Exhibit B

IN THE MATTER OF AN ICC ARBITRATION
Arbitration No.: 21199/ZF/AYZ

B E T W E E N:-

TRANSCANADA TURBINES LIMITED

Claimant

- and -

MINISTRY OF ELECTRICITY, REPUBLIC OF IRAQ, GENERAL DIRECTORATE OF ELECTRICITY AL-FURAT MIDDLE REGION

Respondent

SECOND PARTIAL FINAL ARBITRATION AWARD

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A. INTRODUCTION: THIS ARBITRATION

A1. The parties and their representatives

1. The Claimant in this Arbitration is TRANSCANADA TURBINES LIMITED, a corporation incorporated pursuant to the laws of Alberta, Canada. Its registered office address is 998 Hamilton Blvd, Airdrie, AB, T4A 0K8 Canada. It is referred to in this Award as "TCT". TCT carries on the business of repairing, maintaining and overhauling aeroderivative gas turbine industrial engines, including those manufactured by General Electric ("GE").

2. TCT has at all times during this Arbitration been represented by Bennett Jones LLP ("Bennett Jones"), of 4500 Bankers Hall East, 855 2nd Street SW, Calgary, Alberta, T2P 4K7 Canada, and in particular by Mr Munaf Mohamed QC, Ms Codie Chisholm, Ms Christine Viney and Ms Kate Schwantz of that firm. The relevant e-mail addresses for communication with TCT are those of Mr Mohamed QC and Ms Viney of Bennett Jones: MohamedM@bennettjones.com and VineyC@bennettjones.com.

3. The Respondent is described in the Terms of Reference as the MINISTRY OF ELECTRICITY, REPUBLIC OF IRAQ, GENERAL DIRECTORATE OF ELECTRICITY AL-FURAT MIDDLE REGION. As appears in more detail below, the words that matter in that description are "Ministry of Electricity". It is referred to in this Award as "the MOE". The MOE is a Ministry, or department, within the Government of Iraq. It has an independent legal personality that is separate from the Republic of Iraq; it is able to sue and be sued and to make contracts in its own name. The MOE is responsible for, amongst other matters, the generation of electric power in the Republic of Iraq.

4. The MOE's address is the Ministry of Electricity, Legal Office, Baghdad Kadimyia, Dist. 427, St. 21, Res. No. 8, Iraq, although from time to time during this Arbitration, TCT has (rightly or wrongly) sent correspondence intended for the MOE to the Embassy of the Republic of Iraq, 21 Queen's Gate, London SW7 5JE, UK.

5. The MOE owns and operates power stations in Iraq. Those include the Al-Mussaib Thermal Power Station ("Al-Mussaib") and the Al-Qudas Thermal Power Station ("Al-Qudas").

6. During the earlier stages of this Arbitration, and as again appears further below, the MOE was unrepresented. Since approximately 11 February 2016, it has been represented by Seddons Solicitors ("Seddons"), of 5 Portman Square, London W1H 6NT, and in particular by Christian Smith, Charles Goldblatt and Farhana Khanom of that firm. The MOE has also been represented by a London barrister, Paul Sinclair QC, instructed by Seddons on the MOE's behalf. The relevant e-mail addresses for communication with the MOE are those of Mr Smith and Mr Goldblatt of Seddons, namely: Christian.Smith@seddons.co.uk and Charles.Goldblatt@seddons.co.uk.

A2. The Arbitration Agreement

7. The arbitration agreement between the parties ("the Arbitration Agreement") is contained in a written Master Services Agreement between TCT and the MOE dated 1 March 2011 ("the MSA"). Article 21 of the MSA provides as follows:

"21. DISPUTE RESOLUTION

21.1. The Parties agree that in the event of a claim, dispute or controversy ("Claim"), whether contractual, extra-contractual, tortuous [sic] *or statutory, arising out of or related to this Agreement each Party shall designate a committee to negotiate a resolution to the Claim. If the company officers or committee are unable to agree upon a resolution within thirty (30) days, or any agreed upon extension, then the Parties agree to submit the dispute to final and binding arbitration for resolution.*

21.2 Any such arbitration shall be determined before a mutually agreed upon Arbitrator in accordance with the Rules of Arbitration of the International Chamber of Commerce (ICC). Judgment upon arbitration awards may be entered in any court, state or federal, having jurisdiction.

21.3 The place of arbitration shall be London, United Kingdom. The Arbitrator shall apply the Laws of Iraq to the substance of the dispute.

21.4 Arbitration proceedings shall use the English Language throughout.

21.5 The Parties agree that the award of the Arbitrator shall be final and shall be the sole and exclusive remedy between them.

21.6 Any claims, counterclaims, issues or accountings presented or pleaded to the Arbitrator shall be made and shall promptly be payable, free of any tax, deduction or offset, and that any costs, fee or taxes incident to enforcing the award shall, to

the maximum extent permitted by law, be charged against the Party resisting such enforcement."

8. As I set out below, a jurisdictional objection was taken by the MOE to the appointment of an arbitrator pursuant to the Arbitration Agreement, it being contended by the MOE that neither the MSA nor the Arbitration Agreement was valid and binding upon it. As further described below, that jurisdictional objection was resolved in favour of TCT.

A3. Seat and governing law

9. As can be seen from Article 21.3 of the MSA as set out above, the seat of this Arbitration is London, UK, and it follows that English law applies to procedural matters relating to this Arbitration.

10. Given the date of the Request for Arbitration, as to which see below, this arbitration has proceeded under the ICC Rules of Arbitration 2012 (without the 2017 amendments). I refer to the 2012 Rules in this Award as "the ICC Rules".

11. The MSA is governed by the law of Iraq, and it is common ground between the parties that the law of Iraq is that which applies to the substance of the dispute between them.

B. PROCEDURAL HISTORY

12. The procedural history of this reference is long and complex. I do not set out every step in the Arbitration in this Section of this Award. In particular, I deal in summary form with the progress of this Arbitration between its inception and 15 August 2017. That is the date of a Partial Award as to Jurisdiction ("the First Partial Award") issued in this Arbitration by my predecessor as Sole Arbitrator, Dr Mark Hoyle.

B1. July 2015-August 2017

13. In paragraphs 33-101 of the First Partial Award, Dr Hoyle set out exhaustively the various steps taken in this Arbitration up to that point. I therefore identify below only the steps that are salient to the issues now live between the parties.

For a blow-by-blow account of the various items of correspondence, reference should be made to those paragraphs of the First Partial Award.

14. TCT's Request for Arbitration is dated 10 July 2015. It was received by the ICC Secretariat on 13 July 2015, and that date is therefore deemed to be the date of commencement of the Arbitration for the purposes of Article 4(2) of the ICC Rules.

15. The MOE did not take part in the early stages of the Arbitration. In particular, it did not co-operate with TCT in the joint nomination of a sole arbitrator, as contemplated by the Arbitration Agreement.

16. Accordingly, on 22 October 2015 the ICC Court appointed Dr Hoyle as Sole Arbitrator directly, pursuant to Article 13(4)(a) of the ICC Rules.

17. There followed a period of attempts by Dr Hoyle and the ICC Secretariat to make contact with the MOE.

18. On 11 February 2016, Seddons notified Dr Hoyle that they had been instructed on behalf of the MOE.

19. A case management conference took place by telephone on 15 February 2016, at which the MOE indicated that it wished to contest the jurisdiction of the Sole Arbitrator.

20. Following that case management conference, on 9 March 2016 Dr Hoyle issued a Procedural Order No. 1, which set out a timetable for the service of submissions and the determination of the MOE's jurisdictional challenge. That timetable contemplated a hearing of the challenge during May 2016.

21. That timetable was not adhered to: there was considerable slippage. However, during the course of 2016, submissions were served by the parties in relation to the MOE's challenge to jurisdiction. The essence of the challenge was that the MSA had, so the MOE contended, not been stamped by the MOE, nor had it had a document number assigned to it by the MOE. It was thus, so the MOE contended, ineffective as a matter of the law of Iraq, with the result that neither the MSA itself nor the Arbitration Agreement contained therein was binding on

the MOE. TCT accepted that, if the MSA had not been stamped by the MOE and a contract number assigned to it, then it would have been invalid; but its case was that it had in fact been so stamped, and a contract number had been assigned.

22. Both parties served expert reports on the law of Iraq in relation to the jurisdictional issue. The MOE's report was prepared by a Dr Haider Ala Hamoudi. TCT's report was prepared by a Mr Salam Zuhair. There was also a procedural hearing which took place by telephone on 8 November 2016, at which there was some discussion of the jurisdictional challenge and also as to any further procedural steps that might be required if that challenge was not successful.

23. It is right also to record that during this period, Seddons indicated on a number of occasions that they were without instructions from the MOE, and that on 30 October 2016 Dr Hoyle indicated to the parties that he intended to rely on Article 6(8) of the ICC Rules, which provides that if any of the parties refuses or fails to take part in the Arbitration or any stage thereof, the Arbitration shall proceed notwithstanding such refusal or failure.

24. In the light of the MOE's failure to engage, the suggestion of an oral hearing in relation to the determination of its jurisdictional challenge appears to have been shelved.

25. On 12 December 2016, Dr Hoyle declared the proceedings closed with regard to the jurisdiction issue.

B2. <u>The Terms of Reference</u>

26. Before turning to the First Partial Award, it is necessary to say something separate about the Terms of Reference, which were the subject of a separate and ongoing set of exchanges during the period identified above.

27. It is a requirement of any ICC arbitration that there be Terms of Reference, and the ICC Rules contemplate that these be drawn up by the arbitrator(s) and signed by the arbitrator(s) and the parties: see Article 23(2). However, where signature by all concerned is not achievable, for whatever reason, Article 23(3) provides:

"If any of the parties refuses to take part in the drawing up of the Terms of Reference or to sign the same, they shall be submitted to the Court for approval. When the Terms of Reference have been signed in accordance with Article 23(2) or approved by the Court, the arbitration shall proceed."

28. In the present case:

(a) Dr Hoyle circulated draft Terms of Reference to the parties on 13 January 2016.

(b) Following chasers from Dr Hoyle, TCT confirmed that it agreed with the contents of the draft on 26 January 2016, but no response was received from the MOE.

(c) Once Seddons had been instructed, there were several exchanges between the parties and Dr Hoyle in relation to moving matters forward with the draft Terms of Reference, culminating in the sending on behalf of the MOE of a track changes version of the draft on 23 May 2016.

(d) Dr Hoyle amended the draft Terms of Reference and recirculated them for signature on 26 May 2016. TCT, which, so it would appear, did not object to the amendments, did indeed sign them on 31 May 2016. However, the MOE did not sign them.

(e) On 29 June 2016, the MOE suggested some minor changes to the draft Terms of Reference.

(f) On the same day, Dr Hoyle signed the draft Terms of Reference.

(g) On the following day, Dr Hoyle asked TCT to confirm that it was content with the amendments proposed by the MOE.

(h) On 8 July 2016, TCT confirmed that it had signed the amended Terms of Reference.

(i) Despite repeated requests by Dr Hoyle, the MOE did not confirm that the Terms of Reference could be signed.

(j) TCT signed the final version of the draft Terms of Reference on 27 September 2016.

(k) The Terms of Reference as signed by TCT and Dr Hoyle were submitted to the ICC for approval by the Court in the absence of signature by the MOE, as contemplated by Article 23(3) of the ICC Rules.

(l) On 6 October 2016, the ICC Court – which had extended the deadline for approval of the Terms of Reference on a number of occasions – approved the Terms of Reference as signed by Dr Hoyle on 26 June 2016 and by TCT on 27 September 2016.

B3. The First Partial Award

29. On 29 January 2017, the ICC Court informed the parties that Dr Hoyle's draft award in relation to the jurisdictional challenge had been approved by the ICC Court. It was, however, only handed down to the parties on 17 August 2017 and, as I have already noted above, it bears the date 15 August 2017.

30. By paragraphs 161-163 of the First Partial Award, Dr Hoyle made the following findings:

"I find that the MSA is a valid contract, under Iraqi law. Consequently both the Law clause and the Dispute Resolution clause are valid.

The Claimant's Expert has cogently identified and put before me the evidence that the MOE has complied with the requirements of a binding contract.

The Respondent's Expert was told by the Republic's Counsel that the MSA was not authorised by the MOE, the agreement was not stamped, and was not assigned a Ministry document number. In fact and in law there was no evidence at all that suggests that the MSA was not authorised. In fact it was signed by the Director General of Electricity Production, certified by the MOE's Legal Dept. on 10 March 2011, a number was assigned (No. 14 — as required), and it was stamped by the Legal Dept. Therefore the MSA was and is valid and enforceable."

31. By the dispositive section of the First Partial Award, Dr Hoyle held:

"The Arbitrator has jurisdiction to hear this dispute between TransCanada Turbines Limited (Claimant) and the Ministry of Electricity, Republic of Iraq, Directorate of Electricity, Al-Furat Middle Region (Respondent)."

32. It follows that the MOE's jurisdictional challenge did not succeed. No challenge to the First Partial Award was made pursuant to s.67 of the Arbitration Act 1996.

33. It should also be noted that Dr Hoyle made certain other findings in the First Partial Award which are, of course, binding on the parties. Of significance are the following.

34. By paragraph 150 of the First Partial Award, Dr Hoyle found:

"Thus, the question remains: "Who is the proper Respondent?" In my view it is clear. "Ministry of Electricity" is the proper Respondent. The MSA is a trade contract with the MOE and TCT. The words "Republic of Iraq, General Directorate of Electricity, Al-Furat Middle Region", are descriptive geographical terms not designed to create further legal parties."

35. And by paragraphs 152 and 154, he found:

"...The [Republic of Iraq] is a distinct juridical body from the MOE. It is the latter, the MOE, which is the Respondent. There is no support from either Expert to suggest that the [Republic of Iraq] is in fact or in law the Respondent, rather than the MOE.

... It is clear that the MOE is a juridical body that can sue and be sued under Iraqi law..."

36. Thus the finding was, as I have set out in the introductory Section of this Award, that, although a department within the Government of the Republic of Iraq, the MOE was and is an entity with a legal personality separate from that of the Republic of Iraq and capable of concluding contracts in its own name.

B4. <u>August 2017-February 2018: timetable and statements of case</u>

37. On 28 August 2017, Dr Hoyle issued a Procedural Order No. 2. That Order set out the form which submissions and witness statements were to take, but did not lay down any timetable for further steps.

38. There followed discussions between the parties as to a timetable for the resolution of the remaining issues in the Arbitration. On 28 November 2017, TCT's counsel indicated to Dr Hoyle that a timetable had been agreed between the parties. That agreement included the following: (i) that TCT would serve its Statement of Claim by 22 December 2017; (ii) that the MOE would serve its Defence/Counterclaim by 22 January 2018; (iii) that the parties would exchange lists of documents by 15 February 2018, with applications for document production to be made by 15 March 2018; (iv) that witness statements and expert evidence would be exchanged by 30 April 2018, with expert meetings to follow in May 2018; and (v) that there would be a 5-day hearing in June/July 2018. The one matter that was not agreed was whether there should be oral discovery (i.e. examination of witnesses prior to the final Arbitration hearing); TCT considered that there should, whilst the MOE contended that it was not a necessary step.

39. On 13 December 2017, a telephone conference took place between Dr Hoyle and representatives of Bennett Jones for TCT and Seddons for the MOE in relation to the timetable going forward. TCT made submissions as regards the appropriateness of pre-hearing oral discovery.

40. On 22 December 2017, TCT served its Statement of Claim.

41. On 7 January 2018, Dr Hoyle indicated to the parties that the MOE should summarise its reasons for objecting to oral discovery by 20 January 2018. The MOE did not provide a response within that timeframe.

42. On 14 January 2018, Dr Hoyle circulated a "draft Procedural Order No. 2". This seems largely to have mirrored the Procedural Order No. 2 issued on 28 August 2017. I am not clear whether that earlier Order had been overlooked or was in fact only ever produced in draft. At all events, the 14 January 2018 draft Order again did not include any specific dates.

43. TCT indicated on the same date that the draft Procedural Order should incorporate what the parties had previously agreed by way of timetabling.

44. On 19 January 2018, the MOE's counsel wrote to Dr Hoyle stating that the MOE appreciated that no timetable had yet been ordered. They stated that they had anticipated being in a position to provide the MOE's Response by 22 January

2018 but that they would not in fact be able to do so, as they were awaiting further information from their client, and asked that the date for provision of the MOE's Response be fixed for 5 February 2018.

45. On 19 January 2018, TCT's counsel wrote to Dr Hoyle and the MOE pointing out that TCT's Statement of Claim had been served on the basis of the timetable which had been agreed between the parties' legal representatives, and urged the MOE to comply with the agreed dates. On the same date, Dr Hoyle responded, stating that it was vital that the timetable was maintained.

46. On 23 January 2018, Dr Hoyle invited the MOE to indicate the reason for the delay to the Response. On the same day, TCT expressed disappointment that the MOE was allowing matters to slip, and asked Dr Hoyle to provide the Procedural Order that had been in contemplation. TCT's counsel also indicated that TCT was contemplating a "motion for summary judgment" on the basis that the MOE had refused to defend the claim.

47. On the same date, the MOE's counsel wrote to Dr Hoyle and to TCT, stating that he had been heavily engaged in another matter. He noted that the MOE had not breached any procedural order because none had been made, and stated that the MOE was waiting to hear the outcome of the question on oral discovery. He also stated that he had not received the Statement of Claim until his return to the office in the New Year, because it had been served after his firm had closed for the Christmas break. He indicated that he was working with the MOE to serve its Response, and that further time was required in part because of the date of receipt of the Statement of Claim and in part because the MOE was arranging for documents to be translated, which was taking longer than expected.

48. TCT's counsel replied on 24 January 2018, stating that he had taken the MOE's counsel at his word and assumed that the timetable had been agreed. He stated that, whilst there had been perhaps no technical breach of an order, there was a failure to honour an agreement. He suggested that an order from Dr Hoyle would be appropriate, and expressed concern lest there be further slippage and the possibility of a June/July 2018 hearing jeopardised.

49. On 24 January 2018, Dr Hoyle directed that, *"The Respondent shall deliver its Response by 29 January 2018 at 4 p.m. GMT. If there are papers that need translation*

the Respondent must make all full attempts to produce these documents. Delay on production of the translated documents will not prevent the Respondent being in breach of the 29 January 2018 date".

50. On 29 January 2018, the MOE served Points of Defence and Counterclaim.

51. Between 30 January 2018 and 14 February 2018, there were further exchanges between Dr Hoyle and the parties' counsel in relation to the question of whether there should be oral examination of witnesses in advance of the final hearing. On 14 February 2018, Dr Hoyle wrote to the parties stating that he had come to the conclusion, *"with some reluctance"*, that the proposal for oral discovery was really one for *"oral cross examination in an overseas location"*, that there was *"no certainty in the procedures, the mechanics, and the people in the room(s)"* and that *"Consequently we will proceed in the usual way"*. The parties seem to have read this communication as a direction that there would not be oral examination in advance of the final hearing, but that each side would be permitted to call live evidence at the final hearing, with the witness statements to stand as evidence in chief and cross-examination of witnesses to be permitted.

B5. <u>February-May 2018: document production</u>

52. On 15 February 2018, the parties exchanged Lists of Documents. TCT's List set out a detailed description of each document being disclosed. The MOE's List was generic, in the sense that it referred in short form to documents or files of documents, without it being clear what was actually being disclosed.

53. On 16 March 2018, Dr Hoyle confirmed that the final hearing in this Arbitration would take place from 23-27 July 2018.

54. On 11 April 2018, Dr Hoyle wrote to the parties with various detailed questions relating to arrangements for the July 2018 hearing.

55. On the following day, TCT's counsel replied stating that he feared that there was little prospect of the hearing being able to proceed on the date scheduled. He said that TCT had not received documents from the MOE, and not even a list to know what they were or whether they had been translated. He said that TCT had sent its List. He pointed out that, without the MOE's documents, TCT was

unable to determine whether there were gaps or deficiencies that would require an application by TCT and a ruling by Dr Hoyle, and that witness statements and expert reports could not be prepared until the document production process was complete.

56. On 15 April 2018, Dr Hoyle asked the MOE for a full update on progress by 17 April 2018.

57. The MOE's counsel responded on 17 April 2018. He stated that he agreed with TCT's counsel that it was unlikely that the hearing could proceed in July 2018 as was then scheduled. He also agreed that disclosure had to be completed before any experts could prepare reports. The MOE's counsel stated that TCT had requested copies of most of the MOE's documents on 5 April 2018. He said that a shared workspace had been created on 14 March 2018 and that two of the volumes of documents sought had been uploaded the same day. He stated that Mr Mohamed QC and Ms Viney of TCT's counsel had been added as users to the shared workspace, though it was possible that the relevant notification had not been received. He further indicated that his firm would be uploading the remainder of the MOE's documents the following day, 18 April 2018, and that a revised disclosure list would be supplied. So far as TCT's documents were concerned, he stated that his firm had sought copies of them on 14 March 2018, but had received access to the relevant shared workspace only on 16 April 2018.

58. The MOE's counsel suggested that he and his opposite number should discuss a revised timeframe for the progress of the Arbitration and that there should thereafter be a conference call with Dr Hoyle.

59. On 25 April 2018, TCT made an application for production of documents. The documents sought were the following: (i) documents relating to the operational history of the Engines (this is a defined term, and I explain below what it means); (ii) documents setting out the maintenance history of the Engines; (iii) documents relating to the purchase and use of parts for the Engines; (iv) documents relating to the shipping and storage of the Engines and their parts, and the directions provided by the MOE in relation to such shipping and storage; (v) documents relating to local labour retained and supplied by the MOE pursuant to the MSA; and (vi) MOE correspondence regarding the handling of the Letter of Credit and the Performance Bond.

60. The MOE did not make any document production requests of TCT.

61. On 26 April 2018, a telephone hearing took place, attended by Dr Hoyle, by Mr Mohamed QC and Ms Viney for TCT and by Mr Smith and Mr Goldblatt for the MOE. Following that telephone hearing, Dr Hoyle issued an order entitled, despite the numbering of earlier orders, "Substantive and Procedural Order No. 1".

62. That Order provided as follows (the meaning of the capitalised words in the Order will be apparent from the later parts of this Award, insofar as they have not already been defined above):

    (a) The MOE was directed to produce all records and documents, electronic and in hard copy, within its possession and control within the following categories: (i) the operational history of the Engines upon which TCT worked under the MSA, which the MOE was required to maintain by virtue of its role as an operator of GE turbine Engines; (ii) the maintenance history of those Engines; (iii) purchase and use of parts of the Engines; (iv) shipping and storage of the Engines and their respective parts and the directions provided by the MOE in relation to such shipping and storage; (v) local labour retained and supplied by the MOE pursuant to the MSA; and (vi) MOE correspondence regarding the handling of either the Letter of Credit or the Performance Bond. Those records and documents were to be provided by no later than 4 pm BST on 13 May 2018. Production was to entail a copy of the document, translated into English if required, being provided to Dr Hoyle and to TCT.

    (b) Subject to any further order from Dr Hoyle, the MOE was not to be permitted to rely on or refer to any documents not so produced.

    (c) A further case management conference was to be held within 10 days of the contemplated document production, or in any event by no later than 23 May 2018.

63. On 10 May 2018, the MOE's counsel wrote to Dr Hoyle stating that a large volume of documents had been dispatched from Iraq to his firm by the MOE, by

DHL. Those documents were, he said, due to reach his firm on or around 16 May 2018, and would require review, translation and listing. He therefore asked, on behalf of the MOE, for an extension of time for production of the documents required by Dr Hoyle's Order of 28 April 2018 until 30 May 2018.

64. On 14 May 2018, TCT indicated that it was prepared to consent to the extension sought, provided that it was on a peremptory basis.

65. On 15 May 2018, Dr Hoyle indicated that he would extend the date for the MOE's document production until 30 May 2018, but on a peremptory basis: that was to say, no further material was to be produced after 30 May 2018.

66. On 21 May 2018, TCT served its Statement of Defence to Counterclaim.

67. The MOE produced a substantial number of further documents on 30 May 2018, but there were documents missing within the requested categories.

B6. <u>July 2018: the fixing of the procedural timetable</u>

68. Thereafter, further exchanges followed between the parties with a view to agreeing a timetable going forward. On 3 July 2018, the MOE's counsel wrote to Dr Hoyle summarising the point which discussions had reached at that stage. He said that agreement had been reached as to the following:

    (a) Witness statements were to be exchanged by 1 October 2018;

    (b) Expert reports were to be exchanged by 31 October 2018, with expert meetings to follow by 30 November 2018 and joint statements by 14 December 2018;

    (c) The Arbitration hearing was to take place in London, with a time estimate of 8 days.

69. The MOE's counsel further indicated that the parties were not in agreement as to the timing of the hearing. TCT was anxious to have the hearing by the end of April 2019 at the earliest, whereas the MOE wished it to be fixed for June or July 2019, because of issues with regard to its London barrister's availability.

70. A further case management conference took place by telephone on 6 July 2018, attended by Dr Hoyle, by Mr Mohamed QC and Ms Viney for TCT, and by Mr Smith and Mr Goldblatt for the MOE. Discussions took place in relation to the timing of the final hearing. TCT's position was that issues relating to documents had been resolved, since TCT was protected by the peremptory nature of Dr Hoyle's previous Order.

71. According to the agreed note of that hearing, the following was ordered:

(a) Witness statements were to be exchanged by 1 October 2018;

(b) Expert reports were to be exchanged by 31 October 2018, with expert meetings to follow by 30 November 2018 and joint statements by 14 December 2018;

(c) The Arbitration hearing was scheduled for 18-27 March 2019;

(d) All those dates were described as "peremptory on" the MOE.

72. It is not without significance, as I explain further below, that no direction was given as to the areas of expertise to be covered by expert evidence, or the issues which were to be addressed by experts.

73. It also appears from the note of the hearing that there was some discussion as to the possibility of having part of the hearing in Dubai, because some of the MOE's proposed witnesses might face difficulties in travelling to London.

B7. <u>October 2018: witness statements</u>

74. On 2 October 2018, TCT advised Dr Hoyle that the parties had agreed to extend the time for the service of witness statements to 15 October 2018. TCT's counsel indicated, however, that he was concerned that the MOE wished to reserve its rights to apply for a further extension if required. He suggested that a case management conference be scheduled, to discuss that issue and so that Dr Hoyle could be updated as to progress generally.

75. A further telephone case management conference did indeed take place on 9 October 2018, attended by Dr Hoyle, by Mr Mohamed QC and Ms Viney for TCT and by Mr Smith for the MOE. Following that hearing, and on 11 October 2018, Dr Hoyle issued Procedural Order No. 4, in the following terms:

> *"1. Each Party shall serve on the other Witness Statements of the evidence on which they intend to rely in relation to issues of fact to be decided at the Arbitration by 29 October 2018;*
> *2. Expert Reports shall be exchanged by 15 November 2018;*
> *3. The Experts shall hold discussions by no later than 15 December 2018 for the purposes of identifying the points on which they agree and on which they disagree;*
> *4. The Experts shall, by no later than 15 January 2019, prepare a joint statement showing:*
> *4.1. Those issues on which they agree; and*
> *4.2. Those issues on which they disagree and a summary of their reasons for disagreeing*
> *that shall be served upon both Parties.*
> *5. The dates set out in paragraphs 1 and 2, above, are peremptory on the Respondent.*
> *6. The Respondent shall not be permitted to adduce any evidence in relation to issues of fact other than Witness Statements served by 29 October 2018 in accordance with paragraph 1, above, and such direct examination on those Witness Statements as shall permitted by the Arbitrator.*
> *7. The Respondent shall not be permitted to adduce any Expert Evidence other than Expert Reports served by November 15, 2018 in accordance with paragraph 2, above, and such direct examination on those Witness Statements as shall* [sic] *permitted by the Arbitrator."*

76. On 29 October 2018, and in accordance with that Order, TCT served the following "will say" witness statements on Dr Hoyle and on the MOE: a statement of Daniel J.B. Simonelli signed on 29 October 2018; a statement of Benjamin (Ben) Archer signed on 29 October 2018; and a statement of Steven Michael Caldwell, signed on 29 October 2018. Mr Simonelli is the President and Chief Operating Officer of TCT; Mr Archer is TCT's Director of Global Field Services; and Mr Caldwell is TCT's Vice President, Operations.

77. The MOE did not serve any witness statements by or on that date.

78. On 30 October 2018, TCT wrote to Dr Hoyle stating that no evidence had been received from the MOE and the MOE was now precluded from tendering any. TCT requested a case management conference the following week to discuss a summary motion to dismiss the counterclaim and to deal with next steps.

79. On the same day Dr Hoyle responded indicating that he was happy to have a case management conference, and that he would also give notice to Seddons in case they were re-instructed; he said that he understood that Mr Smith was without instructions from the MOE.

B8. <u>November 2018: the dismissal of the counterclaim</u>

80. A telephone case management conference took place on 7 November 2018, attended by Dr Hoyle, by Mr Mohamed QC and Ms Viney for TCT and by Mr Smith for the MOE. At that hearing, TCT invited Dr Hoyle to dismiss the counterclaim. The MOE's counsel indicated that they remained without instructions from the MOE, and that the MOE had not engaged an expert.

81. On 8 November 2018, TCT served written submissions on its application for an Order:

(a) dismissing the counterclaim, on the basis that it was untenable without factual evidence which the MOE had not served and was now precluded from serving; and

(b) permitting the MOE nonetheless to submit expert evidence by 15 November 2018, with that date remaining peremptory on the MOE, and with TCT being afforded the opportunity to respond to any expert evidence served by the MOE.

82. In the submissions, TCT set out the lengthy history of the Arbitration to date, and identified the MOE's various failures to comply with the procedural timetables that had been laid down.

83. It appears that Dr Hoyle did not immediately make any order in response to TCT's application. However, by Procedural Order No. 4, it remained the case

that the MOE was entitled to serve expert evidence, provided that it did so by 15 November 2018.

84. On 15 November 2018, the MOE's counsel wrote to Dr Hoyle. They stated that it had been difficult for them to obtain instructions from the MOE; there had been recent elections in the Republic of Iraq which had led to various ministerial and senior officer changes within the Government, including the MOE and the Ministry of Justice. That had, they said, led to delays in instructions from MOE. They stated, however, that the MOE was committed to progressing the matter and correcting the issues faced to date. They confirmed that they were now receiving regular instructions from the MOE and that they had authorisation formally to instruct an expert on behalf of the MOE. They asked, on the MOE's behalf, for a 13-week extension of time for service of that expert's report, although they indicated that it might be possible to serve it within 10 weeks.

85. TCT's counsel responded, also on 15 November 2018. They objected strenuously to the MOE's application. They expressed the view that, with the counterclaim struck out, there was no longer any matter to which any expert evidence could be relevant. TCT asked Dr Hoyle to confirm that the counterclaim had been struck out and to refuse the MOE's request for a time extension.

86. On 27 November 2018, Dr Hoyle forwarded his Procedural Order No. 5 to the parties. Although it is expressed to be signed "as for" 9 November 2018, it does not appear that it was sent to the parties any earlier than 27 November 2018 (and a signed version was not in fact sent to the parties until 18 January 2019). It provided as follows:

"Based on the history of the arbitration and submissions made by counsel during the 7 November 2018 hearing, and with the submissions on behalf of the Claimant subsequently having been reduced into writing, attached as Appendix A, and based upon confirmation from counsel for Respondent that he remains without full instructions from his client, the Ministry of Electricity, Republic of Iraq, General Directorate of Electricity, Al-Furat Middle Region, and has not yet retained experts in connection with this matter, IT IS ORDERED THAT:

1. *The Counterclaim advanced by the Respondent in its "Points of Defence and Counterclaim" is hereby dismissed, and paragraphs 56 – 71 of the "Points of Defence and Counterclaim", together with the "Relief Sought" by the Respondent in respect of the Counterclaim, are dismissed and struck out.*

2. *The deadline for the exchange of Expert Reports set out in Procedural Order No. 4 is amended as follows:*
   2.1. *The Respondent shall submit any expert reports on which it intends to rely by 15 November 2018.*
   2.2. *If the Respondent submits expert evidence in accordance with paragraph 2.1, above, TCT has leave to respond to that expert evidence. Any such evidence, including any Expert Reports on which TCT intends to rely, shall be submitted by 15 December 2019.*

3. *If Expert Reports are exchanged pursuant to paragraph 2, above, the Experts shall hold discussions by no later than 31 January 2019 for the purposes of identifying the points on which they agree and on which they disagree;*

4. *The Experts shall, by no later than 15 February 2019, prepare a joint statement showing:*
   4.1. Those issues on which they agree; and
   4.2. Those issues on which they disagree and a summary of their reasons for disagreeing
   And that Joint Statement shall be served upon both Parties.

5. *The date set out in paragraph 2, above, remains peremptory on the Respondent.*

6. *The Respondent shall not be permitted to adduce any expert evidence other than Expert Reports served by November 15, 2018 in accordance with paragraph 2, above, and such direct examination on those Expert Reports as shall permitted by the Arbitrator."*

87. By an e-mail also sent on 27 November 2018, Dr Hoyle confirmed that he had decided that the counterclaim *"must be dismissed and/or struck out"*. He said that he had re-read TCT's counsel's letter of 8 November 2018, which he regarded as a straightforward explanation of TCT's points and its frustration. He stated that he had some sympathy with the MOE's counsel, *"who has clearly a difficult task"*, but that *"To push the arbitration into April 2019, without any real handle upon it, would be egregious"*. Dr Hoyle expressed the view that the MOE's letter dated 15 April 2018 was *"a sound letter but... does not actually amount to any comfort of action"*; he noted that the MOE had not even been able to name the proposed expert. Accordingly, he concluded that he was *"not persuaded that the Seddons letter amounts to a substantial reason for a reversal of my decision"*.

