Neutral Citation Number: [2025] EWHC 1785(Comm)

Case No: CL-2024-000634

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

COMMERCIAL COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 July 2025

Before :

The Hon. Mr Justice Bryan

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Between :

TECNICAS REUNIDAS SAUDIA FOR SERVICES & CONTRACTING CO. LTD	**Claimant**
- and -	
PETROLEUM CHEMICALS AND MINING COMPANY LIMITED	**Defendant**

- -

- -

Ms E Wood KC and Mr M Gregoire (instructed by **Sidley Austin LLP**) for the **Claimant**

Mr F Singarajah (instructed by **Freeths LLP**) for the **Defendant**

Hearing date: 24 June 2025

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Approved Judgment

This judgment was handed down remotely at 9.30am on Monday 14 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE BRYAN:

A. INTRODUCTION

1. The Claimant, Tecnicas Reunidas Saudia For Services & Contracting Co. Ltd ("Tecnicas"), brings an arbitration claim against Petroleum Chemicals and Mining Company ("PCMC") under section 67 of the Arbitration Act 1996 (the "Section 67 Application") challenging a Partial Award on Preliminary Issues (the "Award") as to "whether the Tribunal has jurisdiction to hear [PCMC's] principal claims" issued by an arbitral tribunal in an institutional arbitration under the auspices of the International Chamber of Commerce ("ICC").

2. Tecnicas does so on the ground that the Tribunal had no jurisdiction to hear the claims relating to a dispute that arose between PCMC and Tecnicas, because (per Tecnicas) the parties never agreed to any arbitration under the auspices of the ICC, but only to an ad hoc arbitration in London before three arbitrators as set out in the arbitration clause in the Purchase Order, which formed part of a subcontract (the "Sub-Contract") between the parties, and which had precedence over other documents forming part of the Sub-Contract. The Sub-Contract itself was for part of the works in relation to the provision of engineering, procurement and construction work in connection with the Fadhili gas processing plant in Saudi Arabia.

3. The Section 67 Application had been fixed for this one-day hearing since February 2025 following PCMC's failure to file any Acknowledgement of Service ("AoS") to Tecnicas' section 67 Arbitration Claim Form that was issued by Tecnicas in the Commercial Court on 15 November 2024 and served upon PCMC on 15 December 2024 (by emails to various individuals associated with PCMC in Saudi Arabia).

4. After such fixture, and as will appear, PCMC has issued, but has never had fixed, various applications of its own, including a challenge to jurisdiction and, inconsistently with that, a claim for reverse summary judgment and security for costs of the section 67 Application, including a requisite application for relief from sanctions and associated extension of time to file its Acknowledgment of Service. All these applications would logically precede the hearing of the Section 67 Application, but none of them (not even that for relief from sanctions) had been fixed by PCMC, and all parties were aware that the hearing on 24 June 2025 was the final substantive hearing on the Section 67 Application.

5. That remained the (highly unsatisfactory) position until the morning of the hearing, when the Court was informed, shortly before coming into Court, that Tecnicas was willing to agree to PCMC being granted relief from sanctions and an extension of time for Acknowledgment of Service on the basis that PCMC withdrew its challenge to jurisdiction based on allegedly defective service, so as to facilitate the Section 67 Application being heard, and PCMC being able to address the Court thereon. However the parties could not agree costs, and PCMC still sought to have heard its (unlisted) application for security for costs (and before the Section 67 Application), with the result that there was no concluded agreement between the parties (even subject to the Court's approval).

6. At the start of the hearing, both parties candidly acknowledged that this proposal would in any event necessitate PCMC making its (unlisted) application for relief from sanctions, in

circumstances where it was a matter for the Court (and not the parties) as to whether relief from sanctions should be granted on the facts of the present case.

7. In order, so far as possible, to save the hearing of the Section 67 Application, I agreed, at the outset of the hearing, to hear PCMC's application for relief from sanctions and associated application for a retrospective extension of time to file an Acknowledgement of Service (the "Relief from Sanctions Application")

8. In the event, and for the reasons set out in Part 1 of this judgment, I refused PCMC relief from sanctions, and dismissed the Relief from Sanctions Application, as a result of which all of PCMC's other applications fell away.

9. I was, however, keen to ensure that all arguments that were contrary to those advanced by Tecnicas on the Section 67 Application were before me, so that I could have regard to the same. I accordingly allowed PCMC to be heard orally, through its counsel Mr Singarajah, not as a party, but *de bene esse*.

10. The Section 67 Application proceeded on that basis, and it proved possible to conclude the oral hearing of the Section 67 Application within the available time, following which I reserved judgment on the Section 67 Application.

11. Part 1 of this judgment addresses the Relief from Sanctions Application, after which Part 2 addresses the Section 67 Application itself.

B. PART 1 – RELIEF FROM SANCTIONS APPLICATION

B.1 Background

12. It is first necessary to provide a short overview of the history of events, before turning to the procedural history that has led up to the Relief from Sanctions Application.

13. In 2022, PCMC filed a claim against Tecnicas before the Commercial Court of Saudi Arabia. The Court declined jurisdiction, holding that the Purchase Order had provided for settlement of the dispute between the parties by arbitration.

14. PCMC then filed a request for arbitration before the London Court of International Arbitration (the "LCIA"). On 13 September 2023, the LCIA declined to initiate the arbitration and noted that PCMC were referring to an arbitration agreement which they were asserting contained references to the ICC.

15. Ultimately, on 6 October 2023, PCMC filed their request for arbitration against Tecnicas before the ICC. The detailed chronology of events thereafter, which included Tecnicas asserting that the ICC had no jurisdiction, resulted in the ICC bifurcating the arbitration proceedings and dealing first with the issue as to jurisdiction.

16. On 18 October 2024, the Tribunal rendered a Partial Award on the Preliminary Issues; namely "whether the Tribunal has jurisdiction to hear [PCMC's] principal claims", insofar as they relate to the interpretation of the arbitration agreement, finding that it did have

jurisdiction. Tecnicas issued the Arbitration Claim Form on 15 November 2024 challenging jurisdiction under section 67 of the Arbitration Act 1996.

17. Importantly, the Tribunal, PCMC and its representatives in the arbitration were notified of the challenge on the same day. Accordingly, PCMC knew of the challenge from 15 November 2024.

18. On 15 December 2024, Tecnicas served PCMC with a sealed Claim Form, the associated claim pack, and supporting documents in relation to the Section 67 Application and challenge to the tribunal's jurisdiction, by sending the same by email to various email addresses associated with PCMC in Saudi Arabia. In this regard, Tecnicas did not need permission to serve out of the jurisdiction in the context of the claim being an arbitration claim.

19. The email stated:

> "We refer to the Tribunal's Partial Award dated 18 October 2024 (the Partial Award).
>
> This email constitutes notice under section 67(1) of the Arbitration Act 1996 (the Act) to the Tribunal and each Member thereof, and to Petroleum Chemicals and Mining Company Limited that, on 15 November 2024, Tecnicas Reunidas Saudia For Services & Contracting Co. Ltd. (Tecnicas) applied to the courts of England and Wales pursuant to section 67 of the Act challenging the Partial Award and seeking an order that it is set aside. The representatives from Tecnicas are copied herein.
>
> In accordance with Part 62.6 of the Civil Procedure Rules as part of this notice we attach the arbitration claim form and all written evidence in support thereof. Exhibit AF1 can be downloaded in the following link: [link given] …".

20. PCMC then had 24 days (until 8 January 2025) to file an Acknowledgment of Service. It did not do so, notwithstanding that it had, sometime before this deadline, already instructed English solicitors. It is perhaps remarkable that those acting on behalf of PCMC did not immediately acknowledge service (as one would have expected them to do) not least if, as appears to be the case, they were contemplating the possibility of challenging jurisdiction/the validity of service, given that the consequence of a failure to acknowledge service by the deadline was that they thereby submitted to the jurisdiction of the English court.

21. Even more extraordinarily (given subsequent events) PCMC did not file an Acknowledgement of Service (accompanied by an application for an extension of time and relief from sanctions) in the weeks (or even well over a month) that followed, in the context of what was an arbitration claim, where expedition is of the essence of such arbitration proceedings.

22. Indeed, it was the Commercial Court itself that took the next step (furthering the need for expedition in arbitration proceedings). It emailed the parties' solicitors on 18 February 2025, stating that:

> "The court would like to confirm that there has been no acknowledgment of service as it has been 3 months since the claim was filed. If so, we await listing instructions (time estimate and availability) to list this s.67 claim **for a final hearing**".
>
> (emphasis added)

23. That is precisely what occurred, and the final hearing of the section 67 Application was fixed by the Commercial Court on 3 March 2025 for a one-day hearing on 24 June 2025.

24. In the meantime, on 20 February, the Claimant's solicitors wrote to the Defendant's solicitors. In the course of that email letter, at paragraph 5, they pointed out that the deadline for PCMC to file its Acknowledgment of Service ran from the date it was served on 15 December 2024. They then had 24 days to acknowledge service. It refers to when they may have been instructed, and then, at paragraph 6, it pointed out, correctly, that if PCMC did not consider the service had been validly affected:

> "the proper course would have been for your client to file an acknowledgement of service indicating that it intended to dispute the Court's jurisdiction in *Hoddinott v Persimmon Homes (Wessex) Ltd [2007] EWCA Civ 1203* [a decision of] the Court of Appeal...".

25. The email letter went on to say that:

> "7. The stance adopted in your correspondence appears to be an attempt to overcome the serious consequences of your client's failure to file an acknowledgement of service in time.
>
> 8. Tecnicas maintains that: (a) the Claim was validly served on PCMC on 15 December 2024; (b) PCMC failed to file an acknowledgement of service in time; and (c) it will proceed to seek to have a hearing of the Claim fixed at the first available date.
>
> 9. All of Tecnicas' rights are reserved".

26. The email letter of 20 February 2025 did not, itself, provoke a filing of the Acknowledgment of Service with an accompanying application for relief from sanctions, nor did the subsequent hearing of the section 67 Application being fixed by the Commercial Court on 3 March achieve that either. Even this did not immediately provoke PCMC to seek an extension of time to acknowledge service and seek relief from sanctions.

27. The trigger for that seems to have been a further email letter from Tecnicas' solicitors on 4 March 2025,

> "Please find attached an email from the Commercial Court Listing Office fixing a hearing to take place in these proceedings on 24 June 2025… for the reasons stated in our letters dated 31 January 2025 and 20 February 2025 your client is not able to participate in the hearing and therefore is not permitted to submit a skeleton argument".

28. On 5 March 2025, PCMC filed an Acknowledgment of Service (nearly two months late and after the further expiry of over double the original time for acknowledging service, and in the context of what was an arbitration claim where expedition is important).

29. At the same time, PCMC informed Tecnicas that:

> "PCMC issues an application ["the First Application"] in which it applies (a) to strike out Tecnicas' claim on the basis that Tecnicas failed to validly serve the Claim Form dated 15 November 2025 within the time limit prescribed by CPR 62.4(2); (b) alternatively if the claim is not struck out, for extensions of time and/or relief from sanctions for the Defendant to 'facilitate' the timetable below: (a) the Defendant to file an AoS within 14 days of the Claim Form in accordance with CPR 58.6(2); (b) directions for evidence in respect of the Challenge; (c) 'the claimant to provide adequate security for the Defendants costs of the claim, the Claimant's application and this application'; (d) the 'listing of a hearing of' the Defendant's application for summary dismissal of the s.67 challenge on its merits, accompanied by a skeleton argument setting out the Defendant's position on the merits".

30. This was accompanied by a witness statement in support by Paul Kinninmont of Freeths solicitors (PCMC's solicitors) of the same date ("Kinninmont 1").

31. On 6 March 2025 PCMC filed an application amending its 5 March 2025 Application, seeking, in respect of the Acknowledgement of Service, "relief from sanctions and a retrospective extension of time to file the AoS until 5 March 2025 pursuant to CPR 3.1(2)a)…".

32. Some quite remarkable aspects of the First Application will be immediately noted. First, as originally drafted, it did not even seek relief from sanctions and an extension of time to file acknowledgement of service (a prerequisite to any step in the action). Secondly, it engaged on the substantive merits, seeking to strike out the claim and summary dismissal of the section 67 Application on its merits, as well as seeking security for costs not in relation to its jurisdictional challenge, but of the whole arbitration claim (including the substantive section 67 Application itself) which, on any view, was itself a submission to the jurisdiction, and inconsistent with the challenge to the jurisdiction that it was seeking to advance.

33. On 2 April 2025, PCMC issued a further application (the "Second Application") in which it sought:

    (1) Permission to rely upon expert evidence of foreign law.

    (2) A declaration that the Court had no jurisdiction to try the Claim pursuant to CPR 11(1)(a).

    (3) An order setting aside the Claim Form on the basis that the Court has no jurisdiction or will not exercise jurisdiction to hear the Claim.

(4) A declaration that Tecnicas was out of time to effect service of the Claim in accordance with CPR 62.4(2).

34. It will be noted that the Second Application was seeking to challenge jurisdiction at a time after it had made its First Application in which PCMC was seeking (supported by Kinninmont 1) both summary judgment, and also security for costs, each of which was self-evidently a claim on the merits and, as such, a submission to jurisdiction.

35. There was some correspondence between PCMC and Commercial Court Listing in relation to listing of various matters (on 9 March and 11 April 2025) but that correspondence did not refer to the need for relief from sanctions before hearing any other aspect of the First or Second Applications, and PCMC has never had fixed for hearing either the relief from sanctions application or, indeed, any of the matters in the First or Second Applications. Following correspondence between the parties and the Court on 11 June 2025 in relation to what was listed on 24 June 2025 and consideration of the Court file, I directed as follows:

> "[T]he hearing on 24 June 2025 has been fixed to deal with the Claimant's challenge pursuant to Section 67 of the Arbitration Act 1996 made by way of claim form dated 15 November 2024 (the "Hearing").
>
> **The subsequent applications issued by the Defendant have never been fixed for a hearing and are not listed to be determined at the Hearing.** The Hearing will proceed on 24 June 2025. The judge will consider at the start of the hearing whether anything else can be determined at that hearing. In the meantime, the skeleton arguments should deal with all matters arising on all applications".
>
> (emphasis added)

36. I have now had the benefit of the evidence that has been served, which is:

(1) The First Witness Statement of Andrew Fox ("Fox 1") dated 15 November 2024.

