CMA CGM SA v Hyundai Mipo Dockyard Co Ltd [2008] EWHC 2791 (Comm) (14 November 2008)

Neutral Citation Number: [2008] EWHC 2791 (Comm)

Case No: 2008 FOLIO 347

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

14 November 2008

B e f o r e :

MR JUSTICE BURTON

Between:

IN AN ARBITRATION CLAIM BETWEEN

CMA CGM SA	**Claimant**

- and -	
HYUNDAI MIPO DOCKYARD CO LTD	**Defendant**

IN THE MATTER OF ARBITRATIONS BETWEEN

HYUNDAI MIPO DOCKYARD CO LTD	**Claimant**
- and -	
CMA CGM SA	**Respondent**

Mr Nicholas Hamblen QC and Mr Alain Choo Choy (instructed by Izod Evans) for the Claimant
Mr Christopher Butcher QC and Mr Alexander MacDonald (instructed by Clyde & Co) for the Defendant
Hearing date: 3 November 2008

HTML VERSION OF JUDGMENT

Mr Justice Burton :

1. This has been the hearing of an appeal by the Claimant ("CMA") under s69 of the Arbitration Act 1996 on two questions of law arising out of Awards by an Arbitral Tribunal composed of Messrs Mark Hamsher (Chairman), Ian Kinnell QC and Stephen Males QC ("the Arbitrators") on 13 March 2008, with accompanying Reasons. Permission to appeal was granted by Tomlinson J on 4 July 2008.
2. The Awards arise out of four identical arbitrations, heard together by the Arbitrators, commenced by the Defendant ("HMD") against CMA in relation to four container vessels built by HMD pursuant to four Shipbuilding Contracts entered into with subsidiaries of ER Schiffahrt GmbH (which I shall collectively refer to as "ERS"), dated 26 February 2004. The material clauses of these four contracts, which are in materially the same terms, are Articles XIII and XIV, and I shall so refer to them, the material parts of which read as follows:

> "*Article XIII: ARBITRATION*
>
> 1. *APPOINTMENT OF THE ARBITRATOR*

> *If any dispute should arise in connection with the interpretation and* [fulfilment] *of this CONTRACT, same shall be decided by arbitration in the City of London and shall be referred to a single Arbitrator to be appointed by the parties hereto …*

> *ARTICLE XIV: SUCCESSORS AND ASSIGNS*

> *Neither party shall be entitled to transfer any or all of his rights and obligations under this CONTRACT to a third party without the prior written consent of either party, such consent not to be unreasonably withheld or delayed.*"

3. The short background history is that CMA wanted to take over the Shipbuilding Contracts from ERS, and in April 2004 ERS requested HMD's consent to a novation to CMA of the four then existing contracts. HMD refused, its reason being that it did not want to have to account to CMA's supervision during the shipbuilding period. After initially threatening, by letter of 30 June 2004, to "*go to court or arbitration in London against* [HMD] *for irresponsible behaviour and no respect of contractual conditions*", and making various other commercial threats, CMA, as a third party (ERS had taken no steps), issued a claim in the Marseilles Commercial Court on 2 March 2005 ("the French proceedings") by way of a tortious claim for substantial damages, brought under Article 1382 of the French Civil Code, which provides for a fault-based liability in tort. CMA alleged that HMD had unreasonably withheld its consent to a transfer of ERS's rights under the Shipbuilding Contracts, that this was a breach of those contracts which constituted fault under Article 1382, and that CMA was thus able to recover damages for the losses which it had suffered (largely as a result of an agreement of 13 May 2004, which it had entered into with ERS).
4. These proceedings were still extant when the parties carried out negotiations to attempt to resolve the issue of the novation. CMA and HMD were unable to meet face to face, but all negotiations took place indirectly, between HMD and ERS and ERS and CMA. The Arbitrators, in paragraph 70 of their Reasons, describe this situation:

> "… *there had been and remained considerable annoyance and resentment between HMD and CMA. CMA was affronted by what it regarded as HMD's unreasonable refusal to accept it as a contract partner for the four vessels, which it regarded as insulting and completely without justification. HMD in turn was offended by what it regarded as CMA's aggressive tactics in pursuing the novation, and was outraged at being sued in what it regarded as thoroughly unmeritorious proceedings in France. As a result, HMD insisted in dealing only with ERS and refused to negotiate terms … directly with CMA. Thus the negotiations were not merely at arms' length – the atmosphere was positively hostile.*"

5. The outcome was a series of four Novation Agreements, entered into on 12 September 2005, 27 January 2006, 7 April 2006 and 20 June 2006, each for a separate vessel. The terms of the Novation Agreements involved that in each case the novation only took effect after construction work on the vessel had been completed, at a Transfer Date, meaning (by reference to clause 1 of each Agreement, the Definitions section) the "*date and time of actual delivery of the Vessel by the Builder* [HMD] *and acceptance by the New Buyer* [CMA] *under the terms of the Shipbuilding Contract*." The relevant clauses of each novation agreement, upon which attention was concentrated in the Arbitrations, are as follows:

> "*4. NOVATION*
>
> *1. The Original Buyer* [ERS]*, the New Buyer and the Builder hereby agree that on and with effect from the Transfer date the New Buyer shall be substituted in place of the Original Buyer as a party to the Shipbuilding Contract and the Shipbuilding Contract shall thenceforth be construed and treated in all respects as if the New Buyer was named* [therein – it is agreed there was a misprint in the Agreement] *instead of the Original Buyer. Save for the substitution of the New Buyer as the Buyer under the Shipbuilding Contract pursuant to this Clause, the Shipbuilding Contract shall remain in full force and effect.*
>
> *2. The New Buyer hereby agrees with the Builder that, as and with effect from the Transfer Date, the New Buyer shall duly and punctually perform and discharge all liabilities and obligations whatsoever from time to time to be performed or discharged by it or by virtue of the Shipbuilding Contract in all respects as if the New Buyer was named therein instead of the Original Buyer.*
>
> *3. Provided that the delivery instalment has been duly paid by the Original Buyer in accordance with clause 3.1 above, the Builder hereby agrees with the New Buyer that, as and with effect from the Transfer Date, the Builder shall be bound by the Shipbuilding Contract in all respects as if the New Buyer was named therein instead of the Original Buyer.*
>
> *4. Provided that the above delivery instalment has been duly paid by the Original Buyer in accordance with clause 3.1 above and except as provided otherwise herein, the Builder and the Original Buyer hereby, as and with effect from the Transfer Date, mutually release and discharge each other from all liabilities, obligations, claims and demands whatsoever touching or concerning the Shipbuilding contract and, in respect of anything done or omitted to be done under or in connection therewith, the Builder hereby accepts the liability of the New Buyer in respect of any such liabilities, obligations, claims and demands in place of the liability of the Original Buyer.*

> *5. The mutual release contained at Clause 4.4 above shall not apply in relation to the claim of the New Buyer against the Builder currently pending before the commercial court in Marseilles.*
>
> *…*
>
> *5. REPRESENTATIONS AND WARRANTIES*
>
> *1. The Original Buyer represents and warrants to the other Parties to this Agreement that at the date of this Agreement:*
>
> *…*
>
> > *d. The Shipbuilding Contract is valid and subsisting and without prejudice to clause 4.5 above the Original Buyer is not aware of any facts or circumstances which would entitle the Original Buyer of the Builder to terminate, rescind, cancel or claim damages under or for breach of the Shipbuilding Contract.*
>
> *2. The Builder represents and warrants to the other Parties of this Agreement:*
>
> *…*
>
> > *d. The Shipbuilding Contract is valid and subsisting and without prejudice to clause 4.5 above the Builder is not aware of any facts or circumstances which would entitle the Builder or the Original Buyer to terminate, rescind, cancel or claim damages under or for breach of the Shipbuilding Contract.*
>
> *7. MISCELLANEOUS*
>
> *The New Buyer confirms to the Builder that there are no further claims arising from the New Buyer against Builder between the date of signing this Agreement and the Transfer Date.*"

6. As can be seen there was no express provision as to what should occur in relation to the French proceedings. The Arbitrators noted in paragraph 69 of their Reasons:

> "*… all parties were aware of the existence and nature of the French proceedings. That much is obvious from the terms of the Novation Agreement itself.*"

7. CMA continued with those proceedings, in which HMD entered an appearance under protest (it is common ground that they did not thereby submit to the jurisdiction and that no issue estoppel is created by the judgment which eventuated).

8. The Marseilles Commercial Court delivered its judgment on 30 September 2006, concluding that it had jurisdiction to hear CMA's claim, that the applicable law for considering CMA's claim in tort was French law but that English law was to be applied to the issue as to whether HMD had unreasonably refused its consent to a novation, and held, as described by the Arbitrators in paragraph 62 of their Reasons, that:

> "*(d) … HMD had unreasonably refused to consent to a novation, in breach of Article XIV of the Shipbuilding Contract.*
>
> *(e) This breach constituted "fault" within the meaning of Article 1382 of the French Civil Code.*
>
> *(f) CMA was entitled to its full damages of US$ 3,646,125, without any deduction whatsoever, together with € 10,000 by way of damages for the slur cast on CMA's image to other shipbuilders and legal costs of € 30,000.*"

9. HMD has appealed that judgment to the Cour de Cassation in Aix-en-Provence, which appeal is still pending, although I am told that the hearing is fixed for next month. HMD paid (inclusive of interest) a total of US$ 3,682,407.55 plus € 10,099.48 to CMA on 2 March 2007 in satisfaction of the judgment, although the legal costs remain outstanding.
10. The Arbitrations related to HMD's claim to recover those sums (to be allocated as to one quarter to each Shipbuilding Contract, and hence to each Arbitration) on the basis that CMA was in breach of the Arbitration Clauses, Article XIII in each of the Shipbuilding Contracts, by bringing, pursuing and continuing the French proceedings. Although the Arbitrators found that there was no breach by CMA in respect of its having originally brought the French proceedings in March 2005 (and HMD reserves the right effectively to cross-appeal in respect of that conclusion, though does not pursue it if it succeeds in upholding the Awards otherwise) the Arbitrators concluded that, by continuing to pursue, and not discontinuing, the French proceedings after the respective transfer dates, by reference to each of the Novation Agreements, CMA was in breach of Article XIII in each of the Shipbuilding Agreements as novated. They concluded that:
    i) consequently HMD was entitled to recover damages for breach of the Arbitration Clauses, provided it could establish that it had suffered loss;

    ii) they were not bound by the judgment of the Marseilles Court, and were entitled to, and did, hear evidence and reach conclusions themselves as to whether there had been a breach of Article XIV by HMD in respect of unreasonable refusal to consent;

    iii) HMD was not in breach of Article XIV, as a result of which:

    > a) HMD's loss and damage was the sum which it was ordered to pay, and did pay, in the French proceedings to CMA, coupled with compensation in respect of lost management time and their own French legal costs, and interest.