B9. January-March 2019: the lead-up to the hearing

88. On 16 January 2019, a telephone case management conference took place, attended by Dr Hoyle, by Mr Mohamed QC and Ms Viney for TCT and by Mr Smith and Mr Goldblatt for the MOE. No signed Procedural Order was ever issued following that hearing, but TCT's counsel produced a draft Procedural Order No. 6, to which no objection was made by the MOE, and the parties appear to have proceeded on the basis that the directions set out in that draft Order had in fact been given. Those directions were as follows:

> *"1. The within arbitration shall proceed in London as agreed between the parties, subject to a further Order from the Panel directing that it take place elsewhere.*
>
> *2. The within arbitration shall proceed over four days: March 20 – 22, 2019 and March 25, 2019.*
>
> *3. It is anticipated that the within arbitration shall proceed as follows:*
>
> *3.1. Claimant and Respondent shall provide opening submissions to the Panel, limited to one hour each.*
>
> *3.2. Claimant shall present an examination in chief of each of its witnesses, limited to approximately one hour each.*
>
> *3.3. Claimant and Respondent shall provide closing submissions on March 25, 2019, which shall be limited, pending any further Order, to two hours each.*
>
> *3.4. Claimant may respond to closing submissions from Respondent. There shall be a time limit for reply submissions.*
>
> *4. Any request by either Claimant and Respondent to vary the time limits set out above shall be made to the Panel on or before March 8, 2019, after consultation with counsel for the other Party.*
>
> *5. Counsel for Respondent shall arrange facilities in London for the within proceeding.*
>
> *6. Counsel for Respondent shall arrange for a court reporter to attend throughout the arbitration proceedings.*
>
> *7. Counsel for Respondent may arrange to have an interpreter present to assist representatives of Respondent.*
>
> *8. Claimant and Respondent shall provide brief written arguments to the Panel on March 18, 2019."*

89. On 31 January 2019, TCT received information from its bankers, HSBC, which suggested that there had been a recent attempt to draw down on the Performance Bond issued by TCT pursuant to the MSA, which, as I describe below, is made up of a series of financial instruments. On the same date, the MOE's counsel advised that their instructions were that the MOE had made no attempt to draw down on the Performance Bond. TCT replied attaching a series of SWIFT messages from HSBC, and inviting Dr Hoyle to convene a case management conference as a matter of urgency.

90. In response, Dr Hoyle indicated that a conference call should take place in the afternoon of 1 February 2019.

91. On 1 February 2019, the MOE's counsel wrote to Dr Hoyle indicating that a hearing was not necessary, that they were having difficulties obtaining instructions since it was the weekend in Iraq, that they required time to investigate the position fully, that they did not know what application TCT was seeking to make, and that there was in any event no urgency.

92. Dr Hoyle indicated, in reply, that the call that had been fixed would go ahead. It did so, and was attended by Dr Hoyle, by Mr Mohamed QC and Ms Viney for TCT and by Mr Smith and Mr Goldblatt for the MOE. According to a draft minute of that call, which was never signed, TCT advised Dr Hoyle that there was evidence that the MOE had made three requests for payment under the Performance Bond, and that it had relied in so doing on a judgment obtained in the Iraqi courts (discussed further below). TCT submitted that the MOE's attempts to draw down on the Performance Bond were fraudulent. The MOE's counsel advised that his instructions were that no recent demands on the Performance Bond had been made, but that investigations would be carried out, and that it was possible that an "exuberant" employee of the MOE had made the demand.

93. According to the draft minute, Dr Hoyle endorsed the following schedules, consented to by the MOE, in respect of an application by TCT concerning the Performance Bond:

(a) TCT was to submit evidence and an outline of its motion to Dr Hoyle and to the MOE by 7 February 2019;

(b) If the MOE wished to provide materials or submissions in response, it was to do so by 13 February 2019;

(c) A telephone hearing of the motion would take place at 3.00 p.m. GMT on 18 February 2019.

94. In accordance with that timetable, on 6 February 2019 TCT served a written application, described as a Notice of Motion, for:

"an interim Order, to remain in effect until 20 days after the final award of the Panel in the within arbitration is issued:

(a) Declaring that:
(i) any request or demand for payment by the MOE, TBI, DES or anyone acting on behalf of one or more of those parties under HSBC standby letter of credit PEBHCC111610, whether made before or after the date of this order would be a fraudulent demand;
(ii) any request or demand made by the MOE, TBI, DES or anyone acting on behalf of one or more of those parties for an extension of standby letter of credit PEBHCC111610, or for payment of the full amount of such letter of credit to be made in lieu of the requested extension, whether such demands or requests were made before or after the date of this order would also be fraudulent;
(iii) the MOE has no basis, pending judgment from the within Panel, to claim under the guarantees referenced in paragraphs (a)(i) and (ii) herein;
(iv) the MOE is restrained from making, whether directly or indirectly, demands for the extension of, or payment under, the Performance Bond or any of the instruments that comprise the Performance Bond;

(b) the MOE is restrained from taking any steps, whether directly or indirectly, to enforce payment on the Iraqi Judgment;

(c) Ordering that costs in the amount of $25,000 USD be paid to Claimant within 7 days of the transmission (by electronic means) of the decision of the Arbitrator regarding the merits of the within Motion; and

(d) Declaring that, in the event that Respondent fails to comply with the order referred to in paragraph 3(c), above, Claimant shall have summary judgment for the relief

sought in (a) above without prejudice to the rights of TCT to seek additional relief relating to the Performance Bond as stated in its claim and ancillary to it."

95. TBI is the Trade Bank of Iraq, and DES, also referred to as DESIB, is Dar Es Salaam Investment Bank: I explain the role of those entities further in Section D3 of this Award, below. TCT's application was supported by a supplemental will-say witness statement of Daniel J.B. Simonelli.

96. On 13 February 2019, the MOE served submissions in response to TCT's application, supported by a witness statement of Ayser Hamid Saheb. The MOE's position, in summary, was that it had no knowledge of the demands apparently made on the Performance Bond, and that in any event the determination of TCT's application should be adjourned until the substantive hearing in March 2019.

97. On 15 February 2019, TCT served further written submissions in support of its application.

98. A telephone hearing took place on 18 February 2019, attended by Dr Hoyle, by Mr Mohamed QC and Ms Viney for TCT and by Mr Smith for the MOE. At that hearing, Dr Hoyle said that he would consider TCT's application. Following the hearing, TCT supplied him with a draft Procedural Order No. 7, reflecting the submissions made on its behalf. However, the parties have confirmed that no order was ever issued in respect of the application by Dr Hoyle.

99. Quite separately, on or around 19 February 2019, the MOE's counsel indicated that they had been instructed, on behalf of the MOE, to apply for a direction that the final hearing, by then booked to take place in London, be transferred to Dubai.

100. Following concerns expressed on behalf of TCT that any application should be made promptly because of its implications for the travel arrangements of TCT's team, on 19 February 2019 Dr Hoyle asked the MOE to provide information in relation to those proposing to travel from Iraq, including the date and duration of any UAE visa, by 21 February 2019.

101. On 21 February 2019, the MOE's counsel responded to say that the MOE was unable to put together the information required within the timeframe provided for. They also stated that they were instructed that part of the delegation from Iraq would in fact be able to attend in London. They therefore indicated that they were instructed not to proceed with the application to transfer the location of the final hearing.

B10. <u>March 2019: the hearing</u>

102. On 18 March 2019, each of TCT and the MOE served written opening submissions for the purposes of the final Arbitration hearing.

103. That hearing took place at the International Dispute Resolution Centre, 70 Fleet Street, London EC4Y 1EU, UK, on 20, 21, 22 and 25 March 2019.

104. The Claimant was represented by Mr Mohamed QC, with the assistance of Ms Viney. Mr Simonelli and Mr Archer, both of whom (as I have noted above) had made witness statements on behalf of TCT, were also present on behalf of TCT. Mr Caldwell was not present and was not called, but his statement was put in evidence.

105. The MOE was represented by Mr Sinclair QC, with the assistance of Mr Smith, Mr Goldblatt and Ms Khanom of Seddons. Also present on behalf of the MOE were Mr Ali Asghar Hasan Younus, Ms Nadia Ezzildeen Jalal, Mr Thaer Saeed Shakhir, Mr Ikram Mahmood Ali and Mr Sadiq Hameed Nejm. An Arabic interpreter, Mr Ali Mosin Hasani, attended to assist the MOE's representatives.

106. It should be noted that in the written opening submissions served on its behalf, the MOE stated that those submissions were *"filed under protest as is the MOE's attendance at this hearing"*. The submissions went on to state that:

    (a) The issues in the claim had already been determined by the Iraqi Court, which was competent, properly constituted, had jurisdiction over the dispute and made a decision following a lawful process in which TCT was given the opportunity to participate. It was therefore suggested that the matters in dispute were *res judicata*.

(b) *"The Tribunal has refused permission to MOE to file or rely on any factual evidence in this matter (Procedural Order No. 4, 5 and 6). This is an abuse of natural justice and a failure to follow properly the principles set out in the ICC Rules. The Tribunal imposed arbitrary deadlines on MOE for filing evidence and refused applications to extend that deadline despite MOE having good reason for its inability to meet the arbitrary deadlines imposed."*

(c) *"The Tribunal has also dismissed MOE's counterclaim due to the same arbitrary deadlines identified above (Procedural Order No. 5)."*

107. The MOE did, however, take a full part in the hearing; its counsel cross-examined TCT's witnesses and made opening and closing written and oral submissions.

108. On 20 March 2019, Dr Hoyle heard opening submissions from Mr Mohamed QC on behalf of TCT and Mr Sinclair QC on behalf of the MOE.

109. On 21 March 2019, Dr Hoyle heard evidence from Mr Archer for TCT. Mr Archer was examined in chief by Mr Mohamed QC on behalf of TCT, cross-examined by Mr Sinclair QC on behalf of the MOE and re-examined by Mr Mohamed QC on behalf of TCT.

110. On 22 March 2019, Dr Hoyle heard evidence from Mr Simonelli for TCT. Mr Simonelli was examined in chief by Mr Mohamed QC on behalf of TCT, cross-examined by Mr Sinclair QC on behalf of the MOE and re-examined by Mr Mohamed QC on behalf of TCT.

111. On 25 March 2019, Dr Hoyle heard closing submissions from Mr Mohamed QC on behalf of TCT, followed by closing submissions from Mr Sinclair QC on behalf of the MOE, and reply submissions from Mr Mohamed QC on behalf of TCT. Each of Mr Mohamed QC and Mr Sinclair QC also provided Dr Hoyle with further written submissions – in the case of Mr Mohamed QC, fairly lengthy written submissions, and in the case of Mr Sinclair QC, a shorter "speaking note" – on behalf of their respective clients.

B11. Events following the substantive hearing

112. On 10 April 2019, a case management conference took place by telephone, attended by Dr Hoyle, by Mr Mohamed QC and Ms Viney for TCT and by Mr Smith and Ms Khanom for the MOE. According to the draft minute of the case management conference (which was never signed), its purpose was to address outstanding procedural Orders and questions raised by Dr Hoyle regarding the amounts in issue between the parties.

113. During that case management conference, TCT indicated that it would provide Dr Hoyle with an updated itemized list of the relief being sought by it in the Arbitration, reflecting a concession made on its behalf during closing submissions. It also confirmed that it sought declaratory relief in connection with the Performance Bond.

114. Also according to the draft minute, Dr Hoyle stated at the hearing that Procedural Order No. 6 was acceptable in the form in which it had been drafted, but that he needed to consult with the ICC in connection with TCT's proposed draft Procedural Order No. 7.

115. On the same date, 10 April 2019, TCT provided Dr Hoyle with an updated breakdown of the relief sought by TCT in the Arbitration ("the Final Breakdown Letter"). As appears further below, I have considered the relief sought by TCT in this Arbitration by reference to the Final Breakdown Letter.

116. On 21 June 2019, TCT's counsel wrote to Dr Hoyle enclosing a document which had just come to their client's attention. As I explain further below, that document was a writ of execution addressed to TCT and Mr Simonelli, and appeared to have been applied for in January 2019. It was sent under cover of a letter from the Embassy of the Republic of Ottawa directly to Bennett Jones.

117. On 22 June 2019, Dr Hoyle asked the MOE for an explanation of this development in short order. The MOE did not reply.

118. On 30 August 2019, Dr Hoyle advised that he would be forwarding a draft Award to the ICC for consideration within the following few days.

119. It appears from a message sent to the parties by Dr Hoyle on 16 December 2019 that he in fact passed a draft Award to the ICC on 29 November 2019. In that message, Dr Hoyle also stated that he would be reserving questions of costs to a later date.

120. On 11 December 2019, the ICC Secretariat informed the parties that the draft Award had not been approved by the ICC Court at its session on 10 December 2019.

121. It appears that Dr Hoyle then provided a revised draft Award to the ICC on 5 February 2020. On 21 February 2020, the ICC Secretariat informed the parties that that revised draft Award had not been approved by the ICC Court at its session on 20 February 2020.

122. I emphasise that I have not seen any draft Award produced by Dr Hoyle. I understand that it does exist, but it has not been supplied to me.

B12. <u>The resignation of Dr Hoyle, and my appointment</u>

123. On 20 March 2020, Dr Hoyle wrote to the ICC stating that he had decided to resign as Arbitrator *"for personal reasons"*. That e-mail was forwarded by the ICC to the parties on the same date.

124. The ICC Court accepted Dr Hoyle's resignation on 26 March 2020. Not unreasonably, TCT's counsel, by a letter dated 27 March 2020, expressed considerable dismay on behalf of their client at this turn of events. They sought full disclosure of the reasons for Dr Hoyle's resignation.

125. On 1 April 2020, the ICC Secretariat wrote to the parties in response to TCT's letter dated 27 March 2020. Amongst other matters, the Secretariat indicated that Dr Hoyle was not required to provide reasons for his resignation. The parties' comments were also invited in relation to the appointment of a replacement arbitrator.

126. I know nothing of the reasons for Dr Hoyle's resignation, which, given the stage at which the Arbitration had by then reached, was most unfortunate.

127. On 28 April 2020, the ICC Secretariat indicated that I the undersigned, Philippa Hopkins QC, of Essex Court Chambers, 24 Lincoln's Inn Fields, London WC2A 3EG, UK, had been appointed by the ICC Court as Sole Arbitrator in this matter to replace Dr Hoyle, such that the Arbitral Tribunal was once again fully constituted.

128. The ICC Court has, in the light of the events set out above, extended the deadline for the rendering of the final Award on a number of occasions. Those extensions have been made before and following my appointment, as follows:

(a) On 16 March 2017, the Court extended the time limit for rendering the final award until 30 June 2017;

(b) On 22 June 2017, the Court extended the time limit for rendering the final award until 29 June 2017;

(c) On 21 September 2017, the Court extended the time limit for rendering the final award until 30 November 2017;

(d) On 16 November 2017, the Court extended the time limit for rendering the final award until 29 December 2017;

(e) On 20 December 2017, the Court extended the time limit for rendering the final award until 31 October 2018;

(f) On 31 October 2018, the Court extended the time limit for rendering the final award until 31 May 2019;

(g) On 23 May 2019, the Court extended the time limit for rendering the final award until 28 June 2019;

(h) On 26 June 2019, the Court extended the time limit for rendering the final award until 31 July 2019;

(i) On 25 July 2019, the Court extended the time limit for rendering the final award until 30 August 2019;

(j) On 29 August 2019, the Court extended the time limit for rendering the final award until 30 September 2019;

(k) On 26 September 2019, the Court extended the time limit for rendering the final award until 31 October 2019;

(l) On 24 October 2019, the Court extended the time limit for rendering the final award until 29 November 2019;

(m) On 28 November 2019, the Court extended the time limit for rendering the final award until 31 December 2019;

(n) On 19 December 2019, the Court extended the time limit for rendering the final award until 31 January 2020;

(o) On 30 January 2020, the Court extended the time limit for rendering the final award until 28 February 2020;

(p) On 27 February 2020, the Court extended the time limit for rendering the final award until 31 March 2020;

(q) On 26 March 2020, the Court extended the time limit for rendering the final award until 30 April 2020;

(r) On 30 April 2020, the Court extended the time limit for rendering the final award until 30 June 2020;

(s) On 25 June 2020, the Court extended the time limit for rendering the final award until 31 August 2020;

(t) On 27 August 2020, the Court extended the time limit for rendering the final award until 30 September 2020;

(u) On 24 September 2020, the Court extended the time limit for rendering the final award until 30 October 2020;

(v) On 29 October 20, the Court extended the time limit for rendering the final award until 30 November 2020.

B13. Events following my appointment

129. On 28 April 2020, the ICC transmitted the file in this matter to me.

130. On 6 May 2020, a telephone conference took place, attended by me, by Mr Mohamed QC and Ms Viney for TCT and by Mr Smith for the MOE. The purpose of the call was to discuss practicalities relating to my reading into the case and my navigation of the relevant documents. In the course of that telephone conference, the parties confirmed that each had no particular further submissions that it wished to make as regards the matters in dispute. They indicated that they were content to leave it to me to read in, and to advise them if I required any further assistance or submissions on any matters once I had done so.

131. On 22 May 2020, the parties provided me with a revised index to the documents in the Arbitration and with organised electronic files of the various materials, including the bundles that had been used at the hearing. I had some difficulty downloading the documents from the link provided, and there were issues with the embedded hyperlinks. On 28 May 2020, I had a short telephone meeting with Ms Viney and with Ms Kate Schwanz of TCT's counsel in relation to those technical issues. The MOE was not able to attend that meeting, but its counsel had indicated in advance that he did not object to its taking place.

132. On 29 May 2020, TCT sent a further link to the documents. I was able to download the documents successfully, and the issues with the hyperlinks had been resolved.

133. On 11 June 2020 I wrote to the parties and to the ICC Secretariat raising a number of questions with regard to procedural aspects of the Arbitration, as I was struggling to piece together some of the procedural history on the basis of the material provided to me. I received a response from the ICC Secretariat in relation to one of those points on 12 June 2020. I also received an e-mail from on behalf of TCT with a short response on 12 June 2020, and a longer response, attaching documents not previously supplied in relation to the drawing up of the Terms of Reference, on 15 June 2020.

134. On 17 June 2020, I wrote to the parties indicating that if the MOE wished to respond or add to anything in the material sent to me in relation to those queries, it should do so by 9 a.m. London time on 23 June 2020.

135. On 22 June 2020, the MOE's counsel wrote to me indicating that he was without instructions from the MOE, and sought an extension of that deadline to 4pm on 25 June 2020. I granted that extension, which was not opposed by TCT, but indicated that I had difficulty in seeing what would be required in the way of instructions, given that my queries related to the historical conduct of the Arbitration.

136. The MOE did indeed respond on 25 June 2020, providing its responses to the questions that I had raised. In that letter, the MOE's counsel referred to an e-mail which they indicated had been sent to Dr Hoyle and to the ICC on 19 December 2018; they said that it *"was not sent to Bennett Jones as it included privilege information"* and that they would forward it to me separately, which they did.

137. On the same day, TCT provided a response to the MOE's letter. Amongst other matters, they indicated that they had not been aware that the MOE had corresponded separately with Dr Hoyle, indicated that it was improper for one party to make submissions to the Arbitrator of which the other was unaware, and formally requested a copy of the 19 December 2018 letter.

138. Also on 25 June 2020, I wrote to the parties indicating that I considered that either the parties had to agree to the 19 December 2018 e-mail (I referred to it, incorrectly, as *"the 18 December e-mail"*, but I am confident that both parties understood the e-mail to which I was referring) being shown to TCT's representatives, or I had to disregard it, on the basis that it was indeed unfair that one side should be entitled to rely on material not shown to the other. On 3 July 2020, the MOE's counsel responded saying that they noted my comments and that I should therefore disregard the e-mail. I have therefore done so.

139. In their letter dated 25 June 2020, the MOE had also asked for an indication as to the likely timescale for this Award, and as to whether I would require further submissions. I responded on the same day, indicating that I did not expect to require a great deal in the way of further submissions from the parties, but would have some questions/areas on which I will be seeking additional input, and that

my present intention was to get those to the parties by the end of the week commencing 6 July 2020. That was, unfortunately, over-optimistic, and on 10 July 2020 I wrote to the parties advising them that they could expect further questions/points from me by Friday 24 July 2020.

140. On 24 July 2020, I wrote again to the parties raising a query with regards to the location in the electronic bundles of certain documents, and indicating that my list of questions would be with them the following week.

141. I wrote to the parties on 31 July 2020 with the promised list of questions, and suggested that they seek to agree between themselves a timetable as to when and how to respond. This did not prove possible and, following an exchange of e-mails between myself and the parties during the week of 11 August 2020, I gave directions as to a timetable by an e-mail sent on 19 August 2020.

142. On 25 August 2020, and in accordance with that timetable, TCT served a further schedule in relation to its claims for charges in connection with the Performance Bond (as described below).

143. Also in accordance with the timetable directed by me, on 4 September 2020 TCT and the MOE both served further written submissions in response to my list of questions. Amongst other matters, both parties agreed that it would be appropriate for me to address questions of interest and costs not in this Award but by way of a further Award in due course.

144. On 8 September 2020, and following e-mail exchanges with the parties, I directed that each party be permitted to serve further written submissions in response to those served on 4 September 2020 by no later than 18 September 2020.

145. TCT served its further written submissions on 17 September 2020, and the MOE served its further written submissions on 18 September 2020.

146. There followed exchanges between me and the parties' representatives as to the need for a further oral hearing. On 23 September 2020, TCT advised that the parties had agreed that they did not consider an oral hearing necessary, although they remained at my disposal if I considered that such a hearing would be useful.

147. On 30 September 2020, I advised the parties that I did not consider a further oral hearing necessary, and declared the proceedings closed with respect to the matters to be decided in this Award, that is to say, all matters save for interest and costs, pursuant to Article 27 of the ICC Rules.

C. THE MATTERS IN DISPUTE IN THIS ARBITRATION, AND THE PARTIES' CLAIMS: A SUMMARY

148. In the ordinary course, I would take a summary of the claims and the parties' cases, and of the matters in dispute between the parties, from the Terms of Reference. However, the reality in this Arbitration is that the summary in the Terms of Reference has been overtaken by events, prepared as it was at a time when the MOE was still challenging Dr Hoyle's jurisdiction, and before it had served any form of Response or Defence.

149. Accordingly, the summary below is drafted on the basis of the parties' written submissions prepared for the purposes of the hearing in March 2019, and the Final Breakdown Letter.

150. TCT's claim arises, as has been said above, out of the MSA. The MSA is governed by the law of Iraq.

151. The MSA related to the rehabilitation and repair of a number of GE LM6000 aero-derivative engines ("the Engines") and so-called "Packages" owned and operated by the MOE. A "Package", for these purposes, is the suite of auxiliary equipment into which an aeroderivative turbine engine fits and in which it operates as part of a power plant; the Package is connected to the local grid.

152. The Engines which were the subject of the MSA formed part of the power plants at Al-Mussaib and Al-Qudas. As discussed in more detail below, under the MSA, TCT agreed to carry out work on eight Engines and eight Packages at Al-Mussaib, but only on three Engines, and no associated Packages, at Al-Qudas.

153. The disputes that have arisen between TCT and the MOE relate to the following:

(a) Tools and parts – TCT has a substantial claim for damages/compensation arising out of what it claims to have been the wrongful retention by the MOE of tools and parts that are its property. This claim is non-contractual.

(b) Payments under the MSA – TCT claims that there are sums due to it under the MSA and not paid by the MOE. The MOE claims that it is entitled to withhold the sums not paid by it.

(c) Damages claims – TCT advances claims for damages based on what it contends to be breaches of express or implied terms of the MSA. Some of those claims are advanced, in the alternative, as restitutionary claims.

154. In more detail, TCT claims the following relief (these being the claims advanced by way of final relief in the Final Breakdown Letter):

(1) Damages for usurpation/conversion of its equipment – parts and tools – which has remained in Iraq, in the sum of US$2,232,957.

(2) Payments said to be due but unpaid under the MSA: US$584,750.

(3) Fees associated with financial instruments entered into pursuant to the MSA, which TCT contends are for the MOE's account under the terms of the MSA and/or for which the MOE is liable in damages for breach of the MSA: US$310,572.37 in respect of the Letter of Credit obtained by the MOE and US$558,581.34 in respect of TCT's Performance Bond. Because the Performance Bond fees are said by TCT to be ongoing, the second of those claims was updated by TCT by its submissions dated 24 August 2020, so that the final figure claimed was and is US$621,454.12.

(4) The sum of US$337,012, which the MOE has deducted from payments made under the MSA as an "engine penalty"; TCT says that the MOE has done so improperly.

(5) Damages for breach of the express and/or implied terms of the MSA, in relation to wasted trips to Al-Qudas: US$386,143.40.

(6) Damages for breach of the express and/or implied terms of the MSA, in relation to demobilisation costs which TCT says it ought not to have incurred, but did incur: US$261,879.59.

(7) Damages for breach of the express and/or implied terms of the MSA, in relation to additional labour expenses incurred by TCT: US$138,468 in respect of cabling labour and US$510,000 during work stoppages.

(8) Damages for breach of the express and/or implied terms of the MSA and/or compensation on a restitutionary basis for additional parts and labour supplied by TCT: US$253,691.

(9) Payment and/or damages for breach of the express and/or implied terms of the MSA, in relation to a failure investigation carried out in respect of the MOE's allegation of breach of warranty (US$160,905.26) and storage charges in respect of an Engine (US$208,000).

(10) Interest on all sums found to be due to it at a rate of 4% p.a.

(11) An order for the return of the Performance Bond.

(12) Declarations that:

(a) the MOE has no further interest in either the DES Guarantee (number 048/LG/352) or the TBI Guarantee (11/963/1G111133119IND/ 2011), each issued pursuant to the Standby LC (PEBEICC111610), and that HSBC, TCT, DES, and TBI are fully released from any of their obligations and liabilities to the Iraqi MOE under these documents;

(b) the MOE has no basis to claim under the guarantees referenced in paragraph (a), above;

(c) any previous claims, demands, or requests by the MOE made under the DES Guarantee (048/LG/352) or the TBI Guarantee (1-1/963/IGT11133119IND/2011), each issued pursuant to the Standby LC (PEBHCC 111610), are withdrawn;

(d) the MOE may not make any further claims, demands or requests on DES under the DES Guarantee (048/L0/352) or the TBI Guarantee (H/963/1CiT1 1 1331 19IND/2011), each issued pursuant to the Standby LC (PEBEICC 111610);

(e) the DES Guarantee and the TBI Guarantee have expired;

(f) in the event that the Performance Bond is not returned within seven days of the issuance of the decision of the Tribunal in the within Arbitration, it shall be declared cancelled effective the date of the decision; and

(g) any attempt to extend any of the instruments that comprise the Performance Bond and/or any attempt to obtain payment under any of those instruments by the MOE, whether directly or indirectly, is fraudulent.

155. Lastly, TCT maintains its application for a permanent injunction, as originally sought in its Notice of Motion dated 6 February 2019, restraining the MOE from making, whether directly or indirectly, demands for the extension of, or payment under, the Performance Bond or any of the instruments that comprise the Performance Bond.

156. The MOE denies that it is liable to TCT in respect of any of its claims, for the reasons which I describe in detail below.

157. As I have noted above, the MOE originally advanced a counterclaim. It sought damages for what it contended to have been breaches of the warranty provisions contained in the MSA. In essence, it said that TCT's work on certain of the Engines was defective and that it was obliged to repair them, or pay for repairs. However, and as I have also noted above, that counterclaim was struck out by Dr Hoyle.

D. THE FACTUAL BACKGROUND

158. Before considering the individual items of claim advanced by TCT, it is necessary for me to set out my findings as to the relevant factual background. In reaching

the conclusions that I do, I have in mind the oral and written submissions of both parties, the evidence of TCT's witnesses and the contemporaneous documents that have been provided to me. I do not refer below to each and every exchange between the parties but to those that I consider to be of particular relevance to TCT's claims.

D1. The MSA

159. The MSA was executed on 1 March 2011. It was in the English language but, by Article 20.1, was expressly governed by the law of Iraq. It was signed by Mr Simonelli for TCT and by Mr Wadi M Munadi Al-Mayahi for the MOE. As has already been noted above, it was stamped and assigned a contract number (no. 14) by the MOE.

160. The MSA stated that it was for the provision of "field support, material supply and repair and overhaul services". TCT was referred to as TCT, and the MOE as "the Customer".

161. The provisions of the MSA that are material to this dispute are set out below.

162. By Article 1.3, the "Commencement Date" or "Day Zero" for the MSA was identified as *"the date upon the TCT's receipt of a valid and irrevocable letter of credit from the Trade Bank of Iraq"*.

163. Article 1.2 provided for a *"Total Contract Execution Period"*. It set out a number of periods, each running from the Commencement Date, as follows: for the three Al-Qudas Engines, and for four of the eight Al-Mussaib Engines and four Packages: 114 days; for two of the eight Al Mussaib Engines and two Packages: 144 days; and for the remaining two Al-Mussaib Engines and Packages: 174 days. That was further amplified in a separate *"SPECIFIC MINISTRY TERMS"* section, which stated that the duration of the contract was to be the Total Contract Execution Period plus a one year warranty period.

164. The Specific Ministry Terms also provided as follows:

    (a) The total contract value was US$60,886,000, *"subject to the terms contained in this agreement"*.

(b) TCT was to provide *"a performance bond, equal to 5% of the value of the Agreement Price, valid until the expiration of the Agreement. Subject to the terms of this Agreement TCT shall provide a bond to the Trade Bank of Iraq within two weeks of Contract authorization by the Ministry. The bond will be valid only upon issuance of the Payment Letter of Credit to be supplied by Customer".*

(c) Under the heading, *"LETTER OF CREDIT PROCESS"* it was stated that *"subject to the terms contained herein, CUSTOMER shall establish a confirmed Letter of Credit for 100% of the TOTAL CONTRACT VALUE, which Letter of Credit shall be irrevocable and at CUSTOMER's expense after contract execution. TCT shall bear the expense of any fees outside the country of Iraq".*

(d) Under the heading, *"AGREEMENT"*, it was stated that *"This Agreement represents a culmination of several series of discussions, negotiations and exchanges of correspondence. Such correspondence to the extent that it does not conflict with either the contents or intent of this Agreement, shall apply to provide guidance".*

165. The MSA contemplated that the Engines would be removed by TCT to its own premises in Canada for overhauling and repair. In addition, field services were to be provided by TCT at the MOE's own sites; as has been noted, this included the overhaul of the Packages at Al-Mussaib (but not Al-Qudas). Article 3 of the MSA was entitled *"FIELD SERVICE PROCEDURE"* and materially provided as follows:

"3.1 TCT will provide the CUSTOMER with Field Support Services for the CUSTOMER's Engine(s).

3.2 The CUSTOMER shall ensure that TCT's field service technician(s) will have access to a suitable and safe work environment.

3.3 CUSTOMER shall provide access to the site to TCT field service technicians 24 hours per day, 7 days per week from Commencement Date until Contract Completion.

...

3.6 EXPORT SHIPMENT

(a) *CUSTOMER shall be the exporter of record. TCT shall arrange for export shipment from Baghdad Airport. The parties mutually agree that export shipment may take place prior to Commencement Date. CUSTOMER shall deliver the engines FCA Baghdad Airport. The engines should be cleared for export by CUSTOMER."*

166. Article 4 of the MSA entitled the MOE to ask TCT to vary its performance under the MSA, subject to agreement as to payment terms.

167. Article 7 of the MSA set out the procedures for invoicing and terms of payment. They were as follows:

(a) The MOE's payments were to be made by the letter of credit to be established under the MSA;

(b) For the Al-Mussaib Engines (those from units 2, 3, 4, 5, 6, 8 and 9, and a spare), the total price was US$38,460,900, payable by the MOE as follows:

- 90% was payable on shipment by TCT of each of the Engines back to Iraq after repair, with TCT being obliged to provide supporting documents including a test report establishing performance by the Engine of 40MW;

- 5% was *"due upon delivery, installation of the engines to site and successful one hour performance run of the engine"*; and

- The remaining 5%, described as a *"holdback payment"*, was to be *"automatically released one year after delivery of operating engines to site as further defined in this Agreement unless one of the following documents is presented to the issuing bank"*. Those documents were *"Copy of Arbitration agreement signed by both parties agreeing to enter into Arbitration proceedings"* or *"Copy of a determination from an Arbitration proceeding that has competent authority to make such a determination stating that TCT is liable for damages"*. The clause also provided that *"In the event that there are active Arbitration proceedings in progress as per above, the CUSTOMER shall have the right to extend the release period accordingly"*.

(c) For the Al-Qudas Engines, of which there were three, the total price payable was US$10,996,000. 95% was payable on shipment back to Iraq with supporting documents including evidence of performance testing, and there was a "holdback payment" of 5% in the same terms as for the Al-Mussaib Engines.

(d) For the Package rehabilitation work at Al-Mussaib, payments were also to be made in stages (Article 7.2). Although the clause states that the stages were *"proposed"* by TCT, there is nothing to suggest that this was not what the parties agreed. The price was US$11,431,000, payable as follows:

- 85% was payable on submission of payment request documentation, submitted by TCT and approved by the MOE, attesting that the work had been done;

- 10% was payable on submission by TCT of a Certificate of Contract Completion attesting that a minimum of 34 megawatts per engine per 72 hour period had been achieved; and

- There was a 5% "holdback payment" on the same terms as for the Engine work.

(e) Article 7.3 provided as follows:

- TCT reserved the right to retain sole and reasonable determination of when the Package work was completed, and required access to the site until completion had taken place; if that was denied *"for any reason out with the control of TCT for an aggregate period of 30 days or more, TCT reserves the right to terminate the contract in accordance with the provisions of Article 12 of this Agreement"*.

- The term relating to the provision by TCT of a performance bond was repeated.

- The MOE was to provide a draft copy of the Letter of Credit from the Trade Bank of Iraq to TCT for review and approval. The *"minimum"* provisions for the Letter of Credit were set out.

(f) Article 7.4 provided:

"If CUSTOMER fails to fulfill any condition of the terms of payment, TCT may:

(a) withhold deliveries and suspend performance; or
(b) continue performance if TCT deems it reasonable to do so; or
(c) place the Engine(s) into storage pursuant to the provisions of Article 11, Delivery.

In any event, the costs incurred by TCT as result of CUSTOMER's nonfulfillment shall be paid by CUSTOMER upon submission of TCT's invoices. If such nonfulfillment is not rectified by CUSTOMER promptly upon notice thereof, TCT may cancel the purchase order, and CUSTOMER shall pay TCT its reasonable and proper charges for cancellation upon submission of TCT's invoices therefore."