(2) The Second Witness Statement of Andrew Fox ("Fox 2") dated 16 April 2025.

(3) The First Witness Statement of Paul Kinninmont ("Kinninmont 1") of 5 March 2025.

(4) The Second Witness Statement of Paul Kinninmont ("Kinninmont 2") dated 13 April 2025.

37. I also have two Skeleton Arguments on behalf of Tecnicas: one dealing with the section 67 Application, and one dealing with PCMC's applications. I also have two Skeleton Arguments from PCMC: the first a Skeleton which was lodged as part of the Summary Judgment Application on the merits, and a second Skeleton, more recently, dealing with other matters.

38. I considered all the material before me in preparation for the hearing of the Section 67 Application. It was highly unsatisfactory that PCMC continued to seek to pursue, but had never had fixed for hearing, any of its applications (not even that for relief from sanctions),

despite knowing that this hearing was the final hearing of the section 67 Application and was fixed as such by the Commercial Court on 3 March 2025.

39. The section 67 Application is an arbitration claim. The courts have repeatedly noted that arbitration claims, and any associated matters, are to be brought, and progressed, with expedition, so as to achieve speedy finality in arbitration matters – see *Nagusina Naviera v Allied Maritime Inc* [2003] 2 CLC 1 at [14]) as to "the importance of finality and the time limits for any court intervention in the arbitration process". This applies both to applications brought in respect of pending arbitrations and challenges to arbitral awards, which therefore naturally also includes partial awards – see, for example, *M v N* [2021] EWHC 360 (Comm).

40. CPR 8.4 sets out the consequences of a defendant failing to file an Acknowledgment of Service and the time period for doing so having expired, as in the present case, namely as CPR 8.4(2) provides, "[t]he defendant may attend the hearing of the claim but may not take part in the hearing unless the court gives permission".

41. As already noted, at the start of the hearing of the Section 67 Application, the question arose as to what to do about the situation that has arisen in circumstances in which PCMC has never had any of the applications in the First Application and the Second Application listed (not even that for relief from sanctions), in circumstances where, in its Skeleton Argument lodged on 19 June 2025, PCMC was arguing that all such matters in the First and Second Application should be determined either before or at the same time as the Section 67 Application hearing.

42. Clearly, it would have been impossible to hear all those matters and the section 67 Application at the hearing which has been fixed as the final hearing. Ms Emily Wood KC, who appeared on behalf of Tecnicas on this hearing, described this state of affairs as a "dog's breakfast". Mr Frederico Singarajah, who appeared on behalf of PCMC, agreed.

43. In its preparation for this hearing, the Court had to decide what to do about this state of affairs. I considered that, whilst one possibility was simply to take the view that PCMC could attend but not take part in the proceedings (which of course is the consequence of CPR 8.4(2), unless the Court orders otherwise), the more appropriate course would be to hear the Application for Relief from Sanctions, and associated application for an extension of time which, depending on the outcome of that application, might well clear the decks, in whole or in part, for the final hearing of the section 67 Application at the present hearing.

44. Unbeknown to the court, because neither party saw fit to tell the court, there was correspondence the day before the hearing between the parties in relation to whether or not a solution could be found. There had, in fact, been attempts to reach a solution, which had not been brought to the court's attention, in correspondence on 11 June and following. That did not come to fruition because the parties were not *ad idem* on the terms of any resolution. However, this culminated in PCMC's solicitors (Freeths) writing to Sidley Austin LLP (Tecnicas' solicitors) on the afternoon of 23 June (i.e. the afternoon before the Section 67 Application hearing), in a letter which contained, amongst other matters, the following at paragraph 10:

> "Our client is content to agree to submit to the jurisdiction of the Court and not to challenge the validity of your client's service and to your client not

> opposing our client's application for a retrospective extension of time to file its acknowledgement of service, such that our client may participate in the hearing and make submission on the merits of the Claim. We will also agree for costs of the applications made by both sides to be costs in the case".

45. No doubt time was then spent taking instructions on the part of Tecnicas, and Tecnicas then respond in an email at 18.26 on 23 June. In that email, it was provided as follows:

> "Tecnicas welcomes PCMC's agreement to Tecnicas' proposal as set out in paragraph 10 of your letter. It is clear that both parties' applications are no longer required. However, Tecnicas does not agree that the costs of the applications should be treated as costs in the case and maintains there should be no order as to the costs of these applications.
>
> For the avoidance of doubt, Tecnicas' proposal was that there be no order as to the costs of PCMC's applications dated 5 /6 March 2025 and 2 April 2025, and Tecnicas' application dated 11 June 2025. Tecnicas understands the parties agreed that the costs of the s.67 challenge would be costs in the case.
>
> Please confirm by return if this is agreed and we will write to the Court accordingly".

46. It will be seen that this email therefore contemplated a response from Freeths, after which Tecnicas would write to the court. That email continued:

> "If PCMC does not agree, we will write to the Court to explain that:
>
> (a) PCMC will submit to the jurisdiction of the Court and will not challenge validity of service;
>
> (b) Tecnicas will not oppose PCMC's application for a retrospective extension of time to file this acknowledgement of service so that PCMC may participate in the hearing and make submissions on the merits of the claim; but
>
> (c) the parties are not agreed as to whether the parties' applications should be treated as no order as to costs or costs in the case and invite the Judge to decide this issue and are prepared to make submissions on this issue if that would be of assistance".

47. Thereafter, neither party wrote to the Court in accordance with that latter part of the Sidley Austin letter. At 09.43 on the morning of the hearing, my clerk was provided with a copy of the Freeths letter of 23 June 2025 and the email. Neither party had made Commercial Court Listing, or my clerk, aware of any such developments prior to this time.

48. It will also be apparent that both Freeths' letter and Sidley Austin LLP's letter assumed that if Tecnicas would not oppose PCMC's application for a retrospective extension of time to file the Acknowledgment of Service and the Relief from Sanctions Application, that was, as it were, the end of the matter and that the Court could proceed to hear the section 67

Application with all PCMC's applications falling away and without the need for any involvement of the Court.

49. As I pointed out to the parties at the start of the hearing, that is wrong. PCMC would need relief from sanctions from the Court if it wished to have an extension of time for the Acknowledgment of Service and if it wished, therefore, to attend as a party and make submissions in opposition to Tecnicas' application under section 67. During the course of discussing this with the parties, both parties candidly accepted that that was the position, i.e. that PCMC would have to make its Application for Relief from Sanctions, and the Court would then determine whether or not to grant relief.

50. In the course of those discussions, I explored with the parties what the consequences would be if I did or did not grant relief from sanctions. If I did not grant relief from sanctions, Ms Wood KC confirmed that Tecnicas would not seek to oppose (if the Court was minded to allow) PCMC making oral submissions on the final hearing, even if only on a *de bene esse* basis rather than as a party. The reason for that is that Tecnicas recognised that the Court would be assisted by hearing any contrary arguments to those of Tecnicas, to ensure that the Court was aware of all relevant matters when determining the Section 67 Application.

51. Equally, Mr Singarajah confirmed that PCMC no longer challenged the jurisdiction and no longer challenged the validity of service, and invited the Court either to grant relief from sanctions or, if the Court was not minded to grant relief from sanctions, to nevertheless allow PCMC to be heard, if not as a party, then on a *de bene esse* basis, either under CPR 8.4(3) or under the inherent jurisdiction of the Court (to hear submissions from anyone on any application).

52. In those circumstances, I indicated that PCMC was required by the Court to make its Application for Relief from Sanctions and, in addition to the detailed submissions in writing from both PCMC and Tecnicas, I heard oral submissions from Mr Singarajah on behalf of PCMC.

53. I am grateful to counsel for both Tecnicas and PCMC for the quality of their written and oral submissions. Ms Wood KC did not address me orally in respect of the Application for Relief from Sanctions for understandable reasons, in circumstances where her Skeleton Argument had set out at some length, and in forthright terms, as to why it was not appropriate to grant relief from sanctions but, of course, in the light of the correspondence between the parties, Tecnicas was no longer opposing the application. The parties recognise that it is a matter for the Court as to whether it is appropriate to grant relief from sanctions.

B.2 The Application for Relief from Sanctions

54. Following service on 15 December 2024, PCMC had 24 days, per CPR PD 6.8, to file its Acknowledgment of Service. As already noted, it did not do so until some two and a half months later on 5 March 2025, and only after the section 67 Application had been fixed and the failure to file an Acknowledgment of Service had been drawn to its attention by both the Court, and by Tecnicas, in correspondence in clear terms (and in the latter case in terms which spelled out the consequences of such failure to file an Acknowledgment of Service).

55. A defendant who wishes to make an application to challenge the Court's jurisdiction must first file an acknowledgement of service (CPR r.10.1(3)(b)). The Court's "jurisdiction" is a

reference to the court's power or authority to try a claim (see *Hoddinott v Persimmom Homes [2007] EWCA Civ 1203*, at [27]-[28]).

56. The procedure for challenging the court's jurisdiction is contained in Part 11, and it is expressly stated that:

> "11. – (1) A defendant who wishes to –
>
> (a) dispute the court's jurisdiction to try the claim; or
>
> (b) argue that the court should not exercise its jurisdiction
>
> may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.
>
> (2) **A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10**".
>
> (emphasis added)

57. PCMC does not dispute that it has failed to file an Acknowledgment of Service on time. Accordingly, PCMC is disabled from applying under CPR r.11(1) (absent an extension of time or waiver) because CPR r.11(2) requires timely acknowledgement before an application under CPR r.11(1) (see *Cunico Resources NV v Saskalakis* [2018] EWHC 3382 (Comm), per Andrew Baker J at [34]).

58. It is against that backdrop that PCMC has applied for relief from sanctions and for a retrospective extension of time to file an Acknowledgment of Service until 5 March 2025, pursuant to CPR r.3.1(2)(a). Relief from sanctions is required in relation to a failure to file an Acknowledgment of Service within the specified time (CPR 3.9). In this regard, service of an Acknowledgment of Service is not a mere procedural matter, and it has fundamental consequences in terms of the furtherance of the action (and its defence) thereafter.

59. The three-stage test for relief from sanctions in *Denton v TH White Ltd* [2014] EWCA Civ 906 is well known, and does not require restating.

60. In relation to the first stage, and the identification and assessment of the seriousness and significance of the failure to comply with the rules and to file a timely Acknowledgment of Service, I am satisfied that the failure to comply with the rules and file a timely Acknowledgment of Service, is a serious breach, particularly in the context of the consequences of the non-filing of an Acknowledgment of Service and the length of time over which the failure continued, particularly in the context of an arbitration claim and the associated need for expedition and finality.

61. There are numerous serious consequences that flow from the filing or non-filing of an Acknowledgment of Service. It is a clear requirement of the CPR that for a defendant to mount a challenge to the court's jurisdiction under CPR Part 11 an Acknowledgment of Service must be filed. Equally, a defendant cannot even address the Court on the substantive hearing of a claim, without permission if it has failed to file an Acknowledgment of Service.

The significance of the failure is all the greater in the present case as it has caused Commercial Court Listing to fix the final hearing.

62. Here the failure continued, with no application for relief from sanctions or for an extension of time, for the best part of two months after the time for filing of an Acknowledgment of Service. This is despite PCMC retaining English solicitors on 26 December 2024, who began to receive documents from "on or around 30 December 2024", as well as corresponding directly with Tecnicas' legal representatives from 9 January 2025 onwards.

63. Thereafter, even the Court's email of 18 February 2025 seeking confirmation that no Acknowledgment of Service had been filed did not provoke an application, nor did Tecnicas' solicitors email letter of 20 February, and indeed the result was the further serious consequence flowing that the final hearing was itself fixed. Even then, and at the time of this hearing, the application for relief from sanctions was not even fixed.

64. I reject the brave suggestion that the failure to file an Acknowledgment of Service is only a "technical" breach. Nothing could be further from the truth given the serious consequences that flow from either filing or not filing an Acknowledgment of Service. This is not a case where there have been no consequences of the late filing. On the contrary, a final hearing has been fixed, PCMC has lost the ability to participate in the hearing without permission, and there can be no challenge to the jurisdiction without a timely Acknowledgment of Service or an extension with associated relief from sanctions. The breach has also had a serious and significant effect on both Tecnicas and the Court's preparations to hear the claim and the conduct of the hearing itself, which is the final hearing of the Section 67 Application. The breach is a serious breach.

65. As to the second stage, and why the default occurred, I do not consider that any good reason has been demonstrated for the failure to file an Acknowledgment of Service timeously. The claim was served on 15 December 2024. It is page one, line one for any solicitor that an Acknowledgment of Service should be filed within the time specified in the CPR, given the potentially draconian consequences of a failure to do so. The position is *a fortiori* if a party is contemplating challenging service or jurisdiction (as it appears PCMC was). That was all the more reason to file a timely Acknowledgment of Service, without which the party may not be able to challenge service or jurisdiction.

66. The reasons given by PCMC as to why the default occurred do not bear examination. First, it is suggested that the claim could have been served before 15 December 2024. That cannot be a cause of the default. Despite the fact that PCMC had known that a section 67 challenge had been made since 15 November 2024 (and so was forewarned), time only ran from 15 December 2024. Any competent solicitor would know that service then had to be acknowledged within the time required to do so*, a fortiori* if the party was considering investigating whether service was valid, or whether there could be any challenge to jurisdiction.

67. Secondly, in the claim form Tecnicas also requested permission for alternative service, which, it is said, presupposes that service could not have occurred until the Court granted permission. That is a bad point. The reference to Tecnicas' intention to seek permission for alternative service did not constitute an application and did not preclude Tecnicas from serving the claim by any other valid means. If Tecnicas had wanted to obtain a Court order

for alternative service, it should have issued an application notice within the arbitration claim seeking an order for alternative service. If it had done so, that would have been put before a paper applications judge who would have considered that application and either made such an order or not made such an order. It would, however, be clear to those acting on behalf of PCMC, simply from looking at CE-File, that no such application had ever been made, still less ruled upon.