> b) they made a declaration that HMD did not unreasonably withhold or delay its consent to the transfer of the Shipbuilding Contracts to CMA.

11. The two questions of law arising on the appeal are summarised by CMA as follows:
i) Whether the Arbitration Clause in the novated Shipbuilding Contracts applied to the pre-existing dispute between CMA and HMD which had already been referred to the French court, and was pending before it at the time of novation.

ii) If so, whether the Arbitrators were bound by the French court's determination of the same issues between the same parties in a judgment which the English courts would be bound to recognise pursuant to the Council Regulation (EC) No 44/2001of jurisdiction and the recognition and the enforcement of judgments in civil and commercial matters ("the Judgments Regulation").

12. A further application, the nature of which has not been made known to me, but related to the fact that the French judgment was in any event in the wrong amount, made by HMD, has been adjourned by consent, pending the determination of this appeal.
The first ground of law

13. There are some unusual features about the facts of this case:
i) The dispute arose between the parties at a time when they were not contracting parties, nor in a contractual relationship governed by an Arbitration Clause, and the question is whether they are obliged to arbitrate, or are free to litigate that dispute, once they become parties to a contract with an Arbitration Clause which antedated that dispute, if it otherwise falls within the definition of the Arbitration Clause.

ii) The French proceedings had already been launched prior to the entering into of the Novation Agreements, so that, if the obligation to arbitrate and not litigate binds, there would be the necessary consequence that the French proceedings would have to be discontinued. Mr Hamblen QC for CMA accepted, when I put it to him, that the existence of the proceedings per se would make no difference. The issue is whether the underlying dispute is one which must be arbitrated. If not, then one or other or both of them would be free to issue proceedings even if they had not done so already. If they had already issued proceedings and now had to arbitrate, then the existence of proceedings could not be determinative and they would simply have to be discontinued.

iii) There are four Novation Agreements, as set out above, and, contrary to Mr Hamblen's suggestion that this makes a difference and somehow involves an "*absurd consequence*", I cannot accept that that is so. If each of them has an Arbitration Clause by which, upon becoming a party, CMA is bound, then to that extent he is then prevented from litigating a dispute which falls within the Arbitration Clause. If technically that would have meant a sequence of partial withdrawals of

issues from the French proceedings, then that is its consequence, but this cannot possibly have any impact upon the construction issue which was before the Arbitrators.

14. There are two aspects to this first point of law:
i) What is the contractual significance of Article XIV once it applies to CMA by virtue of the Novation Agreement, i.e. upon CMA becoming a party to the Shipbuilding Agreement as novated?

ii) Do the various other provisions of the Novation Agreement, clauses 4(5), 5 and 7, set out above, impact upon the argument or the construction? I shall deal with this second question first.

15. It is in my judgment quite clear, as it was to the Arbitrators, that these other provisions of the Novation Agreements have no impact upon the decision. It is wholly apparent to me that, in the absence of any express agreement, indeed in the impossibility, because of the hostility between them, of any express agreement, as to the effect of or on the French proceedings, the two parties, negotiating as they did through an intermediary, simply left the matter to be resolved as a matter of law:
i) There was a mutual release and discharge between HMD and ERS in clause 4.4 in respect of all matters other than (clause 4.5) any liability that might arise out of the French proceedings. If the French proceedings continued, and there were any consequential claim arising out of them as between HMD and ERS, that would be left open. That did not in my judgment amount to any licence or consent for those proceedings, nor to any agreement that CMA was free to continue with them.

ii) ERS and HMD each warranted to all the other parties, severally in clauses 5.1(d) and 5.2(d) that it was not aware of any fact or matters which would entitle HMD or ERS to bring any claims, except, once again, that any potential claim as between HMD and ERS which might arise as a consequence of the French proceedings was preserved.

iii) Clause 7, to which Mr Hamblen QC drew attention, does not in my judgment add anything. It constituted a warranty by CMA to HMD that there were no further claims arising in what Mr Christopher Butcher QC, for HMD, described as the *scintilla temporis* between the signing of the agreement and the transfer date, which were effectively one and the same. All parties knew of CMA's existing French proceedings, as the Arbitrators found.