168. Article 8 of the MSA was headed *"PENALTIES"*, and provided that:

"8.1 "Engine Penalty" – In the event that TCT is unable to meet the agreed upon Contract Term as set out in this clause below and delay is not due to any delays or reasons listed in Article 19, the Appendix or caused by the CUSTOMER, TCT's total liability shall be limited to a maximum of 10% of Repair Value of each individual work scope…"

The Engine Penalty was to be the MOE's *"sole and exclusive remedies for TCT's failure to meet the agreed terms"*.

169. Article 9 of the MSA was headed, *"TAXES AND OTHER CHARGES"*. It provided as follows:

"9.1 All amounts payable are exclusive of all federal, provincial, local, municipal or other excise, sales, use, value-added, stamp, property or similar taxes and fees and all export or import fees, customs duties, tariffs or consular fees, now in force or enacted in the future. Where applicable, all such costs, duties, tariffs, taxes and fees shall be paid by CUSTOMER unless CUSTOMER provides a certificate of exemption or similar document exempting a payment from a particular tax.

9.2 Should TCT be required to pay any duties, fees, taxes or other like charges which are the responsibility of CUSTOMER, then CUSTOMER shall reimburse TCT for the total amount paid by TCT.

9.3 *For the avoidance of doubt, all taxes, duties and other similar fees charged out with the Republic of Iraq will be paid by TCT. All taxes duties and other similar fees charged within the Republic of Iraq, will be paid by the Ministry of Electricity (this Project funded from the Investment Plan of the Ministry of Electricity)."*

170. Article 11, entitled *"DELIVERY"*, provided, amongst other things, that TCT was to deliver the Engines and any parts to the MOE on DAT Baghdad Airport terms. Article 11.1 specifically provided that, *"CUSTOMER is responsible for all import duties and taxes and obtaining customs clearance for all shipments"*. Article 11.3 provided that TCT could deliver any Engine into storage if delivery to the airport was not possible, *"at TCT's premises or elsewhere if agreed by both parties"*; on notification of delivery into storage, that would be good delivery. In other words, that provision contemplated storage for delivery purposes, rather than during a suspension of performance.

171. Article 12 was headed *"TERM AND TERMINATION"*, though it covered more than that. It provided:

"12.1 The term of this Agreement shall begin from the Effective Date; however the Parties agree that the Commencement Date shall be the date upon which a Letter of Credit complying with the requirements of Article 7 is received by TCT.

12.2 The total length of this Agreement shall be 539 days from the Commencement Date ("Contract Term") which shall be comprised of the following periods; a) 174 day period commencing from opening of Letter of Credit as per 12.1 above, and, b) 365 day warranty period.

12.3 The duration of the performance of the Services performed under this Agreement, subject to all of the conditions listed herein is 174 days.

The duration of the performance of the Services shall be subject to the following provisions:

(a) CUSTOMER to provide access to CUSTOMER site, 24 hours per day, 7 days per week for the duration of the Agreement. In the event that access to the site is restricted for an aggregate period of more than twenty (20) days, TCT will issue a Certificate of Substantial Completion and reserves the right to terminate the contract in accordance with Article 12.3 below.

(b) CUSTOMER to transport engines to Baghdad Airport from site and obtain customs clearance within three (3) days of TCT making engines available at CUSTOMER site.

(c) *CUSTOMER to transport engines to CUSTOMER site from Baghdad Airport and obtain customs clearance within three (3) days of TCT making engines available at Baghdad Airport*

(d) *CUSTOMER to provide site assistance and support including but not limited to, material handling personnel and equipment, and general labour services.*

(e) *For the purposes of completing the package work scope as defined in Appendix "B", CUSTOMER to provide sufficient fuel of a quality specified by the OEM and electrical power to operate the MCCs and starter motors with in the packages.*

(f) *Any required software changes needed as a result of deactivating the water NOX system are included in the package rehabilitation price; however such software revisions are dependant upon the full co-operation of the Ministry of Electricity in relation to their own software.*

Any delays attributable to CUSTOMER failing to provide the above will result in the duration of the Agreement being extended accordingly. With the exception of I) above, should these delays extend beyond an aggregate of thirty (30) days, TCT reserves the right to terminate the Agreement in accordance with the provisions in the paragraph below and Article 12.3."

172. In addition, Article 12.4 afforded both parties an express termination right in the event of material breach by, or insolvency of, the other.

173. Article 14 was a warranty clause. It provided materially as follows:

"14.1 In respect of the Services which are proved to the reasonable satisfaction of TCT not to have been provided or performed with the skill and care commensurate with the recognized standards prevailing in the industry, (reasonable wear and tear to CUSTOMER's Engine excepted) TCT will repair or replace any defective Parts, relevant to the provision of the Services.

14.2 If any defect or failure occurs in the Services within the period specified in Clause 14.5, then TCT shall replace or repair the defective Part or re-perform the Services at the CUSTOMER's site or TCT's authorized Canadian facility.
Any downstream or collateral damage caused by the failure or defect is not covered by this warranty.

14.3 Any replacement part provided or Services under the terms of the warranty shall in turn be warranted in accordance with the provisions of this Agreement, provided however, the foregoing shall not serve to extend any warranty beyond twelve (12)

months from the date of completion of the original Services as attested by delivery documents.

14.4 *TCT makes no warranty in respect of material or part supplied by the CUSTOMER for fitting to the CUSTOMER's Engine by TCT.*

14.5 *Subsequent to the Services provided, this warranty shall be subject to the following conditions:*

(a) *The Engine was properly installed by qualified personnel;*

(b) *The Engine was operated and maintained in accordance with applicable manufacturer's guidelines and standards, overhaul manuals, service bulletins and CUSTOMER 's handbooks;*

(c) *The Engine has been used under normal operating conditions, has/have not been subject to misuse, neglect or accident and has/have not subsequently been repaired or altered, except by TCT;*

(d) *Where the Engine is to be stored for any period prior to installation, acceptance by TCT of any warranty claim, is conditional upon the Part being stored in accordance with the manufacturer's recommended storage procedures and conditions laid down in the maintenance instructions prepared by the manufacturer; and,*

(e) *Any warranty claim made shall be made in writing and delivered to TCT within thirty (30) days after the defect or failure is discovered.*

(f) *Warranty claims shall only be considered by TCT in respect to defects that become apparent and are notified by the CUSTOMER in writing to TCT before the expiry of the following:*
Repair and Overhaul Services:
Calendar Time: 12 months from completion of Services
Running Time: 8,000 hours
Whichever of the above limitations occurs first.
Supply of Parts:
Calendar Time: 12 months from delivery

14.6 *It is expressly agreed that there are no warranties, whether express, implied, statutory or otherwise, as to merchantability, fitness for particular purpose or for any other matter relating to the Services performed hereunder, except those warranties set out above.*
In no event shall TCT be responsible for any incidental or consequential damages incurred by the CUSTOMER in respect of any defect or failure covered by the warranty set out above. The within warranty is made in lieu of all other warranties and may not be altered or amended.

14.7 *TCT will provide CUSTOMER with 24 hours per day / 7 days per week technical telephone support related to the equipment listed in this Agreement. Should such*

technical support prove insufficient to resolve any issue at the CUSTOMER's site, TCT will endeavour to provide a field service technician to site within 3 working days.

14.8 Site of Rectification: All work carried out by TCT under this Warranty shall be performed at TCT's Premises, unless otherwise agreed...."

174. Article 15 was headed *"INDEMNIFICATION"*, and provided as follows:

15.1 TCT shall be liable for, and shall defend, indemnify and hold the CUSTOMER harmless from and against each and every claim arising from:

(a) Loss of or damage to the property of TCT, or of any officer, employee, servant or agent of TCT, or of any person or company (other than the CUSTOMER) who is a party to a contract with TCT;
(b) Death or illness of or injury to any officer, employee, servant or agent of TCT or any officer, employee, servant or agent of any person or company (other than the CUSTOMER) who is a party to a contract with TCT;
(c) Loss of or damage to the property of the CUSTOMER where such property is in the exclusive custody and control of TCT, such custody ceasing once the property is defined by TCT as delivered DAT, Baghdad Airport;

and arising out of or relating directly or indirectly to performance of the Services and whether or not resulting from any wilful act or omission, or negligence in any form, of the CUSTOMER, any person or company party to a contract with the CUSTOMER or their respective officers, employees, servants or agents.

15.2 CUSTOMER shall be liable for, and shall defend, indemnify and hold TCT harmless from and against each and every claim arising from:

(a) Loss of or damage to the property of CUSTOMER, unless such property is in the exclusive custody and control of TCT, such exclusive custody ceasing once the property is defined by TCT as delivered DAT, Baghdad Airport;
(b) Loss of or damage to the property of any officer, employee, servant or agent of the CUSTOMER or of any person or company (other than TCT) who is a party to a contract with the CUSTOMER or of any officer, employee, servant or agent of any person or company (other than TCT) who is a party to a contract with the CUSTOMER;
(c) Death or illness of or injury of any officer, employee, servant or agent of the CUSTOMER or any officer, employee, servant or agent of any person or company (other than TCT) who is a party to a contract with the CUSTOMER;

and arising out of or relating directly or indirectly to performance of the Services and whether or not resulting from any wilful act or omission, or negligence in any form, of TCT, any person or company party to a contract with TCT or their respective officers, employees, servants or agents.

15.3 Notwithstanding Clause 15.2, TCT shall be liable for and shall defend, indemnify and hold the CUSTOMER harmless from and against each and every claim which arises out of one or both of the following (i) loss of or damage to the property of any third party, (ii) death or illness of or injury to any third party, where such loss, damage, death, illness or injury is solely and directly caused by the negligence of TCT in the performance of the Services. In the event that any such damage or injury is caused by the joint or concurrent negligence of TCT and CUSTOMER, the loss, expense or claim shall be borne by TCT and CUSTOMER in proportion to their degree of negligence.

15.4 Regardless of cause, for the avoidance of doubt, it is the intent of clauses 15.1 and 15.2 that each Party to this Agreement shall bear its own losses."

175. Article 18 was headed *"LIMITATION OF LIABILITY"* and provided, materially, that TCT's *"total liability under any of the express or implied terms of this Agreement, in respect of all claims of any kind"* was limited to US$2.5 million.

176. Article 23, headed *"ENTIRE AGREEMENT"*, provided:

"This Agreement constitutes the entire agreement between the parties and supersedes all prior communications, understandings and agreements relating to the subject matter hereof, whether oral or written and there are no further terms, conditions, warranties or representations., written or oral other than those contained herein."

177. Article 25 set out a number of miscellaneous provisions, including a no-waiver clause (Article 25.6) and Article 25.5, which provided:

"No provisions of this Agreement shall be changed or modified in any way (including this provision) either in whole or in part except in written form made after the date of this Agreement and signed on behalf of both parties and which is expressly stated to amend this Agreement."

178. The details of the work to be carried out by TCT, and the detail of the parties' responsibilities, did not appear in the body of the MSA. Instead, they were set out in a series of Appendices.

179. Appendix A identified the work to be done in respect of the Al-Mussaib Engines. Those engines were there identified by serial number as Engines 191-348, 191-381, 191-391, 191-469, 191-382, 191-468, 191-464, and 191-415. Although Appendix A was stated to be a "proposal", it was evidently treated by the parties as the agreed work to be carried out (in other words, the proposal had been accepted by the MOE). It set out in detail the work to be done by TCT on these Engines, and what that would cost per Engine.

180. Appendix B was in a similar form. It identified, in detail, the work that TCT would carry out on the Al-Mussaib Packages, with costings, and explained why the work was necessary (*"... the packages mated to their LM6000 PC engines are missing a large quantity of parts and are in need of heavy rehabilitation"*).

181. Appendix C set out the workscope for the three Al-Qudas Engines, identified by serial numbers 191-488, 185-123 and 191-283.

182. There was no Appendix D. Appendix E is important and is heavily relied on by both parties in this Arbitration. It was headed, *"Project Execution Summary and Responsibilities"*. The relevant provisions were the following:

> "2. *...b. Ministry to provide access to their site, 24 hours per day, 7 days per week for the duration of the Agreement...*
>
> 3. *It has been estimated that each engine will require two days to remove from the package and prepare for transportation. Once all engines are packaged for transport the Ministry will be responsible to ensure that appropriate security and insurance is in place for their transportation to Baghdad Airport in the time frame required.*
>
> *b. Ministry to provide site assistance and support including but not limited to, material handling personnel and equipment, and general labour services.*
>
> 4. *Once the engines have been removed the field crew will begin work on the individual packages. For the purposes of completing the package work scope as defined in Appendix "B", Ministry to provide sufficient fuel of a quality specified by the OEM and electrical power to operate the MCCs and starter motors within the packages.*

a. *Ministry to transport package rehabilitation parts to CUSTOMER site from Baghdad Airport and obtain custom, clearance within 3 days of TCT making parts available at Baghdad Airport.*

b. *Ministry to provide site assistance and support including but not limited to material handling personnel and equipment, and general labour services.*

5. *Upon arrival in Calgary the engines will be inducted on a priority basis in order to return to the customer as soon as possible so that the customer may increase their production of power. It may be that the earliest completion of packages is beyond the re-arrival date of the engines in Iraq. With this in mind the packages will also be worked on in an order to accommodate the schedule of the engines so as to bring as much power back on line as soon as possible…*

6. d. *Ministry to be responsible for the supply of the crane to lift the engines off of the air ride trailer and the A frame to install the engine into the package.*

7. *TCT will have the field technicians re-install, align, and commission the engines as they become available for Installation and/or the packages become available to receive engines.*

8. *Assurances from the Ministry that they will assist in expediting visas as required in a 3 day period.*

9. *Any delays attributable to CUSTOMER failing to provide the above will result in the duration of the Agreement being extended accordingly. Should these delays extend beyond an aggregate of 20 days, TCT reserves the right to terminate the agreement in accordance with article 12.3 of the Master Services Agreement…*

13. *Package Cables – Under the supervision of TCT, the Ministry will provide adequate labour/Engineer assistance to label, un-terminate, separate and re-locate high voltage cables from low-voltage cables as required and instructed by TCT staff…*

17. *Ministry will supply general labour to clean the package and equipment, assist in installing filter housings and filters etc. This labour will be under the direction of TCT site staff…"*

D2. <u>The discussions around the time of the conclusion of the MSA</u>

183. Although the MSA is a formal written contract it was, like most contracts of this kind, the product of discussions and negotiations. In this case, and as set out

above, the MSA expressly referenced the existence of those negotiations and exchanges of correspondence. Although the MOE disputes that these prior negotiations have any relevance to the construction of the MSA, TCT disagrees. It is right to note – as the MOE does – that the MSA included an entire agreement clause; however, this seems to me to be "trumped" by the express reference to the negotiations in the MSA in Ministry Condition (d). The pre-contractual background is therefore potentially relevant, although it does seem to me that TCT has, in the end, relied principally on the express terms of the MSA and not on anything that went before.

184. Evidence as to how the MSA came to be concluded and as to those negotiations was given by Mr Simonelli in his first witness statement. Mr Simonelli was personally involved in all negotiations and was therefore well placed to give that evidence. He states that preliminary discussions between TCT and the MOE began in the autumn of 2010, following the latter's request for a meeting to discuss its maintenance requirements.

185. Mr Simonelli stated, and I accept, that the work encompassed by the MSA was treated by both parties as an urgent project. The MOE simply could not satisfy the demand of Iraq's citizens for electric power. The electricity supply in Iraq was subject to power interruptions; these had led to demonstrations. Accordingly, the MOE was anxious to *"get power onto the grid"*, as Mr Simonelli put it, as soon as possible. Mr Simonelli has stated, and I have no reason to doubt, that TCT agreed to carry out the work specified in the MSA in an unusually short timeframe.

186. Mr Simonelli states that there was an ongoing meeting between 27 February and 3 March 2011. The minutes of that meeting in fact state that it finished on 2 March 2011, which is – perhaps – consistent with the execution of the MSA taking place at or near the end of that meeting. Those minutes state that the *"Intention of meetings [was] to clarify and finalize conditions of contract between the 2 companies"*. It does not seem to me, however, that the minutes of that particular meeting record anything that bears particularly on the parties' obligations under the MSA.

187. I do, however, find and hold that the negotiations evidence an intention on the part of both parties to get the project contemplated by the MSA completed as

soon as possible and to treat it as urgent, and the terms of the MSA must, as I find, be read with that in mind.

D3. The provision by TCT of the Performance Bond

188. As is apparent from the provisions set out above, the MSA required TCT to post a performance bond ("the Performance Bond"), to a value of 5% of the total price payable by the MOE under the MSA, or US$3,044,300.

189. In his first witness statement, Mr Simonelli sets out the process by which the Performance Bond was put in place by TCT. He makes clear that this part of his evidence is not first-hand evidence; it is based on what he was told by Ms Beverley Stewart, then TCT's Chief Financial Officer, and his review of the documents. However, there appears to be no controversy in relation to this part of his account.

190. It seems that putting in place an instrument which could be drawn down on in Iraq was not straightforward. In order for TCT to fulfil its obligations with regard to the Performance Bond, the following transactions/instruments were entered into:

(a) On 22 March 2011, TCT concluded an agreement with HSBC Bank Canada ("HSBC"), whereby HSBC agreed to issue a letter of guarantee in favour of Dar Es Salaam Investment Bank ("DESIB") and TCT agreed to indemnify HSBC in respect of that letter of guarantee. DESIB was HSBC's counter-bank in Iraq.

(b) On the same date, HSBC issued a standby Letter of Credit ("the Standby LC") to DESIB in the amount of the Performance Bond. It was issued in exchange for DESIB issuing a letter of guarantee to the MOE, and was payable at sight on receipt of a SWIFT demand stating that there had been a demand for payment under DESIB's letter of guarantee. It expired on 30 October 2012, but was subject to extension on request, and contained an "extend or pay" provision whereby, if HSBC refused to extend it, it would pay the outstanding amount. Mr Simonelli's evidence is that the "extend or pay" provision was a local Iraqi requirement.

(c) On 31 March 2011, DESIB issued a letter of guarantee in the amount of the Performance Bond in favour of Trade Bank of Iraq ("TBI"), the MOE's bankers ("the DESIB Guarantee"). The DESIB Guarantee was payable at sight on receipt of a signed statement from the MOE that the amounts claimed under the Performance Bond were due to it from TCT because TCT had failed to perform its obligations under the MSA. It was valid until 30 September 2012, but it appears to have been possible to extend it in the event of an extension of the Standby LC.

(d) On 3 April 2011, TBI issued a Letter of Guarantee ("the TBI Guarantee") in favour of the MOE. Payment under the TBI Guarantee was triggered *"on demand, being your claim for damages brought about [by TCT] resulting from breach of his commitments"*. The TBI Guarantee expired on 30 September 2012 but was automatically extended if the DESIB Guarantee was extended.

191. As appears from the above account, the instruments comprising the Performance Bond were not fully back-to-back. It seems that TCT was aware of this, and considered it to be a far from ideal position, but that there was a concern that the MSA would fall through altogether if the Performance Bond was not in place, and so it agreed to the terms of the instruments as they were in fact concluded.

192. By a letter from Mr Simonelli and Ms Stewart to HSBC dated 11 April 2011, TCT agreed to bear all charges incurred on the issuance of the Performance Bond, including those claimed by DESIB and TBI.

193. The Performance Bond remains in place. This is because DESIB has on several occasions requested an extension of the Standby LC, and extensions of the Guarantees have followed. As Mr Simonelli explained in his witness statement, HSBC's relationship with DESIB is governed by the terms of the Standby LC and is not influenced by the underlying disputes between the MOE and TCT. As a result, HSBC has no choice but to extend the Standby LC when asked, unless TCT authorises payment under it or the MOE returns the original. The other instruments comprising the Performance Bond also remain in place.

194. It appears to me that the demands to extend the Performance Bond originate with the MOE, which has given instructions to TCT and/or DESIB, with which instructions those entities have complied. I also find and hold that the MOE has

made attempts to draw down on the Performance Bond, most recently on 4 January 2019. I note the MOE's position that it had nothing to do with these attempts, but I do not accept this: the MOE, although it said that it would investigate the position, has provided no credible explanation to the contrary. The obvious inference is that the MOE has indeed sought to draw down on the Performance Bond, by reference to the judgment which it has obtained in the Iraqi courts and which I describe further below.

D4. <u>The Letter of Credit</u>

195. As also set out above, under the MSA, the MOE was obliged to put in place a letter of credit that complied with the express provisions set out in the MSA and in the full amount payable under the MSA ("the Letter of Credit"). Although the MSA did not set out a specific date by which the Letter of Credit was to be put in place, it is clear to me that the parties intended that this be done promptly – not least because the Commencement Date of the MSA was the date when the Letter of Credit was put in place. As I have already stated, the MOE wanted TCT to carry out its work fast; TCT was not obliged to do so until the Letter of Credit was in place (although, as appears below, it did in fact start work); and it must therefore have been intended that the MOE put the Letter of Credit up more or less immediately. I therefore find and hold that the MOE was obliged to put the Letter of Credit in place immediately, or at least within a reasonable time of the conclusion of the MSA – which would have been a matter of days or, at the most, weeks, not months.

196. In fact, the putting up of the Letter of Credit was a slow process. Mr Simonelli has stated – and this is not in dispute – that a first version of the Letter of Credit was supplied only on 19 May 2011.

197. Although I have not been supplied with all the intermediate exchanges (though I have seen various amendments to the Letter of Credit) it is evident that the Letter of Credit as originally supplied did not accord with the terms of the MSA. Indeed, it was not even in the full amount due, but only in the sum of US$45 million. It is evident that TCT (not surprisingly) complained about this, because in a letter dated 19 November 2011, Mr Hasan of the MOE wrote to Ms Stewart of TCT as follows:

"Ref. to your letter... concerning the confirmation of 45$ instead of 60$ [sic], *this is the policy of TBI but it is clear from the L\C that your bank can withdraw according to the complained document, and the remaining payments will release through TBI according to our instruction, any how it is not a big issue. The most important to accelerate completion of rehabilitation of [the Engines]..."*

198. A confirmed Letter of Credit in the full amount required by the MSA was not in place until 23 January 2012.

199. The issuing bank under the Letter of Credit was TBI. HSBC acted as the advising bank but did not confirm the Letter of Credit.

200. TBI charged fees to TCT in relation to the opening of the Letter of Credit, in a total sum of US$310,573.37. It is TCT's case that these charges should, under the MSA, have been for the MOE's account, and they form part of TCT's claim in this Arbitration.

201. The Letter of Credit expired in December 2013 and has not been replaced by the MOE.

D5. <u>The carrying out of work by TCT pursuant to the MSA</u>

202. As Mr Simonelli explained in his first witness statement, TCT did not use its own personnel to carry out the fieldwork in Iraq, *"due to the dangers involved in travel and the need for those performing the work to be able to communicate effectively with personnel at the MOE plants"*. Instead, the technicians carrying out the on-side work were employed by a sub-contractor, Pro-Per Energy Services, a Turkish company ("Pro-Per"). TCT also retained three independent contractors on the ground in Iraq, and security services, Reed Inc. Sub-contracting and the use of independent contractors were permitted under the MSA and the MOE has not suggested otherwise. Accordingly, when I refer to "TCT's personnel" or use similar expressions in the remainder of this Award, that expression encompasses Pro-Per employees and independent contractors engaged by TCT.

203. The MOE submits, however, that TCT's witnesses are unable to give evidence in relation to conditions, and issues that arose, in Iraq because they were not directly involved. I do not accept that submission. Both Mr Simonelli and Mr Archer state that they were kept informed of developments in detail. Common

sense suggests that that is likely to have been the case; it is also borne out by the contemporaneous correspondence in which complaints were made by TCT about conditions in Iraq.

204. Notwithstanding the fact that the Letter of Credit was not in place, TCT commenced work. I do not know precisely when TCT's personnel arrived in Iraq. Mr Simonelli's evidence, which I accept, was that upon entering the Al-Mussaib site and inspecting the Engines and the Packages, TCT's personnel found that *"the engines and packages... were in deplorable condition and the power supply within the packages was dangerously overloaded"*.

205. It is evident from a letter sent by Mr Simonelli to the MOE dated 18 March 2011 that by that date TCT's personnel had attended both at Al-Mussaib and at Al-Qudas.

206. By that letter, Mr Simonelli identified various issues that were affecting the carrying-on of work in Iraq by TCT's personnel. They included the following:

(a) MOE employees were refusing TCT's personnel access to the sites and to the Engines. At Al-Mussaib, they were refusing access to the site manuals, without which TCT could not perform the package repairs.

(b) There was a particular issue with visas. Mr Simonelli said:

"We require assistance and support of the MOE with Visas for our people. Specifically if possible we would like the support of the MOE in relation to multiple entry 6 month visas. Currently all our people can get from Iraqi customs are 10 day visas. As a result, all of TCT's personnel will be required to leave the country in 8 days. We absolutely require that our people are able to work in country for periods longer than 10 days."

207. The MOE responded on 22 March 2011. It provided some explanations in relation to the difficulties regarding site access. As to visas, it said that *"The issue of entry and residence visas in Iraq has received our due attention from the very beginning"*. It pointed out that it had asked some days before for soft copies of the passports of TCT personnel; it requested that all details of employees be provided prior to those employees' arrival in Iraq *"so that necessary preparations could be made to make visa available"*.

D6. Further meetings in 2011

208. It is fair to say that as the project progressed, difficulties continued. TCT was unhappy with the visa arrangements; it was unhappy with the adequacy of the labour provided by the MOE at the site; and it was concerned, in particular, about the state of the Packages at Al-Qudas. There were also delays in payment by the MOE of the invoices rendered to it by TCT.

209. For its part, and as further set out below, the MOE was not happy with the work done by TCT on some of the Engines and considered that it had a valid warranty claim in relation to at least three of the Engines.

210. I do not set out each and every exchange between the parties in this Section of this Award but I highlight below some of the specific events and exchanges relevant to the claims advanced by TCT.

211. Some of the issues between the parties were discussed at meetings which took place between them, as follows.

212. A meeting took place between representatives of TCT and the MOE on 29 May 2011 at which various issues were discussed. In particular, a list of issues produced by TCT for that meeting records difficulties with visas and check point passes, a lack of assistance provided by the MOE staff on site and concerns expressed by TCT as to the state of the Packages at Al-Qudas. TCT summarised the discussions at that meeting in a letter to the MOE dated 6 June 2011.

213. There was a further meeting between representatives of TCT and the MOE in Amman, Jordan on 8 July 2011. There are agreed minutes of this meeting, which set out various agreed actions on the part of the MOE and TCT. They include the following:

    (a) One of the MOE representatives was to *"work with appropriate authorities, are consulted to ensure TCT personnel are immediately issued 3 month visas as required"*. TCT was *"to advise MOE of travel schedules of TCT Representatives"* and the MOE was *"to expedite visas and assist with entry into country"*.

(b) TCT was to keep the MOE apprised of issues as regards the performance of the local labour force.

(c) TCT raised an issue over parts being delayed entering Iraq; this was said to be causing loss and delay. The MOE agreed *"to follow up directly with authorities to arrange clearances on an expedited basis"*.

214. There was also a meeting between representatives of the parties at Amman, Jordan on 21 October 2011. Again, there was an agreed set of minutes with action points; these included the following:

(a) As regards visas, Mr Raad of the MOE *"advised that his ofc had the ability to sort these challenges and that if TCT provided him with info regarding employees he would ensure the visas were sorted within 1 day"*. TCT was *"to provide Mr. Raad with a list of names and Mr. Raad will ensure appropriate visas were issued"*.

(b) There was a discussion regarding delays by the MOE in carrying out cabling works. The MOE stated that *"all units will be done in 3 weeks"*.

(c) The issues regarding the state of the Packages at Al-Qudas were discussed, and TCT raised the fact that the Packages were not ready when they arrived on site in October 2011. The minutes record that *"Mr. Wafi committed to better communication regarding Qudas issues"*.

215. It will be noted that, even as work was being carried out and these discussions were taking place, the Letter of Credit was not in place. This too was a matter raised at the meetings detailed above.

D7. <u>What happened to the Engines and the Packages</u>

216. It is appropriate at this stage to summarise what happened to each of the Engines, and to the Package work.

217. Mr Archer and Mr Caldwell gave evidence as to what happened to each of the Engines that was the subject of the MSA – eight from Al-Mussaib and three from Al-Qudas. Each of the Engines was shipped from Iraq to TCT's facility in Airdrie, Alberta, for repair and overhaul. Details of the deficiencies found in the

Engines were described by Mr Archer and Mr Caldwell in their witness statements. They also exhibited, and I have been provided with, final reports issued by TCT in relation to each Engine. I do not set out here the detail of the damage which TCT found to have been sustained to the different Engines: it suffices to say that all were dirty, and most had suffered serious blade damage and other damage.

218. Whilst the work on the Engines was ongoing in Alberta, TCT's personnel were engaged in work on the Packages at Al-Mussaib. As already noted, the MSA did not contemplate work on the Packages at Al-Qudas.

219. Engine 191-348 from Al-Mussaib arrived at TCT's facility in Airdrie, Alberta on 30 April 2011. It was cleaned, repaired and overhauled, and successfully performance tested on 15 June 2011, in accordance with the criteria set out in the MSA. The final report setting out the detail of the work done was issued on 20 July 2011. The Engine was re-installed in Unit 3 at Al-Mussaib. It successfully completed its 72-hour performance test on 13 April 2012; TCT issued a Certificate of Completion for Unit 3, as contemplated by Article 4.2 of the MSA, and this was signed by representatives of the MOE. There were three warranty punch-list items. The parties agreed that the warranty period for Unit 3 was to start on 15 April 2012.

220. Engine 191-381 from Al-Mussaib was inducted at the facility in Alberta on 20 July 2011. It was cleaned, repaired and overhauled, and successfully performance tested on 13 December 2011, in accordance with the criteria set out in the MSA. The final report setting out the detail of the work done was issued on 23 January 2012 (though it bears the date 23 January 2011). The Engine was re-installed in Unit 4 at Al-Mussaib. It successfully completed its 72-hour performance test on 7 May 2012; TCT issued a Certificate of Completion for Unit 4, as contemplated by Article 4.2 of the MSA, and this was signed by representatives of the MOE. There were six warranty punch-list items. The parties agreed that the warranty period for Unit 4 was to start on 7 May 2012.

221. Engine 191-382 from Al-Mussaib arrived at the facility in Alberta on 16 June 2011, but was not inducted until 29 September 2011. It was cleaned, repaired and overhauled, and successfully performance tested on 18 January 2012, in accordance with the criteria set out in the MSA. The final report setting out the

detail of the work done was issued on 8 March 2012. The Engine was installed in Unit 2 at Al-Mussaib and successfully commissioned in May 2013, as acknowledged by the MOE. No further performance test was required, since the package work on Unit 2 had already been attested in December 2011.

222. It will be seen that this timescale was much longer than for most of the Engines. This is the subject of dispute, as I explain further in Section E5 below.

223. Engine 191-391 from Al-Mussaib was inducted at the facility in Alberta on 16 September 2011. It was cleaned, repaired and overhauled, and successfully performance tested on 9 January 2012, in accordance with the criteria set out in the MSA. The final report setting out the detail of the work done was issued on 5 March 2012. The Engine was re-installed in Unit 5 at Al-Mussaib. It successfully completed its 72-hour performance test on 17 July 2012; TCT issued a Certificate of Completion for Unit 7, as contemplated by Article 4.2 of the MSA, and this was signed by representatives of the MOE. The parties agreed that the warranty period for Unit 6 was to start on 19 July 2012.

224. This Engine was the subject of a warranty claim by the MOE. The MOE submitted a warranty consideration form on 5 September 2012, alleging dents in some of the blades and issues with vibration. TCT's position was and is that damage of this kind was likely to have been caused by a foreign object, rather than by any matter within the scope of the warranty.

225. In June 2013, at a meeting between representatives of TCT and the MOE to which I refer further below, TCT agreed to carry out repairs to Engine 191-391, notwithstanding its position that it was not obliged to do so.

226. A claim in relation to this Engine formed part of the MOE's counterclaim in this Arbitration which was struck out as has been described above.

227. Engine 191-415 from Al-Mussaib was inducted at the facility in Alberta on 25 May 2011. It was cleaned, repaired and overhauled, and successfully performance tested at the facility on 21 June 2011, in accordance with the criteria set out in the MSA. The final report setting out the detail of the work done was issued on 16 August 2011. The Engine was re-installed in Unit 2 at Al-Mussaib. It successfully completed its 72-hour performance test on 4 December 2011; TCT

issued a Certificate of Completion for Unit 2, as contemplated by Article 4.2 of the MSA, and this was signed by representatives of the MOE. The parties agreed that the warranty period for Unit 2 was to start on 4 December 2011.

228. This Engine was the subject of a series of warranty claims by the MOE made between 17 December 2011 and 30 May 2012. Following a borescope inspection by the MOE which showed that the Engine was no longer in serviceable condition, the Engine was returned by the MOE to TCT for a failure investigation. It was disassembled and inspected. On 11 July 2014, Mr Caldwell wrote to the MOE outlining the results of the investigation: TCT had concluded that the damage to the Engine was caused by improper operation, and was thus outside the scope of the warranty.

229. As I describe further below, Engine 191-415 was also the subject of extensive discussions between the parties during meetings in 2013, 2014 and 2015.

230. This Engine remains at TCT's premises in Alberta. TCT says that it is exercising a lien over it in relation to the sums unpaid by the MOE.

231. A claim in relation to this Engine formed part of the MOE's counterclaim in this Arbitration which was struck out as has been described above. However, the MOE continues to maintain that TCT must either return this Engine or give credit for its value, as I discuss further below.

232. Engine 191-464 from Al-Mussaib was inducted at the facility in Alberta on 26 August 2011. It was cleaned, repaired and overhauled, and successfully performance tested on 7 December 2011, in accordance with the criteria set out in the MSA. The final report setting out the detail of the work done was issued on 16 December 2011. The Engine was re-installed in Unit 1 at Al-Mussaib. It successfully completed its 72-hour performance test on 31 March 2012; TCT issued a Certificate of Completion for Unit 1, as contemplated by Article 4.2 of the MSA, and this was signed by representatives of the MOE. There were six warranty punch-list items. The parties agreed that the warranty period for Unit 1 was to start on 3 April 2012.