68. If there was any ambiguity or misunderstanding (and I do not consider that there was one), such ambiguity or misunderstanding was removed by the fact that it was clear that Tecnicas was purporting to serve on 15 December coupled with its explicit statement that service of the claim had been affected by email on 15 December 2024. As is clear from subsequent events, even if that had not been crystal clear at the time of service, it was clear in the correspondence that followed in January 2025 and following.

69. Mr Kinninmont says he was on leave until 7 January 2025, but equally that, or any other matter thereafter, is not of any relevance for a number of reasons:

    (1) Firstly, Freeths are a significant firm and ought to have appropriate resources available when taking on a mandate.

    (2) Secondly, Mr Kinninmont does not say he was not made aware of the matter or the fact that the claim form had been issued. On the contrary, he said he "provided some initial thoughts based upon the documents available at that time" whilst he was on leave, which included the email from Sidley Austin dated 15 December 2024, stating that, "[t]his email constitutes service on PCMC of the following documents, which have also been filed with the Court".

    (3) Thirdly, and in any event, Mr Kinninmont returned to work on 7 January, yet PCMC did not file an Acknowledgment of Service in time, despite any solicitor being aware of what the deadline was.

    (4) Fourthly, and even more fundamentally, none of the above matters amounted to any reason, still less a good reason, why an Acknowledgment of Service was not filed in the days, weeks, or even over a month thereafter, and even when the failure to file an Acknowledgment of Service was drawn to PCMC's attention by the Court on 18 February 2025 and by Sidley Austin on 20 February 2025.

    (5) Fifthly, whilst it is suggested that a considerable amount of time was spent trying to pin Tecnicas down as to why it said service was valid, that is besides the point. That might be relevant to whether to make any challenge to service or to jurisdiction, but in the meantime, it was all the more important to get on and file an Acknowledgement of Service, as a failure to do so would prejudice (if not preclude) the ability to advance any such application(s).

    (6) Sixthly, even when an Acknowledgment of Service was filed on 5 March 2025, the First Application did not even include an application for relief from sanctions or an extension of time. That followed the next day.

(7) Seventhly, and to compound matters, PCMC never had such applications fixed for a hearing (not even that for relief from sanctions) despite knowing that the present hearing was the final hearing in the arbitration claim. Even on the day of the hearing, the Relief from Sanctions Application had not been fixed, and essentially PCMC was asking the Court to rule upon the Relief from Sanctions Application (taking up time allocated for the final hearing of the Section 67 Application), in circumstances where it had long been aware that the Relief from Sanctions Application had never been fixed for a hearing.

70. Accordingly, and in the above circumstances, there is no good reason demonstrated for the failure to file an Acknowledgment of Service timeously or indeed at all until 5 March, or indeed to proceed expeditiously thereafter in relation to the determination of the application which was then made.

71. Turning to the third stage, and the consideration of "all the circumstances of the case so as to enable [the court] to deal justly with the application", including the factors in CPR r.3.9(1)(a) and (b); namely, the need (a) for litigation to be conducted efficiently and at proportionate cost, and (b) to enforce compliance with rules, practice directions and orders.

72. In this regard, CPR r.3.9(1)(a) is of particular importance in the context of an arbitration claim and the need for expedition and speedy finality in circumstances where the failure has led to the fixing (and now hearing) of the final hearing in that arbitration claim, and all without PCMC fixing its Relief from Sanctions Application and, if successful, its application for an extension of time.

73. Equally, in relation to r.3.9(1)(b), the need to enforce the rules is of particular importance in the present case, given the serious consequences that do follow from filing or not filing an Acknowledgement of Service and the serious consequences that have followed in this case, which included the fixing of the final hearing of the section 67 Application in circumstances where there had been no Acknowledgment of Service filed.

74. In terms of considering all the circumstances so as to enable the Court to deal justly with the application, and standing back, this is a case where PCMC has failed to file the Acknowledgment of Service in time, or over an extended period of time thereafter, without any good reason for that (continued) failure and in circumstances which led the Court some considerable time ago to fix the final hearing of the Section 67 Application, and even subsequently PCMC failed to have its application fixed.

75. PCMC should have filed its Acknowledgment of Service months ago. Any solicitor would have known of the need to do so. PCMC's solicitors had the information and documents to do so before the end of 2024. It was all the more important that they acknowledge service in time if they were considering challenging either service or jurisdiction. Thereafter, there was no excuse for their continued failure to do so, or failure to do so even to this day in terms of fixing their Relief from Sanctions Application.

76. This was a serious failure to comply with the rules in circumstances where there was no good reason for the continuing default in relation to acknowledging service, which has had fundamental consequences, resulting in the final arbitration hearing taking place on 24 June 2025.

77. Taking all such matters into consideration, I am satisfied that it would not be appropriate to grant relief from sanctions, and I accordingly dismiss the Relief from Sanctions Application. It follows that all other aspects of the First and Second Applications also fall away, and for completeness are dismissed.

78. I am, however, prepared to give PCMC permission to take part in this hearing, but only on a *de bene esse* basis, and not as a party, given that it failed to file its Acknowledgment of Service on time and has failed to obtain relief from sanctions. I am prepared to hear PCMC on such basis so as to ensure that the Court is aware of, and is able to take into account, any and all counterarguments to those advanced by Tecnicas on the Section 67 Application.

C. PART 2 – THE SECTION 67 APPLICATION

C.1 The Purchase Order, the Deviation List and the GTCCS

79. The contract in issue is concerned with the Fadhili gas programme project in Saudi Arabia, which is run by Saudi Aramco. In 2015, Saudi Aramco appointed Tecnicas as the head EPC contractor in respect of various packages of work required in relation to the project. In 2016, Tecnicas subcontracted certain electrochemical elements of the works to PCMC, which is a Saudi company.

80. The Sub-Contract is comprised of a series of documents entered into over the course of two days in December 2016, which the Parties expressly agreed "are listed in order of precedence".

81. The Purchase Order, dated 14 December 2016, sets out the order of precedence of the documents:

> "This Purchase Order will be carried out in accordance with the following attached documents which **are listed in order of precedence** and form an Integral part of the Purchase Order.
>
> 1. **This Purchase Order**.
>
> 2. Deviation List to the GTCCS.
>
> 3. Purchase Order Requisitions (Technical Requisitions I and IJ, all their attachments and all documents referenced in Document Index).
>
> 4. General Terms and Conditions for Construction Subcontracts (GTCCS Project Fhadhili Rev. 04(2))".
>
> (emphasis added)

82. The Purchase Order was entered into on 14 December 2016 (which was subsequent to the signing of the Deviation List). The documents were in fact signed on the following dates:

    (1) The Purchase Order was signed and executed by the Parties on 14 December 2016.

    (2) The Deviation List to the General Terms and Conditions for Construction Contracts ("GTCCS") (the "Deviation List") was signed by the parties on 13 December 2016.

    (3) The Purchase Order Technical Requisitions I and II was signed by the parties on 14 December 2016.

    (4) The GTCCS itself was signed by the parties on 14 December 2016 (but apparently it was drafted in November 2015).

83. In respect of the Deviation List, it "memorialized" the parties' negotiating process in relation to particular Items, and was signed on 13 December 2016).

84. Whilst it is described as a Deviation List to the GTCCS, it is common ground that Items 1 to 18 related to potential amendments to the (then draft) Purchase Order, whilst Items 19 to 26 concern amendments to the GTCCS.

85. This is of some relevance in the context of the Section 67 Application as the only contractual agreement, in relation to what is set out in Items 1 to 18 of the Deviation List, is the Purchase Order itself. The Purchase Order is the contractual document which was executed the following day, and which sets out the contractually agreed terms in relation to the matters stated therein. In this regard, and as already noted, the Purchase Order has precedence over the other documents forming part of the Sub-Contract.

86. It follows that there is, and can be, no contractual inconsistency between what is stated in the Deviation List and in the Purchase Order. It is the Purchase Order which contains what was contractually agreed in relation to the items the subject matter of Items 1 to 18 of the Deviation List, so even if there were a difference between what is stated in the Deviation List and what is agreed in Purchase Order, the Purchase Order "trumps" the Deviation List for two reasons. First (and fundamentally) it is the contractual document that contains the contractual terms in relation to matters the subject matter of the Purchase Order and secondly, and in any event, it has precedence over the Deviation List.

87. This hierarchy, and approach, is itself consistent with PCMC's earlier express request on 8 December 2016 that Tecnicas "review and incorporate [the proposed amendments to the Purchase Order] into the final PO. We do hope that the above will be acceptable to you and look forward to receive the final PO draft for our review", and attaching a list of proposed adjustments to the Subcontract.

88. In consequence, the Deviation List can only amend the GTCCS and not the Purchase Order, as if there is a suggested amendment in relation to the Purchase Order in the Deviation List it is only contractually agreed, if it is what is agreed in the (subsequent) signed Purchase Order. This has been recognised by PCMC (at Comment 77):

> "[the] 'Deviation List to the GTCCS'…refers to the items that constitute modifications to the Terms and Conditions only, not the Purchase Order… This is simply because all modifications to the Purchase Order ha[ve] been expressly negotiated between the Parties, ha[ve] been incorporated in the signed version of the Purchase Order. In short, the Deviation List can only apply to the Terms and Conditions [i.e., the GTCCS]".

89. I would only add at this point that, as Mr Singarajah confirmed at the hearing on behalf of PCMC, PCMC does not allege that the Purchase Order failed to record that which had been agreed on behalf of the parties in relation to the subject matter thereof, and as such, no claim for rectification is (or could be) advanced. The Purchase Order therefore contained what the partes had contractually agreed in relation to the subject matter thereof.

90. In contrast, Items 19 to 26 of the Deviation List concerned clauses in the GTCCS rather than the Purchase Order, and what was agreed in relation thereto, and this was not incorporated into the GTCCS (by way of amendment) because the Deviation List took priority over the GTCCS.

91. The final form of the Purchase Order, which incorporated all the agreed modifications to the draft version thereof, was executed on 14 December 2016. As PCMC has previously stated in the arbitration, "all modifications to the Purchase Order, that has been expressly negotiated between the Parties, has been incorporated in the signed version of the Purchase Order".

92. In the above circumstances, the Deviation List memorialised negotiations between the parties (so far as the subject matter of the Purchase Order is concerned) with the agreement of the parties in relation to the subject matter of the Purchase Order being set out in the Purchase Order itself as signed on 14 December 2016.

93. The initial draft of the Purchase Order included two separate sub-clauses in blue colour (as recorded in row 18, column 5 of the Deviation List), one for governing law and one for an ad hoc arbitration agreement:

> "11.1 The validity, interpretation, construction and performance of the SUBCONTRACT and all aspects derived therefrom will be governed by the laws of **England and Wales**.
>
> 11.2 The arbitration proceedings shall take place in **London (England)** and the arbitration shall be held in English".
>
> (emphasis added)

94. PCMC had proposed in blue colour (as recorded in row 18 of the Deviation List) that the Subcontract be governed by Saudi law and the arbitration seated in Saudi Arabia, in the following terms:

> "11.1 The validity, interpretation, construction and performance of the SUBCONTRACT and all aspects derived therefrom will be governed by the laws of **Kingdom of Saudi Arabia**.

> 11.2 The arbitration proceedings shall take place in **Saudi Arabia** and the arbitration shall be held in English".
>
> (emphasis added)

95. It will be seen that such proposals are inconsistent with the terms of Clauses 11.1 and 11.2 in terms of governing law and seat, which has potentially fundamental differences as to the terms, and the procedure, that would apply in relation to any arbitration. For example, it would only be in the context of an English seated arbitration that the provisions of the Arbitration Act 1996 would apply. Equally neither proposal agrees to the arbitration being under the terms of any particular body (and so would be an ad hoc arbitration subject to any impact of the governing law).

96. Tecnicas did not accept the proposal. This is recorded in green colour in the Deviation List. The Deviation List records that PCMC "accepts clause 11.1 and 2: **England and Wales law and Arbitration** under **ICC Laws** in London and held in English" (emphasis added). The Item is described as "closed".

97. It is therefore recorded that PCMC accepted clause 11.1 and 11.2 (which referred to the Sub-Contract being governed by the laws of England and Wales, and the arbitration proceedings taking place in London (England) and the arbitration shall be held in English), but those clauses did not provide for "under ICC Laws".

98. The parties were unsure what "Item closed" meant, but it was suggested by Ms Wood KC (and not contradicted by Mr Singarajah) that it suggested that some sort of resolution had been struck. What that resolution was, was not identified in row 18 of the Deviation List. For that, one had to look at the Purchase Order given (1) that its purpose was to set out what had been agreed, and (2) it in any event had precedence over the Deviation List.

99. What the parties agreed is set out in Clause 11.1 of the executed Purchase Order. Clause 11.1 of the signed Purchase Order (signed the next day 14 December 2016) combined Clauses 11.1 and 11.2 into a single contractual arbitration agreement:

> "11.1. The arbitration proceedings shall take place in London (England) and the arbitration shall be held in English, and will be governed by the laws of England and Wales".

100. The parties are agreed that this is a London seated arbitration, and the parties also agree that in the absence of a reference to any particular arbitration rules in an agreement, the agreement in the Purchase Order is to an ad hoc arbitration. Clearly there is no agreement to ICC arbitration in the Purchase Order. Tecnicas accordingly submits that what was agreed to, and all that was agreed to, was ad hoc arbitration in London governed by English law, and that the parties did not agree to an ICC arbitration under the auspices of the ICC and ICC Rules. In contrast PCMC submits that the arbitration agreement was not ad hoc, but was under ICC Rules.