16. The Arbitrators persuasively found in paragraph 70 of their Reasons that:

> "*Neither party would reasonably have thought that CMA would willingly give up whatever ability it had to pursue its claim in the French proceedings. Conversely, both parties would have recognised that HMD would do whatever it could to stop those proceedings.*"

17. The Arbitrators further convincingly conclude in paragraph 71 of the Reasons that it "*is obvious from the terms of the Agreements themselves*" that:

> "*HMD was reserving the right to claim against ERS in the event it was found liable in the French proceedings. This was the reason for the inclusion of Clause 4.5. It involved the recognition of the possibility (but, we think, no more than the possibility) that those proceedings might continue to what would be, for HMD, an adverse judgment.*"

18. Mr Hamblen QC submits as follows:
i) As the consequence of the Arbitrators' construction is that, as Tomlinson J put it in granting permission, CMA would thus be "*obliged to terminate proceedings which it had been no breach of contract to bring and moreover to prosecute for some months*", then this would be what Mr Hamblen calls a "*surprising and uncommercial consequence*". Mr Hamblen describes the Tribunal's construction as involving "*CMA sleep-walking into a bargain which it would never knowingly have made*". But the fallacy in Mr Hamblen's argument can be seen in paragraph 20 of his skeleton, where he submits:

> > "*The result of the bargain which the Tribunal held to be made was that CMA was freely entering into an agreement which both parties knew CMA was immediately going to breach.*"
>
> This misunderstands the real position, as was clearly found to be the case by the Arbitrators. Both sides thought they were in the right. Both sides no doubt knew that CMA was going to go on with the proceedings, but CMA certainly did not know that that was going to render it in breach, indeed it believed the contrary, and that it was entitled to pursue the proceedings. The Arbitrators have found, rightly in my judgment, that on a proper construction of the contract, to which I shall turn, CMA was not so entitled. It is clear that both sides' positions were preserved and reserved.

ii) Mr Hamblen further submits that such a construction is inconsistent with the terms of the Novation Agreements, which I have set out above. Mr Hamblen notes that the Arbitrators acknowledge that clauses 4.4 and 4.5 contemplated "*the possibility*" that the French proceedings might continue, and submits that the Arbitrators erred in overlooking the fact that the continuation of the Marseilles proceedings was what Mr Hamblen calls a "*contractual possibility*", which itself demonstrated that the parties did not intend that those proceedings were required to be discontinued. This would not be the first time, and it will not be the last, in which a court (or in this case the Arbitrators) having carefully assessed the factual matrix conclude that objectively a contract must be construed in a way which does not accord with one or other or indeed both of the two parties' subjective intentions. In paragraph 83 of the Reasons, the Arbitrators found as follows in relation to clauses 4.4 and 4.5:

> "*As is evident from these clauses, and as is confirmed by reference to the background to the Novation Agreement, HMD considered that it would or might have a remedy over against ERS in the event that it was held liable to CMA in Marseilles. The purpose of Clause 4.5, referred to in argument as a "carve-out" from the mutual releases in Clause 4.4, was to preserve whatever claim HMD might have against ERS. It is therefore true that these clauses do contemplate the possibility that CMA's French proceedings may continue, and may result in a judgment against HMD. But it does not follow, in our opinion, that HMD was accepting that they would continue, let alone that they would do so legitimately; or that these provisions, which operate only as between HMD and ERS, displace the obligation to arbitrate this claim which CMA had undertaken by virtue of Clauses 4.1 and 4.2.*"

I agree, and would only add that the Arbitrators were entitled to find that what was also obviously the case, namely CMA's intention to continue with the proceedings, had no effect upon the proper construction of the Agreement.

19. I return therefore to the effect of the novation on the Arbitration Clause. Mr Hamblen understandably emphasises that the novation only takes effect in each case at the Transfer Date of the relevant vessel, but the provisions are that:
i) by Clause 4.1 CMA is to be substituted on and with effect from the Transfer Date in place of the ERS "*as a party to the Shipbuilding Contract and … the Shipbuilding Contract shall thenceforth be construed and treated in all respects as if* [CMA] *was named in the Shipbuilding Contract instead of* [ERS]"

ii) by Clause 4.2, on and with effect from the Transfer Date CMA "*shall duly and punctually perform and discharge all liabilities and obligations whatsoever from time to time to be performed or discharged by it or by virtue of the Shipbuilding Contract in all respects as if* [CMA] *was named in the Shipbuilding Contract instead of* [ERS]".

20. The obligation which CMA thereby undertook as a party to the original Shipbuilding Contracts, which it only became as at the transfer date, was to submit to arbitration "*any dispute* [which] *should arise in connection with the interpretation and fulfilment*" of that contract. Mr Hamblen points out that there is slightly different wording in clause 4.3, because in relation to the consequence of the Novation Agreement in respect of HMD, it is agreed that HMD "*shall be bound by the Shipbuilding Contract in all respects as if* [CMA] *was and had at all times been named therein instead of the original buyer*". I agree with Mr Butcher, however, that this has no materiality. So far as HMD is concerned, HMD had been a party to the Shipbuilding Contracts from the beginning and had owed continuing obligations throughout, which it now retrospectively owed to CMA. For the purpose of the appeal being pursued before me, namely whether CMA was, as the Arbitrators found, in breach of its obligations after the transfer date in continuing the French proceedings, such retrospectivity is irrelevant and the only question is whether the obligations imposed as at the transfer date, resulting from CMA's being named as a party to the original Shipbuilding Contract, are then breached.
21. There are two contentions made by Mr Hamblen QC, the second of which is characterised by Mr Butcher QC as a 'new' argument, Mr Hamblen not having been instructed below; but Mr Butcher does not object to the argument, being one of law, being run. They both relate to the central question of the construction of Article XIII, once the Shipbuilding Contracts are novated. I do not accept Mr Hamblen's submission that, on the Tribunal's construction, it was or became an *ad hoc* Arbitration Agreement, thereby creating what he calls a unique hybrid clause. If it were an *ad hoc* agreement, then Mr Hamblen would be entitled to rely upon **Mustill and Boyd's** characterisation of such agreements as always being the result of a "*deliberate decision by both parties to the dispute to create or define the Arbitrator's jurisdiction and powers to deal with the dispute*" (**Commercial Arbitration** (2nd Ed) 1989 p132). But that does not arise, in my judgment, and the whole question falls within the confines of the wording of Article XIII.

