Neutral Citation Number: [2019] EWHC 1219 (Comm)

Case No: CL-2018-000336

**IN THE HIGH COURT OF JUSTICE**
**IN THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**COMMERCIAL COURT (QUEEN'S BENCH DIVISION)**
**IN THE MATTER OF THE ARBITRATION ACT 1996**
**AND IN THE MATTER OF AN ARBITRATION CLAIM**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/05/2019

**Before**:

**SIR ROSS CRANSTON**
**(Sitting as a High Court Judge)**

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**Between:**

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| **NOBISKRUG GMBH** | **Claimant/ Builder (Claimant in the arbitration)** |
| **- and –** | |
| **VALLA YACHTS LIMITED** | **Defendant/ Purchaser (Respondent in the arbitration)** |

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**Adam Constable QC** (instructed by **Clyde & Co**) for the **Claimant/Builder**
**Andrew Rigney QC** and **N G Casey** (instructed by **Wikborg Rein**) for the **Defendant/Purchaser**

Hearing date: 7 March 2019

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR ROSS CRANSTON

## Sir Ross Cranston:

### *Introduction*

1. This is an appeal pursuant to section 69 of the Arbitration Act 1996 on a question of law arising out of a Fifth Partial Final Arbitration Award issued by an arbitral Tribunal ('the Tribunal') on 24 April 2018. The Fifth Award relates to substantial claims and counterclaims in an arbitration between the appellant builder of a superyacht, a German shipyard, Nobiskrug GMBH ("the Builder" or "Nobiskrug"), and a vehicle for the defendant purchaser, Valla Yachts Limited ("the Purchaser" or "Valla Yachts"). The Yacht Construction Agreement ("the Agreement") was dated 29 March 2012. The Yacht was delivered on 27 January 2017.

2. The question of law at issue in the appeal concerns payments made by Valla Yachts to sub-contractors which Nobiskrug said it had no obligation to pay. In broad terms Nobiskrug's case was that the Tribunal was in error in finding that Nobiskrug should pay Valla Yachts these amounts where the latter had failed to establish that Nobiskrug was under a legal liability to make them. On the other hand, Valla Yachts' case was that it was entitled to these amounts in unjust enrichment or damages because Nobiskrug had been in breach of its responsibilities under the Agreement to project management the build, and it had made the payments subject to a reservation of rights in order to ensure completion of the yacht.

### *The construction agreement*

3. Under the Agreement Nobiskrug was to build a yacht on behalf of Valla Yachts. Recital E to the Agreement stated that: "The Builder agrees to plan, (where applicable) execute, organise and project manage the Works in order to achieve the Target Delivery Date". Recital F provided that "the Purchaser's remedies in respect of the Builder's non-performance are expressly understood and agreed to be only as set out in Clause 14 below."

4. Recital G contemplated three phases to the build (1) the construction and delivery of the steel hull (including some pre-outfitting and the installation of certain major machinery and components), described as the "Kiel Works" and including what was called the "fixed price package" (one element of the contract price); (2) the completion of the interior and exterior outfitting of the yacht, to be performed by the so-called interior outfitting contractors; and (3) the installation of the skeg, the shaft lines and masts, and the yacht's commissioning and sea trials.

5. Clause 1.1 of the Agreement contained definitions. Relevant to these proceedings are those relating to how, under the contract, the build was to be carried out, in part, by sub-contractors working under Approved Contracts concluded between Nobiskrug and relevant sub-contractor.

    (a) "Approved contracts" as defined in the Agreement were those listed in Appendices 9a and 9b of the Agreement, and those approved under the procedure set out in clause 5.

(b) "Sub-Contracted Works" were defined as any and all materials and supplies required to construct, complete and deliver the yacht in accordance with the Specification but excluding those under the Fixed Price Package, Engineering Services and Construction Hours (all defined terms).

(c) "Sub-Contracted Works Costs" were the aggregate of the fixed prices payable for the Sub-Contracted Works, as specified in the Approved Contracts.

(d) "Suppliers" were defined as those suppliers nominated by Valla Yachts and thereafter appointed by Nobiskrug to supply the Sub-Contracted Works.

(e) "Works" were defined as "all work by the Builder or the Suppliers necessary to design, engineer, construct, outfit, complete and deliver the Yacht in accordance with the Agreement."