233. Engine 191-468 from Al-Mussaib was inducted at TCT's facility in Airdrie, Alberta on 4 May 2011. It was cleaned, repaired and overhauled, and

successfully performance tested on 18 June 2011, in accordance with the criteria set out in the MSA. The final report setting out the detail of the work done was issued on 16 August 2011. The Engine was re-installed in Unit 8 at Al-Mussaib. It successfully completed its 72-hour performance test on 17 March 2012; TCT issued a Certificate of Completion for Unit 8, as contemplated by Article 4.2 of the MSA, and this was signed by representatives of the MOE. There were two warranty punch-list items. The parties agreed that the warranty period for Unit 8 was to start on 19 March 2012.

234. Engine 191-469 from Al-Mussaib was inducted at the facility in Alberta on 20 July 2011. It was cleaned, repaired and overhauled, and successfully performance tested on 24 September 2011, in accordance with the criteria set out in the MSA. The final report setting out the detail of the work done was issued on 27 October 2011. The Engine was re-installed in Unit 6 at Al-Mussaib. It successfully completed its 72-hour performance test on 17 March 2012; TCT issued a Certificate of Completion for Unit 6, as contemplated by Article 4.2 of the MSA, and this was signed by representatives of the MOE. There was one warranty punch-list item. The parties agreed that the warranty period for Unit 6 was to start on 19 March 2012.

235. TCT did not agree to overhaul the Engine in Unit 7 at Al-Mussaib: the only work to be done was on the Package. The unit successfully completed its 72-hour performance test on 30 December 2011; TCT issued a Certificate of Completion for Unit 7, as contemplated by Article 4.2 of the MSA, and this was signed by representatives of the MOE. The parties agreed that the warranty period for Unit 7 was to start on 30 December 2011.

236. Engine 185-123, one of the Al-Qudas engines, arrived at TCT's facility in Alberta on 30 April 2011. It was cleaned, repaired and overhauled, and successfully performance tested on 14 July 2011, in accordance with the criteria set out in the MSA. The final report setting out the detail of the work done was issued on 16 August 2011. The Engine was installed and commissioned in Package 8 at Al-Qudas on 4 January 2012, and successfully reached full load, as acknowledged in writing by the MOE. The parties agreed that the warranty period for the Engine was to start on 4 January 2012.

237. The MOE did make complaints about TCT's work done on Engine 185-123, and requested parts which TCT supplied. However, no counterclaim was advanced in relation to this Engine.

238. Engine 191-283 from Al-Qudas was inducted at the facility on 11 July 2011. It was cleaned, repaired and overhauled, and successfully performance tested on 22 October 2011, in accordance with the criteria set out in the MSA. The final report setting out the detail of the work done was issued on 2 December 2011. The Engine was installed and commissioned in Package 5 at Al-Qudas on 5 July 2012, and successfully reached full load, as acknowledged in writing by the MOE. The parties agreed that the warranty period for the Engine was to start on 5 July 2012.

239. This Engine was the subject of a warranty claim by the MOE. The MOE submitted warranty consideration forms on 11 July and 5 November 2012, alleging stoppages and issues with the VSV system.

240. TCT asked the MOE, if it wished to pursue a warranty claim, to remove the VSV actuator and provide it to TCT for inspection. It made that request by, in particular, a letter dated 5 April 2013, though it appears that this request repeated requests previously made. The MOE never did so. However, TCT did provide the MOE with replacement parts for the Engine, to a total value of US$78,125.00.

241. A claim in relation to this Engine formed part of the MOE's counterclaim in this Arbitration which was struck out as has been described above.

242. Engine 191-488 from Al-Qudas was inducted at the facility on 11 July 2011. It was cleaned, repaired and overhauled, and successfully performance tested on 1 October 2011, in accordance with the criteria set out in the MSA. The final report setting out the detail of the work done was issued on 15 November 2011. The Engine was installed and commissioned in Package 6 at Al-Qudas on 5 July 2012, and successfully reached full load, as acknowledged in writing by the MOE. The parties agreed that the warranty period for the Engine was to start on 5 July 2012.

243. The reinstallation of the Engines at Al-Qudas was delayed because of the state of the Packages at Al-Qudas. TCT says that it was unable to reinstall the Engines until the MOE took the necessary steps to get the Packages in working order, that being a matter for the MOE and not for TCT under the MSA. The MOE says that TCT was not in fact obliged to reinstall the Engines. These matters give rise to one set of claims advanced by TCT in this Arbitration, as I describe in greater detail below.

D8. <u>The meeting in June 2013</u>

244. By June 2013, all but one of the Engines – Engine 191-415 – had been returned to Iraq. But there were disputes between the parties. There were substantial sums invoiced by TCT which had not been paid by the MOE. TCT was also becoming concerned about containers, tools and parts which were its property and which remained at the MOE's sites – I refer to these as "the Tools and Parts" (as I note below, the issue with regard to the containers was in fact resolved). The MOE, meanwhile, wanted TCT to provide it with further parts and carry out further work; it contended that TCT was obliged to carry out at least part of this work under warranty. It also wanted Engine 191-415.

245. On 5 and 6 June 2013, a meeting took place between representatives of TCT and representatives of the MOE in Istanbul. Mr Simonelli was present at the meeting and so was able to give evidence about it. In addition, TCT drew up minutes of the meeting, which were agreed and signed by both parties ("the June 2013 Minutes").

246. There is an issue between the parties as to whether the June 2013 Minutes constituted a binding variation to the MSA. The MOE says that they did not; but at the same time it puts them up as a defence to certain of TCT's claims. I deal with this issue in more detail below.

247. The June 2013 Minutes set out the following matters as agreed between the parties:

(a) The MOE was to make a payment of US$996,950, described as "the First Payment", to TCT as soon as possible and by no later than 14 June 2013. The First Payment related to nine invoices. Those invoices were for

Holdback Payments – for six of the packages, and for three Engines including, materially for present purposes, Engine 191-391.

(b) The MOE was immediately to issue all documentation necessary for, and to provide site assistance in relation to, the return to TCT of the containers and the Tools and Parts remaining on site (referred to in the minutes as "the Can Shipment" and "the Tool Shipment").

(c) TCT was to provide the MOE with passport information for its personnel who were to attend at Al-Mussaib, and a letter setting out the need for a 30 day visa, at which point the MOE was to arrange a 30-day visa for TCT's personnel in support of what was described as "the 391 Mobilization".

(d) The 391 Mobilization was defined as the repair of minor compressor damage on Engine 191-391. TCT was to commence it on receipt of the following: (i) a letter from TBI instructing Commerzbank to make the First Payment; (ii) the 30 day visa for TCT's personnel; (iii) the documents for the Can Shipment and the Tool Shipment.

(e) Also on receipt of those documents, TCT was to provide a possible delivery date for Engine 191-415, and was to commence the failure investigation into that engine as soon as possible. The minutes record that the MOE acknowledged that any potential quoted delivery dates were subject to the receipt of a container for the Engine from the MOE.

(f) Whilst in Iraq for the 391 Mobilization, TCT was to provide the MOE with further parts and services as set out in the minutes. Those parts principally related to Engine 191-293 at Al-Qudas.

(g) TCT was to provide the MOE with a list of recommendations relating to spare parts for Al-Mussaib, and a letter outlining training options for the MOE's personnel.

(h) On receipt of a notice from TCT that the 391 Mobilization work was complete, the MOE was to make a further payment ("the Second Payment") of US$584,750 to TCT. The Second Payment was to comprise the second

staged payment for Engine 191-382 and the Holdback Payments for two other engines.

D9. Events following the meeting in June 2013

248. Following the meeting, the MOE did make the First Payment as defined in the June 2013 Minutes. However, it deducted the sum of US$218,250.00, the Holdback Payment for Engine 191-391. It advised by a letter dated 10 June 2013 that it was doing so *"due to the fact that the warranty period has not expired yet"*. This is undoubtedly correct – the warranty period expired on 17 July 2013 – but it is nonetheless the case that the MOE had agreed to make that payment, as part of the First Payment, by 14 June 2013.

249. The MOE made the Second Payment in full.

250. There was a dispute between the parties, however, as to whether the MOE had complied with the other requirements of the June 2013 Minutes. In particular, it was (and is) TCT's case that the MOE had not provided it with all necessary documents for the return of the Tools and Parts. The documents provided were for air freight rather than sea freight and export permits were missing.

251. It was thus TCT's position that it was not obliged to carry out the 391 Mobilization, because the preconditions to its doing so had not been fulfilled.

252. It appears to me that TCT was right about this. By a letter dated 23 September 2013, the MOE on the one hand insisted that it had complied with its obligations, but at the same time stated that the issues with regard to the export of the Tools and Parts would *"be resolved soon"*. That seems to me to be an admission that those issues had not in fact been resolved.

253. Mr Simonelli's evidence was that, even though the MOE had not complied with its obligations under the June 2013 Minutes, *"in an attempt to progress towards a final resolution"* he authorised TCT's personnel to return to Al-Mussaib in mid-September 2013 to undertake the 391 Mobilization work.

254. However, on arrival at Al-Mussaib, TCT's personnel discovered that their living accommodation had been vandalised, and that Unit 5, in which Engine 191-391

was installed, had been significantly disassembled and parts taken from it. It was thus impossible for Engine 191-391 to be commissioned. That was both Mr Archer's and Mr Simonelli's evidence, which I have no reason to doubt; and it is borne out by a letter which Mr Simonelli sent to the MOE on 23 September 2013, which attached photographs. Mr Simonelli advised in that letter that TCT's personnel would carry out the minor repairs to Engine 191-391, but that they could not restart the unit in view of its condition. That is indeed what happened.

D10. The meeting in June 2014

255. During the first half of 2014, correspondence continued between TCT and the MOE. That correspondence related to the MOE's assertions that it had valid warranty claims in relation to Engines 191-391 and 191-415 at Al-Mussaib, and Engines 185-123 and 191-283 at Al-Qudas, and to TCT's continuing attempts to recover the Tools and Parts.

256. A further meeting took place between the parties in Istanbul on 18 and 19 June 2014. As the minutes of that meeting record, the subject of discussion was the MOE's warranty claims relating to Engines 191-391, 191-415 and 191-283. The MOE asserted that it had valid warranty claims; TCT disagreed. TCT did, however, promise to offer the MOE solutions to the issues that it was experiencing with those Engines.

257. By a letter dated 11 July 2014, TCT suggested work that could be done on Engine 191-415 and the cost that that would entail. It indicated that it was not prepared to make any further offer in relation to the other two disputed Engines. It also noted that the MOE had not made payment of outstanding sums and that it was still in possession of TCT's tools and parts. It made a without prejudice proposal for the resolution of the issues between the parties.

258. The MOE responded on 13 August 2014, putting forward a counter-proposal and indicating that it was prepared to enter into a discussion with TCT.

D11. The meeting in January 2015

259. The upshot of that exchange was that a final meeting did indeed take place between the parties, in Istanbul on 28 January 2015. Once again, the parties drew up minutes ("the January 2015 Minutes").

260. The January 2015 Minutes record that an agreement was reached on the following terms:

(a) The MOE was to arrange the export documentation for TCT's three containers that remained in Iraq (this did in fact occur).

(b) TCT denied that the MOE had valid warranty claims in relation to Engines 191-391 and 191-283.

(c) In relation to the Tools and Parts, it was provided that, *"With respect to TCT's spare parts and tooling located at the Al Mussaib site, which both MOE and TCT agree have a value of $1,700,000.00 USD; TCT, in the interest of compromise and subject to the successful execution of this agreement, will waive its rights to ownership of the spare parts and tooling"*.

(d) Although TCT had stated that the warranty claim in relation to Engine 191-415 was invalid, and that it would cost US$2.6 million to repair, TCT would, in the interests of compromise and subject to the successful execution of the parties' agreement, repair it for US$1.375 million.

(e) The MOE was to establish an irrevocable letter of credit for US$1,959,750.00 within 90 days from the signing of the amendment to the MSA which was contemplated.

(f) On receipt of that letter of credit, TCT was to start the repairs on Engine 191-415.

(g) Arrangements for those repairs, the redelivery of the Engine to Iraq and payment were also agreed. In particular, the Engine was to be redelivered to storage in Iraq, and released to the MOE only on confirmation of the cancellation of the Performance Bond.

(h) Paragraphs 14 and 15 of the January 2015 Minutes provided that, *"MOE representatives have advised that this document shall be incorporated via amendment to Master Service Agreement TCT-11-MSA-6LM-079-C... This agreement is subject to the acceptance of the Higher Authority of the Ministry which authority is required to sign such amendment to the MSA as required to assist in the opening of the Letter(s) of Credit in the amount of $1,959,750.00 USD".*

261. It followed that the January 2015 Minutes were intended to be a binding and enforceable amendment to the MSA, but only (i) once accepted by "the Higher Authority of the Ministry" and (ii) once a formal amendment to the MSA reflecting the January 2015 Minutes was prepared and signed by the "Higher Authority".

262. It appears, however, that the "Higher Authority" did not accept or agree to the January 2015 Minutes. On 15 March 2015, the MOE wrote to TCT stating,

"In reference to (MOM) that held in Istanbul on Jan. (27-28).2015.
Kindly be aware of the following:
Soon MOE will direct an official letter signed by Minister of MOE which declare that MOE commitments towards your company will be executed as soon as you:
- *repair the engine of S.N. (191-415) that belongs to AL-Mussaibe P.P,*
- *Shipping, installation & supervising of the engine operation.*

Confirming your point of view in this regard will be highly appreciated..."

263. What was contemplated by that letter was, self-evidently, quite different from the arrangements agreed in the January 2015 Minutes.

264. On 20 March 2015, TCT wrote to the MOE asking it to confirm that it was indeed rejecting the agreement set out in the January 2015 Minutes.

265. No response was received, nor was any formal amendment to the MSA ever drawn up. It follows that the agreement contained in the January 2015 Minutes did not come into force.

266. On 14 April 2015, TCT wrote to the MOE indicating that unless the MOE complied with the agreement set out in the January 2015 Minutes, it would take

steps to enforce its rights under Article 21 of the MSA. As has been noted above, it commenced this Arbitration on 16 July 2015.

D12. The proceedings in Alberta

267. I have already referred above to the extensions of the Performance Bond requested by the MOE, and to its attempts to draw down on the Performance Bond.

268. On 8 July 2015 – that is to say, shortly before the commencement of this Arbitration – TCT sought and obtained an order for interim injunctive relief from the Court of Queen's Bench of Alberta, Canada on an *ex parte* basis. Its application sought interim and final relief, but the relief granted by the Alberta court was on an interim basis only, with the application for final relief being adjourned *sine die*. The order restrained HSBC from making any payment under the Standby Letter of Credit, and declared that any demand for payment under, or extension of, the Performance Bond, would be fraudulent, in each case until 20 days after the issue of a final Award in this Arbitration.

269. The MOE submits that this means that issues relating to the Performance Bond are before the Alberta Court and should be determined by the Alberta Court. I do not accept this. The only order made by the Alberta Court is for interim relief, in support of TCT's claims in this Arbitration. Orders of that kind are permitted by Article 28(2) of the ICC Rules and do not constitute a waiver of the underlying Arbitration Agreement, nor do they impinge on the Arbitrator's powers pursuant to that agreement.

D13. The proceedings in Iraq

270. It is also necessary to make some mention of the proceedings brought by the MOE in Iraq. The MOE has – perhaps understandably – been keen to play these down. However, it seems to me that they are relevant in a number of respects.

271. These proceedings are described in the second witness statement of Mr Simonelli, and the documents referred to by him are exhibited to that statement. Although some objection was made on behalf of the MOE to the admission of that statement at the March 2019 Hearing, it seems to me that the MOE has had

ample opportunity to deal with it. Indeed, and as set out above, the MOE was specifically invited on more than one occasion to comment on apparent attempts to draw down on the Performance Bond and on subsequent steps taken by it in Iraq. It has chosen not to do so.

272. I therefore accept what Mr Simonelli says in his statement in relation to the Iraqi proceedings. In any event, the documents speak for themselves.

273. As appears from Mr Simonelli's second statement, and from a letter from TCT's counsel to the MOE dated 21 September 2015, on 14 September 2015 TCT received a "letter of notification" by registered mail relating to proceedings that had been commenced by the MOE before the Court of First Instance Specialised for Commercial Cases in Baghdad. This letter suggested that proceedings had been commenced by the MOE against "Canadian TCT Company" – presumably TCT – and that "Daniel G.B. Simonily" (presumably Mr Simonelli) was required to attend before that court on 13 September 2015 – that is to say, one day before the notification was in fact received by TCT.

274. It also appears from the attachment to the notification that the proceedings were commenced by the MOE sometime in August 2015, and that they were initiated pursuant to the MSA. I note that in the MOE's claim, it states that *"[the MOE] has concluded with the above cited defendant: The contract No. 14 dated April 03, 2011 – The agreement No. IM-079-C-TCT-10-MSA"*. That contract is, of course, the MSA. The MOE's claim in the proceedings in Iraq is for (i) an order for delivery up of *"the motor handed to him by us for repairing purposes which is still under the guarantee period"*, and for sequestration of the Performance Bond *"in an amount equals to the motor price and the damages incurred by [the MOE] due to the above cited violation"*. That *"violation"* is said to be a breach of warranty in relation to Engine 191-415.

275. On receipt of the notification, TCT wrote to the MOE advising that the Iraq proceedings were in breach of the Arbitration Agreement and that they were being advanced without regard for the requirements of procedural fairness.

276. A further notification was apparently issued to Mr Simonelli on 15 November 2015, requiring him to appear before the Court in Baghdad on 27 December 2015.

According to Mr Simonelli's second statement, that notification was received by TCT on 16 December 2015.

277. Mr Simonelli goes on to state, in his second statement, that on 19 October 2016 TCT received what appears to have been a default judgment handed down by the Court in Baghdad on 22 June 2016 ("the Iraqi Judgment"). The Iraqi Judgment requires Mr Simonelli, in his capacity as Managing Director of TCT, to pay the MOE the sum of US$5,809,162, and to return Engine 191-415 to the MOE. It also appears to permit the MOE to sequestrate the Performance Bond and the Tools and Parts in relation to the judgment. It is noteworthy that Mr Simonelli was not, of course, a party to the MSA; and that the Iraqi Judgment exceeds the amount of the limitation of liability set out in Article 18 of the MSA.

278. On 14 May 2019, and as mentioned above, the Iraqi Embassy in Ottawa forwarded to TCT a "writ of execution" dated 28 January 2019, which stated that forcible execution against TCT's property would be effected if the sum of US$5,809,162 was not paid to the MOE within 30 days. The writ of execution was obviously based on the Iraqi Judgment.

279. At the March 2019 Hearing, it was submitted on behalf of the MOE that the Iraqi Judgment was properly obtained and that it was not for Dr Hoyle to express any view in relation to it. Similar submissions have subsequently been made to me in writing. But the assertion seems to me to be overly simplistic. Whilst it is not for me to comment on Iraqi process, nor as to whether it is for TCT to make any application to the Iraqi Court, there are a number of findings which, it appears to me, I am entitled to make in relation to the Iraqi Judgment.

280. First, the Iraqi Judgment is not merely a judgment affording interim relief in support of a claim in this Arbitration. It is a judgment on the merits, awarding damages, and other final relief, to the MOE, and entails a finding that TCT was in breach of the MSA.

281. However, the MSA does not allow either party to bring proceedings in national Courts. That is because it contains an Arbitration Agreement, which Dr Hoyle has held to be binding on both TCT and the MOE. By paragraph 161 of the First Partial Award, and as I have set out in paragraph 30 above, Dr Hoyle found in terms that, *"both the Law clause and the Dispute Resolution clause are valid"*; the

Dispute Resolution clause there referenced is, of course, the Arbitration Agreement. The finding in the First Partial Award that the parties are bound by the Arbitration Agreement binds the parties and cannot be reopened.

282. There is no evidence that TCT submitted to the jurisdiction of the Iraqi Court, and thereby waived its entitlement to rely on the Arbitration Agreement. On the contrary, on the basis of the evidence before me, it appears that the Iraqi Judgment was delivered before TCT was afforded a proper opportunity to appear and to defend itself.

283. Thus the bringing of proceedings by the MOE in Iraq, in relation to claims pursuant to the MSA, was a breach of the Arbitration Agreement.

284. It follows that the Iraqi Judgment has also been obtained in breach of the Arbitration Agreement in the MSA. Pursuant to ordinary *kompetenz-kompetenz* principles, that is a determination which I am entitled to, and do, make.

285. Thus the Iraqi Judgment is not one which I am entitled, still less obliged, to recognise.

286. Secondly, the Iraqi Judgment was obtained at a time when the MOE was contesting the jurisdiction of the Sole Arbitrator. The basis for the challenge to jurisdiction was, as I have noted above, that the MSA was not binding on the MOE because it had not been stamped nor allocated a contract number. Yet before the Iraqi court the MOE was, it would appear, asserting positively that the MSA was binding, and that it had been allocated a contract number. That is evident from, for example, the Iraqi Judgment, which records (in translation) that *"the plaintiff's representative claimed that under the agreement No.14 he had concluded an agreement with the defendant to rehabilitate"* the Engines and Packages (emphasis added). The fact that the MOE was asserting directly opposing positions in this Arbitration and before the Iraqi Court is – to put it at its lowest – striking.

287. Thirdly, and as I explain in greater detail in Section E2 of this Award below, the fact of the Iraqi proceedings, including the Iraqi Judgment and the subsequent writ of execution, does, to my mind, have consequences as regards the MOE's defence of TCT's claims. It has relevance both to what it says about the claims

relating to the Performance Bond and to the claim in relation to the Tools and Parts.

E. THE CLAIMS

288. As I have noted above, the claims now advanced by TCT in this Arbitration are set out in the Final Breakdown Letter. I consider each of the claims set out in the Final Breakdown Letter in turn.

289. Before doing so, I address a series of threshold issues that are relevant to a number of the claims. I do not repeat my findings on these issues in the Sections dealing with the individual claims below, save where that is necessary, and reference should be made to the following Section E1 of this Award on those various issues.

E1. Threshold issues

(i) Allegations by the MOE of res judicata and procedural unfairness, and the approach to the evidence

290. I can deal shortly with the allegation made in the MOE's written opening submissions and noted above that the Iraqi Judgment renders the matters the subject of this Arbitration *res judicata*. I can do so not least because, notwithstanding the content of those submissions, at the hearing the MOE's counsel expressly stated that the MOE was not, in fact, seeking to rely on a defence of *res judicata* (though in his oral closing submissions he stated that the point was *"there for the record"*). In any event, it would not be possible for that Judgment to give rise to a defence of *res judicata*, first because it was obtained in breach of the Arbitration Agreement (as I have found in paragraphs 281-284 above) and secondly because it does not deal with the majority of the claims that are advanced by TCT in this Arbitration, and so does not have the same subject matter as those claims.

291. As to the allegations of procedural unfairness, this is a little more complex. Again, the MOE's counsel stated in closing that he was *"not taking a point before you* [i.e. Dr Hoyle] *that there's been a breach of natural justice"*, and that this had also been included in the written submissions *"for the record"*. I do not, therefore,

need to address this allegation directly. However, I consider that I do need to say something about Dr Hoyle's orders relating to the adducing of evidence by the MOE and relating to its counterclaim because they do have an impact on how I should approach the evidence that is before me.

292. I have set out the procedural history of this Arbitration at some length above. It will be seen from that history that the MOE has – to put it kindly – dragged its feet. It also launched a jurisdictional challenge which was not only found to be misconceived, but must have been known by the MOE to be misconceived, because in the Iraqi Proceedings the MOE was positively stating that the MSA was valid and enforceable (its claim in those Proceedings being for damages for its breach), and that it had been allocated a contract number – no. 14 (see the claim documents in the Iraqi Proceedings and the Iraqi Judgment).

293. I am also conscious that, whilst from time to time the MOE's counsel did make reference to political difficulties in Iraq, and reasons why instructions were not forthcoming from their client, no-one from the MOE has ever, at any time, provided any evidence to support these explanations. The only representative of the MOE who has ever gone into print, as it were, is Mr Ayser Hamid Saheb, in his short statement made in response to TCT's application for an interim injunction, and he did not address any matters of this nature.

294. As to the series of procedural orders by which a timetable was set for service of witness statements and expert reports (with which the MOE did not comply), and by which its counterclaim was struck out, I note that:

(a) The MOE made only limited objections, if any objections, to those orders at the time they were made.

(b) In particular, whilst the MOE did, in October 2018, ask for further time to serve an expert's report, it did not (as far as I can see) object specifically to the series of orders which by which the timetable was set and with which it did not comply. Nor, as far as I can tell, did it invite Dr Hoyle to revisit those orders (with the exception of the order dismissing the counterclaim, which he was asked to revisit but declined to reverse – see paragraph 295 below); and it has not asked me to do so.

(c) There is no doubt that the MOE did have the opportunity to produce documents and to adduce witness evidence in support of its defence, and to pursue its counterclaim, before peremptory orders were made against it and before the time limits under those orders passed. In this regard I note that the timetable originally set was one agreed by the MOE.

(d) No specific or cogent reasons were given at the time for the failure to produce documents or the failure to produce witness statements. That that is the case, and that the MOE's delays were persistent and endemic, is a matter of record; TCT's letter dated 8 November 2018 set out a full account of those delays and that letter was annexed to Dr Hoyle's Procedural Order No. 5, as referenced in paragraph 86 above.

295. Specifically as to the MOE's counterclaim, and as appears from the procedural history described above:

(a) The counterclaim was not included in the Terms of Reference, because it had not at that date been advanced;

(b) The counterclaim was first advanced in the MOE's Points of Defence and Counterclaim served on 29 January 2018. It comprised claims for (i) damages for breach of warranty and/or by reason of poor workmanship and materials on the part of TCT in relation to Engines 191-415, 191-391 and 191-283, with the amount of the claim to be quantified by way of expert evidence; (ii) *"an injunction directing TCT to return Engine 191-415 to [the] MOE in full working order"*; (iii) interest and (iv) costs;

(c) TCT requested that the MOE produce documents in categories which would have borne on the counterclaim on 25 April 2018 (see paragraph 59 above);

(d) On 26 April 2018, the MOE was ordered to produce those documents by 13 May 2018 (see paragraphs 61-62 above). It never did so;

(e) The original deadline for the exchange of witness statements and expert evidence was 30 April 2018 (see paragraph 38 above);

(f) On 3 July 2018, that date was extended by agreement between the parties to 1 October 2018 for witness statements and 31 October 2018 for expert reports (see paragraph 68 above);

(g) The MOE served no witness statements by that agreed and extended deadline;

(h) On 2 October 2018, the parties agreed a further extension of the witness statement deadline to 15 October 2018 (see paragraph 74 above);

(i) At the telephone procedural hearing on 11 October 2018, Dr Hoyle extended that deadline further to 29 October 2018, and the deadline for expert reports to 15 November 2018, but on the basis that those dates were peremptory on the MOE (see paragraph 75 above);

(j) The MOE did not serve witness statements by 29 October 2018;

(k) TCT's application for a *"summary motion to dismiss the counterclaim"* on the ground of the MOE's failure to adduce evidence was first mooted on 30 October 2018 (see paragraph 78 above);

(l) That possibility was discussed at the telephone case management conference on 7 November 2018, at which Seddons indicated that they were without instructions (see paragraph 80 above);

(m) TCT served written submissions in support of its application on 8 November 2018 (see paragraph 81 above);

(n) On 15 November 2018, the MOE applied for a 13-week extension for service of experts' reports, in circumstances where it had served no factual witness evidence (see paragraph 84 above);

(o) The application to strike out the counterclaim was granted by Dr Hoyle by Procedural Order No. 4 dated 9 November 2018 (see paragraph 86 above);

(p) Dr Hoyle was invited by the MOE to reconsider that order, and he did reconsider it, but, on 27 November 2018, declined to reverse his decision (see paragraph 87 above).

296. It is also necessary to bear in mind that an arbitrator's duty of fairness is owed to both sides. It does not necessarily entail giving one party as much time as it wants or asks for to put in submissions or evidence. And an arbitrator is, when setting a procedural timetable, entitled to take into account earlier delays in the process, and the cause of those delays.

297. In the light of the above, I have borne in mind the following when approaching the matters before me:

(a) I cannot take account of the MOE's counterclaim as though it was still able to be advanced in this Arbitration. It is not. It has been struck out.

(b) I accept that the MOE is entitled to raise matters relating to the condition of the Engines by way of defence, rather than by way of counterclaim. However, it is hampered by not having produced any evidence that supports its defence despite having had the opportunity to do so.

(c) The burden lies on TCT to prove its claims, in the usual way. Where I consider that it has failed to do so, then the claim in question must fail.

(d) That said, I am conscious that where one side has adduced no evidence, it can be a little difficult for the claiming party to assess how far it needs to go in adducing evidence. To put it another way, it is very easy for a respondent in that situation to pick holes in what has been put forward by the claimant.

(e) In particular, the MOE has submitted that TCT's evidence should be treated, not as dishonest, but as unreliable. That submission is, perhaps counter-intuitively, rather easier to make when one has no witnesses with whom a comparison can be made. So far as I can tell from the transcripts of the oral evidence and from the witness statements – and I am fully aware that I was not able personally to assess their demeanour – both Mr Simonelli and Mr Archer were doing their best to assist.

(f) TCT must, of course, prove its claims. But the question in each case is whether it has done enough to do so, not whether it could have done more, or whether there might be "better" evidence in existence.

(g) I am assisted by the contemporaneous documents where those are before me, and I have relied on those where that is possible.

(h) I am also conscious that some of the relevant documents are in the hands of the MOE and that it has not produced those documents despite, in some instances, having been asked to do so. Where documents are likely to exist in the hands of the MOE which might prove or disprove a particular state of affairs, insofar as there is any doubt, it is TCT, and not the MOE, which is entitled to the benefit of that doubt.

(ii) Proof of the law of Iraq

298. It is common ground that TCT's claims in this Arbitration are governed by the law of Iraq.

299. In its Defence, the MOE made various assertions in relation to the law of Iraq, from which it was apparent that there would be points in issue. More particularly, it denied that there was any cause of action in "conversion" under Iraqi law; and it denied that any proper basis had been stated as a matter of the law of Iraq as to the implication of terms into the MSA. The Defence also stated that the MOE would *"rely on expert evidence at the hearing of this arbitration concerning the correct construction of the MSA and the legal effect of the Minutes"*.

300. There was no expert evidence before Dr Hoyle in relation to Iraqi law. TCT did not adduce any. Neither did the MOE.

301. In fact, and as far as I can see, expert Iraqi law evidence at the merits stage of these proceedings does not appear to have been discussed at any time following the service of the MOE's Defence. I have already noted that the directions agreed between the parties and made by Dr Hoyle did not identify the nature of any expert evidence to be relied on, but, so far as I can tell from the correspondence, the parties were contemplating technical expert evidence on the Engines, rather than Iraqi law evidence. Thus, whilst it was clear that the claims were governed

by Iraqi law, apart from the mention in the Defence there appears to have been no suggestion prior to the run-up to the March 2019 hearing that any Iraqi law evidence was required.

302. Instead, TCT attached various provisions of the Iraqi Civil Code to its written opening submissions and has sought to rely on those as proving its claim.

303. In its written opening submissions, the MOE stated that its position was that TCT had simply failed to prove Iraqi law, and that its claims – or some of them – should fail.

304. The MOE does not take the same position relating to all TCT's claims.

305. The MOE does not go as far as asserting that all TCT's claims must fail because there is no Iraqi law evidence. As the MOE made clear in oral closing submissions (see Day 4 of the hearing transcript), *"Where it is just a question of contractual interpretation then you can just use your English law hat, or any hat you like, because just reading a contract anyone can do that"*. Thus it was not suggested by the MOE that the claims for breach of, or pursuant to, the MSA, should fail for want of proof of Iraqi law: it was accepted that I could read the MSA and do my best to ascertain its meaning. Neither side developed any submission as to the proper approach to the construction of contracts pursuant to the law of Iraq in any detail, and I have therefore sought to construe the words used in the MSA as the best guide to the intentions of the parties.

306. However, the MOE submits that TCT's claim for the value of the Tools and Parts – the usurpation claim – must fail because Iraqi law has been insufficiently proved.

307. It also contends that TCT cannot run a case based on the implication of terms into the MSA, as that would depend on the Iraqi law (if any) regarding implied terms; and that it cannot advance any other non-contractual claims.

308. The MOE has made only very limited submissions on the Iraqi law materials that have been relied on by TCT. It has chosen instead to stake its position on the "no proof" argument.

309. The alternative position taken by the MOE in its written opening was that, if its primary position was wrong, Iraqi law should be presumed to be the same as English law. It has subsequently reneged somewhat from that secondary position, instead taking the approach that TCT has not sufficiently proved its case on Iraqi law, and that there is no scope for the operation of the presumption.

310. In support of its primary position, the MOE relies on a number of English cases and textbooks. I do not mention each of them, but the thrust of the submission is the well-known proposition that as a matter of English law, foreign law is a matter of fact which must be pleaded and proved like any other: see Earl Nelson v. Lord Bridport (1845) 8 Beav. 527, and the discussion of that case in the leading English text, *Phipson on Evidence* (19th edn. at [33-76]). The MOE contends, on the basis of a passage in Professor Robert Merkin's loose-leaf textbook on arbitration law, that the same principle applies to any arbitration which has an English seat, as this Arbitration does.

311. The MOE relies further on the decision of Sir Andrew Morritt C. in Global Multimedia International Ltd/ v. ARA Media Services [2006] EWHC 3612 (Ch), which suggests, in the context of an application for permission to serve out of the jurisdiction, that where the applicability of foreign law has been raised by one or other party, that there is no scope for the operation of the presumption, that no assumptions can be made as to the content of the relevant foreign law, and that the claim must fail.

312. TCT's contention is that the MOE has taken the wrong approach. The authorities on which the MOE relies, so TCT says, do not apply in the context of international arbitration. They are pertinent, it contends, only to English court proceedings. It argues that those authorities do not apply in the context of an ICC arbitration, even though the Arbitration's seat is London. Indeed, it points out that section 34(1)(g) of the Arbitration Act 1996 provides in terms for the tribunal to decide *"all procedural and evidential matters"* and that these include *"whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law"*, which – at least arguably – signals a departure from the position that obtains in an English court.