101. The parties' respective arguments are addressed in Section G below. It suffices to note at this point that PCMC seeks to rely upon Clause 32 of the GTCCS which provides:

> "The validity, interpretation, construction and performance of the SUBCONTRACT and all aspects derived therefrom will be governed by the laws of **Saudi Arabia**.
>
> If at any time any question, dispute or difference (a "Dispute") arises between CONTRACTOR and SUBCONTRACTOR in connection with the SUBCONTRACT or the carrying out of the WORKS such Dispute shall be finally settled by Arbitration administered by the **International Chamber of Commerce** by three Arbitrators appointed **in accordance with those Rules**.
>
> All disputes, differences or contentions arising out of the execution of, or in connection with, the Subcontract, shall be settled through friendly negotiation between the PARTIES.
>
> Should no amicable settlement be reached through negotiation, he (sic) PARTIES expressly agree that any and all disputes, controversies, matters or claims of any nature whatsoever directly, or indirectly arising out of, based-upon, relating to or in connection with the formation, validity, existence, interpretation, application, implementation, performance, breach or termination of the SUBCONTRACT, any provision or part there-of or any activities carried out in connection therewith, shall be finally settled by arbitration in accordance with the **Rules of Arbitration and Statutes of the International Chamber of Commerce** to which the administration of the arbitration and the appointment of the arbitrator is hereby entrusted in accordance with the said Rules and Statutes.
>
> The arbitral tribunal shall sit in **Riyadh (Saudi Arabia)** and the proceedings shall be in the English language".
>
> (emphasis added)

102. It will be noted that Clause 32 of the GTCCS is strikingly similar to the rejected proposal of Tecnicas in Item 18 of the Deviation List in relation to the Sub-Contract being governed by Saudi Arabian law, with arbitration in Riyadh (as opposed to English law and arbitration in London, England), and the reference to "ICC Rules", none of which was agreed in the Purchase Order. In addition, it is to be borne in mind that the GTCCS is itself below the Purchase Order in order of precedence.

C.2 The ICC Arbitration

103. As already noted, PCMC originally ignored the fact that it had entered into an arbitration agreement with Tecnicas, and in 2022 filed a claim against Tecnicas before the Commercial Court of Saudi Arabia, which declined jurisdiction, holding that the Purchase Order had provided for settlement of the dispute between the parties by arbitration.

104. PCMC then filed a request for arbitration before the LCIA, but on 13 September 2023 the LCIA declined to initiate the arbitration and noted that PCMC were referring to an arbitration agreement which they were asserting contained references to the ICC.

105. So it was that on 6 October 2023, PCMC filed its request for arbitration against Tecnicas before the ICC (the "ICC Arbitration"). In its Request for Arbitration to the ICC of that date, PCMC addressed the arbitration agreement at paragraph 25. After quoting from Clause 11 of the Purchase Order, PCMC failed to mention (or quote) the order of precedence, and then quoted from Article 32 of the GTCSS but omitted to quote what was stated about arbitration in Riyadh.

106. On 12 December 2023, Tecnicas' legal representatives at the time, Mayer Brown, wrote a letter to PCMC, in which it stated that it had acquired knowledge of the existence of the arbitral proceedings, and requested that the Request for Arbitration be forwarded to it. The letter ended with the following express reservation of rights:

> "12. [Tecnicas] reserves all of its rights in respect of the present matter and of PCMC's claims. Nothing in this letter should be constructed as a submission to the jurisdiction of the ICC Court or of any tribunal appointed in the present matter, nor as a waiver of any of [Tecnicas'] rights".

107. On 19 December 2023, Welshdale Consultancy Ltd ("Welshdale"), who were consultants acting for PCMC in the ICC Arbitration, wrote to the ICC, and referred to the possibility of an extension of time for Tecnicas to respond to the Request for Arbitration, also stating:

> "a) Unconditional Confirmation of ICC Jurisdiction.: As stipulated in Clause 32 of the GTCCS, the ICC holds sole and indisputable jurisdiction over disputes arising from this matter. Accepting this extension confirms your unequivocal acknowledgment and agreement to this established contractual basis for arbitration".

108. On 27 December 2023 Tecnicas rejected the "10-calendar day extension" which it noted was also subject to "conditions unilaterally dictated by [PCMC]", and sought a direction that the time for response to the Request for Arbitration ran from 15 December 2023. The letter ended with a further express reservation of rights in these terms:

> "[Tecnicas] reserves all of its rights in respect of the present matter and of PCMC's claims. Nothing in this letter should be construed as a submission to the jurisdiction of the ICC International Court of Arbitration or of any arbitral tribunal appointed in the present matter, nor as a waiver of any of [Tecnicas'] rights".

109. In a letter dated 3 January 2024 Mayer Brown, on behalf of Tecnicas, wrote to the ICC. Amongst other matters the letter noted the tribunal consist of three arbitrators and requested the ICC to appoint Marcus Taverner KC as co-arbitrator. The letter ended with a further express reservation of rights, in identical terms to that in Tecnicas' letter of 27 December 2023.

110. On 1 March, the Tribunal in the ICC proceedings sent the parties the first draft of Terms of Reference.

111. Mayer Brown wrote to the tribunal on 7 March 2024 to request "that the preparation of the Terms of Reference and Procedural Order no.1 are put on hold" until issues concerning authority and capacity in relation to PCMC were satisfactorily clarified. The letter ended,

"[Tecnicas reserves all its rights including to claim for the costs incurred to date in the present arbitration against PCMC and/or against Welshdale Legal".

112. On 11 March 2024, Tecnicas filed an answer to the Request for Arbitration (the "Answer") and submitted a counterclaim on a precautionary and conditional basis (conditional on the RFA having been validly submitted and PCMC having capacity to submit it).

113. In this document:

(1) Tecnicas stated (at paragraph 7) that, "[Tecnicas] reserves all its rights in respect of these matters and submits this Answer only in a precautionary manner, conditioned to the demonstration that the RFA was actually submitted by the Claimant and confirmation of its capacity to act to pursue its claims in this arbitration".

(2) Tecnicas stated (at paragraph 9) that it submitted its Answer, "…with a view to allow the Claimant and the Arbitral Tribunal to consider and understand [Tecnicas'] position in this arbitration and particularly in the context of the preparation of the Terms of Reference and the Procedural Timetable to be established".

(3) Tecnicas stated (at paragraph 92) under the heading "Procedural rules", "[Tecnicas] submits that, pursuant to and Item 18 of the Deviation List and Clause 32 of the GTCCS, the present arbitration must be conducted in accordance with the ICC Rules" referring to Clause 11 of the Purchase Order and Clause 32 of the GTCCS.

(4) Tecnicas denied (at paragraphs 93 and 94) that the Sub-Contract was governed by the laws of the Kingdom of Saudi Arabia, noting that this was contrary to the express provisions of the Sub-Contract, and also noting that whilst PCMC relied exclusively on Clause 32 of the GTCCS (in contending that the applicable law was that of the Kingdom of Saudi Arabia) that was an "untenable position" which was, "without regard to other provisions of the Sub-Contract that take precedence over this Clause" (paragraph 96).

(5) Tecnicas referred to Item 18 of the Deviation List (paragraph 101), but at this stage submitted that the parties agreed to Item 18 of the Deviation List (in the terms it quoted which included the reference to "under ICC Rules"), and said that this agreement "must clearly prevail over the GTCCS as a result of the order of precedence between the contractual documents agreed under the Subcontract".

(6) Tecnicas also referred to (and quoted) at paragraphs 108 and 110, Clause 11 of the Purchase Order expressly stating that the laws of England and Wales governed the Sub-Contract, and established London (England) as the seat of the arbitration.

(7) Tecnicas at this stage asserted (at paragraph 114) that Item 18 of the Deviation List modified Clause 32 of the GTCCS, stating that "Clause 32 of the GTCCS cannot prevail over an express agreement contained in a prevailing contract document" and does not modify the Purchase Order (also stating that there is no contradiction between the Deviation and the List and the Purchase Order).

(8) Tecnicas in the paragraph seeking relief (paragraph 128) sought the dismissal of jurisdiction, but at this stage this was on the basis that the Request for Arbitration was submitted with no authority and PCMC had no capacity to act.

(9) Tecnicas ended its Answer with a section headed "Reservation of Rights" which provided:-

> "131. The Respondent reserves all of its rights in respect of the Claimant's potential lack of authority and/or lack of capacity to initiate and to act in this arbitration due to the Suspension, for the reasons set out elsewhere above and in the Respondent's letter to the Arbitral Tribunal, dated 7 March 2024, and to develop its position in connection with the Suspension.
>
> 132. The Respondent does not accept that the RFA was duly submitted on behalf of PCMC and nothing in this document or in the previous correspondence exchanged in this matter can be construed as a submission to the jurisdiction of this Tribunal constituted as a consequence of the RFA.
>
> 133. This Answer to the Request for Arbitration and Counterclaim is not intended to prejudice or waive any right the Respondent may have under the Subcontract or any other instrument or law. The Respondent respectfully reserves its right to amend, supplement and correct its prayers for relief in the course of the proceedings, as may be warranted by the circumstances and as far as permissible under the applicable procedural rules".

114. It will be noted, therefore, that at this stage, whilst Tecnicas did challenge the jurisdiction, it did not make the "Ad Hoc vs ICC Arbitration" challenge, and referred to the arbitration being conducted pursuant to the ICC Rules. As appears below, Tecnicas did in due course make the Ad Hoc vs ICC Arbitration challenge, the same was accepted by the ICC, and the ICC proceeded to address the preliminary issue as to its jurisdiction by reference to such Ad Hoc vs ICC Arbitration challenge.

115. On 22 March 2024, at 11 am, a Case Management Conference ("CMC") took place. It is uncertain what happened at the CMC, as none of the legal representatives in the current proceedings were present. However, Ms Wood KC suggested that it seems likely that the Ad Hoc vs ICC Arbitration challenge was raised then. This would appear to be the case, as the draft Terms of Reference, which were in circulation as of 1 March 2024, were sent after the CMC with amendments in tracked changes. In particular, Tecnicas added the following to the draft Terms of Reference:

> "2. Lack of jurisdiction
> 78. The Respondent notes that the Claimant seems to suggest (in the context of the discussion on the applicable law) that item 18 of the Deviation List is not applicable. Item 18 of the Deviation List contains the agreement of the Parties that the arbitration would be administered under the ICC Rules. If this position of the Claimant were accepted by the Tribunal, the result would be that the PO, which supersedes Clause 32 of the GTCCS, would prevail and would provide for ad hoc arbitration. It would follow from this conclusion that the Arbitral Tribunal, constituted pursuant to the ICC Rules, would not have jurisdiction to decide on the matters referred to this arbitration. Therefore, a preliminary decision on

> jurisdiction determining whether the Tribunal has jurisdiction in the present case would be required".

116. The Tribunal recirculated the Terms of Reference to the parties on 25 March 2024, stating:

> "Please find attached the Terms of Reference ready for signing. **They incorporate both the changes and amendments discussed at the CMC of 22 March 2024, including** those proposed by the Claimant immediately preceding the CMC, as well as **the amendments submitted by the Respondent in its subsequent email of 22 March 2024**."
>
> (emphasis added)

117. This was an opportunity for PCMC to object to Tecnicas' Ad Hoc vs ICC Arbitration, given that the next stage was for PCMC to sign the final Terms of Reference (which it did without objection). Equally, the Tribunal permitted the Terms of Reference to include Tecnicas' jurisdictional objection, and so allowed the objection to be raised.

118. A further draft of the Terms of Reference was sent by the Tribunal on 25 March 2024. Tecnicas did not sign the Terms of Reference, on the basis that it could not do so as its "ESG/Compliance policies" prevented it from signing the Terms of Reference without having been able to confirm the authority and representation of the counter-party.

119. On 29 April 2024, PCMC returned the Terms of Reference "duly signed", together with PCMC's further Reply to Tecnicas' Objections to signing the Terms of Reference.

120. On 7 May 2024, Tecnicas wrote to the Tribunal, referring to PCMC's letter of 29 April 2024 and an invitation from the Tribunal to confirm its position regarding signing the Terms of Reference, and Tecnicas maintained its concerns about PCMC and authority. At paragraph 11, it reiterated its jurisdictional objection to the jurisdiction of the Tribunal to hear the case or the ICC to administer the arbitration, stating:

> "Accordingly, the Respondent takes this opportunity to confirm that its right to raise a
> jurisdictional objection to be resolved as a preliminary matter in the arbitration remains reserved and **that nothing in this letter should be construed as an admission of the jurisdiction of the Arbitral Tribunal** to hear this case **or the ICC Court to administer this arbitration**".
>
> (emphasis added)

121. The final terms of the Terms of Reference were approved by the ICC on 23 May 2024 and sent to the parties on 24 May 2024 (inviting Tecnicas to sign them by 10 June 2024). The Terms of Reference encapsulated the Parties' respective positions as follows (at paragraphs 77 and 88):

> "The Claimant submits that, based on Article 32 of the Terms and Conditions, the merits of the dispute are governed by the laws of the Kingdom of Saudi Arabia. The Claimant does not exclusively rely on Article 32 as alleged by the Respondent. The Claimant highlights that the

> second document in order of precedence as set out in the Purchase Order is "Deviation List to the GTCCS", which refers to the items that constitute modifications to the Terms and Conditions only, not the Purchase Order. Item 18 in the Deviation List, that the Respondent refers to, represents a modification to the Purchase Order, Article 11.1 & 11.2, which is not consistent with the function of the Deviation List. This is simply because all modifications to the Purchase Order, that has been expressly negotiated between the Parties, has been incorporated in the signed version of the Purchase Order. In short, the Deviation List can only apply to the Terms and Conditions".
>
> …
>
> "2. Lack of Jurisdiction
>
> 88. The Respondent notes that the Claimant seems to suggest (in the context of the discussion on the applicable law) that item 18 of the Deviation List is not applicable. Item 18 of the Deviation List contains the agreement of the Parties that the arbitration would be administered under the ICC Rules. If this position of the Claimant were accepted by the Tribunal, the result would be that the PO, which supersedes Clause 32 of the GTCCS, would prevail and would provide for ad hoc arbitration. It would follow from this conclusion that the Arbitral Tribunal, constituted pursuant to the ICC Rules, would not have jurisdiction to decide on the matters referred to this arbitration. Therefore, a preliminary decision on jurisdiction determining whether the Tribunal has jurisdiction in the present case would be required".