6. Clause 4 was entitled "Kiel Works and the Fixed Price Package". It provided in clause 4.4 that if the Kiel Works had not been completed by the scheduled Kiel departure date in the contract, Nobiskrug would indemnify Valla Yachts for any additional suppliers' costs incurred by it in consequence of such delay. That was subject to two provisos. One was in clause 4.4.1, that "the delay or any part thereof is solely caused by the Builder or other causes for which it is responsible pursuant to this Agreement..."

7. Clause 5 was headed "Sub-contracted works, allowances and completion". Under the procedure in clause 5.1.1, Valla Yachts as purchaser was to instruct Nobiskrug as builder to appoint a chosen successful bidder for Sub-Contracted Works. Clause 5.1.2 dealt with Nobiskrug's position after the first phase of the build.

> "5.1.2 Following the Kiel Completion Date, the Builder's responsibility for the remaining Sub-Contracted Works shall be limited to the co-ordination and project management of those works (including without limitation, weight management) and the supervision of the Suppliers and, subject to the foregoing, not for the due performance of the Suppliers of their obligations under the Sub-Contracted Works nor for the conformity of such works to the requirements of the Specification."

Clause 5.3 provided in material part, that:

> "The Builder shall perform all works necessary to manage, coordinate and integrate the Sub-Contracted Works and will do such further acts and take such additional steps as are necessary in connection with or arise from the performance and management of all work and activities involved in and associated with the construction, outfitting, launch, trials, completion and delivery of the Yacht."

There was a target delivery date in clause 9.1of 8 October 2015.

8. The Contract Price was defined in clause 11.1 and included at 11.1.3 the Sub-Contracted Works Costs.

9. Payment was dealt with in clause 12. Clause 12.2 provided that Nobiskrug was to submit invoices within 5 business days of the end of each calendar month. Details should include in the case of Sub-Contracted Works "those sums due pursuant to the Approved Contracts which are payable in the following calendar month…".

10. Clauses 13 and 14 dealt with termination by the Builder and Purchaser respectively. In clause 16 there was a procedure involving a written change order for modifications of the build by either side. Before work on a modification commenced under the clause, Nobiskrug and Valla Yachts were to sign a change order.

***Suppliers' demands for payments***

11. Pursuant to the Agreement, Suppliers were appointed to undertake some of the build. ISMOTEC GmbH ("Ismotec") was the sub-contractor responsible for electrical engineering and cabling throughout the yacht. The fixed price under the Approved Contract between Nobiskrug and Ismotec was for some €13 million.

12. Over the course of the project, Valla Yachts approved variations to that Approved Contract in the sum of €3,364,314.50. In 2014 Ismotec claimed a further sum from Nobiskrug above these agreed costs, and on 11 September 2014 Nobiskrug paid €474,500 without reference to Valla Yachts. There is no dispute over these payments.

13. Then on 15 December 2014 Ismotec made the first of five further claims at issue in the arbitration. The Tribunal found that these were made in the following circumstances. The first claim was in the sum of approximately €3,000,000. Ismotec threatened to stop work unless the claim was met. There were meetings in the first part of January 2015 between Nobiskrug, Valla Yachts and Ismotec. At a meeting on 6 January 2015 it was agreed that an independent expert should be appointed to review and comment on Ismotec's claims: para [114] of the Award.

14. On 16 January 2015 Valla Yachts informed Nobiskrug that it would pay Ismotec €750,000 for the period November 2014 to March 2015. This was expressed to be on the basis of Nobiskrug's agreement that:

> "the parties would jointly appoint an independent expert to review the Ismotec claim and determine the cause and amount due Ismotec and the responsible party…Should that not occur for any reason or should the issue remain unresolved, the Purchaser intends to submit the issue of responsibility for these costs to arbitration under the [Agreement]...": para [115](see also para [146]).

15. On 23 January 2015 Nobiskrug wrote to Valla Yachts to the effect that (i) it was agreed at the meeting that the latter should make the payment; (ii) that Nobiskrug's opinion was that it had no liability to Ismotec; and (iii) that they had been advised that under German law Ismotec had no right to additional payments even if it, Nobiskrug, was at fault: para [118].

16. Valla Yachts made payment for Ismotec of €750,000.

17. There was a second payment in July 2015, when each of Nobiskrug and Valla Yachts each paid Ismotec €542,976. The background in brief was that earlier in April Ismotec demanded additional payments, part of which were claims for overtime and accelerated work: para [122]. Nobiskrug rejected the claim: para [123]. An independent expert was appointed and concluded that Nobiskrug was primarily responsible for the acceleration costs because of its management of the project, but that part of the delay was because of design change: para [124].