313. In support of its position, TCT relies on various published materials. I do not here refer to them all; but they include the current (4th) edition of the *Handbook*

on ICC Arbitration: Commentary and Materials, by Messrs Webster and Bühler, who make the following observations with regard to the proof of "foreign" law in ICC arbitrations (at paragraph 21-56):

"As regards the proof of law, there is no set practice in ICC arbitration. In many instances, issues of national law will be argued by the lawyers who represent the parties. Unlike in state court proceedings, there is no requirement in ICC arbitration that foreign law be proven by expert evidence or other means as a question of fact. In many other cases, however, the parties will submit legal opinions with respect to matters of national law. Most international arbitrators are experienced in various legal systems and therefore are quite flexible as to how the relevant rules of law are addressed in the proceedings."

314. In addition, TCT relies on the 2008 *International Law Association Recommendations on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration*, paragraph 9 of which states,

"In ascertaining the contents of a potentially applicable law or rule, arbitrators may consider and give appropriate weight to any reliable source, including statutes, case law, submissions of the parties' advocates, opinions and cross-examination of experts, scholarly writings and the like."

315. On the basis of these materials, I conclude that TCT's position is correct. It seems to me that, notwithstanding the suggestion by Professor Merkin in his textbook, in an international arbitration of this kind it is not necessary for a party to prove "foreign" law as fact. Rather, it is usual for "foreign" law to be treated as law, and thus I should take a more flexible approach to the proof of Iraqi law than would be taken in English court proceedings.

316. Although I do not begin to pretend to have specific expertise in relation to Iraqi law, it seems to me that it is open to me to look at the Iraqi law materials that have been provided to me, and that were supplied by TCT to Dr Hoyle for the purposes of the hearing in 2019. Whether they are sufficient to prove TCT's case is a separate matter which I address below; but insofar as it is suggested that I cannot draw conclusions on Iraqi law without the assistance of an expert, or cannot look at the materials that have been supplied to me, I do not agree.

317. That being so, and since TCT has squarely advanced its case on the basis that Iraqi law applies and that it can prove it and has done so, it is not necessary for

me to decide whether there is in principle any scope for the operation of the so-called "English law presumption" to the effect that a foreign law is to be presumed to be the same as English law unless otherwise proven, in an arbitration of this kind. For that reason, I do not discuss the various authorities cited by the MOE in relation to that point.

(iii) The MOE's contention that TCT can have no claim for damages for breach of the MSA

Generally

318. The MOE takes a further threshold point that, if correct, applies to all TCT's claims for damages for breach of the MSA. It contends that clause 15.4 of the MSA, as set out above, excludes any right on the part of TCT (or the MOE) to claim damages for breach of the MSA. It says that, were the position otherwise, the MSA, which was a fixed price contract, ceases to be a fixed price contract.

319. This point was not pleaded in the MOE's Defence, but it was fully argued by both parties at the hearing and I consider that I am able to deal with it.

320. TCT disputes the point made by the MOE. It contends that clause 15.4 is applicable only within clause 15, and so applies only to the cross-indemnities set out in that clause, rather than being intended to exclude claims for damages more generally. It also points out that the MOE previously sought to counterclaim in this Arbitration, and has advanced a claim before the Iraqi courts, on the basis that it is possible to claim damages for breach of the MSA, which is at odds with the contention it now advances.

321. Article 15 of the MSA is set out in paragraph 174 above. It will be seen that it is headed *"INDEMNIFICATION"*. Articles 15.1 and 15.2 mirror each other; each provides that each of TCT and the MOE is to *"be liable for, and shall defend, indemnify and hold TCT harmless from and against each and every claim arising from"* the matters listed in those clauses. Article 15.3 is then a carve-out from Article 15.2, and provides that in relation to a sub-set of the Article 15.2 claims (namely certain claims by both parties), TCT and the MOE will share any claim in proportion to their negligence. Article 15.4 goes on to state that, *"Regardless of*

cause, for the avoidance of doubt, it is the intent of clauses 15.1 and 15.2 that each Party to this Agreement shall bear its own losses".

322. I consider that TCT's case on this issue is to be preferred, essentially for the reasons it advances. It seems to me that on a fair reading of the MSA, all that clause 15.4 is saying is that in relation to the categories of claim identified in clause 15, and save where an indemnity is provided for by that clause, each party is to bear its own loss. It is a "knock for knock" clause of a kind seen in many industries. Those categories of claim are property damage claims and claims by third parties or by employees or agents; the clause does not relate to all claims that one party might have against the other.

323. If clause 15.4 had been intended to have the broader effect contended for by the MOE, it is unlikely that it would have been contained within the indemnity provision that is Article 15. What is more, it is pertinent that Article 15.4 does not itself say that it excludes all claims pursuant to the MSA. It states that *"it is the intent of clauses 15.1 and 15.2 that each Party to the agreement should bear its own losses"*. But Articles 15.1 and 15.2 say only that the parties shall bear the types of loss enumerated in those clauses.

324. I consider that clearer words than those contained in Article 15.4 would be required to exclude any and all claims for damages for breach of the MSA. I also consider that the construction of Article 15.4 contended for by the MOE is inconsistent with other provisions in the MSA – specifically, the warranty regime in Article 14 (see paragraph 173 above) and the limitation of liability in Article 18 (see paragraph 175 above). If Article 15.4 really meant that each party to the MSA was to bear all its own losses, then those provisions would make no sense.

325. Nor do I consider that the "fixed price contract" argument assists the MOE. It is simply an assertion. Where a contract has a price, then normally that price is fixed; but that does not preclude the non-paying party from claiming damages if it suffers loss by reason of the other party's breach of its obligations. To put it another way: if the parties perform in accordance with their bargain, and the non-paying party finds that the bargain is bad and he is out of pocket, that is not a matter of which he can complain. But the mere fact that a price is fixed does not seem to me to give one party to a contract *carte blanche* to fail to comply with his obligations and then to say that the other party has no remedy.

326. In this regard, the MOE has not sought to identify any provision of Iraqi law which stipulates that where a contract has a "fixed price" there can be no claim for damages for breach of it. The only provisions of Iraqi law that are before me in relation to damages for breach of contract are Articles 168 and 169 of the Civil Code, which provide materially (in translation) as follows:

> *"Article 168. -If it is impossible for the obligee of a contract to perform his obligation specifically he will be adjudged to pay damages for non-performance of his obligation unless he establishes that the impossibility of the performance was due to a cause beyond his control; the adjudication will be the same if the obligee has delayed (was late in) the performance of his obligation.*
>
> *Article 169. -(1) If the compensation (damages) has not been estimated in the contract or in a provision of the law it will be assessed by the court.*
> *(2) The damages shall be in respect of every obligation which arises from the contract be it an obligation of conveyance of property, a benefit or any other right in rem, or an obligation to do or to abstain from doing an action and includes the loss of and the lost profit suffered by the creditor on account of loss of or delay in receiving the right provided that this was a natural result of the failure of or delay by the debtor to perform the obligation."*

327. Those provisions suggest to me that the default position is that a contract-breaker will be required to pay damages for breach of contract.

Appendix E

328. Allied to the point identified above is a further argument raised by the MOE specifically in relation to TCT's claims for breaches of Appendix E to the MSA. The MOE points to clause 9 of Appendix E, as set out in paragraph 182 above, which provided for the duration of the MSA to be extended in the event of delays attributable to the MOE *"failing to provide the above"*, i.e. failing to take the steps set out in Appendix E. The MOE contends that the ability to extend the duration of the MSA was an exclusive remedy and that TCT could not, in addition, claim damages or compensation for breach of any provisions of the MSA.

329. I do not accept this submission. There is nothing in clause 9 which states that it affords TCT an exclusive remedy. It simply affords TCT relief which has to be spelled out, because otherwise it would not exist. Nor is the ability to extend the

duration of the MSA inconsistent with the ability to claim damages for breach, as I find.

330. If the "extension" remedy was intended to be an exclusive one, the MSA would say so. I consider that clearer words would, once again, be required to exclude a right to claim in respect of losses caused by a breach of the provisions of Appendix E.

(iv) Failure to warn

331. In relation to a number of the claims for damages/compensation advanced by TCT, the MOE complains that there was a failure by TCT to warn that it would, if the MOE persisted in its conduct, seek to claim in respect of its loss.

332. In a number of instances, it is right to note that TCT did not specifically say to the MOE that it would be advancing a damages claim against it – though there were complaints about the MOE's conduct. However, I can see nothing in the MSA which expressly obliged TCT to issue some sort of warning to the MOE; nor is there anything in the MSA which states that, if no warning is given, a right to claim damages or compensation is waived. In the absence of a duty to warn, I do not consider that a "failure" to warn, that is to say, the lack of a warning, can bar TCT from what would otherwise be a right to claim damages.

E2. Claim in relation to the Tools and Parts

333. TCT claims damages/compensation in relation to the Tools and Parts which, so it contends, the MOE has retained. The total amount claimed is US$2,232,957.00, said to represent the value of the Tools and Parts. This is thus the single largest element of TCT's financial claim.

334. It is common ground that TCT owns the Tools and Parts that are the subject of this head of claim, and that they are still in Iraq. What is not common ground is whether the MOE is under any liability to TCT in relation to them. The MOE says that it is not, for the reasons which I discuss below.

335. TCT's claim is not a claim for breach of the MSA. It is a non-contractual claim, and the principal claim on which the MOE advances its arguments – discussed above – as to the non-proof of Iraqi law.

Proof of Iraqi law

336. I have dealt with this issue as a matter of principle above.

337. TCT advances its claim pursuant to the Iraqi tort – I use the word "tort" here as a shorthand for a non-contractual basis of claim – of "usurpation". It is not disputed by the MOE that such a tort exists.

338. TCT relies on Articles 192-194 of the Iraqi Civil Code. I have those provisions in translation. They state as follows:

Usurpation

Article 192. - The property usurped must be restituted in kind to its owner at the place wherein it was usurped if it is existing; if the owner of the property has casually met the usurper who had with him the usurped property at a different place he may if he so wishes have the property restituted in that place, but if he demands restitution at the place of usurpation the expense of moving it and the costs of providing for its restitution will be borne by the usurper which thing will be without prejudice to reparations for the other injuries.

Article 193. - The usurper will be liable if he has expended, destroyed, or lost the property usurped or where it has perished totally or partially without encroachment on his part.

Article 194. - (1) If the thing usurped has changed while in possession of the usurper the usurpee may if he so wishes recover the thing usurped in kind and claim reparations for the other damages or leave (abandon) the thing usurped and claim reparations from the usurper.
(2) The usurper who has changed the thing usurped in such a manner which changed its name (nomenclature) will be liable and will keep the thing; he who has usurped the wheat of a third party and sowed it in his land will be liable for the wheat and will keep the crop.
(3) Where the usurper has changed some description of the thing usurped by adding to it something from his own property the usurpee will have the option if he so wishes to give the usurper the value of the addition and take back the thing usurped in kind and claim the other reparations or to abandon the thing and claim from the usurper.

339. It appears from an ordinary reading of those provisions that Iraqi law gives a cause of action to a party whose property is appropriated by another, and that if that property has been destroyed or lost or has "changed" whilst in the possession of the usurper, the claimant has the option to claim monetary relief, rather than restitution of his property.

340. Indeed, the Iraqi tort of usurpation is not unfamiliar even to English commercial lawyers, because of the well-known and long-running dispute in Kuwait Airways Corp. v. Iraqi Airways Co.: there are many reported judgments, but see in particular the House of Lords' decision at [2002] A.C. 19, to which I was also referred by TCT.

341. In Kuwait Airways, the tort of usurpation was treated by the House of Lords as being not identical to, but very similar to, the tort of conversion in English law. Under English law, as the MOE acknowledges, a party is liable in conversion where it unlawfully asserts an interest in the goods and/or denies the ownership interest of the owner, or where it prevents the true owner from retaking possession of them. The last of those is a conversion because it entails the tortfeasor acting inconsistently with the owner's rights of possession.

342. I consider that TCT has done enough, by its reference to the Civil Code, to demonstrate that there is a cause of action of usurpation under Iraqi law, and to demonstrate the requirements of that cause of action as I have described them above.

343. The MOE complains that it was not able to deal with the Iraqi law materials relied on by TCT. As to this, I consider that the MOE's position in this regard is somewhat artificial, in that the expert report of Dr Ala Haimoudi, relied on by the MOE in support of its challenge to the jurisdiction, states that, *"Some of the Claimant's claims, respecting alleged conversion of the Claimant's property, could very well sound in tort under Iraqi law, and in particular the tort of usurpation, set forth in Articles 192-201 of the Civil Code"*. Whilst I have not relied on that statement as demonstrating the content of the cause of action of usurpation it does make clear that such a cause of action exists and that the MOE has for some time understood TCT's claim to be capable of advancement in this way. Further, whilst it is true that those materials were supplied only shortly before the hearing, the MOE was

able to make submissions on them, and, had it wished to do so but required further time, it could have asked for that further time. It chose not to do so.

344. Further, the MOE's case has in essence been, "if we had denied TCT's ownership of its goods, it would have a claim; but since we did not, it does not". However, and as I discuss below, I find and hold that the MOE has in fact taken possession of the Tools and Parts and thus acted inconsistently with TCT's ownership of them.

345. I now turn to the various elements of the claim in usurpation which must be satisfied. As I have noted above, they are as follows:

(a) The claimant's property must have been "usurped", i.e. appropriated by another;

(b) If that has occurred, the claimant has a claim, either for the return of the property usurped, or, if that property has been destroyed or lost or has "changed" whilst in the possession of the usurper, the claimant has the option to claim monetary relief, rather than restitution of its property;

(c) If the claimant wishes to claim monetary relief, it must prove the amount of its loss.

Has there been a usurpation?

346. The MOE's case is that, if TCT is entitled to advance a claim for usurpation at all, there has in fact been no usurpation as regards the Tools and Parts. The MOE says that it has not denied TCT's ownership of the Tools and Parts; it says that TCT has always been free to come and collect them. There might, it acknowledges, have been some difficulty in obtaining the relevant export documentation to enable it to remove the Tools and Parts from Iraq. But that, it says, is a separate matter: the MOE does not issue export permits and is and was under no duty to ensure that the relevant documents were produced.

347. In this regard, the MOE – notwithstanding the fact that neither party contends that English law is relevant - refers to the principle that, where a party does not take possession of another's goods nor prevent the true owner from taking

possession, he is not liable in conversion: see Capital Finance Co. Ltd. v. Bray [1964] 1 W.L.R. 323.

348. The MOE points to the July-December 2013 exchanges between the parties (I have referenced some of those above), which show difficulties in obtaining export documentation for the Tools and Parts and do appear to demonstrate some attempts by the MOE to obtain the relevant documentation. However, the documents relied on predate the January 2015 Minutes (in which the MOE again promised to obtain documents) and the subsequent breakdown in relations between the parties. I can see no evidence that the MOE has, since that breakdown, made the Tools and Parts available to TCT even in Iraq; and the lapse of time since those events rather suggests that it has not in fact done so.

349. Mr Archer was asked if he knew what had happened to the Tools and Parts in the course of his examination in chief. He said this, as Day 2 of the transcript of the hearing records:

"I've been given some information on, you know, what happened to that equipment but I can't say for certain what happened to the equipment. What I was told was that our containers were opened and that equipment was accessed, but I can't say for certain what eventually happened to it."

350. Thus there is some – albeit limited – evidence that the MOE has made use of the Tools and Parts for itself, and has therefore taken possession of them on a permanent basis, such that they are not available to TCT to collect as has been suggested. And the MOE could have produced evidence as to the current whereabouts of the Tools and Parts at the time when it was still open to it to serve witness statements, but it did not do so.

351. On the basis of the matters set out in paragraphs 348 to 350 above, I consider that I am entitled to conclude that the MOE, at least as from April 2015 (when relations between the parties finally broke down) has unlawfully asserted an interest in the Tools and Parts, and has done more than simply "failed to load the tools onto the haulage contractor's van" (as the MOE's counsel put it, according to the transcript of the hearing for Day 4).

352. But that is not the end of the matter. As I have already noted above, the MOE has obtained a writ of execution in the Iraqi proceedings (which I have already

found to be have been brought in breach of the Arbitration Agreement) to enforce the Iraqi Judgment (which I have already found is not one that I am obliged to recognise). For present purposes, it is important to note that the writ of execution states that, absent a response (within a period that had already expired as at the date of receipt by TCT of the writ), *"measures of forcible execution will be resorted to in accordance with the law for the debt owed"*.

353. Although the writ of execution does not in terms specifically reference the Tools and Parts, the Iraqi Judgment does. In circumstances where the MOE continues to hold the Tools and Parts, and is asserting a right to enforce a money judgment which is, on any view, in excess of the value of those Tools and Parts, it is no great stretch for me to find that it either intends to execute, or has taken steps to execute, its judgment against the Tools and Parts. And since, as I have found, the Iraqi Judgment was wrongly obtained, that is not something which the MOE is entitled to do: it amounts to a taking of possession of the Tools and Parts.

354. It follows that, even if it might have been possible to doubt that the MOE had appropriated the Tools and Parts prior to 28 January 2019, the date of the writ of execution, it is more likely than not that it has done so since that date.

355. I therefore find and hold that the MOE has indeed wrongfully appropriated the Tools and Parts, and is liable to TCT in the tort of usurpation.

Have the Tools and Parts been destroyed or lost or "changed"?

356. I also consider it more likely than not, to the extent relevant, that the MOE has destroyed or lost or "changed" the Tools and Parts (whether by using them or otherwise), such that TCT is entitled to a monetary remedy. As I have already noted, there is no direct evidence as to what has happened to the Tools and Parts. Only the MOE could have provided that evidence and it has chosen not to do so. I consider that I am entitled to infer that the Tools and Parts have been used, or that they have deteriorated, in such a way that restoration *in specie* is not possible and that TCT is entitled to claim their value.

Loss and damage

357. As to how much TCT can claim:

(a) Mr Archer's witness statement attaches a valuation of the Tools and Parts. He values them at US$2,232,957.00 as at 2013, or US$2,294,398.90 as at 2018. He uses GE's cost price for each tool or part in respect of which claim is made.

(b) Mr Archer has also sought to add a 25% "retail mark-up". I do not consider that any such "mark-up" is justified, and the 25% figure seems to be random.

(c) The MOE has suggested that any claim ought to be confined to a claim for US$1.7 million. That figure is derived from the January 2015 Minutes, which state that *"both MOE and TCT agree have a value of US$1,700,000.00 USD"*. TCT complains that it ought not to be held to the value that is set out in those Minutes. However, the MOE also points out that TCT's pleaded claim, as set out in its Statement of Claim, was for US$1.7 million and not for the higher value that is now claimed.

358. I consider that there is some force in the MOE's objections to a claim for the higher figure. Mr Archer has, no doubt, done his best in trying to come up with a correct valuation for the Tools and Parts, but there is necessarily an element of hindsight in the exercise. Further, at the point when the usurpation took place the Tools and Parts will not have been new.

359. Whilst I accept that there may have been an element of compromise in the US$1.7 million valuation agreed in January 2015, it is undoubtedly the case that TCT was content to include that figure as its pleaded claim in its Statement of Claim, and did not – until service of witness statements – suggest that the figure was too low. I consider that the safest course, and the one which I adopt, is to take that figure as the best evidence of the value of the Tools and Parts.

360. I therefore find and hold that TCT is entitled to damages/compensation in the sum of **US$1,700,000.00** in respect of the Tools and Parts usurped by the MOE.

E3. Claim for outstanding payments under the MSA

361. TCT claims US$584,750.00 by way of sums unpaid under the MSA. This figure is broken down as follows:

(a) US$183,250.00 comprises the second staged payment for Engine 191-382;

(b) US$183,250.00 comprises the Holdback Payment for Engine 191-382;

(c) US$218,250.00 comprises the Holdback Payment for Engine 191-391.

362. There is a further, separate dispute in relation to payments for Engine 191-382, which forms the subject of a separate claim by TCT. Given that the history of this Engine is somewhat complex, it is convenient to deal with all the payment issues relating to it together. I therefore address claims (a) and (b) in Section E5 below.

363. So far as the Holdback Payment for Engine 191-391 is concerned, the position is complicated by the agreement set out in the June 2013 Minutes.

364. The MOE's position is that it had a valid warranty claim in relation to Engine 191-391, that that claim was recognised by TCT at the meeting in June 2013, as recorded in the June 2013 Minutes and also in Mr Simonelli's letter dated 23 September 2013, that TCT never completed the work that it said it would do, and that therefore the MOE was and is justified in withholding the Holdback Payment.

365. It seems to me, however, that there are difficulties with that analysis.

366. First, as TCT has submitted, the payment mechanism under the MSA is separate from the warranty claim mechanism. The provisions of Article 7 of the MSA relating to the Holdback Payments are set out in paragraph 167 above. They allow the MOE to retain the Holdback Payment only in specified circumstances, namely that the bank issuing the Letter of Credit has been presented with a *"Copy of Arbitration agreement signed by both parties agreeing to enter into Arbitration proceedings"* or a *"Copy of a determination form an Arbitration proceeding that has competent authority to make such a determination stating that TCT is liable for*

damages". Otherwise, the release of the Holdback Payment is to be automatic. Nothing in Article 7 provides that the MOE can retain the Holdback Payment merely because it asserts that it has a warranty claim: in order to be entitled to retain the Holdback Payment it must at the very least have commenced an arbitration. Rather, it can be withheld only if there is a pending arbitration or an award. Neither was the case as at 17 July 2013, that being the date when the warranty period expired for Engine 191-391.

367. Secondly, the evidence of Mr Archer, which was not challenged, was that the cause of the damage to Engine 191-391 was the incursion of a foreign object. That suggests that the MOE had no valid warranty claim in any event, although that is a matter which I do not have to decide. (Insofar as the Iraqi Judgment purports to establish otherwise, I am entitled to disregard it for the reasons already given.)

368. Thirdly, it appears to me that the MOE agreed to make the Holdback Payment in relation to this Engine before any repairs were carried out by TCT. It was to form part of the First Payment under the June 2013 Minutes, and thus was to be paid by 14 June 2013. I do not, therefore, see how the MOE can rely on an allegation that TCT did not carry out the work which it had agreed to do as a under the June 2013 Minutes as a defence to the claim for the Holdback Payment.

369. I do not think that it ultimately matters to this analysis whether the June 2013 Minutes were binding or not. It is possible that they were not, given the terms of the Article 25.5 of the MSA (see paragraph 177 above), which provided that variations to the MSA were only to be effective if in written form, signed and expressly stated to amend the MSA. However, that does not assist the MOE, so it seems to me. For if they were binding, there was no binding agreement by the MOE to make an early payment of the Holdback Payment; but there was equally no binding agreement by TCT to repair the Engine on which the MOE can rely so as to justify non-payment. Instead one has to fall back to the provisions of the MSA, which required the Holdback Payment to be released automatically on 17 July 2013.

370. I therefore find and hold that the MOE was not entitled to retain the Holdback Payment on Engine 191-391, and must pay TCT the sum of **US$218,250**.

E4. Claim for fees associated with financial instruments: the Letter of Credit

371. TCT claims a total of US$932,026.49 by way of fees which it has paid in relation to financial instruments under the MSA, and which it contends to be for the MOE's account under the terms of the MSA. Of that figure, US$310,572.37 relates to the Letter of Credit and US$621,454.12 to the Performance Bond. It is more convenient to address the Performance Bond claim together with the claims for declarations sought by TCT in relation to the Performance Bond, and I therefore do so in Section E11 below.

372. This claim is for fees charged to TCT. The fees were charged by TBI, the MOE's bank, to HSBC, TCT's bank, which therefore debited TCT's account in the amount of the fees.

373. The MOE contends that these fees were *"fees outside the country of Iraq"*, because they were charged to TCT in Canada, such that they are properly for TCT's account under Article 9.3 of the MSA.

374. TCT's position is as follows:

    (a) The fees were "issuing fees", charged by TBI for the issue of the Letter of Credit.

    (b) They were thus banking charges inside Iraq, and so for the MOE's account pursuant to the MSA.

    (c) TCT also relies on the provision of the MSA which states that the Letter of Credit is to be *"at CUSTOMER's expense after contract execution"*.

375. There is limited evidence as to what these charges actually were. However, in a letter sent on 23 January 2012 (though wrongly dated 23 January 2011), Ms Stewart of TCT described them as *"charges that relate to the issuing of the letter of credit"* and as *"borrowing fees"*. A subsequent letter from the MOE dated 3 April 2012 describes them as *"confirmation charges"*. I consider it most likely, however, that these were borrowing fees, which TCI charged to its customer, the MOE, in consideration for opening the Letter of Credit, and which the MOE then caused TCI to pass on to TCT.

376. This is also borne out by a further document that was produced in the course of the March 2019 hearing. It is a translation of a letter from Mr Munadi of the MOE, and is apparently internal to the MOE; it is dated 25 January 2012 and appears to acknowledge that the MOE is liable for these charges, as being *"commissions and expenses in Iraq"*.

377. Mr Simonelli also stated in his oral evidence that TCT was told by the MOE that TCT's being charged with these fees was a mistake. I have no reason to doubt that that is correct.

378. I also note that, by Article 9.2 of the MSA, where TCT is required to make payment of any fee that is the MOE's responsibility under the MSA, it can claim reimbursement from the MOE.

379. It appears to me that these charges were charges imposed by TCI, and were costs associated with opening the Letter of Credit. They were thus charges within Iraq; and they were in any event expenses which were intended to be for the MOE under the MSA since the Letter of Credit was at its expense. I therefore consider that the MOE is obliged to reimburse TCT in respect of those charges.

380. The MOE complains, lastly, that the charges are insufficiently evidenced, because no bank statements have been provided. However, Ms Stewart's contemporaneous letter is evidence of the amounts charged, as is Mr Munadi's letter dated 25 January 2012, which in fact includes a figure that is one dollar higher (US$310,573.37). I am also conscious that one of the document requests made by TCT of the MOE, with which it failed to comply, was for the MOE's documents relating to the Letter of Credit; if it wished to take issue with the quantum of the charges levied, it could (and should) have done so by its own document production. In these circumstances, I do not accept that the figure claimed is insufficiently evidenced.

381. I therefore find and hold that TCT's claim under this head succeeds in the amount of **US$310,572.37**.

E5. Claim for the purported Engine Penalty

382. The MOE has purported to withhold the sum of US$337,012.00 by way of an Engine Penalty pursuant to Article 8.1 of the MSA. This relates to Engine 191-382. TCT claims that it is entitled to that sum; it says that the MOE was not entitled to apply an Engine Penalty.

383. The chronology in relation to this Engine – mostly already set out above – was as follows:

(a) The Engine arrived at TCT's facility in Alberta on 16 June 2011.

(b) It was inducted on 29 September 2011.

(c) It underwent its detailed inspection from 19 November 2011.

(d) Performance testing was completed on 18 January 2012.

(e) It was shipped on 14 February 2012 – but to Dubai, rather than to Iraq.

(f) The final report setting out the detail of the work done was issued on 8 March 2012.

(g) It arrived in Iraq on 30 October 2012 (or possibly 4 November 2012; the evidence is not altogether clear). On 30 November 2012, TCT issued the MOE with an invoice in relation to the first staged payment for the Engine (i.e. 90% of the overhaul cost).

(h) The MOE refused to pay that invoice on the basis that the Engine had not been fully commissioned.

(i) By a letter dated 10 January 2013, TCT pointed out that the trigger for payment was not commissioning, but shipment to Iraq, and made clear that it would not commission the Engine until its invoice was paid.

(j) On 26 February 2013, the MOE paid TCT's invoice for the first staged payment, but it withheld the sum of US$337,012 on the basis that it was entitled to withhold an Engine Penalty under Article 8.1 of the MSA.

(k) The Engine was commissioned on 5 May 2013, as acknowledged in writing by the MOE.

(l) On 5 June 2013, TCT sent the MOE an invoice for the second staged payment for the Engine, in the sum of US$183,250. That invoice remains unpaid.

(m) On 26 November 2013, TCT sent the MOE an invoice for the Holdback Payment for the Engine, in the sum of US$183,250.00. That invoice remains unpaid.

(n) The warranty period in relation to the Engine came to an end on 5 May 2014.

384. It is fair to say that none of TCT's witnesses gave any explanation in their witness statements as to the reasons for the delays in this process. Mr Simonelli was, however, asked, when giving evidence in chief, why there were delays between arrival and induction, test completion and shipping. He said (as recorded in the transcript of Day 3 of the hearing):

"...two reasons. The first is from the resource planning perspective, we didn't see a need to press this unit, given the fact that we were of the view we had no LC, the contract hadn't started. But stemming from the fact we had no LC, we were starting to have material concerns about payment and the three or four months that we had been interacting with the MOE, gave us significant reservations about whether we were going to get paid and, it reached a point, by the end of August, the combination of the amount of money and accounts receivable for the Iraqis owed us and the amount of wealth the business had invested, was in excess of 30 million US Dollars. I had no LC. We had no evidence they had any intention of paying or acting in good faith and quite frankly, I took a decision to suspend performance and start mitigating our risk and exposure to the MOE's failure to have the payment arrangements in place. This was – I owed to people, our business, that we were putting the business at great risk by continuing to just press on blindly, without assessing the risk. We were materially concerned at that point. There was no evidence we were going to get paid."

385. Later in the course of his oral evidence, Mr Simonelli gave the following explanation for the delay between February 2012 and October 2012, again as recorded in the hearing transcript:

> *"In February [2012] we exercised our right to suspend performance and deliver into storage delivery 382 into Dubai. At that time we were being wrongfully charged LC fees, they were in chronic arrears relative to payment. We were owed $9.6 million at the end of December that was due and not paid. We had an arguable -- we had an argument over the LOC and over the period of January through to carrying on throughout the entire project, they were chronically in arrears. I was chronically exposed to material risk because they would not pay, they would not satisfy their obligations. I mitigated my exposure to their chronic lack of integrity by parking my unit in Dubai, so that it would be staged close if they ever came to their senses and started doing what they said they would do and this thing was parked in Dubai for a very long period of time while we waited for them to just have even a basic semblance of compliance with their obligations, and it never happened. Ultimately, we released 382 once the risk had been exposed and once we deemed it appropriate to no longer suspend performance, as was our right in the agreement, and this unit sat in Dubai for an extended period of time."*

386. In response to further questions, the transcript records Mr Simonelli as saying that there was no specific event that had triggered the decision to hold the Engine in Dubai. Rather, he said, by January/February 2012 he was aware that this was the last of the Engines (and thus, I infer, TCT's only security) and there were serious ongoing issues as regards the MOE making payments due to TCT and signing off on the work done by TCT. He said that whilst he appreciated that delivering the Engine into storage in Dubai would not trigger the MOE's obligation to make the 90% payment for that Engine, it meant that the Engine was close to Iraq and could be delivered to Baghdad in short order if and when the payment position improved.

387. As set out in paragraph 167 above, Article 7.4 of the MSA did entitle TCT either to *"withhold deliveries and suspend performance"*, or to place the Engine(s) into storage, if the MOE *"fails to fulfil any condition of the terms of payment"*.

388. The MOE has suggested that TCT did not, in fact, take a deliberate decision to suspend work in relation to this Engine as permitted by Article 7.4. So far as the periods prior to February 2012 are concerned, I have my doubts as to whether there was in fact a suspension, though (for reasons which appear below) I do not have to decide the issue one way or the other. I have those doubts principally

because TCT never advised the MOE that it was suspending performance, and because, as the MOE points out, the Final Report in relation to Engine 191-382 makes no reference to any suspension of performance. However, I accept Mr Simonelli's evidence that the decision to ship the Engine to Dubai rather than Iraq, and to put it into storage there, was a decision to suspend performance and put the Engine into storage pursuant to Article 7.4. It is true that TCT did not say to the MOE that it had done this, but I can see no other reason why TCT would have sent the Engine to Dubai. There was no advantage to it in doing so; in contrast, Mr Simonelli's explanation that the Engine would be on hand for delivery if and when the MOE performed its obligations is persuasive. Indeed, I consider it a reasonable course to have taken in circumstances where the MOE had simply to fulfil its payment obligations, and the Engine would then have been on hand and ready for installation.

389. I also accept Mr Simonelli's evidence that, as at February 2012 and until October 2012, when the Engine was shipped to Dubai, there were delays by the MOE in the performance of its payment obligations. I have already found that the MOE was obliged to put the Letter of Credit in place immediately or within a reasonable time of conclusion of the MSA, and that it did not do so. Further, I asked the parties to supply details of TCT's invoices, when they fell due for payment, and when they were in fact paid. TCT's solicitors supplied me with a chart showing this information, and the MOE did not suggest that it was incorrect, despite having been given the opportunity to comment on it. That chart shows substantial delays in payment and, in particular, that many invoices issued in 2011 were outstanding until various dates in 2013. It follows that TCT was entitled to suspend performance in accordance with Article 7.4.

390. Where does that leave the question of the Engine Penalty? The position seems to me to be as follows.

391. It is common ground between the parties that TCT had a period of 174 days within which to repair this Engine. But, as Article 8.2 of the MSA makes clear, that 174 day period runs not from delivery of the Engine to the facility in Alberta, but from *"Contract Commencement Date ie. Confirmation of Letter of Credit as referenced above"*. The Letter of Credit was not confirmed until 23 January 2012. The 174-day period thus runs from that date and came to an end, by my calculations, on 15 July 2012.

392. Thus, although the process of dealing with this particular Engine during 2011 was slow, I do not consider that those delays are relevant. What matters is the reasons for the delays after 15 July 2012. Had there been delays after that date which were the fault of TCT, then the MOE would have been entitled to impose an Engine Penalty.

393. However, and as I have set out above, I do not consider this to be the case. From February 2012 onwards and until redelivery, as I have found, TCT was exercising its contractual right to suspend performance and to place the Engine in storage. It cannot be the case that the MOE is entitled to impose an Engine Penalty where the delay in delivery results from its own failure to comply with the payment terms of the MSA and/or from TCT's exercising a contractual right to withhold delivery. That would make a nonsense of TCT's entitlements under Article 7.4.

394. I do not, therefore, consider that the MOE was entitled to apply an Engine Penalty in relation to Engine 191-382. It follows that TCT is entitled to the sum of **US$337,012.00**.