1. "*If any dispute should arise*":

22. The Arbitrators set out CMA's contention and rejected it in paragraphs 79 to 81 of their Reasons:

> "*CMA, however, contends that the clause refers only to disputes arising in the future ("if any dispute should arise") and that as between HMD and CMA that means any dispute arising after the Transfer Date. Accordingly, says CMA, the arbitration clause does not apply to the existing dispute between HMD and CMA which had already arisen prior to the Transfer Date.*

> *80. We reject this argument. It is true that the words "if any dispute should arise" refer to something that may happen in the future, but they are contained in a contract dated 26 February 2004 and refer to disputes arising after that date – which the dispute in question here did. The meaning and effect of the Arbitration Clause was not altered by the Novation Agreement. Before and after the coming into force of the Novation Agreement it referred to disputes in connection with the interpretation and fulfilment of the Shipbuilding Contracts arising after the date of those contracts.*

> *81. CMA's case on this point means that a dispute arising between the parties one day after the Transfer Date, albeit a dispute about events occurring before the Transfer Date, would be subject to an obligation to arbitrate, while precisely the same dispute, arising one day before the Transfer Date, would not. To our minds this is a result which makes little commercial sense, and which rational businessmen are not likely to have intended. Following the approach commended in the* ***Fiona Trust*** **[**this is a reference to Fiona Trust & Holding Corporation v Privalove [2007] 4 All ER 951]*, the clause should be construed so as not to produce this surprising result, unless the language of the contract clearly requires a different conclusion.*"

23. Mr Hamblen QC submits that the ordinary legal effect of a novation is to "*extinguish the original contract and replace it by another*" (referring to Chitty on Contracts 29th Ed 2004 Vol I 19-087), such that there should now be deemed to be novated Shipbuilding Contracts, the first of which would thus be dated 12 September 2005. This seems to me to ignore the express provisions of clauses 4.1 and 4.2, set out and analysed above. In any event, quite apart form the express position so made clear, namely that the parties are placed into the original agreements, Mr Butcher QC draws comfort from **Mustill & Boyd** at 137 and the cases there referred to (such as **Freshwater v Western Australian Assurance Co Ltd** [1933] 1 KB 315, **Dennehy v Bellamy** [1938] 60 Ll. L. Rep 269, **Smith v Pearl Assurance Co Ltd** [1939] 63 Ll. L. Rep 1 and **Oakland Metal Co Ltd v Denaim & Co Ltd** [1953] 2 Lloyd's Rep 192, all to similar effect). The Novation Agreements are not self-standing, they simply repeople the original contracts, leaving their provisions (including their dates) unchanged.

24. Mr Hamblen refers to paragraph 75 of the Reasons, where the Arbitrators reject what was then HMD's first case (not actively pursued before me) that CMA must be treated as having always been in breach of the Shipbuilding Contracts as novated, not just as and from the Transfer Date, with the conclusion that "*conduct by CMA prior to the Transfer Date, committed at a time when CMA was not in any contractual relationship with HMD, is not retrospectively turned into a breach of contract by virtue of the Novation Agreement*". Mr Hamblen submits that that logic ought to have led them to conclude that CMA was also not in breach after the Transfer Date. I have already referred to this in paragraph 20 above. I disagree, and agree with the Arbitrators. This is not a question of retrospective breach. Once CMA becomes party to the Shipbuilding Contracts, and must "*duly and punctually perform and discharge all liabilities and obligations … by virtue of the Shipbuilding Contract in all respects*" then it must arbitrate a dispute that has arisen after the date of the Shipbuilding Contracts, albeit that it does not come under that obligation until after the Transfer Date.
25. I have already dealt with Mr Hamblen's "*surprising and uncommercial consequence*" point in paragraph 18(1) above. Whatever CMA may have hoped, expected or even intended, on a proper construction of the Shipbuilding Contracts as novated it came under an obligation to arbitrate an arbitrable dispute, once it owed obligations under those Contracts, i.e. on and after the Transfer Date: and thereafter was obliged to arbitrate such dispute not litigate it, refraining from any fresh, and terminating any existing, proceedings.
26. I regard the logic of the Arbitrators of the first sentence of paragraph 81, set out above, as powerful. It may be that it is that logic which has driven Mr Hamblen QC to commit most of his efforts in oral submissions to his "new" argument, dealt with below. Such logic does not require support from the **Fiona Trust** case, to which I shall refer below, in addressing that new argument.