18. Ismotec threatened legal proceedings and to suspend work: para [125]. (Ultimately it did stop work: para [129].) Valla Yachts thought the claims valid. Nobiskrug took the view that they were unsubstantiated and baseless in German law, and that under the Agreement they were the responsibility of Valla Yachts: para [130]. Nobiskrug proposed a compromise, maintaining its position, but agreeing that Valla Yachts should make a payment of €542,976, and that an equal amount would be paid from the security deposit: para [130].

19. The third and fourth payments by Valla Yachts came after Ismotec made further claims later in 2015. Nobiskrug rejected them as having no contractual basis, but while not wanting to depart from the contractual basis for claims, Valla Yachts paid €500,000 and €1,459,875 in November 2015. These were recorded in the minutes of the relevant meetings as Valla Yachts wanting "to recompensate Ismotec's good performance and support in the past": paras [134], [136].

20. There was a fifth payment by Valla Yachts of €40,000 in February 2017: para [137].

21. The Muehlhan Group was another provider of Sub-Contracted Works, in its case corrosion protection, interior coatings and surface preparation. In 2015 it presented Nobiskrug with a large number of claims: para [154]. On 3 September Nobiskrug, Valla Yachts and Muehlhan met to discuss a claim for €950,000. In March 2016, Nobiskrug and Valla Yachts agreed to pay Muehlhan €950,000 on a 50/50 basis, with liability for the sum to be determined by the Tribunal: [155].

22. Other sub-contractors included Magna and W. Sander Handel. A claim by Magna related to additional work on the masts through delay when the protective scaffolding had not been completed in the relevant area. There was a document dated 18 July 2016 signed by both Nobiskrug and Valla Yachts Parties, where payment was under an express reservation by the latter that it would be reclaimed in the arbitration: para [217]-[218]. W. Sander Handel was appointed to supply the Sikla railings and fittings and made an additional claim of €248,692.52 for the cost of more screwed Sikla fittings. It was said that this was because Nobiskrug instructed its engineers to used screwed Sikla fittings in areas where it had been envisaged welded units would be used: para [223]-[224].

***The Award***

23. In the arbitration the Tribunal considered numerous claims and counterclaims. The Fifth Partial Award ("the Award") was concerned with all outstanding disputed claims arising in the reference. For present purposes the focus is on its consideration of what under the agreement were Supplier cost claims, in particular the claims by Valla Yachts for the recovery of the sums paid to Ismotec between January 2015 and January 2017

in the sum of €3,292,851.00; to Muehlhan in March 2016 in the sum of €475,000; and to other Suppliers: para [29] of the Award.

24. The Tribunal recorded that Valla Yachts brought these as counterclaims on most, if not all, of the following grounds: (1) as a matter of construction of the Agreement; (2) as a claim in restitution; (3) as a claim on an indemnity under clause 4.4 of the Agreement where the costs incurred by the Suppliers were caused by delay in completion of the Kiel Works for which Nobiskrug was solely responsible; and/or (4) as a claim for damages for breach of Nobiskrug's project management obligations under clause 5.1.2 of the Agreement: para [30].

25. Nobiskrug rejected these claims. The Tribunal recorded that its case was (1) that Valla Yachts' construction of the Agreement was wrong; (2) that any claim in restitution failed since it was excluded by the Agreement, alternatively, the payments "were not due under the relevant sub-Contracts and were therefor entirely voluntary and made contrary to the Builder's advice"; (3) that the claim for an indemnity under clause 4.4 failed since Valla Yachts could not satisfy the elements required; and (4) that any claim for damages failed since it was excluded by the Agreement, alternatively, there was no breach of Nobiskrug's project management obligations under clause 5.1, and even if there was it was not causative of any of the counterclaims: para [31].

26. As to the Agreement and its construction - the first source of contention between the parties – the Tribunal recalled that initially Nobiskrug's case was that it is entitled to be put in funds to enable it to pay all sums invoiced or demanded by Suppliers whether or not such sums were due under the Approved Contracts, but by the time of the hearing its position was that Valla Yachts was obliged to put it in funds so as to enable it to pay all sums properly due to Suppliers under Approved Contracts regardless of the cause of its own liability: paras [34]-[35].