395. For completeness, I should add that I do not see the delays after 30 October 2012 as relevant to either party's case. The Engine Penalty provisions are triggered by a delay in delivery. By Article 11 of the MSA, delivery took place when the Engines arrived at Baghdad airport, not when they arrived at the MOE's plant or when they were commissioned. And in any event, any delay between 4 November 2012 and 26 February 2013 was caused by the MOE's failure to pay TCT's 30 October 2012 invoice.

396. I have stated above that TCT also claims the second staged payment and the Holdback Payment in relation to Engine 191-382, and have said that it is convenient to address those claims in this Section of this Award.

397. In its skeleton argument served in advance of the March 2019 hearing, the MOE stated that TCT could not claim in respect of both the Engine Penalty and the two invoices outstanding on Engine 191-382, because this would be double-counting. However, it is TCT's case and Mr Simonelli's evidence, which I accept, that the Engine Penalty was (as I have found, wrongly) deducted from the first staged payment, and that in addition the second stage and Holdback payments

have not been made by the MOE. The "double counting" argument is not, therefore, an answer to these claims.

398. By Article 7.1 of the MSA, the second stage payment in relation to each of the Al-Mussaib Engines was due on successful commissioning of the Engine. The Engine was commissioned on 5 May 2013 and the MOE agreed this to be the case by signing the document that acknowledged that it had run successfully. The second stage payment therefore became due on 5 May 2013 or, at the latest, when invoiced by TCT on 5 June 2013. I therefore find and hold that the MOE is liable to make payment in respect of the second stage payment for Engine 191-382 in the sum of **US$183,250.00**.

399. As to the Holdback Payment, this sum became payable *"one year after delivery of operating engines to site as further defined in this Agreement"*. As I have noted above, the meaning of that phrase is not altogether clear. However, the Holdback Payment was payable at the latest on 5 May 2014. At that time there were no arbitration proceedings on foot, still less an award in the MOE's favour. Even though it is possible that TCT's invoice in relation to this Holdback Payment was premature, there can be no doubt that the payment was due on 5 May 2014. Since it remains unpaid, TCT is now entitled to that Holdback Payment in the further sum of **US$183,250.00**.

E6. Claims in relation to additional trips to Al-Qudas

400. I have referred above to the fact that TCT contends that, because of the state of the Packages at Al-Qudas (which were the responsibility of the MOE, and not of TCT), TCT found itself obliged to make additional trips to Al-Qudas, which it contends that it should not have made. TCT says that it incurred expenditure as a result of those additional trips. It claims that wasted expenditure as damages/compensation for breach of the MSA. The total claimed is US$386,143.40.

The basis of TCT's claim

401. The claim arises in the following way.

402. It is common ground that, as I have already noted above more than once, TCT was not required to rehabilitate the Packages at Al-Qudas. Its work was to be in relation to the three identified Al-Qudas Engines only.

403. The workscope for the three Al-Qudas Engines is set out in Appendix C to the MSA. Each Engine was to be disassembled, removed to Alberta for repair and overhaul, and then reinstalled. Where costs of repair were set out, under the heading *"Field Service"*, it was stated in relation to each Engine that the *"Estimated time on site is six days per engine, two for removal and four for installation, startup, and commissioning"*.

404. Thus it appears that TCT's job was complete, as it were, only once the Engines had been reinstalled, and that it was obliged to reinstall them. It could only do so if the Packages were in working order, which meant that the MOE had to repair them if they were not.

405. What is more, given the timescale within which TCT was obliged to complete its work, it must follow that the MOE was obliged to repair the Packages at Al-Qudas (if such repair was required) promptly.

406. I also note in this regard that during meetings between the parties – in particular the May 2011 meeting – the evidence is that the MOE acknowledged that it was responsible for ensuring that the Al-Qudas Packages were in a proper state.

407. What in fact happened, according to TCT, was as follows (and I accept the evidence of TCT's witnesses in this regard). When TCT's personnel attended at Al-Qudas to remove the Engines, it was obvious that the Packages were in a poor state of repair; TCT told the MOE that it would be necessary for the MOE to put them right, and the MOE said that it would do so.

408. According to Mr Archer, in October 2011, when TCT advised that the repair of the Al-Qudas Engines was complete, the MOE stated that the Packages were ready. TCT therefore, so it says, put arrangements in place to attend at Al-Qudas. But when TCT's personnel arrived, it was found that the Packages were not, in fact, in a fit state to receive the Engines.

409. It is TCT's case that it made no fewer than nine trips to Al-Qudas to install the Al-Qudas Engines. It was able to install Engine 185-283 on the fifth of those trips, from 2-4 January 2012, and the other two Engines on the ninth trip, between 4 and 9 July 2012.

410. It is Mr Archer's evidence that, on each of those nine occasions, the MOE advised TCT that the Packages were ready. On each occasion, and in order to verify that assertion, TCT had to put security in place for its personnel to travel to Al-Qudas, and someone had to make the journey.

The MOE's defences

411. The MOE resists this claim on a number of grounds.

412. First, the MOE says that there is no term of the MSA that has been breached. As to this, I have stated above that I consider that pursuant to the provisions of the MSA which I have identified above, the MOE was obliged to repair the Al-Qudas Packages promptly, so that TCT could reinstall the Al-Qudas Engines once they were repaired.

413. The MOE states that there is no right under the MSA for TCT to claim for "unnecessary trips". I agree, but that is not the point; if in fact the MOE's breach of the obligation to ensure that the Al-Qudas Engines were repaired promptly was not complied with, then damage caused by that breach – which could in principle included unnecessary trips – is recoverable.

414. Similarly, the suggestion by the MOE that it was not an express term of the MSA that only two trips would be made per Engine misses the point. (In any event, I consider that Appendix C did in fact contemplate only two trips per Engine – see above.)

415. Secondly, the MOE suggests that there was no obligation on TCT to install the Al-Qudas Engines in a working Package. I do not consider that this is right, for the reasons I have set out above. It is true that the body of the MSA does not expressly so state, but the workscope for those Engines, as set out in Appendix C, does require reinstallation. I therefore consider that the MOE is wrong to say

that TCT could have discharged its obligations simply by redelivering the Engines to Al-Qudas.

416. Thirdly, the MOE complains that TCT caused its own loss, at least in part. It is suggested that TCT should not have made so many lengthy and unnecessary trips, but ought to have sent one or two individuals on a short-term basis to scope out the plant and determine readiness.

417. The difficulty with that submission is that, in circumstances where the MOE was telling TCT that the Packages were ready, it is hard to say that it was unreasonable of TCT to attend. It was suggested during the cross-examination of Mr Archer that fewer people should have been sent on later trips; but the figures for each trip as set out by Mr Archer in his statement show that TCT did exactly that. The single biggest cost claimed is for the first abortive trip, at a time when TCT was perfectly entitled to believe that the MOE had done that which it said it would; as time went on, and as Mr Archer put it (see the transcript for Day 2), *"we started sending less and less and less people to site. Because we just didn't feel like it was ready, so we didn't want to expose any more people to the risk of mobilisation than was necessary"*. Indeed, he said in terms that TCT had an eye to costs – *"what we did do to conserve the cost was reduce the size of the crew when we sent one"*. Mr Archer also explained that security issues meant that it was never advisable to send a man to Al-Qudas alone; it was simply too dangerous.

418. I accept that TCT acted reasonably in sending personnel to Al-Qudas on each of the nine occasions identified by Mr Archer. I further accept that, of those nine trips, seven were unnecessary and resulted in TCT suffering loss.

419. As to the amount of that loss, Mr Archer produced a spreadsheet setting out the wasted costs of the seven trips. He explained in evidence that this was necessarily done by reconstruction and by carving out parts of ProPer's invoices to TCT; he said, and I accept, that he took a conservative approach. Indeed, it is fair to say that the MOE did not, in the course of Mr Archer's cross-examination, challenge the costs claimed in any detail. The only serious point made was that there was (and is) a conflict between TCT's original Statement of Claim, in which the sum of US$332,573 was claimed, and the spreadsheet attached to his statement, which set out a figure of US$386,143.40. Mr Archer was asked about this in oral evidence; he suggested that the difference was the result of his

financial people having included an invoice of US$50,000 odd in error. That was a somewhat odd answer since on that basis one would expect the figure in the schedule to be lower than that in the Statement of Claim. However, it seems to me that, given that apparent concession and to be fair to the MOE, and in view of the fact that it was acknowledged by Mr Archer that the quantum exercise here was one of reconstruction, it is safest to award TCT the lower figure of **US$332,573** – and I therefore do so.

E7. Claim in relation to demobilisation costs

420. TCT claims the sum of US$261,879.59 by way of damages/compensation for demobilisation costs said to have been incurred unnecessarily. The claim arises because, so TCT contends, the MOE failed to provide the necessary assistance in obtaining visas for TCT's personnel. In particular, there were delays in obtaining visas and, when visas were supplied, they were for too short a period – typically 10 days only. As a result, it is TCT's case that it had to demobilise its personnel from Iraq on four occasions, resulting in additional and unnecessary expense.

421. I have set out above the provisions of the MSA that related to the obtaining of visas, such as they were. It will be recalled that clause 8 of Appendix E provided, *"Assurances from the Ministry that they will assist in expediting visas as required in a 3 day period"*.

422. That is a somewhat elliptical provision, but must have been intended to constitute some sort of obligation on the part of the MOE. I say that because Appendix E appears to have been intended to identify obligations imposed on each party; it is entitled *"Project Execution Summary and Responsibilities"* (emphasis added), and the preamble states that it sets out *"actions required by both parties to complete the project"*.

423. TCT contends that on its proper construction, that clause required the MOE to ensure that TCT's personnel had the visas that they needed. It is the MOE's case, however, that the clause imposed no such obligation. There was, it says, no guarantee in relation to the obtaining of visas; there was no obligation to obtain visas of a particular length; any obligation was limited to an obligation to "assist", and an obligation to "assist" is in any event too uncertain to be enforceable.

424. It seems to me that the proper analysis is as follows:

(a) The MOE's obligation was indeed one to "assist". That is not too uncertain to be enforceable; the obligation can be read as one to "do all it can to ensure" that visas are issued. That makes sense in circumstances where it appears that the MOE was not itself responsible for the issue of visas but where, as the evidence shows, it was able to exercise considerable influence over the Government department that did. So, for example, and as set out above, Mr Simonelli's notes of the meeting on 29 May 2011 record Mr Wafi of the MOE as saying, *"They* [i.e. the MOE] *have authority"* in relation to the issue of visas. And the minutes of the meeting between the parties on 21 October 2011 record that *"Mr. Raad* [Alharis, of the MOE] *advised that his ofc had the ability to sort these challenges"* [i.e. the difficulties with obtaining visas] and that *"Mr. Raad will ensure appropriate visas were issued"*. Further, the June 2013 Minutes record that the MOE was to be responsible for and arrange for the issue of visas for TCT's personnel; although that document long post-dates the MSA, it demonstrates the MOE's ability to influence the relevant Government department.

(b) The MOE was to assist in expediting – that is to say, assist in obtaining as quickly as possible – visas that were "required". I agree with TCT that this entailed the obtaining of visas that were of sufficient duration to enable TCT's personnel to carry out the work needed. Given the short duration of the MSA, it must have been obvious to both parties that visas lasting only a very short time would not constitute "required" visas.

425. The MOE contends that, even if there was an enforceable obligation to assist in expediting the required visas (as I have found that there was), the MOE did not breach that obligation. It points to evidence in the contemporaneous documents to the effect that it did, in fact, take steps to assist. TCT, in contrast, contends that the fact that the requisite visas were not obtained promptly demonstrates that the MOE cannot have provided the assistance that was needed.

426. As to this:

(a) I accept that the contemporaneous correspondence, and in particular the minutes of meetings, does show that the MOE was taking some steps to assist in obtaining the required visas. So, for example, the minutes of a meeting held on 19 July 2011 make reference to the MOE writing letters which TCT was able to pass to the immigration authorities.

(b) However, there is no evidence as to the totality of the steps taken by the MOE. In essence, the MOE's counsel have alighted on passages in documents produced by TCT (such as the one identified above) and asserted that, as a result of those passages, the MOE must be taken to have discharged its obligations.

(c) The documents which would show the precise nature of the steps taken by the MOE – for example, communications between the MOE and the Government department responsible for the issue of the visas – can be only in the hands of the MOE. But they have chosen not to produce them.

(d) Given the assurances given to TCT during the currency of the MSA, in particular by Mr Raad as noted above, and the MOE's failure to produce the evidence which would support its case, I consider that TCT is entitled to assert that the fact that the required visas were not obtained does indeed demonstrate that the MOE, whilst it took some steps to assist, did not take sufficient steps to do so. That is also borne out by the oral evidence of Mr Archer (see Day 2 of the hearing transcript), in which he referred to TCT's consultant having had to attend the MOE's offices and *"plead"* for the necessary documentation.

427. I therefore find and hold that the MOE did breach its obligations with regard to assisting TCT to obtain visas for its personnel.

428. The MOE further contends that TCT cannot establish, on the balance of probabilities, that the failure to assist with obtaining visas caused TCT to suffer any loss.

429. As to this, in the light of the MOE's assurances as referred to in paragraph 424(a) above, and in the absence of the MOE's own documents which would or might establish the precise steps that it actually took to "assist" in obtaining the

required visas, I consider that I am entitled to infer that, if the MOE had fulfilled its obligations, the requisite visas would indeed have been issued.

430. I also accept that it was the absence of visas that led to the demobilisations on which TCT relies. Mr Simonelli's evidence, which I accept, was that he could not allow TCT's personnel to remain in Iraq without the necessary visas.

431. There is one exception. The MOE contends that the "demobilisation" of 4-7 July 2011, for which the sum of US$6,300 is claimed, was nothing of the kind. Rather, it says that there was a requirement that two of TCT's personnel leave the country and re-enter it in order to obtain 3-month visas. That submission is supported by an e-mail from Mr Abdullah of ProPer dated 30 June 2011. It does seem to me difficult to lay that particular additional cost at the door of the MOE, and it is difficult to characterise what occurred as a "demobilisation". I therefore disallow that element of the claim. But it seems to me that TCT is entitled to claim in principle respect of the demobilisations that did take place. Those, according to Mr Simonelli, were between 6-21 May 2011, 23 July and 6 August 2011, 7-15 September 2011 and in January 2012. There is some small lack of clarity about some of the precise dates but I do not consider that this matters.

432. Lastly, the MOE complains that the quantum of this claim is insufficiently proved.

433. I have some sympathy with the MOE in this regard. Whilst it is fair to say that the specific points put to Mr Simonelli in cross-examination as to the quantum of TCT's claim were not ones that had been pleaded, it has always been for TCT to prove the amount of its losses. And, in contrast to documents relating to breach and causation, documents relating to quantum can only be in the hands of TCT.

434. Demobilisation costs were dealt with by Mr Simonelli in his witness statement and not by Mr Archer. He gave global figures for each of the demobilisations relied on, and said that, insofar as they related to ProPer's costs, they were "included in" invoices which he exhibited. No explanation was given as to which parts of those invoices were being claimed. Further, Mr Simonelli attached an Appendix A to his statement, which was a spreadsheet said to set out TCT's expenses associated with the demobilisations. That spreadsheet does

indeed give a breakdown, by heads of cost, of the items claimed. However, it is not consistent with the global figures given by Mr Simonelli in his statement. In each case, the figures in the spreadsheet are lower.

435. Mr Simonelli was asked about these discrepancies in his oral evidence (as the transcript of Day 3 of the hearing records), and was not able to explain them, whether adequately or, indeed at all. He said that he had relied entirely on Mr Archer. But Mr Archer had not given any evidence as to how he had calculated the demobilisation costs, and by the time Mr Simonelli gave evidence, he had left the witness box.

436. This is not satisfactory. That said, I do accept that costs were incurred and are claimable in principle. In these circumstances, I consider that the only safe course is for me to award TCT damages based on the lower figures in Appendix A to Mr Simonelli's statement. I accept that someone – presumably Mr Archer – has given these careful thought and, unlike the higher global figures in Mr Simonelli's statement, they are broken down by category.

437. Appendix A gives a total cost for the demobilisations of US$285,703.59. However, Mr Simonelli accepted in the course of his cross-examination that the figure of US$43,684.00 has been double-counted (and if one looks at the schedule, that is obviously right). In addition, I have already found that the costs of the 4-7 July 2011 "demobilisation" are not recoverable, and that requires a further deduction from the Appendix A figure of US$6,300, giving a balance of US$235,719.59.

438. In addition, TCT contends that it incurred costs from an outside visa assistance service in resolving the visa issues. The sum claimed is US$6,100; this is evidenced by Mr Archer and partly supported by documentary evidence in the form of an invoice. I consider that TCT ought not to have had to incur these costs and would not have done so had the MOE complied with its obligations with regard to assisting with the obtaining of visas. I therefore award TCT damages/compensation in respect of those costs.

439. The total awarded to TCT in respect of this head of claim is therefore **US$241,819.59**.

E8. Claim for additional labour expenses incurred by TCT

440. TCT contends that, by reason of the MOE's failure to provide local labour, it incurred additional cabling labour costs of US$138,468.00. It also says that it lost US$510,000 worth of labour by reason of a labour stoppage and seeks compensation in that amount.

(i) Cabling and associated labour costs

441. Mr Simonelli and Mr Archer's evidence, which I accept, was that the cabling at Al-Mussaib was in a very poor condition and required remedial work. In addition, it was necessary for cleaning work to be carried out and work had to be carried out on the filter housing, before any of the Engines could be re-installed.

442. Appendix E to the MSA made clear that basic manual labour at the sites was to be carried out not by TCT's personnel, but by the MOE. The MOE was to *"provide site assistance and support including but not limited to, material handling personnel and equipment, and general labour services"* (clauses 3(b) and 4(b)); it was to *"provide adequate labour/Engineer assistance to label, un-terminate, separate and re-locate high voltage cables from low-voltage cables as required and instructed by TCT staff"* and it was to *"supply general labour to clean the package and equipment, assist in installing filter housings and filters etc. … under the direction of TCT site staff…"* The division of responsibility seems to me to be clear: the MOE was to provide manual labour to carry out all tasks necessary to enable TCT to carry out its work, and TCT was to direct the MOE as necessary. I do not consider, as the MOE has suggested, that those provisions are too uncertain to be enforceable because they do not specify a particular number of hours. The MOE's personnel had to do what TCT required of them and when TCT required them to do it, bearing in mind that, as I have noted above, the project was time-critical.

443. I also find and hold that the MOE breached its obligations in this regard. Mr Archer's and Mr Simonelli's evidence is clear: the MOE's personnel were unreliable and difficult to manage, and TCT's personnel (i.e. ProPer) ended up having to carry out tasks which should have been carried out by the MOE. It is no answer to say that the MOE's personnel were on site for a particular number

of hours a day if, as is TCT's evidence, they did not carry out the work required of them.

444. It was suggested by the MOE that TCT was seeking personnel to carry out more tasks than it was contractually entitled to require. That submission was made by reference to the minutes of the meeting of 29 May 2011, in which TCT is recorded as having complained that the MOE's personnel had not carried out cable tray and cable trench draining and cleaning as instructed in writing. However, this seems to me to fall within clause 17 of Appendix E – if not within the requirement to *"clean the package and equipment"* (which it probably is), then within the *"etc."* which envisages TCT directing a wide range of manual tasks.

445. What is much more difficult is assessing the sums to which TCT should be entitled as a result of the MOE's breach of its obligations with regard to the provision of manual labour. I would have expected TCT to keep a record of the hours spent by ProPer on the tasks which ought properly to have been the MOE's. Had that been done, the assessment of the loss suffered by TCT would have been relatively straightforward. However, that is not what TCT has done. Instead, TCT has sought to identify hours which were not worked by the MOE's personnel (when it considers that they ought to have been worked). It has then assumed that its own contractors worked a 10-hour day at a rate of US$1,500 per day, and has calculated a value for the "missing" hours by using that rate.

446. However, and as the MOE's counsel demonstrated in cross-examination of Mr Archer, there are serious problems with that approach.

447. First, TCT's calculations depend on "logs" completed by ProPer in relation to the hours worked by the MOE's personnel and which were supplied to Mr Archer. Unfortunately, however, those logs, and hence the calculations based on them, are problematic. It is not clear whether the figures recorded represent numbers of people or numbers of hours; TCT's original calculations (which it is now accepted were wrong by a factor of 2) were based on there being one shift a day, whereas the logs in fact show two; and the logs are often inconsistent with underlying documents showing work actually carried out on a particular day.

448. Secondly, I struggle to see how identifying "missing" hours for the MOE personnel tells one much about the hours in fact worked on manual labour by

TCT's personnel. As Mr Archer accepted in cross-examination, TCT's personnel were carrying out supervisory work in any event. And there is no knowing how long any particular manual task took them – it might have taken less time than the local workforce would have spent.

449. All this leads me to conclude that TCT has simply not proved its losses under this head of claim. It could have done so, by keeping records of the hours spent by its personnel on manual work which should have been done by the MOE. But the evidence which it has put forward does not come close to establishing what work was actually done and thus what extra monies were incurred.

(ii) Claim in relation to labour stoppage

450. Separately, TCT claims losses which it says that it incurred by reason of a labour stoppage on the part of the MOE.

451. Mr Simonelli's evidence was that when Engine 191-469 arrived at Al-Mussaib on 19 December 2011, the MOE refused to offload it next to Unit 6 for installation, as had been planned and as TCT had directed. Instead, its personnel insisted that it be placed by Unit 3, the package from which it had been removed originally. The package in Unit 3 was not, however, ready for the installation of an engine at that stage. The MOE refused to allow TCT's personnel the use of the site crane, and so TCT was unable to install the Engine. It was only on 17 January 2012 that the MOE relented and allowed the Engine to be installed in Unit 6. I accept that evidence both because it was uncontroverted and because it is borne out by the contemporaneous documents, namely letters from TCT to the MOE dated 21 December 2011 and 7 February 2012.

452. TCT claims damages/compensation in the total sum of US$510,000. It says that those are the camp costs for the 30-day period during which work was carried out.

453. The MOE contends that there is no provision in the MSA which entitles TCT to claim damages in the event of a work stoppage. That is right, but if the MOE's conduct constitute a breach of one or more provisions of the MSA, then in principle TCT is entitled to damages. And it seems to me that it did: it was a breach of Article 3.3 of the MSA as set out in paragraph 165 above (because the

MOE was not providing TCT with the access to the site which it required to do its work) and clauses 6 and/or 17 of Appendix E as set out in paragraph 182 above (because the MOE refused to lift this Engine into the correct Package and refused to provide the labour to enable that to take place).

454. The MOE also says that TCT's evidence of loss is unsustainable. It complains that TCT has claimed the full cost of all personnel during the 30 day period in question, at a rate of US$17,000 per day. However, so it contends, TCT's personnel were not idle for the entirety of the 30 day period, but were carrying out other work.

455. As to this:

(a) There is indeed some evidence that the 30-day period was not entirely wasted and that some tasks were carried out, though Mr Simonelli's evidence was that those were *"the equivalent of a little step up from mopping the floor"*, not the highly specialised work that TCT's personnel would have been carrying out had the MOE permitted the Engine to be installed.

(b) Mr Simonelli also suggested that some of the actual costs of the 30-day period had not been claimed, though it is fair to say that TCT did not produce documents which supported that assertion.

(c) It seems logical that some of the work which was in fact carried out during the 30-day period could, had it been possible to install the Engine, have been carried out alongside that work. Thus it does not seem to me to follow that the 30 days were in fact gainfully used by TCT.

(d) Thus whilst it seems appropriate to make some allowance for the fact that other work was done during the 30 day period, it seems to me that that allowance should be small: the period was effectively wasted.

456. Doing the best I can, and acknowledging that this is a far from scientific approach, I am deducting 3 days' worth of time/costs from the sum claimed, on the basis that time of that order is likely to have been gainfully used. That is a deduction of US$51,000, with the result that I award TCT damages/compensation under this head of claim of **US$459,000**.

E9. Claim for additional parts and labour supplied by TCT

457. TCT claims the sum of US$253,691.00 in respect of additional parts and labour. This figure is broken down as follows: US$175,566.00 relates to the further work carried out by TCT in Iraq to Engine 191-391 pursuant to the June 2013 Minutes, and the remaining US$78,185.00 is for the cost of additional parts supplied for Engine 191-283, also pursuant to the June 2013 Minutes.

458. It is TCT's case that the MOE should meet these costs, because:

(a) The work was done at the MOE's request, and TCT has a restitutionary claim in relation to it; and/or

(b) The work was done pursuant to the agreement embodied in the June 2013 Minutes, and was done based on the premise that TCT would fulfil its outstanding commitments under the MSA or, if it did not, would pay TCT in relation to the additional work; and/or

(c) TCT is entitled to damages based on the usurpation of TCT's property, which remains TCT's because the MOE did not pay for the work.

459. The MOE contends that it is not liable for these additional costs, because:

(a) The June 2013 Minutes were not binding contractually.

(b) Even if the June 2013 Minutes were binding, TCT is not entitled to claim for the cost of the work done. That is not what was agreed; and whether or not the MOE has complied with its obligations under the June 2013 Minutes is irrelevant.

(c) TCT was obliged to carry out the work in any event, because the MOE's warranty claims were valid.

(d) TCT's claims based on unjust enrichment or usurpation must fail.

It also objects that the claims were not pleaded in the Statement of Claim, but since it has been able to address them I consider that I should not shut them out on that ground.

460. It is quite clear that TCT agreed to do the work that it did as part of the arrangements set out in the June 2013 Minutes, whether or not those Minutes were contractually binding. A deal was done: the MOE was to take certain steps – notably making the First Payment, and in due course the Second Payment, and providing the export documentation for TCT's tools and parts – and TCT would in turn provide the extra parts for Engine 191-283 and carry out the work on Engine 191-391.

461. It is also clear that TCT did not expect to be paid anything for that work. The June 2013 Minutes were a compromise.

462. I have indicated above that I can see arguments both ways as to whether or not the June 2013 Minutes were binding. But, once again, I do not consider that this matters. I consider that TCT cannot succeed in relation to this head of its claim, for the following reasons.

463. So far as the Minutes themselves are concerned, I do not agree that it was somehow implicit in them that if the MOE did not perform its side of the bargain, it would pay TCT for the additional work done. That is not what the June 2013 Minutes say, and I can see no warrant for reading that wording into them.

464. Nor is it an answer to say that TCT could somehow "throw up" the Minutes and seek payment anyway, if the MOE did not keep its side of the deal. That is not how a compromise works – at least if it is part-performed. Here both sides did do some of what was expected of them under the June 2013 Minutes. The MOE made (most of) the First Payment and all of the Second Payment. It provided some documents for the re-export of TCT's tools and parts, albeit that they were not adequate. And TCT did the work that it did. This is not a case of some condition precedent not being satisfied (c.f. the January 2015 Minutes, which depended on the approval of the "Higher Authority" of the MOE). It is simply a case of the MOE having done some of what it agreed to do, but not all of it. That does not, it seems to me, entitle TCT to charge for the work which it had agreed to do without charge.

465. I therefore consider that this head of claim cannot succeed pursuant to the MSA or to the June 2013 Minutes, even if those are binding.

466. As to the claim for unjust enrichment, I accept that this is a cause of action known to Iraqi law, by reason of Article 171 of the Iraqi Civil Code, which provides for recovery *"where a person is enriched without a legitimate purpose at the expense of another"*. However, it seems to me that the MOE has not been unjustly enriched at TCT's expense, in circumstances where TCT agreed pursuant to the June 2013 Minutes (whether or not those were enforceable) to carry out the work without any additional payment. Applying an English law analogy, TCT is to be treated for these purposes as a volunteer.

467. Lastly, I do not consider that there is a good claim for usurpation here. There is no reason to suppose that any of the relevant parts remain the property of TCT because they have not been paid for; that begs the question of whether payment was required. If, as I have found, it was not, the parts are the MOE's property.

468. For completeness, I should add that I do not accept that these were valid warranty claims and that TCT was therefore obliged in any event to carry out the work pursuant to the MSA. But in view of my other findings above, this does not assist TCT.

469. It follows that this element of TCT's claim fails.

E10. Claim for additional expenses

(i) Costs of investigation of Engine 191-415

470. I have explained above that Engine 191-415 was removed to TCT's premises at Airdrie for investigation. TCT incurred costs in transporting the Engine and in carrying out the investigation, in a total sum of US$160,905.26. TCT contends that it is entitled to those costs pursuant to the MSA, whether by reason of its express terms or as a matter of implication, because it concluded as a result of its investigation that there was no basis for any warranty claim.

471. In response, the MOE argues that there is no term on which this claim can be based. It says that the claim depends on an implied term of the MSA and that TCT cannot prove Iraqi law as to the implication of terms.

472. I do not, in fact, consider that TCT's case depends on the implication of a term. Rather, it is a matter of construing the relevant provisions of the MSA – in this case, the warranty provisions in Article 14 as set out above. That Article provides that TCT is to carry out repair or replacement work where the warranty conditions are met, at its expense. It also provides, by Article 14.6, that TCT provides no warranties other than as set out in Article 14. Further, Article 14.7 provides that TCT is to afford the MOE technical telephone support and a visit from a field technician at (I infer) its own expense, but is silent as to any obligation to provide further support.

473. Although Article 14 is not worded as clearly as it might be, it seems to me that, taking those provisions together, in circumstances where investigation beyond the "free" telephone advice or site visit is required, but where that investigation results in a determination that the matter is not one falling within the warranty afforded by Article 14, it must follow that the costs of the further investigation are for the MOE. Were it otherwise, TCT would effectively be providing the MOE with more protection than the Article 14 warranty affords; yet Article 14.6 states in terms that it is not to do so.

474. I do therefore consider that, if the MOE's warranty claim was not made out, TCT was and is entitled to claim the shipment and investigation costs from the MOE.

475. The MOE goes on to contend, however, that its warranty claim was in any event valid, such that there is no basis for TCT to claim these costs.

476. That would, if proved, be a valid defence (even though the MOE cannot assert the matter by way of a counterclaim). However, I do not consider that the allegation can be made out. Mr Caldwell states, in his witness statement, that TCT carried out a full investigation of the Engine and concluded, on grounds that appear *prima facie* reasonable, that the cause of the issues with the Engine was operator error and not any breach of warranty on the part of TCT. By virtue of his experience and the fact that he was responsible for the investigation, that is evidence which Mr Caldwell is able to give. In contrast, the MOE cannot,

realistically, mount a contrary case without some expert evidence. It invites me to draw inferences based on a series of matters identified in the MOE's written closing note (some of which were also referenced in the cross-examination of Mr Archer), but I do not consider that those matters begin to justify the inference which the MOE wishes me to draw, particularly when set against the effectively uncontested evidence of Mr Caldwell.

477. I therefore consider that TCT is entitled to the costs which it claims under this head, in the sum of **US$160,905.26**.

(ii) Storage charges

478. In addition, TCT claims US$208,000.00 by way of storage charges incurred during the course of the MSA. According to Mr Simonelli's witness statement, and the further oral evidence given by him, these are comprised as follows:

(a) Um Qasr: US$13,000 for storage charges related to the MOE not having the levy and tax exemptions in place at the time the shipment arrived. Um Qasr was one of the ports of entry for the Engines and for equipment.

(b) Dubai: US$110,000 for engine staging in Dubai while TCT waited for the MOE to secure LOC and issue payments for engines and packages already received in Iraq. Although Mr Simonelli was unable to give a breakdown of this figure, he indicated that it related to Engines that were held in Dubai pending delivery to the Plants, and that (at least) a large part of this sum related to Engine 191-382, the history of which is described above.

(c) Dubai: US$32,000 for deployment of a technician and equipment to Dubai to preserve Engines in storage there, required because of the lengthy storage in Dubai.

(d) Dubai: US$22,000 for insurance for engines while in Dubai.

(e) Mussaib: US$6,000 for site rental containers to store new MOE filters (containers not supplied by the MOE). These, Mr Simonelli said, were required because they had to be stored at the Plants whilst other parts and equipment, which were delayed in customs, were awaited.

(f) BIAP: US$25,000 for storage costs at BIAP awaiting clearance from the MOE for parts shipments. Mr Simonelli explained that these were airport storage fees incurred whilst TCT's parts and equipment awaited customs clearance.

479. Mr Simonelli candidly accepted that he had relied on others at TCT to assemble the details of these costs and was not in a position to supply further details or underlying documents.

480. TCT contends that it is entitled to these sums on the basis of Articles 9.1, 9.3, 11.1 and 12.3 of the MSA, as set out above. The MOE, on the other hand, contends that there is no right on the part of TCT to claim storage charges; that there has been no relevant breach of the MSA which might trigger a right to claim damages (if, contrary to its primary case, damages claims are available to TCT for breach of the MSA – as I have found that they are); that there is no claimable loss; and that any loss was in any event caused by TCT's unreasonable conduct or failure to mitigate.

481. So far as liability is concerned, I agree with the MOE that the provisions relied on by TCT do not in terms entitle TCT to claim storage charges: there is nothing express in them which states that, if the MOE does not fulfil its payment obligations or does not make payment of customs dues, TCT's costs will be for the MOE's account. However, I consider that insofar as the MOE breached its obligations under the MSA and thereby caused TCT loss in the form of storage charges, it is entitled to claim those losses as damages.

482. The various sums claimed under this head fall into two broad categories – the Um Qasr, Mussaib and BIAP costs, all of which are similar in character, and the Dubai costs.

483. As to the first of these, Mr Simonelli gave evidence to the effect that all of these sums were incurred because of delays in obtaining customs clearance or similar exemption for parts or equipment. By Article 12.3 of the MSA and clause 4(a) of Appendix E, the MOE was obliged to obtain customs clearance 3 days from the delivery of Engines and of Package rehabilitation parts at the airport. Further, by Articles 9.1 and 9.3, it was responsible for the payment of dues within Iraq;

and given the short timescale for the MSA, as discussed above, I consider that this must be read as an obligation to make those payments in such a way that Engines, parts and tools were not delayed. It follows, and I find, that these sums comprise losses caused by the MOE's breach(es) of the MSA.

