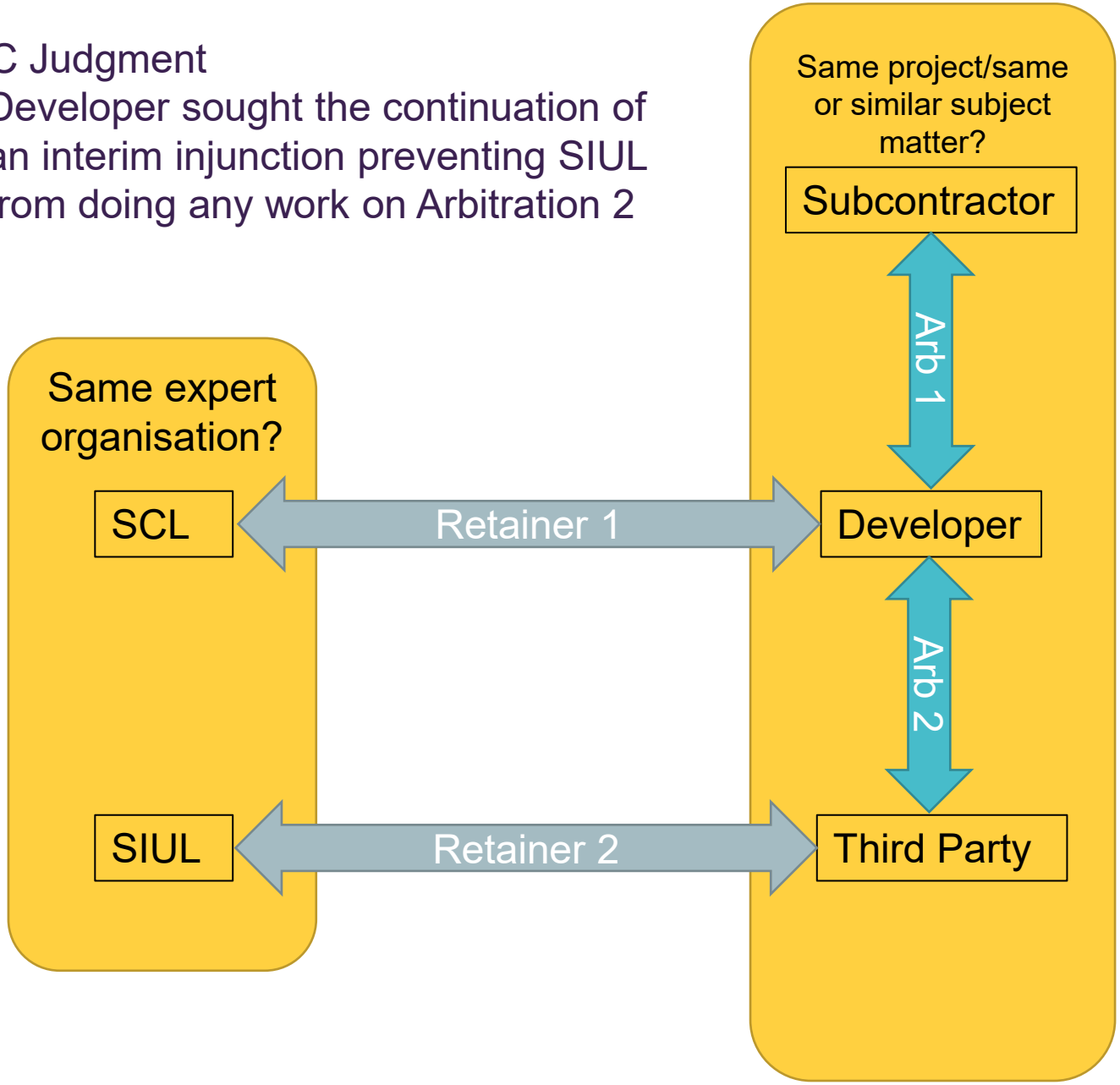