    2. The new argument: not an arbitrable claim

27. In the absence of such argument being before them, the Arbitrators concluded, at paragraph 79, as follows:

> "*The dispute about HMD's allegedly unreasonable refusal to consent to a novation in breach of Article XIV, which had given rise to CMA's claim before the French court, was undoubtedly a dispute "in connection with the interpretation and fulfilment" of the Shipbuilding Contracts. The dispute therefore fell within the terms of Article XIII of those Contracts.*"

28. Mr Hamblen's submission is that this is a claim, albeit one which can be said to be "*in connection with the interpretation and fulfilment*" of the Shipbuilding Contracts, which is outside the ambit of Article XIII. He accepts, indeed emphasises, that the point arises irrespective of the fact that the French proceedings were brought, and would apply as much to a situation in which there had simply been the dispute in existence as from April 2004, still unresolved at the time of the Novation Agreement, without any proceedings yet having been commenced. His case is that the French proceedings could have been commenced after the Transfer Date, after CMA became a party to the novated Shipbuilding Contracts, and yet CMA would not have been under an obligation to submit it to arbitration.
29. The claim in the French proceedings was:
    i) a tortious claim

    ii) by a non-party to the Shipbuilding Contracts

    iii) claiming damages for having been prevented from becoming a party to the contracts by the unreasonable refusal.

    This, Mr Hamblen submits, was not arbitrable. Quite apart from the fact that the tort itself upon which the claim is based is not a familiar one to us, being founded in French law, it is certainly an unusual form of claim to fall within the Arbitration Clause of a contract, and plainly would not have done so at the time when CMA was not a party to the contract. Mr Hamblen submits that Article XIII should be read as "*if any dispute should arise **between the parties"***, and it did not. Once by happenstance (or in this case, as a result of a subsequent agreement) party C who has such a claim subsequently becomes a party to a contract with party A which contains an arbitration clause, that dispute does not become arbitrable, just as would not any other claim which party C might earlier have had against party A prior to their becoming parties to such a contract. **Fiona Trust**, relied upon by the Arbitrators and by HMD, he submits not to be apt. Although this was a decision which concluded that it was time for a "*fresh start to be made to the construction of arbitration clauses*", and by which restrictive interpretation of the width of arbitration clauses was deprecated, he submitted that the words of Lord Hoffmann in that case, upon which reliance is so often, and was in this case, placed are not here applicable:

    > "*6. In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears to be on its face an agreement, which may give rise to disputes. They want those disputes decided by a Tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy …*

> *13. In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered, or purported to enter, to be decided by the same Tribunal.*"

That, Mr Hamblen submits, is not relevant in this case, where the issue is as to a subsequent novation, and HMD and CMA did not negotiate the clause.

30. Mr Hamblen's submissions are attractive but, in my judgment, they do not take proper account of the nature and breadth of Article XIII. It is quite plain that if party C has some claim against party A and then subsequently happens to enter into an agreement with party A, which happens to have an arbitration clause, it is unlikely that such earlier unconnected dispute would even be argued to fall within the arbitration clause. Mr Hamblen refers to a passage in **Arbitration Law by Robert Merkin** 2008 at 5.39, where the author sets out a number of different possible formulations for an arbitration clause and continues:

> "*It will be noted that some of these formulations refer to disputes flowing from a "contract", while others simply refer to disputes. The reluctance of the English courts to recognise retroactivity means that in the latter situation the clauses are unlikely to be taken as referring to disputes which arise between the parties out of some earlier agreement.*"

31. It is not in issue between the parties that a tortious claim can fall within an arbitration clause (see e.g. **E T Plus SA v Welter** [2006] 1 Lloyd's Law Rep 251), and Mr Hamblen seeks to differentiate the case of **Re Polemis & Furness, Withy & Co Ltd** [1921] 3 KB 560, a case in which the arbitration clause covered "*all disputes*", and the claim in tort arose directly from the contractual relationship between the parties.
32. Tortious claims arising prior to contract, such as claims for misrepresentation inducing it, are arbitrable, such as in **Ashville Investments Ltd v Elmer Construction Ltd** [1989] QB 488. Just like a dispute about misrepresentation prior to contract, so a dispute about whether licence to assign or novate a contract was unreasonably refused is a dispute "*in connection with the interpretation and fulfilment of*" the Shipbuilding Contract. I have no doubt therefore that once CMA became party to the novated Shipbuilding Contract, and the question fell to be asked whether a dispute had arisen between the two parties to that novated contract, which fell within the Arbitration Clause, the answer could only be in the affirmative.
33. Whether therefore by virtue of the arguments which were before the Arbitrators or by reference to the new argument which was not, the Arbitrators came to what was in my judgment the correct decision, and in any event there was no error of law. I do not need to deal with an alternative argument as to the meaning of *arise*, which Mr Butcher trailed, but in my judgment rightly did not pursue.

The second point of law

34. In the light of their findings, which I have upheld, the Arbitrators concluded that CMA was in breach of the Arbitration Clause in pursuing the French proceedings. The parties before them had agreed that in that case, the issue as to whether the Arbitrators were bound by, in the sense of having to recognise, the judgment in the French proceedings arose. As to this:
i) HMD contended that the Arbitration Tribunal was not required to recognise the French judgment by the Judgments Regulation, and that it should not do so.

ii) Alternatively HMD submitted that, if the Judgments Regulation applied, then the Arbitrators should conclude that the circumstances fell within the "public policy exception", by reference to Article 34, which provides:

> > "*A judgment shall not be recognised:*
>
> > *1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought.*"
>
> HMD submitted that it would be manifestly contrary to UK public policy to enforce a judgment in proceedings which had been issued, by the party relying on that judgment, in breach of an Arbitration Agreement.