484. I should add that there was a suggestion by the MOE made in its written opening, not pursued in closing, that a claim could not lie in relation to these items because they were neither Engines nor Package rehabilitation parts. As to this: (i) it seems to me that the only sensible reading of Articles 9.1, 9.3 and 12.3 of the MSA and clause 4(a) of Appendix E is that they apply to all Engines, tools and parts insofar as the tools and parts were required for the carrying out by TCT of its work on the Engines and (ii) in any event, as I have found in paragraph 483 above, the MOE was obliged to ensure that all customs dues were paid in a timely manner pursuant to Articles 9.1 and 9.3 of the MSA.

485. The Dubai costs fall into a rather different category. I have already set out above that I consider that TCT was entitled to suspend performance in relation to Engine 191-382, and that it was reasonable of TCT to hold that Engine in Dubai. I have also already found that the MOE did breach its obligations in relation to payment, and that TCT was holding Engine 191-382 until payment was made, as, eventually, it was. Article 7.4 entitles TCT to claim *"the costs incurred by TCT as result of CUSTOMER's nonfulfillment"*, which can, so it appears to me, include storage charges. Or, to put it another way, where payment obligations are breached and TCT exercises its right to suspend performance, the effect of Article 7.4 is to treat losses arising from the exercise of that right as damages for breach, rather than as being losses that are self-induced.

486. I therefore find and hold that each of these categories of loss is recoverable by TCT, whether as damages or additionally (in the case of the Dubai costs) pursuant to Article 7.4 of the MSA.

487. I have found in relation to TCT's other damages claims that a warning to the MOE was not a precondition to the right to claim, and that an extension to the MSA was not TCT's sole remedy; that reasoning applies equally to these claims.

488. The contention that TCT's loss was unreasonable, disproportionate and self-induced is made in relation to the Dubai claim. I do not accept this contention.

I have already found that holding the Engine in Dubai was reasonable. It does not seem to me to be an answer to say that it should have been held in TCT's premises in Alberta. Such a course would necessarily not have been without cost to TCT: the Engine still had to be stored and maintained. And TCT was entitled, when it moved the Engine to Dubai, to assume that the MOE would comply with its obligations as regards payment, rather than proceeding on the basis that it would not do so.

489. As to proof of the precise sums claimed, I consider that the evidence given by Mr Simonelli is (just) sufficient to prove these sums, in circumstances where he was able to explain what they related to.

490. I therefore find and hold that TCT is entitled to the sum of **US$208,000** claimed under this head.

E11. Claims in relation to the Performance Bond

491. Lastly, TCT seeks a series of declarations in relation to the Performance Bond. It also, as I have noted above, claims by way of damages the fees which it says that it has had to incur in keeping the Performance Bond open.

492. I have noted in paragraph 269 above that the MOE contends that the Performance Bond claims are before the Alberta Court and that I should not determine them on that ground. I have rejected that submission. The MOE does not raise any other jurisdictional objections relating to the determination of those claims (save for its jurisdictional objection which was dismissed by the First Partial Award) although, as I explain below, it does suggest that some of the relief sought by TCT in relation to the Performance Bond is not relief which I am able to award.

(i) The duration of the Performance Bond

493. I have explained above that the Performance Bond in fact constitutes four financial instruments. TCT was obliged to open the Performance Bond pursuant to the terms of the MSA; and it opened it in the form that it did so as to satisfy local Iraqi requirements. Those requirements included the "extend or pay" provision.

494. The MOE's case, in essence, is that no complaint can lie against it for the continued duration of the Performance Bond. It says that any claim must be against DESIB, not the MOE; that in any event DESIB is only exercising its contractual right to extend; and that it is not bad faith to extend the Performance Bond in circumstances where the MOE has outstanding claims against TCT and an unpaid judgment in Iraq.

495. In contrast, TCT contends that pursuant to the MSA, the Performance Bond was to be of limited duration only, and that the MOE is obliged to cause it to be released.

496. In order to assess the Performance Bond claims, it is necessary to consider what the MSA required. I note in this regard that:

(a) The Performance Bond was to be *"valid until the expiration of the Agreement"* (page 6 of the MSA; also Article 7.3).

(b) The term of the MSA was 539 days: 174 days commencing from the opening of the confirmed Letter of Credit, and then the 365-day warranty period.

(c) There is nothing in the terms of the MSA to suggest that the Performance Bond was intended to be a warranty bond that was co-existent with the warranty provisions, and which permitted the MOE to claim against it in the event of breaches of warranty.

497. The MOE points out that the MSA does not say that the Performance Bond is to be valid only until the expiration of the MSA. That is, of course, correct. Nonetheless, Article 7.3 seems to me to make sense only on the basis that the Performance Bond is intended to last for the duration of the MSA but no longer.

498. It therefore seems to me that the MOE was and is not entitled to keep the Performance Bond open for longer than the duration of the MSA.

499. Since the last of the warranty periods expired, at the latest, on 5 May 2014 (see the discussion of the fate of the individual Engines in Section D7 above, and in particular paragraph 383 above), it seems to me that the MSA came to an end by

that date at the latest. This is, in fact, longer than the period of 174 days plus 365 days from the Letter of Credit, which was intended to be the duration of the MSA. But if one gives the MOE the benefit of the doubt, and treats the duration of the MSA as being extended by reason of TCT's suspension of performance in relation to Engine 191-391 (see Section E5 above), then TCT was obliged to keep the Performance Bond in place until that date, 5 May 2014. But it was not so obliged thereafter.

500. The MOE contends that, even if that is correct, it had no obligation to return the Performance Bond or to cause it to be returned. I disagree. It seems to me that the obligation to cancel the Performance Bond or cause it to be returned is a necessary concomitant of the time-limited nature of the obligation. To put it another way, there is no entitlement on the part of the MOE pursuant to the MSA to ask for extensions of the Performance Bond beyond 5 May 2014. In continuing to do so, it is seeking to exercise a right under the MSA which it does not have. It is therefore in breach of the MSA.

501. I do not accept that it is "only DESIB" which is exercising a right. DESIB is, as I have found, acting in accordance with the MOE's instructions: see paragraph 194 above.

502. As to the suggestion that it cannot be wrongful for the MOE to cause the Performance Bond to be extended in the light of the Iraqi Judgment, I disagree. Any warranty claims would necessarily have had to be advanced pursuant to the Arbitration Agreement in the MSA. Such claims as were advanced have been struck out. The Iraqi Judgment is, as I have found, one obtained in breach of that Arbitration Agreement, and I am neither entitled nor obliged to recognise it.

503. In circumstances where the MOE's counterclaim has been struck out, there is no basis whatsoever for it to continue to seek to keep the Performance Bond open. I find and hold that it is, and has since 5 May 2014 been, wrongful, and a breach of the MSA, for it to continue to do so.

504. Still less is there any basis for the MOE to seek to draw down on the Performance Bond. That follows from my findings above.

505. Those findings have the following consequences. First, insofar as TCT has suffered loss and damage by reason of the MOE's breach of the MSA, it is entitled to damages and to be compensated in relation to that loss and damage. The MOE suggests that because the MSA required TCT to be responsible for the payment of fees and charges outside Iraq, the costs of keeping the Performance Bond open must be for TCT's account. That, however, ignores the fact that the only reason that the Performance Bond is still open is because of the MOE's breach. These are not charges that should have been incurred at all; they were only incurred by reason of the MOE's breach of the MSA, and I find and hold that the MOE is in principle liable to compensate TCT in relation to them.

506. Secondly, I need to consider the extent to which it is appropriate for me to grant TCT the declarations which it seeks.

(ii) Claim for damages/compensation

507. Had the MOE not sought wrongfully to extend the Performance Bond, it would have been cancelled or returned on or around 5 May 2014. All fees and charges incurred by TCT since that date are therefore, in principle, recoverable as damages/compensation from the MOE.

508. TCT's claim under this head was supported by a spreadsheet attached to Mr Simonelli's first witness statement. That spreadsheet is difficult to reconcile to the documents which are said to support it – in particular, bank statements provided by TCT. I found it difficult to follow. As the transcript of Day 3 of the hearing records, Mr Simonelli was able to give some oral evidence in relation to the content of the spreadsheet (see Day 3 of the hearing transcript), but was clear that it was his finance department which had prepared it, such that whilst he was able to speak to the spreadsheet in general terms he could not descend into detail.

509. Because it seemed (and seems) to me that this claim was in principle a valid one, and because I was struggling with the spreadsheet, I invited TCT to provide me with a proper spreadsheet or table setting out each charge and when it was said to have been incurred, with cross-references to the underlying evidence. I also indicated that TCT was permitted to bring its calculations up to date to the end of July 2020, if it so wished. TCT provided a further version of the spreadsheet

to me in response to that invitation on 24 August 2020. As I have noted above, it did update its claim by that spreadsheet and accompanying submissions, increasing it to US$621,454.12. The MOE was invited to comment on the revised spreadsheet but said simply that the claim was unsupported by evidence.

510. The new spreadsheet has advanced matters a bit, but is still not especially easy to follow. However, I do not accept that it is impossible, nor that there has been a failure to credit sums to the MOE (with one possible exception that I address below). The bank statements relied on by TCT show – as one would expect – debits and credits. But there is no suggestion in the evidence that TCT's bank credited it with sums relating to Performance Bond charges. One asks rhetorically: why would it do so? On the contrary, it is logical that TCT would be charged by its bank for keeping the Performance Bond open, so long as it is indeed kept open – and it is common ground that it has been. What is more, Mr Simonelli's evidence was that his finance department had carried out an exercise in good faith to identify the costs that TCT had incurred in relation to this Bond. I accept that evidence, particularly in view of the fact that the new spreadsheet makes a serious attempt to tie the sums claimed into the documents disclosed.

511. The one exception is as regards a possible credit in the 2015 year. It was put to Mr Simonelli in evidence that TCT had failed to credit the MOE with the sum of US$37,322.79, shown as a "credit" on one of the underlying documents produced. Mr Simonelli's evidence was that he understood his finance department to have taken all sums into account and come out with "the right" figures. However, in TCT's oral closing submissions, it was suggested that, to be conservative, that figure should be deducted, and it therefore seem to me that I must take that concession into account.

512. The total claimed by TCT in relation to Performance Bond fees is, as I have said, US$621,454.12. However, since I have found that TCT was obliged to keep the Performance Bond open until 5 May 2014, and the sums claimed go back to 2013, TCT cannot recover that sum.

513. The single largest component of the sum claimed is an amount of US$168,523.00. Mr Simonelli was asked about that sum in cross-examination. He said that it was a bonding fee, and that it represents the charges on the Performance Bond for 2014. He said that it was not charged for subsequent years because, following

the obtaining of the court order in Alberta, TCT's bank was prepared to waive that fee.

514. Since, as I have found, the Performance Bond should have been returned sometime in May 2014, I consider it appropriate to award TCT seven-twelfths of the fee for 2014, reflecting the period June-December 2014 (or 7/12 x US$168,523.00). That gives a figure of US$98,305.08.

515. The remaining sums claimed by TCT comprise, according to Mr Simonelli, monthly, or monthly-ish, charges on the Bond. They drop from around the US$35,000 mark in 2014 to around US$3,500 per month from mid-2015 onwards, up to and including July 2020. This is consistent with Mr Simonelli's evidence that *"After we obtained the injunction* [from the Alberta court] *we reached out to HSBC and said we would like a reduced fee and they agreed to reduce fee subject to the injunction being in place"*.

516. I therefore consider that these charges are sufficiently proved. That includes those charges where the bank statements have not been supplied to me directly (though they have apparently been supplied to the MOE's counsel). I consider that the spreadsheet is sufficient proof in circumstances where it appears that a monthly or monthly-ish charge in the same sort of order has been applied consistently, and where, as I have stated above, it is obvious that TCT will have been charged for keeping the Performance Bond open. What is more, in most cases where statements have not been provided, the charges are recent; and I invited TCT to update its spreadsheet but not to provide further supporting documents. In those circumstances, and as TCT rightly states, TCT cannot be criticised for providing those documents only to the MOE.

517. I therefore consider that TCT is entitled to the following additional sums under this head. The figures are taken from the updated spreadsheet, with one adjustment, as follows. In cross-examination of Mr Simonelli, :

(a) For 2014 - US$135,447.49 (I have taken the charges only from 29 May 2014 onwards);

(b) For 2015 – US$48,811.27 – this is the US$86,134.06 originally claimed, less the US$37,322.79 conceded as referenced above;

(c) For 2016 – US$38,783.56;

(d) For 2017 – US$38,053.75;

(e) For 2018 – US$38,470.78. (This is the total of the figures for 2018 in TCT's spreadsheet, taking into account two credits which TCT has applied. It is slightly different from the total given by TCT as its headline figure for 2018 but either its arithmetic is incorrect or, more likely, it has mistakenly transposed the 2017 figure above the relevant table in the spreadsheet);

(f) For 2019 – US$41,181.46;

(g) For 2020 – US$22,206.72 (to August 2020).

This gives a total of US$362,955.03. Adding that figure to the sum identified in paragraph 514 above, it follows that the total sum due to TCT by way of damages/compensation in relation to Performance Bond charges is **US$461,260.11**, and I so find and hold.

518. I also hold that TCT is entitled to a declaration that it is entitled to be indemnified by the MOE in relation to any further charges incurred by it by reason of the keeping open of the Performance Bond from August 2020 and until the Performance Bond is cancelled and returned to TCT.

(iii) Claim for declaratory relief and injunctive relief

519. TCT also seeks declarations in the following form:

(a) the Iraqi MOE has no further interest in either the DES Guarantee (number 048/LG/352) or the TBI Guarantee (11/963/1G111133119IND/ 2011), each issued pursuant to the Standby LC (PEBEICC111610), and that HSBC, TCT, DES, and TBI are fully released from any of their obligations and liabilities to the Iraqi MOE under these documents;

(b) the Iraqi MOF has no basis to claim under the guarantees referenced in paragraph (a), above;

(c) any previous claims, demands, or requests by the Iraqi MOE made under the DES Guarantee (048/LG/352) or the TBI Guarantee (1-1/963/IGT11133119IND/2011), each issued pursuant to the Standby LC (PEBHCC 111610), are withdrawn;

(d) the Iraqi MOE may not make any further claims, demands or requests on DES under the DES Guarantee (048/L0/352) or the TBI Guarantee (H/963/1CiT1 1 1331 19IND/2011), each issued pursuant to the Standby LC (PEBEICC 111610);

(e) the DES Guarantee and the TBI Guarantee have expired;

(f) in the event that the Performance Bond is not returned within seven days of the issuance of the decision of the Tribunal in the within arbitration, it shall be declared cancelled effective the date of the decision; and

(g) any attempt to extend any of the instruments that comprise the Performance Bond and/or any attempt to obtain payment under any of those instruments by the Iraqi MOE, whether directly or indirectly, is fraudulent.

520. In addition, TCT seeks injunctive relief in the form of an order for the return of the Performance Bond, and an order restraining the MOE from any further attempt to extend or draw down on the Performance Bond.

521. It is, of course, a matter for my discretion as to whether or not to grant the declarations sought. I am conscious, in this regard, that DESIB (and indeed the other banks who are party to the various instruments that make up the Performance Bond) are not parties to this Arbitration, and that I have jurisdiction only to grant relief against the MOE. That is a point made by the MOE as to why I should not grant declaratory relief. I consider that it is fair to this extent: I can make declarations directed only at the MOE, and not at DESIB or TBI or HSBC. I cannot, therefore, declare that the Performance Bond is "terminated", because that is a declaration as to the status of an instrument to which entities not before me are parties.

522. That does not, however, prevent me from making declarations directed at the MOE, in particular in relation to the status of the Performance Bond vis-à-vis the MOE, and the MOE's entitlement, or lack thereof, to claim on it.

523. The MOE also says that this is a matter properly before the Alberta court and that I should not interfere. That misses the point, however. The order made by the court in Alberta is for interim relief only. The Alberta court awaits this Award and my findings as to whether any drawdown on the Performance Bond would be wrongful.

524. Lastly, the MOE contends that I cannot deny the validity of the Iraqi Judgment and therefore cannot grant any declaratory relief. I disagree with that proposition for the reasons already given: see paragraphs 280-285 above.

525. As to the suggestion that a drawdown under the Performance Bond is fraudulent, I have made very clear in this Award that the Iraqi Judgment was obtained in breach of the arbitration agreement. The MOE has not pursued its counterclaim in this Arbitration; it was struck out, as I have described. It follows that, whatever the position in the past, any attempt in the future to draw down under the Performance Bond is likely to be contradictory to this Award. Whether any individual attempt to draw down would in fact be characterised as fraudulent must, however, depend on the circumstances of that attempt. I therefore accept the MOE's contention that it would not be right for me to characterise any particular attempt at drawdown, should one be made, as "fraudulent" in advance.

526. As I have noted above, I do take on board the fact that there are sensitivities in granting declaratory relief in circumstances where declarations can and must be directed only at the MOE. I have therefore determined that the proper course is to grant modified versions of the declarations which TCT seeks.

527. I therefore find and hold, and declare, as follows:

(a) the MOE has no further interest in either the DESIB Guarantee (number 048/LG/352) or the TBI Guarantee (11/963/1G111133119IND/ 2011), each issued pursuant to the Standby LC (PEBEICC111610);

(b) the MOE has no basis to claim under the guarantees referenced in paragraph (a), above;

(c) any previous claims, demands, or requests by the MOE made under the DES Guarantee (048/LG/352) or the TBI Guarantee (1-1/963/IGT11133119IND/2011), each issued pursuant to the Standby LC (PEBHCC 111610), are invalid;

(d) the MOE may not make any further claims, demands or requests on DES under the DES Guarantee (048/L0/352) or the TBI Guarantee (H/963/1CiT1 1 1331 19IND/2011), each issued pursuant to the Standby LC (PEBEICC 111610);

(g) any attempt in the future to extend any of the instruments that comprise the Performance Bond and/or any attempt to obtain payment under any of those instruments by the MOE, whether directly or indirectly, will be wrongful and a further breach of the MSA.

528. So far as the injunctive relief sought is concerned, the MOE repeats the points made as to declaratory relief, and also complains that *"there is a limited jurisdiction in the English Court for granting anti-suit injunctions which is tightly circumscribed and subject to considerable judicial authority"*. I do not accept that that is an accurate characterisation of the law regarding the English court's ability to grant anti-suit injunctive relief, even if the relief sought here could be characterised as anti-suit injunctive relief, which I am not sure that it can. But in any event, that is not relevant. The question is whether I have power to restrain a breach of the MSA by ordering injunctive relief. The ICC Rules confer the widest of powers on an arbitrator, and it seems to me that I do have such power.

529. Nor is it an answer to say, as the MOE does, that there is no basis for an injunction to restrain the enforcement of a valid foreign judgment. But I have already found and held that the Iraqi Judgment is not one that I can or should recognise. And in any event, the relief sought is not directed at the validity of the Iraqi Judgment, and I am not being invited to restrain its enforcement.

530. I therefore consider that it is appropriate for me to order, and I do order:

(a) that the MOE is restrained from making, whether directly or indirectly, demands for the extension of, or payment under, the Performance Bond or any of the instruments that comprise the Performance Bond;

(b) that the MOE is to take all such steps necessary to bring about the cancellation and/or return of the Performance Bond forthwith, including the giving of such instructions to DESIB as may be necessary to that end.

E12. The relief awarded to TCT

531. It will be seen from the foregoing Sections of this Award that TCT has succeeded in relation to some, but not all, of its claims.

532. To recap, I find and award that TCT is entitled to the following monetary relief:

(a) In relation to its claim for usurpation of the Tools and Parts (see Section E2 and paragraph 360 above): US$1,700,000.00.

(b) In relation to its claim for the Holdback Payment for Engine 191-391 (see Section E3 and paragraph 370 above): US$218,250.00.

(c) In relation to its claim for fees associated with the Letter of Credit (see Section E4 and paragraph 381 above): US$310,572.37.

(d) In relation to its claim for the purported Engine Penalty on Engine 191-382 (see Section E5 and paragraph 394 above): US$337,012.00.

(e) In relation to its claim for the second staged payment on Engine 191-382 (see Section E5 and paragraph 398 above): US$183,250.00.

(f) In relation to its claim for the Holdback Payment on Engine 191-382 (see Section E5 and paragraph 399 above): US$183,250.00.

(g) In relation to its claim for compensation/damages for additional trips to Al-Qudas (see Section E6 and paragraph 419 above): US$332,573.00.

(h) In relation to its claim for compensation/damages for demobilisation costs (see Section E7 and paragraph 439 above): US$241,819.59.

(i) In relation to its claim for additional labour expenses arising out of the MOE's work stoppage (see Section E8 and paragraph 456 above): US$459,000.00.

(j) In relation to its claim for the costs of investigation of Engine 191-415 (see Section E10 and paragraph 477 above): US$160,905.26.

(k) In relation to its claim relating to storage charges (see Section E10 and paragraph 490 above): US$208,000.

(l) In relation to its claim for fees relating to the Performance Bond (see Section E11 and paragraph 517 above): US$461,260.11.

533. The total of those sums is **US$4,795,892.33**.

534. I have also found and held that TCT is entitled to the declaratory and injunctive relief identified in paragraphs 518, 527 and 530 above.

E13. Claims to interest and costs

535. At my suggestion, the parties have agreed to defer the question of the interest due to TCT to a further Award. The start date for the timing of any award of interest on the various claims on which TCT has succeeded, and the appropriate rate to be applied, are matters on which I will be inviting further submissions from the parties in due course. The same is true of any claims for costs.

E14. The counterclaim

536. I have already noted above that the MOE was precluded by Dr Hoyle's orders from pursuing its counterclaim in this Arbitration, and it is not therefore open to me to make any findings in relation to that counterclaim.

537. However, there is one matter which originally did form part of the MOE's counterclaim, and which it is necessary for me to address. That is as regards Engine 191-415, which, as I have described above, remains in the possession of TCT.

538. It is the MOE's case that any award in favour of TCT must take into account that Engine. Either, the MOE says, it must be returned to the MOE, or credit must be given for its value. It asserts that the Engine is worth *"at least US$600-800,000 in its current state"*; this appears to be derived from a statement of Mr Simonelli in oral evidence, as recorded in the transcript of Day 3 of the hearing, that it is worth *"in the highly damaged state that it's in, 600,000, 800 at best"*.

539. In order to evaluate this contention, it is necessary to ascertain the basis on which TCT is purporting to hold the Engine. TCT says that it does so on two bases: first, by possessory lien, and secondly, pursuant to its right to withhold performance of the MSA pursuant to Article 7.4 thereof.

540. It seems to me that the possessory lien is in fact the correct analysis. As discussed above (see paragraph 247), the arrangements made by the parties in relation to Engine 191-415 were, at least in part, outside the terms of the MSA: in particular, the investigation was carried out pursuant to the June 2013 Minutes, with TCT not accepting that it was under any obligation to repair the Engine. I do not consider that TCT has any obligations which it has to perform pursuant to the MSA as regards that Engine, and therefore holding it cannot be a suspension of performance under the MSA. However, I accept – and have indeed found by this Award – that there are sums due and owing from the MOE to TCT under the MSA, and thus the suggestion that TCT is holding the Engine pursuant to a lien appears to be right. Indeed, the MOE has not seriously suggested otherwise.

541. In its written submissions dated 3 September 2020, TCT expressly accepted that the Engine is the MOE's property and that TCT cannot sell it or use it for itself. That concession must be correct, in circumstances where TCT holds the Engine pursuant to a lien. But it also follows that TCT cannot be obliged somehow to "credit" the value of the Engine, whatever that value might be, since it cannot realise that value for itself.

542. Is TCT obliged to return the Engine to Iraq? I consider that it is not. Had the agreement contained in the January 2015 Minutes come into effect, it would have been obliged to repair it and to return it, for the consideration agreed in those Minutes. But, as I have described in paragraphs 259-265 above, that agreement

did not come into effect. And I have also found that TCT was and is not under an obligation to carry out repairs on the Engine.

543. That being the case, I consider that the correct analysis is as follows. If and when the MOE complies with this Award (and any subsequent Award addressing interest and costs) in full, TCT will be obliged to release Engine 191-415 to the MOE. But it will be entitled to do so on an ex-works basis, with it being the MOE's responsibility to arrange and pay for the transport of the Engine to Iraq or, indeed, whatever other arrangements the wishes to make in relation to that Engine.

F. DISPOSITIVE SECTION

544. NOW I the Sole Arbitrator, having carefully and conscientiously considered the evidence and submissions before me, for the reasons set out above, FIND AND HOLD and accordingly AWARD AND ADJUDGE as follows:

(1) In relation to the claims for payment, compensation and damages advanced by the Claimant in this Arbitration, the Respondent is to pay the Claimant the total principal sum of **US$4,795,892.33**;

(2) The Claimant's claim for interest on the principal sum due to it, and any claim by either party in respect of costs, are to be the subject of separate submissions and a further award or awards in due course, and I reserve those claims for determination by myself as Sole Arbitrator.

545. And I further FIND AND HOLD, and accordingly AWARD and DECLARE as follows:

(3) The Respondent has no further interest in the financial instruments referred to in this Second Partial Award as the DESIB Guarantee (number 048/LG/352) or the TBI Guarantee (11/963/1G111133119IND/ 2011), each issued pursuant to the Standby LC (PEBEICC111610);

(4) The Respondent has no basis to claim under the guarantees referenced in paragraph (3), above;

(5) Any previous claims, demands, or requests by the Respondent made under the DES Guarantee (048/LG/352) or the TBI Guarantee (1-1/963/IGT11133119IND/2011), each issued pursuant to the Standby LC (PEBHCC 111610), are invalid;

(6) The Respondent may not make any further claims, demands or requests on DES under the DES Guarantee (048/L0/352) or the TBI Guarantee (H/963/1CiT1 1 1331 19IND/2011), each issued pursuant to the Standby LC (PEBEICC 111610);

(7) Any attempt in the future to extend any of the instruments that comprise the Performance Bond and/or any attempt to obtain payment under any of those instruments by the Respondent, whether directly or indirectly, will be wrongful and a further breach of the MSA;

(8) The Claimant is entitled to be indemnified by the Respondent in relation to any further charges incurred by it by reason of the keeping open of the Performance Bond from August 2020 and until the Performance Bond is cancelled and returned to the Claimant;

(9) If and when the Respondent complies with this Award (and any subsequent Award addressing interest and costs) in full, the Claimant will be obliged to release the Engine which is the property of the Respondent and which bears the serial number 191-415 to the Respondent from the Claimant's premises in Aidrie, Alberta on an ex-works basis.

546. And I further FIND AND HOLD, and therefore AWARD and ORDER as follows:

(10) That the Respondent is restrained from making, whether directly or indirectly, demands for the extension of, or payment under, the Performance Bond or any of the instruments that comprise the Performance Bond;

(11) That the Respondent is to take all such steps necessary to bring about the cancellation and/or return of the Performance Bond forthwith, including the giving of such instructions to DESIB as may be necessary to that end.

Place of arbitration: London, United Kingdom

Philippa Hopkins

PHILIPPA HOPKINS Q.C., Sole Arbitrator

Date: 16 November 2020

Exhibit C

IN THE MATTER OF AN ICC ARBITRATION
Arbitration No.: 21199/ZF/AYZ

B E T W E E N:-

TRANSCANADA TURBINES LIMITED

Claimant

- and -

MINISTRY OF ELECTRICITY, REPUBLIC OF IRAQ, GENERAL DIRECTORATE OF ELECTRICITY AL-FURAT MIDDLE REGION

Respondent

THIRD AND FINAL ARBITRATION AWARD

TABLE OF CONTENTS

A. INTRODUCTION

1. On 16 November 2020, I issued a Second Partial Final Arbitration Award in this arbitration ("the Second Award"). By the Second Award, I held that the Respondent was liable to the Claimant in the sum of US$4,795,892.33. I awarded that sum to the Claimant, together with associated declaratory relief. The precise relief awarded by me is set out in paragraphs 544-546 of the Second Award, to which reference should be made.

2. In paragraph 544(2) of the Second Award, I stated as follows:

"The Claimant's claim for interest on the principal sum due to it, and any claim by either party in respect of costs, are to be the subject of separate submissions and a further award or awards in due course, and I reserve those claims for determination by myself as Sole Arbitrator."

3. This further, and final, Award, is directed principally at those outstanding questions.

4. I adopt the same abbreviations as used in the Second Award, to which reference should be made.

B. THIS ARBITRATION

5. Paragraphs 6-12 below repeat information contained in the Second Award, but for completeness I repeat them because of the requirements of the ICC Rules 2012 ("the ICC Rules"), to which this arbitration is subject.

B1. The parties and their representatives, and the arbitral tribunal

6. The Claimant in this Arbitration is TRANSCANADA TURBINES LIMITED, a corporation incorporated pursuant to the laws of Alberta, Canada. Its registered office address is 998 Hamilton Blvd, Airdrie, AB, T4A 0K8 Canada. It is referred to in this Award as "TCT". TCT carries on the business of repairing, maintaining and overhauling aeroderivative gas turbine industrial engines.

7. TCT has at all times during this Arbitration been represented by Bennett Jones LLP ("Bennett Jones"), of 4500 Bankers Hall East, 855 2nd Street SW, Calgary,

Alberta, T2P 4K7 Canada, and in particular by Mr Munaf Mohamed QC, Ms Codie Chisholm, Ms Christine Viney and Ms Kate Schwantz of that firm. The relevant e-mail addresses for communication with TCT are those of Mr Mohamed QC and Ms Viney of Bennett Jones: MohamedM@bennettjones.com and VineyC@bennettjones.com.

8. The Respondent is described in the Terms of Reference as the MINISTRY OF ELECTRICITY, REPUBLIC OF IRAQ, GENERAL DIRECTORATE OF ELECTRICITY AL-FURAT MIDDLE REGION. It is referred to in this Award as "the MOE". The MOE is a Ministry, or department, within the Government of Iraq. It has an independent legal personality that is separate from the Republic of Iraq; it is able to sue and be sued and to make contracts in its own name. The MOE is responsible for, amongst other matters, the generation of electric power in the Republic of Iraq.

9. The MOE's address is the Ministry of Electricity, Legal Office, Baghdad Kadimyia, Dist. 427, St. 21, Res. No. 8, Iraq, although from time to time during this Arbitration, TCT has (rightly or wrongly) sent correspondence intended for the MOE to the Embassy of the Republic of Iraq, 21 Queen's Gate, London SW7 5JE, UK. The MOE owns and operates power stations in Iraq.

10. During the earlier stages of this Arbitration, and as described in detail in Section B of the Second Award, the MOE was unrepresented. Since approximately 11 February 2016, it has been represented by Seddons Solicitors ("Seddons"), of 5 Portman Square, London W1H 6NT, and in particular by Christian Smith, Charles Goldblatt and Farhana Khanom of that firm. The MOE has also been represented by a London barrister, Paul Sinclair QC, instructed by Seddons on the MOE's behalf. The relevant e-mail addresses for communication with the MOE are those of Mr Smith and Mr Goldblatt of Seddons, namely: Christian.Smith@seddons.co.uk and Charles.Goldblatt@seddons.co.uk.

11. As explained in section B12 of the Second Award, the Arbitrator originally appointed in this Arbitration, Dr Mark Hoyle, resigned on 20 March 2020 and his resignation was accepted by the ICC Court on 26 March 2020. On 28 April 2020, the ICC Secretariat indicated that I the undersigned, Philippa Hopkins QC, of Essex Court Chambers, 24 Lincoln's Inn Fields, London WC2A 3EG, UK, had

been appointed by the ICC Court as Sole Arbitrator in this matter to replace Dr Hoyle, such that the Arbitral Tribunal was once again fully constituted.

B2. The Arbitration Agreement

12. The arbitration agreement between the parties ("the Arbitration Agreement") is contained in a written Master Services Agreement between TCT and the MOE dated 1 March 2011 ("the MSA"). Article 21 of the MSA provides as follows:

> *"21. DISPUTE RESOLUTION*
>
> *21.1. The Parties agree that in the event of a claim, dispute or controversy ("Claim"), whether contractual, extra-contractual, tortuous [sic] or statutory, arising out of or related to this Agreement each Party shall designate a committee to negotiate a resolution to the Claim. If the company officers or committee are unable to agree upon a resolution within thirty (30) days, or any agreed upon extension, then the Parties agree to submit the dispute to final and binding arbitration for resolution.*
>
> *21.2 Any such arbitration shall be determined before a mutually agreed upon Arbitrator in accordance with the Rules of Arbitration of the International Chamber of Commerce (ICC). Judgment upon arbitration awards may be entered in any court, state or federal, having jurisdiction.*
>
> *21.3 The place of arbitration shall be London, United Kingdom. The Arbitrator shall apply the Laws of Iraq to the substance of the dispute.*
>
> *21.4 Arbitration proceedings shall use the English Language throughout.*
>
> *21.5 The Parties agree that the award of the Arbitrator shall be final and shall be the sole and exclusive remedy between them.*
>
> *21.6 Any claims, counterclaims, issues or accountings presented or pleaded to the Arbitrator shall be made and shall promptly be payable, free of any tax, deduction or offset, and that any costs, fee or taxes incident to enforcing the award shall, to the maximum extent permitted by law, be charged against the Party resisting such enforcement."*

13. I have described in section B of the Second Award the jurisdictional objection raised by the MOE to the appointment of an arbitrator pursuant to the Arbitration Agreement, and set out how that jurisdictional objection was resolved in favour of TCT.

B3. Seat and governing law

14. As can be seen from Article 21.3 of the MSA as set out above, the seat of this Arbitration is London, UK, and it follows that English law applies to procedural matters relating to this Arbitration.

15. As I have stated above, the ICC Rules 2012 apply to this Arbitration.

16. The MSA is governed by the law of Iraq, and it is common ground between the parties that the law of Iraq is that which applies to the substance of the dispute between them.

C. PROCEDURAL HISTORY

17. I refer to section B (paragraphs 12-147) of the Second Award, which sets out in detail the procedural history of this Arbitration up to the date of the Second Award. Those paragraphs should be treated as incorporated by reference into this Award. Below I set out the further developments since that date.

18. The Second Award was sent to the parties by courier by the ICC Secretariat, and a courtesy copy was sent by e-mail, on 19 November 2020. I am informed by the ICC Secretariat that the Claimant received the Second Award on 23 November 2020 and the Respondent on 20 November 2020.

19. On 25 November 2020, TCT's counsel wrote to the MOE's solicitors with suggested directions for the determination of issues relating to interest and costs. The MOE's solicitors responded indicating that they needed to take instructions.