122. At paragraph 118 the Terms of Reference it was stated:

> **"K. Issues to be determined**
>
> 118. The issues to be determined by the Tribunal shall be those resulting from the Parties' submissions, including past and forthcoming written and oral submissions, insofar as they are relevant to the adjudication of the Parties' respective claims and defences, without prejudice to the provisions of Article 23(4) of the ICC Rules."

123. By this stage, therefore, the Ad Hoc vs ICC Arbitration challenge had been squarely raised and accepted for determination by the Tribunal. No objection to the timing of the raising of the Ad Hoc vs ICC Arbitration challenge was made by PCMC at this point or at any time during the arbitration.

124. On 30 May 2024, Tecnicas' counsel informed the Tribunal that it intended to "send a communication directly to the ICC setting out their objection to the jurisdiction of the ICC to administer this case and to the jurisdiction of the Arbitral Tribunal in connection with these arbitral proceedings".

125. On 5 June 2024, the Tribunal issued its Procedural Order 2 in which it decided that the arbitration be bifurcated with the first phase dealing with certain preliminary issues, followed by a second phase dealing with the merits of the case (and quantum), if any.

126. The Tribunal expressly determined that "the following preliminary issues shall be dealt with separately in the first phase of the arbitration", which included:

> "(a) **Whether the Tribunal has jurisdiction to hear the Claimant's principal claims**. Under this item (a), the Tribunal will **also** examine, if maintained by the Respondent, whether the Clamant has properly initiated this arbitration through Mr Abid Kasem / Welshdale, and whether the Claimant has the capacity to conduct / participate in this arbitration".
>
> (emphasis added)

127. Tecnicas' then legal representatives (Mayer Brown) sent a letter on 10 June 2024 to the members of the Tribunal. In that letter it was stated, amongst other matters that:

> "For all the reasons set out in previous correspondence, which affect the jurisdiction of the ICC and the Arbitral Tribunal, as well as the invalid initiation and continuation of this arbitration, as long as the Claimant continues to have its trade license suspended, the Respondent will not participate in this arbitration."

128. The letter ended with a further express reservation of rights:

> "All rights of [Tecnicas] are reserved, including to continue disputing the jurisdiction of the ICC and the Arbitral Tribunal in connection with this matter as well as to bring any other actions applicable by law before any available forum to dispute the validity of these arbitration proceedings".

129. A day later, on 11 June 2024, Tecnicas itself sent a direct letter to the ICC Secretariat. It started by stating as follows:

> "[Tecnicas] has consistently raised objections to the jurisdiction of the ICC and the Arbitral Tribunal, as reflected in our letters of 7 March 2024, 21 March 2024, 7 May 2024 and in paragraphs 88 and 115 of the TOR. We emphasize that we have not waived or accepted the jurisdiction of the ICC in this arbitration and reserve our rights in this regard".

130. Tecnicas then addressed its two challenges, under the heading "1. Lack of legal capacity and representation of the Claimant" its case as to the lack of legal capacity and representation of PCMC and then, under the heading "2) Inapplicable arbitration clause" its Ad Hoc vs ICC Arbitration challenge, stating that:

> "the arbitration clause invoked by PCMC is unquestionably superseded by the arbitration clause contained in the Purchase Order, which is the main contractual document governing the relationship between the parties….
>
> The applicable arbitration clause in the Purchase Order provides for an ad hoc arbitration seated in London, not an ICC arbitration seated in Paris
>
> [Clause 11.1 of the Purchase Order was then quoted]
>
> Therefore the ICC has no jurisdiction to administer this arbitration and the Arbitral Tribunal has no jurisdiction to decide this dispute".

131. Tecnicas then went on to elaborate upon its arguments as to why the ICC should decline jurisdiction. The letter ended with Tecnicas stating that it, "reserves all rights and objections, including the right to seek further recourse before the courts with competent jurisdiction if necessary to protect its rights and interests".

132. By way of its Procedural Order 3, dated 11 June 2024, the Tribunal set the timetable for the first phase of the arbitration. The Tribunal noted that "no objections have been raised against the proposed Timetable". It set 20 June 2024 as the date by which Tecnicas was to serve its "full-fledged submissions on the preliminary issues" with PCMC serving its "fully-fledged submissions on the preliminary issue" by 4 July 2024.

133. On 14 June 2024, the ICC refused to reconsider its decision to approve the Terms of Reference.

134. Tecnicas did not take any further steps in respect of Preliminary Issues, and did not submit any submissions or evidence by 20 June 2024, the deadline set by Procedural Orders 2 and 3. In contrast, on 4 July 2024, PCMC made its submissions responding to the issues of the Tribunal's jurisdiction, the capacity and authority of PCMC's representatives and the governing law of the Sub-Contract. It referred to Tecnicas' position on jurisdiction which it summarised at paragraph 36. It did not object to Tecnicas taking the Ad Hoc vs ICC Arbitration challenge, or any aspect of its jurisdictional challenge.

135. In its submissions, PCMC rehearsed its points on jurisdiction which it has repeated on the Section 67 Application (the Section 67 Application being a re-hearing). In particular, it submits that Clause 11 of the Purchase Order is to be read in conjunction with Clause 32 of the GTCCS, submitting that "On a true construction of the [Sub-Contract] the arbitration clause provides for arbitration in London (England) under ICC Rules subject to English law".

136. Importantly, PCMC accepted that the Deviation List could not alter the Purchase Order (a stance from which it did not resile on the Section 67 Application) stating (at paragraph 87):

> "Given its position in the contractually agreed order of priority, the Deviation List cannot alter the Purchase Order as an inferior document. Its function appears to be superior in order of priority to the GTCCS and accordingly it can alter and amend the GTCCS if it does so expressly".

137. PCMC went on to state at paragraph 93 that, "The whole of the Deviation List in respect to the seat of arbitration and laws and rules to be applied is a huge bundle of confusion and ambiguity" before again candidly acknowledging that, "This Deviation List cannot by its very nature alter the Purchase Order in Paragraph 11. It simply has no authority to do so".

138. The denouement of PCMC's submission, again recycled on the Section 67 Application, was set out at paragraph 94:

> "… Paragraph 11.1 of the Purchase Order provides for arbitration in London. When read with General Condition 32 the arbitration is to take place under ICC Rules. If anything can be rescued from the disaster of the

> Deviation List is that the final words confirm ICC involvement in terms of the arbitration is to be held "under ICC Laws".

139. On 9 July 2024, the Tribunal issued its Procedural Order No. 4 in which it held that the Preliminary Issues should be decided without a hearing, and solely on the documents submitted by the parties.

140. The Tribunal issued the Partial Award on 18 October 2024. The Tribunal summarised Tecnicas' and PCMC's positions on jurisdiction by reference to the Terms of Reference.

141. The Tribunal went on to determine the Ad Hoc vs ICC Arbitration challenge. It rejected Tecnicas' submission that the effect of PCMC's position that Item 18 of the Deviation List was not applicable meant that the result would be that the Parties have agreed on Ad Hoc Arbitration (rather than ICC Arbitration) because Clause 11.1 of the Purchase Order, which does not contain any reference to the ICC, and superseded clause 32 of the GTCCS, would prevail and would provide for Ad Hoc Arbitration.

142. The Tribunal expressed its conclusion in these terms:

> "[i]n the Tribunal's view, when read together with the other documents containing references to arbitration, namely the Purchase Order and the GTCCS, Item 18 of the Deviation List records a clear and unambiguous confirmation of the Parties' agreement to arbitrate under the ICC Rules as comprehensively set out in Article 32 of the GTCCS, subject only to the change of the arbitral seat from Riyadh (Saudi Arabia) as per Article 32 of the GTCCS to London (England) as per Clause 11.1 of the Purchase Order. There is nothing to be found in Item 18 of the Deviation List that suggests the Parties had any intention to abolish the provisions on arbitration contained in Article 32 of the GTCCS altogether or to (merely) replace the agreement on ICC arbitration contained in Article 32 of the GTCCS by ad hoc arbitration. On the contrary, Item 18 confirms the Parties' agreement to arbitrate under the ICC Rules, albeit in a linguistically not very skilful form ("Arbitration under ICC Laws"). Moreover, there is nothing to be found in the Subcontract that suggests the Parties intended Clause 11.1 of the Purchase Order to establish a standalone arbitration clause superseding or eradicating all other references to arbitration in the subordinate documents".

143. Tecnicas' case under the Section 67 Application challenging the Tribunal's jurisdiction, is that the arbitration agreement is, and is only, contained in Clause 11.1 of the Purchase Order, and that provides for an Ad Hoc Arbitration in London, and that in consequence the Tribunal has no jurisdiction.

144. Whilst the present hearing is a re-hearing on the merits, Tecnicas submits, should it be of interest to consider the Tribunal's Award, that the Tribunal was simply wrong in its construction of the arbitration agreement because the Tribunal misconstrued the relevance (or lack thereof) of the Deviation List and disregarded the order of precedence that the parties had expressly described in the signed and executed Purchase Order. This led to the Tribunal undertaking an impermissible "pick and mix" approach, taking aspects of Clause 11 of the Purchase Order, Clause 32 of the GTCCS and Item 18 of the Deviation List to

create a dispute resolution mechanism which was not that contractually agreed to by the parties. As will appear, PCMC was to repeat such "pick and mix" approach before me in its submissions on the Section 67 Application.

D. APPLICABLE PRINCIPLES IN RELATION TO THE ARBITRATION ACT

145. The following sections of the Arbitration Act 1996 are relevant to this challenge, and are set out in full for context:

> "**31 Objection to substantive jurisdiction of tribunal.**
> (1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings **must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction**.
>
> **A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator**.
>
> (2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.
>
> (3) **The arbitral tribunal may admit an objection later** than the time specified in subsection (1) or (2) if it considers the delay justified".
>
> (emphasis added).
>
> …
>
> "**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.
>
> **A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3)**".
>
> (emphasis added).
>
> …
>
> "**73 Loss of right to object.**
> (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".
>
> (emphasis added)

146. Prior to the Court of Appeal decision in *Czech Republic v Diag Human SE & Anor* [2024] EWHC 2102 (Comm) ("*Diag*"), there was a degree of uncertainty about whether, under section 73, a tribunal could be considered to have allowed a jurisdictional objection to be raised at a time later than "forthwith", simply by addressing the late jurisdictional objection on the merits in the award (i.e., without positively stating that the objection was taken out of time). The Court of Appeal in *Diag* confirmed that the answer was "yes".

147. In that case, it was not until the Rejoinder, at the hearing which took place some three months later, and in post-hearing briefs, that jurisdiction challenges were taken (see at [58]). The jurisdictional objections were addressed substantively in the arbitration without any timeliness objection being taken (see at [58]) (as too did PCMC in the present case).

148. The Court of Appeal (Males, Popplewell and Andrews LJJ) dismissed the appeal, having considered the jurisdiction objections, finding that the "timeliness" arguments failed for each of three separate reasons. As stated at [72]:

> "We have concluded that the argument in support of the appeal fails for each of three reasons, which we will state and then develop, namely:
>
> i) the timeliness objection was never made to the tribunal during the arbitration, and s. 73 therefore precludes it being made later before the court;
>
> ii) CZR's jurisdictional objections were made "within such time as [was] allowed by … the tribunal" and so within the time permitted by s. 73, irrespective of any question whether s. 31(3) was fulfilled;
>
> iii) in any event the tribunal did "admit" the objections within the meaning of s. 31(3)" (at [72]).

149. The Court of Appeal held that section 73(1)(c) requires a "timeliness" point, or the timing objection, to be raised before the tribunal. If it is not, then it is too late to take it on a section 67 challenge. In other words (as the Court of Appeal put it, "Section 73 bars the timeliness objection").

150. As was stated at [73]:

> "That timeliness objection was never made to the tribunal during the arbitration, and s. 73 therefore precludes it being made later before the

> court. That is a complete answer to the objection and sufficient to dismiss the appeal. We do not need to consider the alternative arguments based on waiver under Article 32 or at common law".

151. Secondly, the jurisdictional objections were made within "the time allowed by the tribunal" under section 73. The other party did not object to the jurisdiction objections being raised in the Rejoinder and addressed them on the merits and thereby effectively invited the tribunal to decide them, and the tribunal went on to determine the objections on their merits in accordance with the apparent agreement of the parties that it should do so. In such circumstances the Court of Appeal concluded (at [75] that:

> "In those circumstances as a matter of ordinary language the tribunal allowed the jurisdiction objections to be taken at the time they were taken. They were within "such time as is allowed by … the tribunal". **The word "allowed" is a passive verb in the passive voice, which simply connotes what the tribunal permits**. The tribunal permitted CZR to make the objections within the time in which they were in fact made. This involves the second of the two alternative bases which were identified by Mr Justice Flaux in *Gulf* and does not depend upon s. 31(1)".
>
> (emphasis added)

152. The reference to Flaux J in *Gulf* is a reference to *Gulf Import & Export Co v Bunge SA* [2007] EWHC 2667 (Comm), in which Flaux J (as he then was) identified two separate routes to the conclusion that the jurisdiction challenge was not too late, the first being that section 31(3) was "in play" i.e. the tribunal was to be treated as having granted an extension. The other was that no extension was necessary because the objection was raised within the time "allowed by the tribunal" and so came within section 73, irrespective of section 31.

153. The Court of Appeal applied the second of these two bases in *Diag* finding that the jurisdictional objections were made "within such time as [was] allowed by … the tribunal" and so within the time permitted by section 73, irrespective of any question whether section 31(3) was fulfilled. As was identified at [78], section 31 is not the sole source of how and when jurisdictional objections are to be made. It is qualified by section 73, which can in some circumstances provide the answer, and there is no reason in the structure of the sections why "time allowed by the tribunal" in section 73 should not encompass circumstances in which it is allowed outside section 31.

154. In this regard, the Court identified (at [79]) that the most natural reading of section 73 is that the objection may be taken if it is taken within the time allowed by the tribunal or the time allowed by any provision of Part 1. Either is sufficient. The Court concluded (at [83]) that where (as in that case, and in this case), jurisdiction objections were raised without a timeliness objection, and dealt with by the tribunal at a convenient point in the process, that fulfils the purpose of section 73.