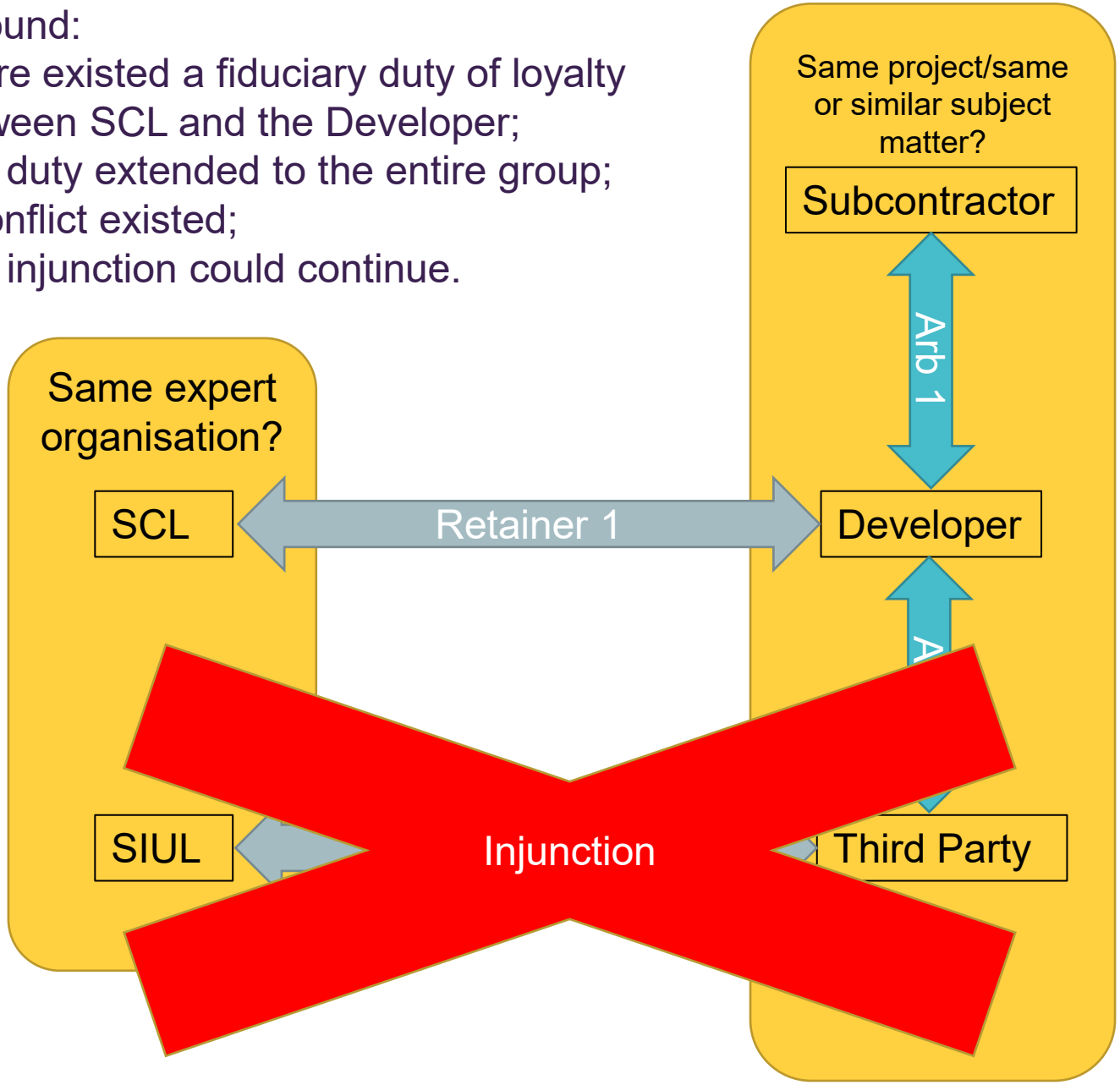
TCC Judgment