20. On 26 November 2020, the ICC Court extended the time limit for rendering the final award until 29 January 2021.

21. On 27 November 2020, TCT's counsel wrote to me setting out a proposed timetable for any remaining submissions and seeking the MOE's agreement to it. I indicated, following an exchange of e-mails with the parties' counsel, that the MOE should respond by 1 December 2020.

22. On 1 December 2020 the MOE's counsel indicated that they were content with the directions proposed by TCT.

23. Accordingly, by an e-mail dated 1 December 2020, I directed as follows:

1. *Since the parties are agreed that there is no need for an oral hearing to determine outstanding matters, they will be dealt with in writing.*

2. *The Claimant is to serve its submissions in relation to all outstanding matters – which I believe only to be interest and costs – by 4 December 2020.*

3. *The Respondent is to serve any submissions in reply by 11 December 2020.*

4. *In the event that the Claimant wishes to serve any submissions in response to the Respondent's submissions, it should do so by 17 December 2020.*

5. *There is liberty to apply.*

24. On 4 December 2020, TCT served its submissions in relation to interest and costs ("TCT's 04.12.20 Submissions"). As I explain below, TCT's 04.12.20 Submissions also included a further monetary claim relating to the fees incurred by TCT in continuing the Performance Bond beyond August 2020.

25. Enclosed with TCT's 04.12.20 Submissions was a further (third) witness statement of Mr. Daniel J.B. Simonelli, and a witness statement of Casey Giovanetto, TCT's Director of Finance.

26. On 11 December 2020, the MOE served its submissions in response ("the MOE's 11.12.20 Submissions").

27. On 14 December 2020, TCT served its submissions in reply ("TCT's 14.12.20 Submissions").

28. On 28 January 2021, the Court extended the time limit for rendering the final award until 26 February 2021.

29. On 9 February 2021, I declared these Arbitration proceedings closed pursuant to Article 27(1) of the ICC Rules.

30. On 26 February 2021, the ICC Secretariat indicated to the parties that a draft form of this Award had been approved by the Court, and that the Court had extended the time limit for rendering the final award until 31 March 2021.

31. Since both parties were agreed that no oral hearing was necessary, I have proceeded to determine the outstanding matters on the basis of the parties' written submissions.

D. RELIEF SOUGHT BY THE PARTIES

32. The relief sought by the parties, insofar as not already the subject of the Second Award, is as follows.

33. TCT seeks:

(1) An additional US$9,591.63 representing the further costs said to have been incurred in maintaining the Performance Bond between 4 August 2020 and 19 November 2020;

(2) Interest on the sums awarded to it pursuant to the Second Award, in a total amount of US$2,132,125.17, or such other amount as the Tribunal considers appropriate;

(3) An award of its legal costs, including interest on those costs;

(4) An order that the costs of the Arbitration, as fixed by the ICC, be paid by the MOE, and reimbursed by the MOE to TCT insofar as they have been previously met by TCT.

34. The MOE does not seek an award requiring payment of any sum or other relief in its favour. However, it contends that it was successful in defeating some of TCT's claims, and on some of the issues raised by its jurisdiction challenge, and that this should lead to a reduction in the costs to be awarded to TCT. It also takes points on the assessment of costs and on the rate(s) and period(s) of interest to be awarded, as I set out in detail below.

35. I therefore turn to deal with each of the items of relief sought by TCT, in turn.

E. ADDITIONAL PERFORMANCE BOND CLAIM

36. By paragraph 545(8) of the Second Award, I found and held that, *"The Claimant is entitled to be indemnified by the Respondent in relation to any further charges incurred*

by it by reason of the keeping open of the Performance Bond from August 2020 and until the Performance Bond is cancelled and returned to the Claimant".

37. In TCT's 04.12.20 Submissions, TCT states that the Performance Bond has not been cancelled and returned to it. The MOE has said nothing to contradict this.

38. Further, in TCT's 04.12.20 Submissions, it claims an additional sum representing the further costs incurred in maintaining the Performance Bond between 4 August 2020 and 19 November 2020. The sum claimed is US$9,591.63, and Mr Simonelli, in his third statement, attests to the fact that those costs have been incurred.

39. Nothing has been said about this claim at all in the MOE's 11.12.20 Submissions. I consider that the MOE has had the opportunity to make submissions on the claim but has chosen not to do so.

40. I find and hold, in view of Mr Simonelli's statement, that the further costs claimed, namely US$9,591.63, have been incurred. Furthermore, it seems to me that it is consistent with the declaration set out in paragraph 36 above for me now to award TCT that further sum of US$9,591.63, and I do so. Hereafter, and in the event that the Performance Bond is not cancelled and returned – as it should be – TCT will have the protection of that declaration.

F. INTEREST

41. It is common ground that I have power to award interest on the sums awarded to TCT.

42. This Arbitration is seated in London. It follows that the power to award interest is derived from section 49 of the English Arbitration Act 1996. That section provides as follows:

> ***49 Interest.***
>
> *(1) The parties are free to agree on the powers of the tribunal as regards the award of interest.*
>
> *(2) Unless otherwise agreed by the parties the following provisions apply.*
>
> *(3) The tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case—*

(a) on the whole or part of any amount awarded by the tribunal, in respect of any period up to the date of the award;

(b) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment.

(4) The tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at such rates and with such rests as it considers meets the justice of the case, on the outstanding amount of any award (including any award of interest under subsection (3) and any award as to costs).

(5) References in this section to an amount awarded by the tribunal include an amount payable in consequence of a declaratory award by the tribunal.

(6) The above provisions do not affect any other power of the tribunal to award interest.

43. The effect of section 49 is that in arbitrations seated in England, interest is considered a procedural matter governed by the law of the seat (the position is somewhat different in proceedings before the English courts, as I explain further below). The parties can exclude the operation of section 49 by agreement but, if they do not do so (and they did not do so here – see paragraph 51 below), an arbitral tribunal has a broad discretion to make whatever award of interest meets the justice of the case.

44. Issues have arisen between the parties as to the rate of interest to be awarded, and whether it should be simple or compound. It is also necessary for me to determine the date(s) from which any award of interest should run.

F1. <u>Interest rate</u>

45. In TCT's 04.12.20 Submissions, TCT claims interest at a variable rate and on a compound basis with monthly rests. That claim is supported by Mr Giovanetto's witness statement, which exhibits a spreadsheet setting out an interest calculation. The total interest claimed on the sum awarded in the Second Award is US$2,132,125.17.

46. It is fair to say that this claim represents a change of tack on the part of TCT. In its Statement of Claim, TCT indicated that it was seeking only simple interest on any sums awarded to it, at a rate of 4% per annum and in accordance with the Iraqi Civil Code. That submission was repeated in TCT's written closing submissions (at paragraph 272). Furthermore, during oral closing submissions

at the March 2019 Hearing, TCT's counsel specifically stated that his client did not claim compound interest; rather, it was claiming simple interest only.

47. TCT now relies on the fact that I have a discretion as to the rate of interest to be awarded, pursuant to section 49 of the Arbitration Act 1996, so as to claim compound interest at varying rates. It further contends that such an award represents the rate at which it could have borrowed funds and thus is proper compensation for its losses in being kept out of its money.

48. In the MOE's 11.12.20 Submissions, the MOE (i) points out that TCT's claim has hitherto been only for simple interest and (ii) contends that, since Iraqi law is the law governing the claims, TCT can in any event only claim simple interest. It relies on the decision of Picken J in Kazakhstan Kagazy v. Zhunus [2018] EWHC 369 (Comm) as support for a submission that the claim to interest must be governed by the law of Iraq. It further contends (iii) that no interest should be awarded on the elements of the Second Award that comprise damages as opposed to debt, since Iraqi law does not allow for interest to be paid on damages claims.

49. It seems to me that the proper approach is as follows.

50. As I have already noted above, my power to award interest is derived from section 49 of the Arbitration Act 1996. That provides that an arbitral tribunal *"may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case"*. In other words, it gives me a wide discretion.

51. Insofar as the MOE suggests that TCT can only be awarded interest in accordance with Iraqi law, I do not consider that it is correct. The Zhunus case concerns the approach to interest in English court proceedings under section 35A of the Supreme Court Act 1981. That provision is different from section 49 and generally does allow only for interest that can be awarded under the law applying to the claims. Further, under the 1981 Act, compound interest cannot be awarded other than as damages. The approach in arbitrations is not the same, because the statutory power under section 49 of the 1996 Act is much wider, as I have explained above. Further, the selection of a particular governing law by the parties to govern the contract between them does not constitute an agreement to exclude the power under section 49: see Lesotho Highlands Development Authority v. Impreglio SpA [2005] UKHL 43.

52. It thus appears to me that I am not, as a matter of law, constrained to order a rate of 4%; nor am I necessarily limited to simple interest; nor am I obliged to decline to order interest on the damages elements of TCT's claims, if that is indeed what Iraqi law requires.

53. The question, therefore, is what rate of interest *"meets the justice of the case"*. In considering that question, I have the following in mind:

(i) TCT has been kept out of its money, and for a long period. The purpose of an award of interest is to compensate a claimant for being kept out of its money.

(ii) Iraqi law governs all TCT's claims.

(iii) The evidence before me is, as is agreed, that Iraqi law contemplates only simple interest at a rate of 4% p.a. According to the MOE, no interest is payable on damages claims.

(iv) Until very recently, TCT has claimed only simple interest at a rate of 4% in this Arbitration. Indeed, at the March 2019 hearing it specifically stated that it was not claiming compound interest.

54. Taking all those matters into account, it seems to me that an award of interest that *"meets the justice of the case"* pursuant to section 49 of the Arbitration Act 1996 is one of simple interest at a rate of 4% p.a. on all those sums which I have found to be due to it, whether in debt or damages.

F2. Interest periods

55. In the annex to TCT's 04.12.20 Submissions, TCT has set out what it contends to be appropriate commencement dates for interest to begin to run on the various elements of the monetary sums awarded by the Second Award. This is, again, a departure from its originally pleaded case, which sought interest running from the date of the Request for Arbitration.

56. The MOE submits that interest should run only from 10 July 2015, that being the date of the Request for Arbitration and that being the approach which an Iraqi court would take. However, and as explained above, I do not consider that I am constrained by the approach which an Iraqi court would adopt. I am entitled to

award interest from such dates as I consider meets the justice of the case. Bearing in mind that, as I have already noted, the purpose of an award of interest is to compensate a claimant for the fact that it has been kept out of its money, I consider that the correct approach is to award interest from the dates on which TCT ought to have been paid in respect of each of its claims. I am conscious that, as I have said, this is a departure from TCT's originally pleaded case, but it seems to me that it meets the justice of the case to adopt this approach, and that to do otherwise would result in TCT being undercompensated.

57. None of the dates which TCT has adopted in its annex has been challenged as incorrect by the MOE (assuming its primary position on dates not to be accepted). With two exceptions as identified below, I am satisfied that those dates are appropriate start dates. I therefore award interest running from the dates set out below in relation to the various heads of claim, and for the following reasons:

(i) Sum awarded under para. 532(a) of the Second Award (damages for usurpation of the Tools and Parts): 14 April 2015. This is consistent with paragraphs 266 and 351 of the Second Award, and my finding that the MOE had usurped the Tools and Parts as from that date, if not before.

(ii) Sum awarded under para. 532(b) of the Second Award (Holdback Payment for Engine 191-391): the date suggested by TCT is 14 June 2013. However, that is based on a misreading of paragraphs 366-369 of the Second Award, where I held that if the June 2013 Meeting Minutes were binding (which I did not decide one way or the other), the Holdback Payment ought to have been paid by 14 June 2013. I went on to hold that the better approach was to fall back on the provisions of the MSA, which required the Holdback Payment to be released automatically on 17 July 2013. 17 July 2013 is therefore the correct start date for interest on this element of the claim.

(iii) Sum awarded under para. 532(c) of the Second Award (Letter of Credit fees): 23 January 2012. This is consistent with paragraph 375 of the Second Award: on this date, TCT pointed out to the MOE that these sums were due and owing, and that is therefore the latest date by which they ought to have been paid.

(iv) Sum awarded under para. 532(d) of the Second Award (alleged Engine Penalty for Engine 191-382): The date claimed as the start date for interest

is 30 October 2012, but that is too early. The Engine (probably) arrived in Iraq on that date: see paragraph 383(g) of the Second Award. Whilst it is true that the date of arrival in Iraq triggered the obligation to pay, the relevant invoice was not issued by TCT until 30 November 2012: see paragraph 383(g) of the Second Award. I do not consider that the MOE could have been expected to pay before that date, and I therefore take the invoice date, 30 November 2012, as the start date for the running of interest.

(v) Sum awarded under para. 532(e) of the Second Award (Second Staged Payment for Engine 191-382): 5 June 2013. That is the date of the relevant invoice, and so is an appropriate start date: see paragraph 383(l) of the Second Award.

(vi) Sum awarded under para. 532(f) of the Second Award (Holdback Payment for Engine 191-382): 5 May 2014. I have found in paragraph 399 of the Second Award that the sum in question was payable at the latest on that date.

(vii) Sum awarded under para. 532(g) of the Second Award (Al-Qudas trips): 9 July 2012. That was the end of the last of the trips to Al-Qudas: see paragraph 409 of the Second Award. Since it is the earlier trips that were not necessary, the MOE's liability had accrued at least by this date, and I consider that using 9 July 2012 as the start date for interest if anything favours the MOE.

(viii) Sum awarded under para. 532(h) of the Second Award (Demobilisation costs): 25 January 2012. This was the end of the last of the demobilisations in respect of which I have awarded TCT damages – see paragraph 431 of the Second Award. Thus TCT has taken a conservative approach in suggesting this date, and I am content to adopt it.

(ix) Sum awarded under para. 532(i) of the Second Award (Additional labour costs): 17 January 2012. This was the end of the labour stoppage which formed the basis of this claim – see paragraph 451 of the Second Award – and was therefore the date on which TCT's cause of action accrued.

(x) Sum awarded under para. 532(j) of the Second Award (Investigation costs): 11 July 2014. This is the date on which Mr Caldwell of TCT wrote to MOE explaining that the damage to the Engine was outside the scope

of any warranty: see paragraph 228 of the Second Award. I am satisfied that all the investigation costs had been incurred by that date and that TCT's cause of action had accrued in respect of them.

(xi) Sum awarded under para. 532(k) of the Second Award (Storage charges): 5 May 2013. This is the date when Engine 191-382 was commissioned (see paragraph 383(k) of the Second Award) and is thus a date after the last of the storage charges was incurred; I am again satisfied that, in selecting this date, TCT has taken a conservative approach which I am happy to endorse.

(xii) Sums awarded under para. 532(l) of the Second Award (Performance Bond costs): as explained in TCT's 04.12.20 Submissions, TCT submits that *"it is reasonable to commence interest calculation periods on an annual rather than rolling basis, such that interest for the total expenses incurred by TCT in respect of the Performance Bond in any given year are calculated beginning on January 1 of the following year"*. I agree with that approach which, if anything, favours the MOE rather than TCT. It follows that the appropriate dates for the calculation of interest are 31 December 2014 for the 2014 costs, 31 December 2015 for the 2015 costs, 31 December 2016 for the 2016 costs, 31 December 2017 for the 2017 costs, 31 December 2018 for the 2018 costs, and 31 December 2019 for the 2019 costs. For the 2020 costs as awarded in the Second Award, I have taken the date of 25 August 2020, that being the date up to which Performance Bond costs were awarded under the Second Award.

(xiii) That leaves the further Performance Bond costs awarded under paragraph 40 above. I adopt the date of 20 November 2020 as the start date for interest, that being the last incurred date in relation to those costs.

58. The MOE contends that it should not be required to pay interest for the period cause by Dr Hoyle's resignation, which was outside its control and outside the normal expected course of an arbitration. I agree that Dr Hoyle's resignation was outside both parties' control and was outside the normal expected course of an arbitration. But I do not consider that this is a reason for reducing the award of interest. During that period, TCT was out of its money, and the MOE had – and therefore had the benefit of – that money. It is TCT, and not the MOE, that would be penalised, if interest was not awarded to it for that period.

F3. Calculation of interest up to the date of this Award

59. In the table below, I set out the interest due to TCT from the MOE in relation to the various heads of claim, using the start dates for interest identified in paragraph 47 above, and applying the rate of 4% simple interest per annum. The calculations are up to the date of this Award, being 5 March 2021; for each claim, therefore, the number of days is from the identified start date to 5 March 2021, both dates inclusive. All sums are in US dollars. To assist with the calculations, I have used an online interest calculator (www.hardwicke.co.uk/simple-interest-calculator/) and have also carried out a manual cross-check. I have derived the daily rate which, as appears below, is to be used going forward, by dividing, for each head of claim, the total sum arrived at using the interest calculator by the number of days for which interest is awarded.

Para. in Second Award	Claim	Amount	Daily rate	Interest commencing	Number of days	Total as at date of this Third Award
532(a)	Tools and Parts	1,700,000.00	186.13	14.04.15	2153	400,734.25
532(b)	Holdback Payment (Engine 191-391)	218,250.00	23.90	17.07.13	2789	66,658.93
532(c)	Letter of Credit fees	310,572.37	34.01	23.01.12	3330	113,237.58
532(d)	Engine Penalty (191-382)	337,012.00	36.91	30.11.12	3018	111,386.16
532(e)	Second Staged Payment (191-382)	183,250.00	20.07	05.06.13	2831	56,812.52
532(f)	Holdback Payment (Engine 191-382)	183,250.00	20.07	05.05.14	2497	50,105.07
532(g)	Al-Qudas trips	332,573.00	36.42	09.07.12	3162	115,152.96
532(h)	Demobilisation costs	241,819.59	26.48	25.01.12	3328	88,116.82
532(i)	Additional labour costs	459,000.00	50.26	17.01.12	3336	167,656.66
532(j)	Investigation costs (191-415)	160,905.26	17.62	11.07.14	2430	42,814.02
532(k)	Storage Charges	208,000	22.78	05.05.13	2862	65,192.33
532(l)	Performance Bond	98,305.98	10.76	31.12.14	2257	24,293.70
		135,477.49	14.83	31.12.14	2257	33,479.64
		48,811.27	5.34	31.12.15	1892	10,109.95
		36,783.56	4.25	31.12.16	1526	6,481.62
		36,053.75	4.17	31.12.17	1161	4,837.52
		38,470.78	4.21	31.12.18	796	3,351.70
		41,181.46	4.50	31.12.19	431	1,940.61
		22,206.72	2.43	25.08.20	193	468.83
This Award, para. 40		9,591.63	1.05	20.11.20	106	111.30
Total			**526.19**			**1,362,942.17**

F4. Post-Award interest

60. Interest will continue to accrue on all the principal sums identified in the above table at the same rate of 4% p.a. That gives a daily rate of US$526.19 per day, derived from totalling the daily rates identified in the above table.

G. COSTS

61. It is common ground that my power to make orders in relation to costs is derived from section 61(1) of the Arbitration Act 1996, which provides as follows:

> *(1) The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties.*
>
> *(2) Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.*

62. In addition, Article 37 of the ICC Rules, to which this arbitration is subject, provides as follows:

> ***Article 37: Decision as to the Costs of the Arbitration***
>
> *1)*
> *The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.*
>
> *2)*
> *The Court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case.*
>
> *3)*
> *At any time during the arbitral proceedings, the arbitral tribunal may make decisions on costs, other than those to be fixed by the Court, and order payment.*

4)

The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.

5)

In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.

6)

In the event of the withdrawal of all claims or the termination of the arbitration before the rendering of a final award, the Court shall fix the fees and expenses of the arbitrators and the ICC administrative expenses. If the parties have not agreed upon the allocation of the costs of the arbitration or other relevant issues with respect to costs, such matters shall be decided by the arbitral tribunal. If the arbitral tribunal has not been constituted at the time of such withdrawal or termination, any party may request the Court to proceed with the constitution of the arbitral tribunal in accordance with the Rules so that the arbitral tribunal may make decisions as to costs.

G1. Parties' claims in relation to costs

62. TCT claims its legal costs of this Arbitration in full. It says that it has incurred costs and expenses, broken down by stages in the Arbitration, as follows.

Item/stage	**Amount in US$**
Pre-hearing costs	211,230.20
Jurisdiction phase	37,340.23
Merits phase (to 01.03.19)	248,431.60
Hearing – legal costs	242,440.86
Hearing – witnesses' expenses	25,483.95
Post-hearing	114,114.22
Total	**879,041.06**

63. Although the claim is framed in US dollars, Mr Simonelli explains in his third statement, most of the invoices to which it relates were issued in other currencies. In particular, Bennett Jones' invoices, which make up the bulk of the claim, were issued in Canadian dollars. Mr Simonelli explains that the invoices were, for ease, converted to US dollars as of the date that they were issued using the online OANDA currency converter and that for fees for the period 1 October to 1

December 2020, the date of 1 December 2020 was used, also using the OANDA currency converter. The MOE has not challenged that approach in principle, and I am satisfied that it is appropriate.

64. In addition, TCT invites me to order that the MOE pay the costs of the Arbitration itself, as fixed by the ICC Court.

65. As I have noted above, the MOE does not itself make any claim in relation to its costs. However, and as I explain further below, it takes various points in relation to TCT's costs claim, and invites me to reduce the amounts awarded to TCT as a result.

G2. **Legal costs: incidence of costs**

66. TCT says that it has been substantially successful in this Arbitration, and that the principle that costs must follow the event therefore means that it should be awarded all its costs.

67. The MOE points to the fact that, whilst section 61(1) of the Arbitration Act 1996 provides that costs should generally follow the event, I do have a discretion to make a different order. It says that I should do so in this case. It relies on the fact that TCT did not succeed on all its claims. It failed on some heads of claim altogether, and on (some) others where it succeeded, it did not recover the full amount of its claim. It also says that it succeeded on one of the three issues raised by its jurisdiction challenge.

68. The MOE therefore contends that TCT should have its costs of the issues on which it succeeded, but the MOE should have its costs of those issues on which TCT failed. Its suggestion is that, as a simple rule of thumb, TCT should be awarded no more than 60% of its costs. It further says that TCT should be awarded only 33% of its costs of the jurisdiction challenge.

69. I consider that the MOE's submissions are a trifle unrealistic. The reality of the position is that the MOE has resisted paying TCT any sum at all. It has taken every conceivable point open to it. TCT has had to come to arbitration to get any redress. Whilst it is right to say that TCT has not succeeded on all its claims, it has, in my view, been very substantially successful. So far as the jurisdiction challenge is concerned, it is true that Dr Hoyle did find and hold that the MOE was and is a separate legal personality and that the Republic of Iraq was not and is not a party to the MSA. But it is nonetheless difficult to characterise the

jurisdiction challenge as amounting to anything other than a win for TCT and a loss by the MOE.

70. In the light of these findings, I consider it appropriate to award TCT its costs, but to make a reduction to reflect the fact that it did not succeed on every issue. I therefore award TCT 85% of its reasonable costs. I go on below to assess those costs.

G3. Legal costs: basis of assessment

71. There appears to be something of a disconnect between the parties as to the basis on which I should assess costs. TCT seeks an indemnity in relation to its costs. The MOE reads this as TCT's seeking an award of "indemnity costs", or "costs payable on the indemnity basis", as that expression is known in English court proceedings. An order for "indemnity costs" is made in English court proceedings when the court wishes to demonstrate its disapproval at the manner in which litigation has been conducted or where it considers that the stance taken by the paying party in the proceedings has been wholly without merit. It is said that indemnity costs will be ordered where the paying party's conduct has been such as to take the case "out of the norm". The effect of such an order is to reverse the usual burden of proof. Part 44.3(3) of the English Civil Procedure Rules provides that, *"Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party"*.

72. As to this:

(i) The Civil Procedure Rules do not apply to arbitration. Instead, my power to award costs derives from section 61 of the 1996 Act and Article 37 of the ICC Rules. The latter, in particular, gives me a wide discretion as regards any award of costs.

(ii) I am far from sure that TCT is seeking "indemnity costs" in the sense understood by the MOE, that is to say, in the sense meant by the Civil Procedure Rules.

(iii) However, and to the extent that it is relevant, I do not consider that this is a case for "indemnity costs" in that sense. Although some of the MOE's conduct can be criticised, and I have criticised it in the Second Award, I do not think that there is sufficient to take this case "out of the norm".

73. As I have said above, I accordingly award TCT 85% of its reasonable costs, assessed as below.

G4. Costs arising from Dr Hoyle's resignation

74. The MOE submits that it should not be liable for any costs incurred by TCT arising from Dr Hoyle's resignation. That, it says, was nothing to do with the MOE. It says that all costs incurred between 25 March 2019 and the date of the Second Award fall into this category.

75. As to this, I accept entirely that Dr Hoyle's resignation was an event beyond the parties' control. I do not, however, accept that all costs incurred by TCT between the dates identified are attributable to that resignation. The position seems to me to be as follows:

(i) The costs incurred by both parties during that time period must have been relatively limited;

(ii) It cannot be said that those costs were attributable *solely* to Dr Hoyle's resignation. Whilst my appointment will have entailed the incurring of *some* additional party costs, those costs will have been small;

(iii) In particular, insofar as costs were incurred in responding to particular queries which I raised with the parties, there is every chance that those queries – or other queries – would have been raised by Dr Hoyle;

(iv) Insofar as the complaint is made that the costs of the arbitral tribunal have increased because of Dr Hoyle's resignation, there has inevitably been some duplication of work. However, the ICC has not increased the costs of the Arbitration since Dr Hoyle's resignation and has not called for additional costs payments from the parties.

76. Insofar as there were additional party legal costs incurred as a result of Dr Hoyle's resignation, they were nonetheless costs incurred during the Arbitration and I find and hold that they should not be carved out from the costs claimed by TCT and which are the subject of this Award.

G5. The assessment of TCT's legal costs

77. As I have noted above, TCT's claimed costs, as converted into US dollars, are in the total sum of US$879,041.06. The claim for costs is supported by Mr Simonelli's third statement. That exhibits a bill of costs and invoices for costs and disbursements provided by Bennett Jones to TCT; invoices for costs of various third parties (including English and Iraqi lawyers); and invoices for certain additional expenses (mostly in relation to the costs of the March 2019 Hearing).

78. The MOE contends that I cannot assess TCT's costs on the basis of the information provided. It suggests that I order a detailed assessment of those costs.

79. I would regard it as very unusual indeed for a tribunal in an ICC arbitration to order a detailed assessment of party costs. That is by reason of the provisions of Article 37 of the ICC Rules, which empower – and indeed arguably require – a tribunal to fix the costs of the arbitration, including recoverable legal costs. In so doing, a tribunal can *"take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner"* (Article 37(5)).

80. I consider that I do have sufficient material before me to assess TCT's costs. I am also satisfied, on the basis of Mr Simonelli's third statement, that the costs in respect of which TCT claims have in fact been billed to, and paid by, TCT.

81. I note that the MOE has not provided me with details of its own costs, which would (or might) have enabled me to make a comparison.

82. The MOE does, however, make a number of specific complaints in relation to the costs claimed by TCT. I deal with each of these in turn below.

83. *Number of fee earners/rates*: The MOE complains that excessive numbers of fee earners have been involved on TCT's side, and that no indication has been given of rates. I do not consider that there is anything in this objection. Given the length of time that this dispute has been on foot, the numbers of lawyers involved appear to me wholly unsurprising. In TCT's 14.12.20 Submissions, TCT provided the hourly rates of Mr Mohamed and Ms Viney, the two fee earners principally involved. Their rates do not appear to me to be out of step with

London rates for work of this kind (though Mr Mohamed's is on the high side) and are not unreasonable.

84. *Lack of indication as to how hours allocated*: The MOE complains that no indication as to how hours have been allocated as between fee earners has been given. This is right. However, I am satisfied that the overall hours incurred are broadly reasonable. I have made a small deduction in relation to each stage to reflect the fact that the total number of hours for each stage is on the high side. But I consider that no substantial reduction falls to be made. On the whole, TCT has conducted the Arbitration in an expeditious and reasonable manner. The MOE has, however, dragged its feet at times (even allowing for difficulties which it says that it has experienced), and has taken a great multiplicity of points. That has led to the costs incurred by TCT inevitably being on the high side.

85. *No indication given as to the work covered by particular invoices*: It is right that Bennett Jones' invoices give little indication as to the work covered by each. However, what I asked for was a breakdown by reference to the stages of the arbitration, and that has been provided by TCT. In the MOE's 11.12.20 Submissions, it makes reference to three particular phases. First is the period October-November 2018 – that is when witness statements were being prepared, and it is no surprise to me that the costs involved in that exercise were high. Second is the period 1 March 2019 – 30 April 2019, when high fees were incurred. That was, however, the period in which the March 2019 Hearing took place and I would expect those fees to be high. Thirdly, the MOE also points to the post-Hearing invoices as being on the high side. I agree with this, and I accept that some reduction may be appropriate there.

86. *Costs of witnesses' attendance at hearing*: The MOE says that these are not recoverable. I disagree; but I do agree with the MOE that the costs claimed are excessive, and I do not allow recovery of the full amounts claimed.

87. I have carefully considered whether the costs claimed by TCT in relation to each stage of the Arbitration are reasonable. I conclude as follows:

(i) Pre-hearing costs: the amount claimed is US$211,230.20. However, this includes US$82,500 in respect of the costs of the Arbitration as billed to TCT by the ICC. These must be deducted, since I deal with them separately below. That reduces the claim for this stage to US$128,730.20. Bearing in mind the nature of the work required, I consider that a reasonable figure for this stage is US$125,000.00.

(ii) Jurisdiction phase: the amount claimed is US$37,340.23. I consider that the costs for this phase are all reasonable.

(iii) Merits phase: the amount claimed is US$248,431.60. Even allowing for the considerable costs incurred in the exercise of taking witness statements, this figure seems to me to be a little on the high side and I question whether 100% of the hours incurred could be said to be reasonably incurred. I therefore fix the amount of reasonable costs at US$245,000.

(iv) Hearing – legal costs: the figure of US$242,440.86 appears to me to be broadly reasonable. I fix a reasonable sum at US$240,000.

(v) Hearing – witnesses' expenses: as I have noted above, I do consider that the claimed figure of US$25,483.95 is on the high side. I have no issue with the claimed travel expenses (US$3,990.45 for Mr Simonelli and US$4,344.47 for Mr Archer). However, even allowing for the fact that London is an expensive city, the fees for accommodation (US$11,996.30 for Mr Simonelli and US$4,058.36 for Mr Archer) and meals (US$867.60 for Mr Simonelli and US$207.72 for Mr Archer) seem to me to be on the high side for a hearing that lasted less than a week. I consider that a reasonable sum in relation to this element of the claim is US$15,000.

(vi) Post-hearing: the sum claimed is US$114,114.22. Even allowing for the disruption caused by the change of arbitrator, that figure seems to me, as I have said, high. This may in part be because TCT has been seeking advice in relation to the enforceability of my Awards: it is entitled to do that, of course, but I am not satisfied that those costs are properly to be awarded as costs of the Arbitration. A more appropriate, and a reasonable, figure for this stage of the Arbitration is, I find and hold, US$80,000.

88. That gives a total figure for TCT's reasonable costs of US$742,340.23.

89. I have found and held that TCT is entitled to 85% of its reasonable costs. 85% of US$742,340.23 is US$630,989.20, and I therefore award TCT that sum in respect of its costs.

G6. Interest on costs

90. It is not, in my experience, usual to award interest on costs pre-Award in ICC arbitrations, no doubt (at least in part) because that is not specifically provided for by the ICC Rules., and no specific reason has been given for making such an award in this case. I decline to do so.

91. However, I do consider it appropriate to award post-Award interest on the costs payable by the MOE, adopting the same interest rate as used elsewhere in this Award. Simple interest will accrue on those costs from the date of this Award at the rate of 4% p.a., that is to say, at a daily rate of US$69.15.

G7. Costs of the Arbitration

92. I must also consider the incidence of the costs of the Arbitration itself.

93. Given that TCT has been obliged, as I have said, to come to arbitration to obtain any redress at all, and given that the costs of the Arbitration have not been materially increased by TCT's having failed on some of its claims, I consider that the costs of the Arbitration, in contradistinction to TCT's own legal costs, should be borne by the MOE.

94. The costs of the Arbitration have been fixed by the ICC Court in the sum of US$165,000 at its session on 25 February 2021. Of that sum, half has been paid by TCT and half by the MOE. Thus TCT is out of pocket in the sum of US$82,500 in relation to the costs of the Arbitration.

95. Accordingly, I find and hold that the MOE is to pay TCT the sum of US$82,500 in respect of the costs of the Arbitration.

H. DISPOSITIVE SECTION

96. NOW I the Sole Arbitrator, having taken upon myself the burden of this reference as arbitrator, and having carefully and conscientiously considered the evidence and submissions before me, for the reasons set out above, FIND AND HOLD and accordingly AWARD AND ADJUDGE as follows:

(1) The Respondent is to pay the Claimant the further sum, in addition to those sums awarded pursuant to my Second Partial Final Arbitration Award, of

US$9,591.63 in respect of the Claimant's costs incurred in connection with the Performance Bond for the period 4 August 2020-19 November 2020;

(2) The Respondent is to pay the Claimant simple interest at a rate of 4% per annum on the sums awarded to the Claimant pursuant to my Second Partial Final Arbitration Award and this Third and Final Arbitration Award, from the dates set out in paragraph 57 of this Award, being the sum of US$1,362,942.17 at the date hereof and accruing at a daily rate of US$526.19 until full payment;

(3) The Respondent is to pay US$630,989.20 in relation to the Claimant's reasonable costs incurred in this Arbitration to Claimant;

(4) The Respondent is to pay interest on the sum set out in sub-paragraph (3) above from the date of this Award at a daily rate of US$69.15 until full payment;

(5) The Respondent is to bear 100% of the costs of the Arbitration as fixed by the ICC Court and is accordingly to pay the Claimant the sum of US$82,500.00 in relation to those costs, as advanced by the Claimant in the course of this Arbitration;

(6) The Respondent is to bear its own costs of this Arbitration;

(7) All other requests and claims are rejected.

Place of arbitration: London, UK

Philippa Hopkins

PHILIPPA HOPKINS Q.C.

Date: 5 March 2021