155. Thirdly, the Court of Appeal concluded (at [84] and following) that the tribunal "admitted" the objections within section 31(3). All that was required was that the tribunal admits the objection at a later time than is specified in section 31(1). The tribunal did so in that case (and did so in this case). The Court concluded that it is no accident that the word used is "admit" in the passive sense of what the tribunal permits, rather than requiring some

positive declaration of an extension (at [85]). In that case (and in this case) the tribunal did rule upon its jurisdiction in its Award, and it was not suggested (and is not suggested in this case) that the tribunal committed any misconduct or procedural irregularity in doing so. It must therefore have treated the objections as "duly" taken i.e. as made in accordance with section 31 (at [87]).

E. APPLICATION OF THE PRINCIPLES IN SECTION 31 AND 73 TO THE FACTS

E.1 Submissions

156. On behalf of PCMC Mr Singarajah took points in relation to section 31(1) and section 73 in his Summary Judgment Skeleton submitting that having "acquired knowledge" of an ICC arbitration by 12 December 2023, Tecnicas had the necessary information and knowledge to object on the grounds upon which it now seeks to rely (that the arbitration agreement provided for an Ad Hoc Arbitration), when on 3 January 2024 it appointed an arbitrator or 11 March 2024 it filed its Answer, but that Tecnicas did not take the Ad Hoc vs ICC Arbitration point until later in the arbitration.

157. He submitted that in failing to object on these grounds when taking the "first step" (both in appointing its own arbitrator and filing its Answer including paragraph 92 thereof) Tecnicas had waived its right to bring a challenge pursuant to section 73 and section 31(1) and/or was estopped from advancing the same. In this regard, he submitted that Tecnicas could not (as he put it) "approbate and reprobate", given that they appointed an arbitrator and submitted to ICC Rules. Mr Singarajah also submitted that none of the three grounds in section 30(1) of the Act applied (where the tribunal may rule upon its substantive jurisdiction).

158. In relation to Tecnicas' repeated reservations of rights (as quoted above), Mr Singarajah accepted that Tecnicas made a reservation of rights but referred to what was said by Foxton J in *Diag* at first instance that "a bare putting to proof of either jurisdiction in general, or broad categories of jurisdiction … cannot be sufficient" to give rise to a jurisdictional challenge under section 67 (see [77(i)]).

159. I would only note at this point that the difficulty with such submission on the facts of the present case is that not only did Tecnicas make a reservation of rights from the start, it also made clear from the start that it was challenging the jurisdiction, and it did take the specific Ad Hoc v ICC Arbitration challenge to jurisdiction in due course, which the Tribunal allowed it to do, and PCMC itself engaged in seeking to rebut such jurisdictional challenge without protest or objection.

160. In his oral submissions before me (which I heard *de bene esse*) Mr Singarajah realistically accepted that this Court was bound by the findings of the Court of Appeal. This somewhat drove a "coach and horses" through his submissions on section 31 and section 73 of the Arbitration Act given the facts of the present case as identified above. He nevertheless sought to maintain his waiver/estoppel point.

161. For her part, Ms Wood KC submitted that the present case is on all fours with the *Diag* case, if not an *a fortiori* case, and that all three of the bases in *Diag* apply. First, the timeliness objection was never made to the Tribunal by PCMC during the arbitration, and section 73 therefore precludes it being made later before the court. This is, in and of itself, fatal to PCMC's timeliness objection. Secondly Tecnicas' jurisdictional objections were made "within such time as [was] allowed by … the Tribunal" and so within the time permitted by section 73, irrespective of any question whether section 31(3) was fulfilled; Thirdly, and in any event, the Tribunal did "admit" the objections within the meaning of section 31(3).

162. In this regard, she points out that PCMC never made a timeliness objection during the arbitration; indeed, PCMC bought into it. If there had been any delay on Tecnicas' side, it nonetheless made jurisdictional objections quicker than the investors in *Diag* in relation to the jurisdiction points made by Tecnicas (including the Ad Hoc vs ICC Arbitration challenge). Moreover, Tecnicas constantly reserved its rights to challenge jurisdiction, as well as the points taken on authority and capacity. Second, and in any event, Tecnicas' objections were made within such time as was allowed by the Tribunal. A key point is that the Tribunal appreciated that Tecnicas made its Ad Hoc vs ICC Arbitration challenge, it bifurcated the arbitration, and then addressed such challenges in its Partial Award. This also meant that the Tribunal did "admit" that challenge within the meaning of section 31(3).

163. Equally, Ms Wood KC submitted that in such circumstances the waiver and estoppel points were themselves without merit, and fell away. She pointed out that Tecnicas had to appoint an arbitrator in order to constitute the Tribunal, and so far as paragraph 92 was concerned (with reference to the ICC Rules) this was all on a contingent basis if the Tribunal had jurisdiction, and was made in circumstances in which Tecnicas made clear that Tecnicas did not accept that the Tribunal had any jurisdiction at all.

164. She also pointed out that the differences between an ad hoc arbitration and institutional arbitration makes them different beasts entirely. She also referred to the final paragraph of section 31(1), which provides that "a party is not precluded from raising [objection to substantive jurisdiction of tribunal] by the fact that he has appointed or participated in the appointment of an arbitrator" which cut across Mr Singarajah's point that Tecnicas participated in the appointment process.

165. For completeness, she also noted that on a section 67 challenge to jurisdiction, it was not necessary to show that any prejudice had been suffered (distinguishing the case of *Flashbird Ltd v Compagnie de Sécurité Privée et Industrielle SARL* [2021] UKPC 32).

E.2 Discussion

166. The difficulty for PCMC is that PCMC's timeliness objection in the present case is, on any view, on all fours with *Diag* and, if anything, it is an *a fortiori* case.

167. First, PCMC never made a timeliness objection to the Tribunal during the arbitration. It had at least two opportunities to do so:

(1) The Tribunal recirculated the Terms of Reference to the parties on 25 March 2024, and invited them to sign them by no later than 27 March 2024. In its email, attaching the final Terms of Reference, the Tribunal wrote:

> "Please find attached the Terms of Reference ready for signing. **They incorporate both the changes and amendments discussed at the CMC of 22 March 2024, including those proposed by the Claimant immediately preceding the CMC**, as well as the amendments submitted by the Respondent in its subsequent email of 22 March 2024".
>
> (emphasis added)

This was an opportunity for PCMC to object to Tecnicas' Ad Hoc vs ICC Arbitration challenge. It signed the final Terms of Reference without making any such objection.

(2) By way of Procedural Order 3, dated 11 June 2024, the tribunal set the timetable for the first phase of the arbitration. The tribunal noted that "no objections have been raised against the proposed Timetable". This was another chance for PCMC to make an objection, because the Ad Hoc vs ICC Arbitration challenge (raised by Tecnicas) would be dealt with in the first phase of the bifurcated arbitration proceedings. Again, PCMC did not make any objection.

168. The reality is that far from making any timely objection, PCMC actively bought into the Ad Hoc vs ICC Arbitration challenge, and addressed it substantively on the merits. Notably, and in contrast to Tecnicas, PCMC actively participated in the jurisdiction issue centred on the Ad Hoc vs ICC Arbitration challenge, and made detailed substantive submissions running to some 26 pages of analysis, addressing the issues as to the Tribunal's jurisdiction, the capacity and authority of PCMC's representatives, and the governing law of the Subcontract.

169. In this regard:

(1) PCMC set out in the introduction that:

> "The Claimant therefor approaches the question of jurisdiction under ICC Rules as a first priority. To do so it relies on the facts and will produce judicial authority in support of its contention that this arbitration is to be conducted under the ICC Rules of Arbitration with a London seat and English Law applicable to the arbitration, before a panel of 3 arbitrators".

(2) The "Jurisdiction – ICC Jurisdiction" section sets out the jurisdiction issues.

(3) The 'Summary of [Tecnicas'] Case on ICC Jurisdiction" includes reliance and reference to paragraph 11 of the Purchase Order:

> "The Respondent's case on lack of ICC jurisdiction is set out in the TOR on the basis that the Deviation List may fail in its purport to alter and amend the provisions of a superior priority document, namely the arbitration clause in the Purchase Order at Paragraph 11. The Respondent reasons that, when read in isolation, Paragraph 11 calls for ad hoc arbitration as there is no mention of ICC Rules. The Respondent addresses

> the reference to ICC Arbitration at Clause 32 of the General Conditions of Construction Subcontracts (GTCCS Project Fahdhili Rev. 04(2)) in saying the Purchase Order supersedes this provision with a reference to ad hoc arbitration. The GTCCS are to be, in effect, ignored and are not to be read as part of the Subcontract".

(4) The "Deviation List to the GTCCS" includes Tecnicas' analysis of the Subcontract itself:

> "87. Given its position in the contractually agreed order of priority, the Deviation List cannot alter the Purchase Order as an inferior document. Its function appears to be superior in order of priority to the GTCCS and accordingly it can alter and amend the GTCCS if it does so expressly. It does so expressly in respect to certain items but, does not mention Clause 32 at all. The function of the Deviation List is to expressly add alter or amend. It cannot do so by mere implication".

170. Accordingly, and on any view, the timeliness objection was never made to the Tribunal by PCMC during the arbitration, indeed PCMC engaged on the merits of the Ad Hoc vs ICC jurisdictional challenge, and section 73 therefore precludes it being made later before the Court (the first of the three reasons identified in *Diag* at [72]).

171. Secondly, Tecnicas' objections were made within such times as was allowed by the Tribunal. When Tecnicas submitted its Answer to the Request for arbitration on 11 March 2024, it proceeded on the basis that, **if** the tribunal had jurisdiction, then the ICC Rules applied, but that did not trump its general reservation of rights which made clear it denied the Tribunal had **any** jurisdiction. Further, following *Diag*, new jurisdictional objections may be made provided that the tribunal accepts them. On any reading of Tecnicas' reservation of rights, a jurisdiction objection was plainly raised, not least because it formed part of the reservation of rights (including on authority and capacity). Thereafter, the Tribunal clearly did allow Tecnicas to make further objections, including the Ad Hoc vs ICC Arbitration jurisdictional challenge, when that was taken. Accordingly, Tecnicas made its jurisdictional objection in the time permitted by section 73, irrespective of any question whether section 31(3) was fulfilled (the second of the three reasons identified in *Diag* at [72].

172. Thirdly, the Tribunal understood what Tecnicas' position was in respect of its "Ad Hoc vs ICC Arbitration" jurisdictional challenge and, consequently, it bifurcated the arbitration to deal with the Preliminary Issues that arose, including the challenge to the Tribunal's jurisdiction. As held in *Diag* at [84], all that is required is that the tribunal admits the objection at a later time than specified in section 31(1). That is exactly what happened in this case. Accordingly, the Tribunal admitted the objection within the meaning of section 31(3) because it ruled upon this point (the third of the three reasons identified in *Diag* at [72]).

173. As for Mr Singarajah's arguments that Tecnicas is precluded from bringing the section 67 challenge or has waived the same or is estopped from denying that the Tribunal has jurisdiction (on the basis that it cannot "approbate and reprobate"), such points do not bear examination, and are, I am satisfied, without merit.

174. PCMC places reliance on Tecnicas' letter dated 3 January 2024 which provided, amongst other matters, as follows:

> "7. The Respondent agrees with the Claimant's proposal that the Arbitral Tribunal shall be composed of three arbitrators. With this, Respondent notes that the Secretariat's interpretation is in line with the Parties' understanding. For this reason, the Respondent kindly awaits for a decision of the Secretariat in this matter.
>
> 8. In respect of the appointment of the third arbitrator, who will act as president of the Arbitral Tribunal, the Respondent proposes that the two party-appointed arbitrators shall jointly nominate the third arbitrator, in consultation with the Parties. In particular, the Respondent proposes that each co-arbitrator is entitled to consult with the party who made that coarbitrator's nomination. If an agreement on the appointment of the third arbitrator is not reached within forty-five days from the confirmation of the latest of the first two arbitrators, any party shall be entitled to request the ICC Court to appoint the third arbitrator in accordance with Article 12.5 of the ICC Rules".

175. Section 67 contemplates that a party will, if it wishes to challenge jurisdiction, take a jurisdiction objection in front of the tribunal. In order for the tribunal to rule upon such jurisdictional issue there has to be a constituted tribunal. So, the act of nominating an arbitrator is not a bar to challenging jurisdiction – that would be against the ethos of the Arbitration Act 1996. The mere fact that the party wishing to challenge jurisdiction appoints an arbitrator, then constitutes the tribunal in accordance with, and in adherence with, ICC Rule 12, does not subsequently deprive it of the opportunity to submit that the tribunal does not have **any** jurisdiction.

176. In this regard, section 31(1) itself provides that "A party is not precluded from raising such an objection [that the arbitral tribunal lacks substantive jurisdiction] by the fact that he has appointed or participated in the appointment of an arbitrator".

177. There was also, in this case, a clear and unequivocal express reservation of rights in the letter of 3 January 2024 which was specific (rather than general) in its nature, and extended specifically to a lack of jurisdiction of the ICC Court and the Tribunal:

> "10. [Tecnicas] reserves all of its rights in respect of the present matter of PCMC's claims. **Nothing in this letter should be construed as a submission to the jurisdiction of the ICC International Court of Arbitration or of any arbitral tribunal appointed in the present matter, nor as a waiver of any of [Tecnicas'] rights**".
>
> (emphasis added)

178. Equally, so far as the Answer to the Request for Arbitration, and paragraph 92 thereof, that Tecnicas filed on 11 March 2024, is concerned, it is clear that the Answer was all on a contingent basis, namely **if** the Tribunal had jurisdiction, and was made in circumstances in which Tecnicas made clear that Tecnicas did not accept that the Tribunal had any jurisdiction at all and reserved its rights in that regard.

179. In this regard, Tecnicas stated (at paragraph 7 of the Answer) that, "[Tecnicas] reserves all its rights in respect of these matters and submits this Answer **only in a precautionary manner**, conditioned to the demonstration that the RFA was actually submitted by the Claimant and confirmation of its capacity to act to pursue its claims in this arbitration" (emphasis added).