35. In the event, the Arbitrators concluded that the Judgments Regulation did not apply so as to render them bound to recognise the French judgment. As to the public policy issue, the Arbitrators referred to the most significant judgment in this area, that of Waller J in **Phillip Alexander Securities v Bamberger** [1997] I.L.Pr 730, where, at para 114, Waller J suggested that a judgment obtained in breach of an arbitration agreement "*may well not be recognisable*", and that recognition might depend on whether the foreign proceedings were "*in blatant disregard*" of the arbitration clause or there was a bona fide argument about the scope of the clause. The Arbitrators decided, at paragraph 116 of their Reasons, that they did not need to determine this question and would not do so. They held that the point only arose if they were wrong about the impact of the Judgments Regulation. What they did do was to conclude that if the test was whether there had been a "*blatant disregard*" of the arbitration clause by CMA, they found that there was not.
36. CMA appeals the Arbitrator's conclusion that the Judgments Regulation does not apply. HMD appeals the failure to find that enforcement of the French judgment would be manifestly contrary to UK public policy, and, so far as necessary, the finding that there was not *blatant disregard*, although they do not pursue such appeal if they otherwise succeed in upholding the Arbitrators' decision in the case, namely that they were not bound by the French judgment and were entitled to proceed, as they did, to reach their own conclusion that HMD was, contrary to the view of the French court, not in breach of Article XIV, and did not unreasonably refuse its consent to the novation.

37. However, there is a prior question, which the Arbitrators discussed but did not resolve, in circumstances described in paragraph 94 of their Reasons. In paragraph 93, they set out that "*the parties agree that the question arises whether we are bound by the Judgments Regulation to recognise the French judgment, and therefore bound as a matter of law to conclude that a notional* [arbitration] *tribunal would have reached the same conclusion as the French court*" – and they indicated that they would therefore go on to deal with the two questions summarised by me above, as they did. But the Arbitrators continued in paragraph 94 as follows:

> "*94. However, we confess to some doubts about why any question of recognising the French judgment arises at all. If the working hypothesis is that instead of proceeding in Marseilles, CMA had brought its claim in a London arbitration, and we are required to decide what conclusion a notional arbitral tribunal would have reached, there would be no French judgment and no question of recognition could arise. The one thing that the London tribunal could not have done would be to recognise a French judgment, since there would be no such judgment to recognise. Nevertheless, the case was argued before us on the premise that the question does arise whether we are, or a notional tribunal would have been, bound by the Regulation to recognise the French judgment, and that an affirmative answer to that question would be conclusive in CMA's favour. Thus, if the French judgment is entitled to recognition under the Regulation, it was common ground that CMA's claim should be treated as if it would have succeeded, and therefore that (subject perhaps to issues about costs) HMD has suffered no loss.*"

38. HMD sought on its application for leave to support that proposition, and to rely upon it on the appeal in order to justify the Arbitrators' decision on an additional ground. Tomlinson J left it to me to decide whether such new arguments could be run. In the event, there has not been a material contest to the right of HMD to pursue that case on appeal. Although it is not usual for new points to be raised on appeal which were not fully or at all canvassed below, this argument, in my judgment, on any view satisfies any necessary test:
i) Although it was only raised by the arbitral tribunal itself in its Reasons, it did at least to that extent feature at first instance. The Arbitrators did not in the event rest their conclusion on it. It is quite plain that if the Arbitrators would otherwise have rested their conclusion on it, they would have reopened the hearing and given both sides the opportunity to make submissions. In the event, there is no prejudice, and Mr Hamblen QC did not assert any, because the opportunity which was thus not given below, has been made available on this appeal.

ii) The point is entirely a matter of law and argument, and does not, as Mr Hamblen QC accepted, involve the need for any further evidence, so can as well be resolved on appeal as it could have been at first instance.

I therefore resolved that I would allow the point to be run.

39. It is a very simple one. There is no question here of needing to consider what a notional tribunal would have concluded. Before these Arbitrators was a claim for damages for breach of contract, namely breach of the Arbitration Agreement, and the injured party is submitting that the contract breaker should not be entitled to benefit from its own wrong (see for example **New Zealand Shipping Co Ltd v Société Des Ateliers et Chantiers de France** [1919] AC 1 at 8), so that the Court is entitled to ask what would have happened if the contract had not been breached. Had it not been breached, then the parties would have both complied with their obligations to have the matter resolved by arbitration, and there would be no French judgment: and the Arbitrators have in fact resolved the issue in HMD's favour, paying no regard to the French judgment. The logic is clear, and Mr Hamblen QC was in the event unable to put up any resistance to it. One matter was mentioned by the Arbitrators themselves in expanding their reasons why, apart from the fact that they were pursuing the course which the parties had agreed that they should take, and that they were in the event making the decision that they would have made anyway, they did not reach a conclusion in this regard. They referred to **The Angelic Grace** [1995] 1 Lloyd's Rep 87, in which, in considering the possible risk if an injunction to restrain proceedings in a foreign court in breach of an arbitration agreement were not issued, Leggatt LJ stated (at 95):