- Developer sought the continuation of an interim injunction preventing SIUL from doing any work on Arbitration 2



TCC found:

- There existed a fiduciary duty of loyalty between SCL and the Developer;
- The duty extended to the entire group;
- A conflict existed;
- The injunction could continue.



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Fiduciary duties

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> "*the expression 'fiduciary' is freighted with a good deal of legal baggage…*"

- One of the most sacrosanct relationships under law.
- One of the main characteristics of fiduciary relationships is that they exist where one party is in the vulnerable position of relying wholly on the other party and therefore an exceptional level of trust and confidence in that party is required.
- Confined to pre-existing categories. E.g. the relationship between a lawyer and a client, or a trustee and a beneficiary.

The Court of Appeal Decision

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Issues the Court of Appeal had to address:

- Whether the entity within the Expert group advising the Developer owed a fiduciary duty of loyalty?;
    - No purpose in designating the relationship as a fiduciary one, given that there was a contract in place between the parties with a conflict of interest provision that dealt with the matter at issue.
- If not, whether that same entity owed a contractual duty to the respondent to avoid conflicts of interest?;
    - Under the retainer the Expert owed a clear contractual duty to avoid conflicts of interest for the duration of their retainer.
- If so, whether that duty extended to all companies within the Expert group?; and
    - The distinctions between entities in the broader Expert international group were immaterial. The assertion that one entity was not bound by the conflicts policy of the other so both entity entities could conceivably act for different sides of the same dispute was a commercially unrealistic position.
- If the duty extended, did that mean there was a conflict of interest in respect of the engagement of the Expert entity by the third party on the second arbitration?
    - Overlaps in instructions were all-pervasive and a conflict of interest existed.

Nature of expert client relationship?

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- At least, in this case, the duty was confined to the terms of the contractual relationship.
- Court of Appeal declined to describe it as fiduciary, however noted:

> *"Depending on the terms of the retainer, the relationship between a provider of litigation support services/expert, on the one hand, and his or her client on the other,* **may** *have one of the characteristics of a fiduciary relationship, namely a duty of loyalty or, to put it another way, a duty to avoid conflicts of interest."*

- Duty to the Court?
- The Court of Appeal also observed that the case should not be taken as saying that the same expert cannot act both for and against the same client. It is inevitable that large multinational companies often engage experts on one project and see them on the other side in relation to a dispute on another project

Avoiding conflicts of interest

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> "…a conflict of interest is a matter of degree."

- Understand the contractual terms of pre-existing retainers when considering taking on new instructions – including both the conflict of interest provisions, as well as the instructions themselves.
- Acting for multiple parties on the same project is likely to result in a conflict.
- Company structure is unlikely to provide protection from conflicts.
- If a party advises you that it believes there is a conflict it is best to follow up with this.
- It is best to err on the side of caution.

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Impartiality of arbitrators

Application of the *Halliburton* principles

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- The arbitrator had advised PLL 4 times in the past, on 1 occasion on the same rules, all 4 more than two years before the appointment.
- The FA's lawyers had been involved in 12 arbitrations with the same arbitrator, having appointed the arbitrator in 3 of those arbitrations (of which 2 were after the appointment in question).
- NUFC applied to remove the arbitrator including on the grounds that a fair-minded and informed observer would conclude that there was a real possibility the arbitrator was biased.

Newcastle United FCL v The Football Association Premier League Ltd [2021] EWHC 349 (Comm)

Who is the fair-minded and informed observer?

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"The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

Lord Hope,
Porter v Magill,
[2001] UKHL 67

Who is the fair-minded and informed observer?

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"The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious…Her approach must not be confused with that of the person who has brought the complaint…

Lord Hope

Helow v The Secretary of State for the Home Department

[2008] UKHL 62

Who is the fair-minded and informed observer?

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Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given…She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

Lord Hope

Helow v The Secretary of State for the Home Department

Application of the *Halliburton* principles

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- IBA *Guidelines on Conflicts of Interest* whilst not binding, helped to set a "*practical benchmark*" against which any potential bias could be judged.
- The earlier advice was concerned with an issue [and part of the rules] that did not arise and the IBA Rules did not mandate the disclosure of the advice as it was provided over three years earlier on a different issue.
- The 2 more recent instructions in 2018 should have been disclosed, even though they did not relate to the issues in the arbitration or show any ongoing relationship.
- The IBA Rules did not require disclosure of the prior appointments, because the arbitrator had not been appointed more than 3 times in the 3 years prior to this arbitration.
- No dispute that the arbitrator was not financially dependent on work from PLL or its solicitors.

Application of the *Halliburton* principles

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- The arbitrator had needed to seek PLL's consent to disclose the earlier advice
- Could not be criticised for doing so without copying-in NUFC's lawyers; the emails might have resulted in a breach of confidence;
- One private email asking PLL's solicitors about their client's position on whether the arbitrator should recuse themselves which the Judge described as "*an error of judgment and ought not have occurred*".
- BUT looking at the overall picture, including the reputation of the arbitrator (a relevant factor in itself) "*the weight of the whole does not exceed the sum of its parts*" and there was no real risk of bias in the eyes of a fair-minded and informed observer.

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Questions?

Thank you

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