180. Thus, when Tecnicas stated (at paragraph 92) under the heading "Procedural rules", "[Tecnicas] submits that, pursuant to and Item 18 of the Deviation List and Clause 32 of the GTCCS, the present arbitration must be conducted in accordance with the ICC Rules" this was on the contingent basis that the Tribunal did, contrary to Tecnicas' position, have jurisdiction.

181. In this regard, Tecnicas made clear that its primary position was that the Tribunal did not have jurisdiction, and in this regard made an express reservation of rights at paragraphs 131 to 133 of the Answer (as quoted above) including at paragraph 132 that:

> "132. The Respondent does not accept that the RFA was duly submitted on behalf of PCMC and **nothing on [sic] this document or in the previous correspondence exchanged in this matter can be construed as a submission to the jurisdiction of this Tribunal constituted as a consequence of the RFA**".
>
> (emphasis added)

182. It was accordingly clear from the Answer, and would therefore have been clear to PCMC, that whilst Tecnicas was taking part in the arbitral process on a contingent basis, that was under a reservation of rights in relation to jurisdiction.

183. In any event, and at any time thereafter during the course of the arbitration, it was always open for Tecnicas to raise any new jurisdictional points so long as the Tribunal allowed them to do so (per *Diag* [72]), and there was nothing in fact or law that prevented them doing so.

184. Tellingly, and inconsistently with any suggestion of waiver or any form of estoppel, when Tecnicas did raise the Ad Hoc vs ICC Arbitration jurisdictional challenge, PCMC did not allege that any such waiver or estoppel had arisen. On the contrary, they acted contrary to any such waiver or estoppel by not only not taking any such point but, even more fundamentally, addressing the jurisdiction challenge on its merits, and without qualification or raising an alleged defence thereto or alleged bar to Tecnicas raising the same.

185. In the above circumstances, I am satisfied that Tecnicas did not waive its right to bring the section 67 challenge and Tecnicas is not estopped from denying the tribunal had jurisdiction.

F. THE SECTION 67 APPLICATION

F.1 The principles applicable to challenges under section 67 of the Arbitration Act

186. Under section 67(1)(a) of the Arbitration Act 1996, a party to arbitral proceedings may apply to the court to challenge any award of the arbitral tribunal as to its substantive jurisdiction. The meaning of "substantive jurisdiction" in s.67(1)(a) is set out in section 30:

> "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".

187. In its Summary Judgment Skeleton (at paragraphs 25 to 33), PCMC argued that the Ad Hoc vs ICC Arbitration issue is a "procedural matter" and that it did not engage section 67 of the Arbitration Act 1996, and instead a challenge should have been brought under section 68 of the Arbitration Act 1996 (serious irregularity). This is a bad point, that does not bear examination.

188. The question of whether the parties agreed to ad hoc or institutional arbitration is plainly an issue of "substantive jurisdiction" within the meaning of section 67:

(1) "Substantive jurisdiction" is defined in section 82(1) by reference back to section 30(1)(a)-(c) of the AA 1996 (as set out above).

(2) In contrast, section 68 is concerned with a challenge where a tribunal which **does** have jurisdiction under the relevant arbitration agreement, has done something in the conduct of the proceedings that constitutes a serious procedural irregularity.

(3) Whether an arbitration agreement is a submission to ad hoc arbitration or an ICC arbitration is not a question of procedural irregularity. It is a matter going to the terms of the agreement to arbitrate itself and as such is jurisdictional. A party can contract out of the court process in favour of ad hoc arbitration or in favour of ICC arbitration (or arbitration under the auspices of any other arbitral body), but an agreement to submit to the former does not constitute an agreement to submit to the latter, as can be tested by consideration of the substantial differences between the two.

(4) As to the substantial differences, it might even be said fundamental differences, between an ad hoc arbitration and an ICC arbitration (which are addressed further in due course below), it suffices to note at this point the following differences:

(a) Where parties agree to ICC arbitration, they agree that they will have no right of appeal to court (Article 35(6)), whereas parties who agree to ad hoc arbitration in England have such a right of appeal (in relation to points of law in accordance with section 69 of the Arbitration Act 1996). Whether a party has submitted to an ICC arbitration or an ad hoc arbitration is therefore jurisdictional: it goes to the nature and extent of the parties' agreement to contract out of the court process. It is not simply a question of some

"irregularity" of procedure adopted by a tribunal to which the dispute has been validly referred under the arbitration agreement; it is that under the parties' agreement the dispute ought not to have been referred to that particular tribunal in the first place. That is the essence of jurisdiction.

(b) The same point can be made by reference to the method by which the tribunal is chosen: it is one thing to agree to submit a dispute to a three-person tribunal, where the party-appointed arbitrators will choose and appoint the presiding arbitrator (as might be the case in an ad hoc arbitration); it is quite another to agree to submit a dispute to a tribunal in which the presiding arbitrator will ultimately be chosen by the ICC, as was the case here.

189. Turning to the language of section 30 itself, and contrary to PCMC's submissions, I am satisfied that all three limbs of section 30 apply. It will be recalled that section 30 provides that 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**.**

190. Whether there was an agreement in favour of Ad Hoc Arbitration rather than in favour of ICC arbitration goes to:

(a) "whether there is a valid arbitration agreement" – as it is necessary to establish whether there is an arbitration agreement and if so what its terms are.

(b) "whether the tribunal is properly constituted" – as to how the tribunal is constituted, and whether it is properly constituted, depends on whether it is an ad hoc arbitration or an ICC arbitration (as noted above).

(c) "what matters have been submitted to arbitration in accordance with the arbitration agreement" – as matters can only be submitted in accordance with the arbitration agreement where matters are submitted under the relevant terms that have been agreed (Ad Hoc Arbitration versus ICC Arbitration).

191. Consistently with this, the authorities treat such issues as jurisdictional and falling under section 67. So, for example, where an arbitration agreement required appointment of the tribunal by the Institute of Arbitrators, an arbitrator appointed by another (albeit wholly respectable) institution did not have jurisdiction – see *Crest Nicholson (Eastern) Ltd v Western* [2008] EWHC 1325 (TCC), [2008] BLR 426 at [51].

192. Similarly, whether the pre-conditions contained in an arbitration agreement for the appointee to act as a sole arbitrator have been satisfied is a matter going to jurisdiction (as opposed to serious irregularity under section 68) – see *Minermet SpA Milan v Luckyfield*

Shipping Corpn SA [2004] EWHC 729 (Comm), [2004] 2 Lloyd's Rep 348 at [9]. The relevant clause in that case provided that,

> "Unless the parties agree upon a sole arbitrator, one arbitrator shall be appointed by each party and the arbitrators so appointed shall appoint a third arbitrator, the decision of the three man Tribunal thus constituted or any two of them shall be final. On the receipt by one party of the nomination in writing of the other party's arbitrator, that party shall appoint their arbitrator within 14 days, failing which the decision of the single arbitrator appointed shall be final".

193. Cooke J found that the issue of whether this had been followed went to substantive jurisdiction (at [9]).

194. PCMC referred, in its Skeleton Argument (at paragraph 32 thereof), to the case of *Union Marine Classification Services LLC v Comoros* [2015] EWHC 508 (Comm). However that case concerned the arbitrator's ability to make an award finding that Union Marine was liable to account and to pay damages to the Government by way of a corrected/additional award rather than its original award (at [20]). It was common ground in that case that the matters that were the subject of the amended award were matters that had been referred to arbitration (see at [23]). I do not consider that that case has any relevance on the Section 67 Application.

195. It appears from PCMC's Skeleton Argument (at paragraphs 29-30) that PCMC has proceeded on the basis that Tecnicas needs to demonstrate that it has suffered prejudice in order for its section 67 Challenge to jurisdiction to succeed. That is not the case, and there is no requirement to demonstrate any prejudice on a jurisdictional challenge under section 67. The position is to be contrasted with section 68 (serious irregularity) which requires that the procedural irregularity must be "serious" and that it has or will cause "substantial injustice" for a challenge to succeed.

196. The reason that there is no equivalent requirement under section 67 is because section 67 is all about what has been contractually agreed by the parties in the arbitration agreement. Under the terms of the arbitration agreement the tribunal either has jurisdiction or it does not. It is a matter of upholding (and giving effect to) the parties' contractual bargain. This is also consistent with the fact that "the Court does not have a general supervisory jurisdiction over arbitrations" and thus can only interfere in the tribunal's process where "in extreme cases where the tribunal has gone so wrong in it conduct of the arbitration that justice calls out for it to be corrected" (see the DAC Report February 1996, paragraph 280). The tribunal must, of course, have been properly seised of jurisdiction. A lack of substantive jurisdiction is one of the situations where the court will intervene and offer relief.

197. Tecnicas drew my attention to the case of *Flashbird Ltd v Compagnie de Sécurité Privée et Industrielle SARL* [2021] UKPC 32, [2022] Bus LR 55. In that case, the Privy Council, considering a Mauritian statute which gave the court the power to set aside an award where the "composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties", upheld the view of the Mauritian Supreme Court that the applicant was required to show substantial prejudice as the result of the breach. The Board held that this approach was supported by the jurisprudence relating to Article V(1)(d) of the New York Convention (at [26]), which permits a court to refuse to enforce an award

where the composition of the arbitral authority or the procedure was not in accordance with the agreement of the parties, referring in particular to Born, International Commercial Arbitration, 3rd ed, (2021).

198. However (as the Board recognised at [29]), where there has been a failure to comply with the parties' agreement as to the institutional rules, which goes to the very architecture of the arbitration, *Born* states that there is no additional requirement that material prejudice be made out (at p. 3909):

> "Where an express agreement regarding the arbitration's basic structure is violated, there are substantial grounds for concluding that no showing of material prejudice to the award debtor is required. Thus, a failure to comply with the parties' clear agreement regarding institutional rules (i.e., CIETAC rather than LCIA), arbitral seat (i.e., Singapore rather than New York), language of the arbitration (i.e., Arabic rather than French), or number of arbitrators (i.e., three rather than one) would generally constitute grounds for non-recognition under Article V(l)(d) without the need for a specific showing of material prejudice. These types of procedural agreements (in contrast to agreements on the length of hearing days, order of examination, or scope of disclosure) concern the basic architecture of the arbitration and typically have a substantial impact on the arbitral proceedings, which generally will permit non-recognition under Article V(I)(d)".

199. In *Flashbird*, the arbitration agreement referred both to the Mauritian Arbitration and Mediation Center ("MARC") and to the ICC. The arbitration proceeded under MARC rules, and the appellant's only complaint was that if it had proceeded as an ICC arbitration, a three-person tribunal would have been appointed rather than a sole arbitrator. That was held to be wrong, since the default position under the ICC Rules was that a single arbitrator would be appointed (at [25]). In those circumstances, the appellant's complaint was not concerned with the architecture of the arbitration and it had not made out sufficient prejudice.

200. *Flashbird* was not concerned with section 67 of the Arbitration Act 1996. Were it to be relevant, however, it is clear that the Ad Hoc versus ICC Arbitration issue goes to the basic architecture of the arbitration. As described by Mr Born, institutional arbitrations, particularly sophisticated ones such as the ICC, provide for highly structured, regulated and self-sufficient process, which stand in "increasing contrast" with ad hoc arbitration (see Mustill & Boyd: Commercial and Investor State Arbitration, Second Edition (2024), at paragraph 2.49). I address this further in Section G below.

201. I am satisfied that there is no requirement to show prejudice under section 67 of the Arbitration Act 1996. In *Flashbird*, the appellant's only ground of challenge was that it had wanted a three-person tribunal rather than a sole arbitrator, but it was unable to show that even if, what it said were, the correct rules, had been applied that would have been the result.

F.2 The nature of a hearing under Section 67 of the Arbitration Act

202. It is well established that a challenge under section 67 of the AA 1996 is a *de novo* hearing of the jurisdictional issues – see, in this regard, *Azov Shipping v Baltic Shipping* [1999] 1 Lloyd's Rep 68 at 70 (Rix J) and *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763, at [95]-[96] (Lord Collins). In the latter case, Lord Collins made clear that "[t]he consistent practice of the courts in England has been that they will examine or re-examine for themselves the jurisdiction of arbitrators". In this context, the award that is the subject of the challenge is not entitled to any particular status or weight – see *The Kalisti* [2014] EWHC 2397 (Comm), [2015] 1 All ER (Comm) 580 at [9] and *National Iranian oil Company v Crescent Petroleum Company International Ltd* [2023] EWCA Civ 826, [2024] 1 WLR 71 at [25].

G. THE PROPER CONSTRUCTION OF THE ARBITRATION AGREEMENT

G.1 The parties' submissions

203. In respect of the proper construction of the arbitration agreement, Ms Wood KC submitted that Clause 11.1 of the Purchase Order, as executed, contains the arbitration agreement between the parties, and is itself at the top of the order of precedence. In this regard, the Purchase Order takes preference over the other contractual documentation.

204. Clause 11.1 is an arbitration agreement to ad hoc English arbitration under English law with a London seat. It is not an arbitration agreement to arbitration under ICC Rules (or under Saudi Arabian law with a Riyadh, Saudi Arabian, seat). Deviation List items 1 to 18 only reflect negotiations, they do not record contractual agreements, and have no contractual force. The Deviation List is in any event below the Purchase Order in the contractual hierarchy, as is the GTCCS. In Item 18 of the Deviation List there is reference to "ICC Rules", but that was not agreed, as the arbitration agreement that was agreed was that set out in Clause 11.1 of the executed Purchase Order. Clause 32 of the GTCCS is at the bottom of the hierarchy and contains terms which are inconsistent with Clause 11.1 of the Purchase Order (including on the Ad Hoc versus ICC Arbitration issue). In any event, it is not permissible to "pick and mix" arbitration terms as to applicable rules, laws, and seat, as PCMC seeks to do.

205. On behalf of PCMC, Mr Singarajah, in addition to the other points made by him in relation to sections 31, 67 and 73 of the Arbitration Act 1996 (which have already been addressed above, and do not assist PCMC) accepted that the Purchase Order is at the top of the hierarchy, and he disavowed that there was any basis for rectification. He also recognised that the Deviation List Items 1 to 18 were not, themselves, contractual. He submitted that all the documents forming the Sub-Contract were to be read together, and that when Clause 11.1 of the Purchase Order was read with Clause 32 of the GTCCS, the parties had agreed for arbitration in London under ICC Rules and governed by English law.