> "*If the Charterers are not restrained from pursuing the Italian proceedings and the Italian court exercised jurisdiction, then the question would arise … whether a judgment by the Italian court would be recognised or enforced in England.*"

40. I cannot see why, and Mr Hamblen QC did not suggest that, this should be a reason not to follow the obvious course in this case. All that was being said in **The Angelic Grace** was that the grant of an injunction would prevent any such argument. We are now having just such an argument, and I conclude that the answer is clear. The Arbitrators expressed the concern in paragraph 94 that, if the French judgment were entitled to recognition under the Judgments Regulation, it might be that following the obvious course "*would be regarded as an unacceptable circumvention of the principles underlying the Regulation*", which encouraged them not to resolve the point, particularly as they did not need to, and in the absence of argument. I conclude that this is no more of a circumvention of the Judgments Regulation than would be an injunction to restrain the continuation of proceedings in a foreign court by injunction prior to its reaching a judgment. This is not a question of not recognising a judgment, but concluding that, as the parties were obliged to go to arbitration, it is only the outcome of arbitration which is of any relevance.
41. Resolution of this point in HMD's favour means that CMA's appeal fails in any event. The issue of the Judgments Regulation was argued before me. On further consideration, as this appeal is now resolved in favour of HMD, I shall do no more than indicate that I am not persuaded that the Arbitrators were wrong in relation to the issue of the inapplicability of the Judgments Regulation.
42. They rested their conclusion upon Article 1, which in material part reads as follow:

> "*1(1) This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.*
>
> *2. The Regulation shall not apply to: …*
>
> *(d) arbitration.*"

43. The Arbitrators referred to a number of authorities, and in particular **The Atlantic Emperor** [1992] 1 Lloyd's Rep 342 and **The Front Comor** [2007] 1 Lloyd's Rep 391, to emphasise that this provision means not only that UK courts are not required to recognise arbitration awards (there being of course other international conventions for that specific purpose) but also proceedings ancillary to arbitration: and the conclusion by the Arbitrators was that this was, on a true and proper construction of the Regulation, intended to be reciprocal, i.e. not only were UK courts not required to recognise foreign arbitral awards, but UK arbitrators were not required to recognise foreign judgments, the Convention thus not "*apply(ing) to arbitration*" at all.
44. In support of that proposition, the Arbitrators, and in his submission Mr Butcher, referred also to Articles 32 and 33 of the Regulation, which are both at the outset of Chapter III, the specific chapter relating to Recognition and Enforcement:

> "*32. For the purposes of this Regulation, "judgment" means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a degree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.*
>
> *33. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.*"

45. The argument runs as follows. It is plain that in Article 32 the reference to a tribunal is to a "*tribunal of a Member State*", not a tribunal in a Member State, i.e. not an arbitration tribunal: this construction is confirmed by the view of the authors of Layton and Mercer European Civil Practice (2nd Ed) at Vol I para 25.006. Thus, it is submitted, if *tribunal* in Article 32 does not include an arbitration tribunal for the purpose of recognition by a UK court, so the word *tribunal* in Article 1.1 is also not a reference to an arbitration tribunal, such that for that reason also the Regulation does not apply to arbitration tribunals, who are thus not obliged to recognise foreign judgments.

46. It is plainly right that, if the Judgments Regulation does not apply to an arbitration tribunal, then arbitration tribunals are not obliged to recognise foreign judgments, even if UK courts are so obliged, and to that extent the Arbitrators were right not to be persuaded by the beguiling argument that arbitrators are applying English law, and if English law requires recognition of a foreign judgment then the arbitrators must recognise the foreign judgment. This argument does not differentiate between substantive and procedural law. Of course arbitrators will apply English law, but they would not then be bound by the procedural requirement, if it be imposed only on a court, to recognise a foreign judgment, estopping it from considering the facts underlying that judgment.
47. I have concluded, as adumbrated above, that, as there is no need for me to disturb the conclusion by the Arbitrators in this regard, and reach any conclusion myself, given that I have dismissed the appeal on other grounds, I should not do so. As to the "public policy" question, I am not invited by HMD to resolve it if it has otherwise succeeded on the appeal, as it has. It remains only to point out that the obvious route in a future case will be the **New Zealand Shipping** route set out above, which in most cases will render the interesting question as to whether Article 34(i) would apply academic.
48. Although there was no separate ground of appeal, permitted or otherwise, in respect of the declaration which the Tribunal made, referred to in paragraph 10(iii)(b) above, Mr Hamblen QC submitted that, if he were otherwise successful in the appeal, the declaration would fall away, while Mr Butcher QC submitted that that aspect of the Arbitrators' Awards was entirely self-standing, and indeed resulted from a contested argument before them as to whether to make that declaration in any event, whatever other decision they might come to: Mr Butcher obviously wished, once the Arbitrators had heard the evidence, to have a finding in his favour, if he could obtain one, as to the issue of reasonable refusal of consent, with an eye on the appeal in the French proceedings. I am satisfied that, as there is no separate appeal in this regard, it would have been appropriate to have left that declaration in place whatever else might have been the outcome of this appeal. In the event however, CMA have failed on its appeal, and so the Arbitrators' Awards stand unchanged.