G.2 Discussion

206. For the reasons set out below, I am in no doubt whatsoever that the Sub-Contract provided for an ad hoc arbitration in London (not under ICC Rules), and that the Tribunal has no jurisdiction. Accordingly, Tecnicas is entitled to the relief it seeks on the Section 67 Application.

207. In this regard the task of the Court is to construe *de novo* the proper construction of the arbitration agreement that was agreed between Tecnicas and PCMC.

208. There is no dispute between the parties that the Purchase Order, dated 14 December 2016, accurately sets out the order of precedence of documents, as follows:

> "This Purchase Order will be carried out in accordance with the following attached documents **which are listed in order of precedence** and form an Integral part of the Purchase Order.
>
> 1. **This Purchase Order**.
>
> 2. Deviation List to the GTCCS.
>
> 3. Purchase Order Requisitions (Technical Requisitions I and IJ, all their attachments and all documents referenced in Document Index).
>
> 4. General Terms and Conditions for Construction Subcontracts (GTCCS Project Fhadhili Rev. 04(2))".
>
> (emphasis added)

It is accordingly common ground that the Purchase Order is given precedence over the other documents that are referred to as part of the Sub-Contract.

209. Due to the order of precedence set out in the Purchase Order, if there was any inconsistency between the terms set out in the Purchase Order and the terms set out in any other document, then the terms set out in the Purchase Order prevail over those in any other document.

210. What the parties agreed in terms of an arbitration agreement is contained in Clause 11.1 of the executed Purchase Order (which was signed on 14 December 2016) which combined into a single contractual arbitration clause what had previously been Clauses 11.1 and 11.2 (with which it is consistent). Clause 11.1 accordingly provides:

> "11.1. The arbitration proceedings shall take place in London (England) and the arbitration shall be held in English, and will be governed by the laws of England and Wales".

211. The parties are agreed that this is a London seated arbitration governed by the laws of England and Wales, to which the Arbitration Act 1996 applies, and the parties also agree that in the absence of the reference to any particular arbitration rules in an arbitration agreement, the agreement is to an ad hoc arbitration. That is clearly right. Clause 11.1 of the Purchase Order is an arbitration agreement whereby the parties agree to ad hoc arbitration in London and governed by English law.

212. Turning next to the Deviation List, I have already addressed, in section C.1 above, the role of the Deviation List and the distinction between Items 1 to 18 and 19 to 26 thereof. The Deviation List (an item immediately below the Purchase Order in the order of priorities) gave contractual effect to the deviations to the GTCCS agreed in that list (i.e., Items 19 to 26). In relation to Items 1 to 18 it merely recorded the parties' negotiating positions. What

was ultimately agreed between the parties was what was agreed in the executed Purchase Order.

213. In some cases, the parties had reached consensus on a matter within the first part of the Deviation List which was then contractually agreed in the Purchase Order. In such circumstances, it was still the Purchase Order that contained the parties' contractual agreement. Item 1 can be taken as an example. Item 1 concerned PCMC's proposed amendment to Clause 1.4 of the Purchase Order. In the column "Issue in Subcontract", the Parties included the original text of Clause 1.4. In the Column "Adjustments by PCMC", PCMC suggested to include that "the maximum deduction shall not exceed 3%" (in blue text). Tecnicas did not accept the suggestion ("Not Accepted" in green text), instead including a reference to "variable indirect costs" (in green text). The Parties then implemented this final text "variable indirect cost" in the final Purchase Order that they signed the day after, with the parties' contractual agreement being set out in Clause 1.4.2 of the executed Purchase Order.

214. There was, however, no consensus contained within Item 18 (as addressed in section C.1 above). Hence, although there was a reference to "under ICC Laws", this was not agreed between the parties, and what they agreed was set out in Clause 11.1 of the executed Purchase Order.

215. It will be recalled that PCMC itself (rightly) recognised, in its submission to the Tribunal on jurisdiction dated 4 July 2024, that the Deviation List could not alter the Purchase Order, a stance from which it did not resile on the Section 67 Application, stating (at paragraph 87):

> "**Given its position in the contractually agreed order of priority, the Deviation List cannot alter the Purchase Orde**r as an inferior document. Its function appears to be superior in order of priority to the GTCCS and accordingly it can alter and amend the GTCCS if it does so expressly".
>
> (emphasis added)

216. The only reliance that PCMC has placed on Item 18 in the Deviation List is in the context of describing it as a "disaster" (a fair description) and as an alleged "confirmation" of ICC involvement in the arbitration, based on PCMC's reliance upon Clause 32 of the GTCCS. Thus, it stated at paragraph 94 of its submission to the tribunal on 4 July 2024 that:

> "… Paragraph 11.1 of the Purchase Order provides for arbitration in London. When read with General Condition 32 the arbitration is to take place under ICC Rules. If anything can be rescued from the disaster of the Deviation List [it] is that the final words confirm ICC involvement in terms of the arbitration is to be held "under ICC Laws".

217. However, as PCMC rightly recognises, the Deviation List cannot alter the Purchase Order, and in any event the reference to "under ICC Laws" in Item 18 was not something that was the subject of agreement. The contents of the Deviation List (and Item 18 thereof) are not relevant (and would not have taken precedence even had they been contractual, which Items 1 to 18 are not).

218. Turning then to Clause 32 of the GTCCS. It will be recalled that it provides:

> "The validity, interpretation, construction and performance of the SUBCONTRACT and all aspects derived therefrom will be governed by the laws of **Saudi Arabia**.
>
> If at any time any question, dispute or difference (a "Dispute") arises between CONTRACTOR and SUBCONTRACTOR in connection with the SUBCONTRACT or the carrying out of the WORKS such Dispute shall be finally settled by Arbitration administered by the **International Chamber of Commerce** by three Arbitrators appointed **in accordance with those Rules**.
>
> All disputes, differences or contentions arising out of the execution of, or in connection with, the Subcontract, shall be settled through friendly negotiation between the PARTIES.
>
> Should no amicable settlement be reached through negotiation, he (sic) PARTIES expressly agree that any and all disputes, controversies, matters or claims of any nature whatsoever directly, or indirectly arising out of, based-upon, relating to or in connection with the formation, validity, existence, interpretation, application, implementation, performance, breach or termination of the SUBCONTRACT, any provision or part there-of or any activities carried out in connection therewith, shall be finally settled by arbitration in accordance with the **Rules of Arbitration and Statutes of the International Chamber of Commerce** to which the administration of the arbitration and the appointment of the arbitrator is hereby entrusted in accordance with the said Rules and Statutes.
>
> The arbitral tribunal shall sit in **Riyadh (Saudi Arabia)** and the proceedings shall be in the English language".
>
> (emphasis added)

219. It will be noted that Clause 32 of the GTCCS is strikingly similar to the rejected proposal of Tecnicas in Item 18 of the Deviation List in relation to the Sub-Contract being governed by Saudi Arabian law, with arbitration in Riyadh (as opposed to English law and arbitration in London, England), and the reference to "ICC Rules", none of which was agreed in the Purchase Order.

220. The fact is that Clause 32 of the GTCCS is a very different agreement to that which was finally agreed. First, it provided for a different governing law (Saudi Arabian law as opposed to English law). This is a fundamental distinction in terms of applicable law. Secondly, it provided for a different seat for any arbitration (Riyadh, Saudi Arabia as opposed to London, England). This is a further fundamental distinction as the provisions of the Arbitration Act 1996 (including as to appeal) would not apply to the former whereas they would apply to the latter. Thirdly, it provided for arbitration in accordance with an institutional arbitration body and associated set of institutional rules (the ICC Rules and an arbitration administered by the ICC) as opposed to an ad hoc arbitration (under the

Arbitration Act 1996). Contrary to PCMC's submission, this was a further fundamental distinction (as addressed below).

221. The short point is that Clause 32 of the GTCCS is simply inconsistent with clause 11.1 of the Purchase Order, and the Purchase Order being higher in the order of precedence prevails. Clause 32 is inconsistent in all three respects identified above namely in terms of governing law, seat, and ad hoc versus institutional rules. As such, Clause 11.1 of the Purchase Order prevails.

222. The suggestion, advanced by PCMC, that Clause 11.1 of the Purchase Order read together with Clause 32 of the GTCCS provides for arbitration in London under ICC Rules and governed by English law is untenable. The simple fact is that Clause 11.1 of the Purchase Order and Clause 32 of the GTCCS are inconsistent in their terms, and the terms of the Purchase Order prevail in order of precedence.

223. This is not a case where (for example) a clause in another document is consistent with what was agreed in the contractual document with greater precedence (for example if there had been a provision as to within what time the parties' respective arbitrators had to be chosen, which could have been read consistently with Clause 11.1 of the Purchase Order).

224. What the parties agreed in the Purchase Order, in terms of governing law was English law (not Saudi Arabian law); what the parties agreed in the Purchase Order in terms of seat was London (not Riyadh); and what the parties agreed in the Purchase Order was an ad hoc arbitration not an institutional arbitration under ICC Rules. It is notable that all three distinctions were floated in Item 18 of the Deviation List but none of them were agreed in the Purchase Order, which contains what was contractually agreed between the parties.

225. PCMC's "pick and mix" approach is itself inappropriate. Clause 32 of the GTCCS was an arbitration agreement containing a package of terms, each fundamental to that arbitration agreement. If such an arbitration agreement were to apply, the arbitration would be under Saudi law, with a Saudi seat and be an institutional arbitration under ICC Rules. Just as PCMC could not suggest that Saudi Arabian law applied to the arbitration (inconsistent with English law), or that there was a Saudi Arabian seat (inconsistent with arbitration in London), so too it cannot suggest that what was agreed was an institutional arbitration under ICC Rules (inconsistent with an ad hoc arbitration to which the Arbitration Act 1996 applied), and in any event such a term could not be divorced from the associated Saudi law and seat provisions (which ran with the application of the ICC Rules).

226. I have already rejected the suggestion that for an arbitration to be subject to "ICC Rules" is a mere procedural matter. It is not. It is a substantive aspect of an arbitration agreement. The provisions of Clause 32 as to an institutional arbitration administered by the ICC on the ICC Rules is simply inconsistent with the ad hoc nature of the arbitration agreed in Clause 11.1 of the Purchase Order.

227. The reality is that ad hoc arbitration and an institutional arbitration under the ICC Rules are fundamentally different beasts, and indeed have fundamentally different contractual consequences. This is well recognised by the editors of Mustill & Boyd: Commercial and Investor State Arbitration, third edition at para 2.49 where they state that the developments they discuss:

> "point to an inevitable trend of an increasing contrast between ad hoc and institutional arbitrations, with the latter providing an increasingly structured, regulated and self-sufficient process. But that structure involves greater powers being assumed and asserted by the institutions, which have the potential to affect the arbitral process in rather profound ways".

228. The differences between an agreement to an ad hoc arbitration and an agreement to an institutional arbitration administered by the ICC under ICC Rules are particularly striking. In relation to an ICC arbitration:

(1) The parties agree to waive their right to any form of recourse in relation to the award (see Article 35 (5)) preventing any appeal on a point of law, in contrast to the regime under section 69 of the Arbitration Act 1996 under which a party to an ad hoc arbitration in England would be able to appeal a point of law subject to meeting the requirements of section 69. This is a fundamentally different contractual bargain, with potentially far-reaching consequences, and not necessarily one that both parties would ultimately be willing to agree.

(2) The parties agree to a detailed set of rules to govern the arbitration, thereby removing a degree of party autonomy in deciding the architecture of the arbitration. Under Article 12(5) the third arbitrator shall be appointed by the ICC Court. This is a fundamentally different approach to that in English ad hoc arbitration, where the parties can agree how the third arbitrator is appointed (with section 16 of the Arbitration Act 1996 setting out the procedure for appointing arbitrators where there has been no such agreement).

(3) Under Article 15 of the ICC Rules there is oversight of the arbitration, with the ICC having power to replace arbitrators – contrast the provisions of section 24 of the Arbitration Act 1996 and the powers of the court to remove and replace arbitrators.

(4) There are very significant costs incurred (and from the outset) in an institutional arbitration before the ICC and on ICC Rules in contrast to an ad hoc arbitration where parties can choose their arbitrators and their associated hourly rate (with modest initial appointment fees). Article 1 of the ICC Rules provides for an advance on costs, with Article 2 providing for costs and fees, which are fixed by the ICC Court in accordance with scales (as to which see Appendix III to the ICC Rules). For example, in relation to the present case the arbitrators fees (calculated by a specified percentage of the amount in dispute) are between US$1,430,000 and US$7,540,000. The costs of an ad hoc arbitration would (on any view) be much more modest.

(5) Article 34 of the ICC Rules provides for scrutiny of the award by the ICC Court itself, which permits it to "lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance" also stating that, "No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form", which is to be contrasted with the autonomy of arbitrators under an ad hoc arbitration agreement.

229. In such circumstances, and quite apart from the different law and seat provisions in Clause 32 of the GTCCS (which are themselves inconsistent with Clause 11.1 of the Purchase Order), and even had it been possible or appropriate to "pick and mix" (which it is not), an institutional arbitration before the ICC and subject to the ICC Rules (as set out in Clause

32 of the GTCCS) is inconsistent with the ad hoc arbitration agreed in Clause 11.1 of the Purchase Order, and as such did not form part of the arbitration agreement.

230. I accordingly find that the arbitration agreement is that as agreed, and agreed only, in the Purchase Order in Clause 11.1 thereof, which in any event has precedence over other documents forming part of the Sub-Contract, and which is an agreement to ad hoc arbitration and not to an institutional arbitration before the ICC or an arbitration under the ICC Rules. The Tribunal accordingly had, and has, no jurisdiction.

231. In such circumstances, Tecnicas' challenge to the Award of the Tribunal as to its substantive jurisdiction under section 67(1)(a) of the Arbitration Act 1996 succeeds, and I set aside the award in full under section 67(3)(c) of the Arbitration Act 1996.