27. Agreeing with Valla Yacht's contention, the Tribunal set out its interpretation of the Agreement at paragraph 43:

> "43…Although the 'Contract Price' in the Approved Contracts is a specified sum of money, the Approved Contracts themselves anticipate the possibility that the 'Contract Price' might be changed by express written agreement between the Builder and the Supplier…[U]nless the "Contract Price" is changed by express written agreement between the Builder and the Supplier, the fixed price for which the Purchaser is liable to the Builder remains the monetary sum stipulated in the Approved Contract. It is important to keep this well in mind."

28. In the following paragraphs the Tribunal considered the process under the Agreement for the approval of modifications as between the parties, and concluded that it meant that:

> "46…a Purchaser is liable (and is only liable) in respect of Additional Supplier Costs if the originally agreed 'fixed price' under an Approved Contract has been amended with (a) the express consent in writing of the Supplier and the Builder (by way of an amendment to the relevant Approved Contract), and

> (b) the Builder and the Purchaser by way of a Change Order, Material Package Agreement or other written agreement ('Change Order/MPA')."

29. The Tribunal noted at paragraph 48 that this construction of the Agreement regarding the responsibility for additional Supplier costs would affect the determination of the various claims and counterclaims. It went on to summarize those effects. As far as Valla Yachts' counterclaims were concerned, the Tribunal said:

> "50(1) The Purchaser is not entitled to recover payments made to Suppliers on a purely voluntary basis unless it can establish that the Builder was obliged to make the payment under an Approved Contract;
>
> (2) Where payments were made by the Purchaser subject to a reservation of rights, the Purchaser is entitled to recover those amounts, unless the Builder can demonstrate (a) the express consent in writing of the Supplier and the Builder... and (b) an agreed Change Order/MPA concluded between the Builder and the Purchaser."

30. The Tribunal went on to consider a second issue between the parties, the interpretation of clause 4.4, the indemnity clause. It found that Valla Yachts had not met the requirements: para [78].

31. The Tribunal then considered, thirdly, Valla Yachts' case for damages because of Nobiskrug's breach of its project management duties. On its interpretation of the Agreement a damages claim was not excluded by its terms: para [82]. The Tribunal noted that these breaches had not been properly particularised, nor had Valla Yachts demonstrated how the alleged failures led to delay and how that delay led to Supplier Costs: para [87]. However, the Tribunal found that Nobiskrug breached its project management obligations: para [90]. As to poor day to day project management, the Tribunal concluded:

> "92 [Nobiskrug] at times effectively abandoned its project management responsibilities to the Purchaser. Thus, and by way of example…
>
> (2) But as the problems with Ismotec and Muehlhan increased and the amount of their financial claims grew larger, the Builder's position changed and it began to pass any demands for additional money to the Purchaser;
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> (3) By that stage, however, large sums were at stake. Ismotec was demanding an additional €3,000,000 and the relationship between it and the Parties had already deteriorated to the extent that Ismotec was threatening to stop work. That placed the Purchaser in an extremely difficult position as Ismotec was a critical supplier under the Project being responsible for the electric cabling;

> (4) The Builder also failed to investigate the claims advanced so that the Purchaser could form a proper assessment of whether or not the sums were due and failed to manage the resolution of Ismotec's and Muehlhan's claims effectively so as to minimize any disruption caused to the Project. Again, and by way of example only:
>
> a. As regards the Ismotec claims, the Builder initially agreed to appoint an independent expert to investigate the claims and report on liability. This did not happen. It then proposed arbitration, but took no positive steps to refer the dispute to a competent tribunal.
>
> b. Turning to the Muehlhan claims, Mr Liedtke [of Valla Yachts] explained that he had failed to identify the cause of the repairs that Muehlhan had to perform despite spending a lot of time investigating them…However, given that earlier in the year, the Builder had paid some €1,044,905.80 to Muehlhan cover the costs of repairs, the Builder should have been on notice that further claims were at least possible, if not likely, and that further monitoring was required. And if the Builder really had not expected additional claims from Muehlhan by that stage, that represented a further failure of project management."

32. After further consideration of the project management claims, the Tribunal stated that the Valla Yachts would be entitled to damages:

> "107…provided that the Purchaser can show that the project management failures we have found were *an effective cause* of any particular item of Supplier Costs claimed. We shall return to consider this question below as necessary when considering the individual Supplier Costs claims." (See also para 103.)

33. In a section on the Ismotec counterclaims, the Tribunal first set out the factual background to Valla Yacht's payments to Ismotec. It recorded Nobiskrug's case that, at the time, it had stated that the payments were not contractually required and therefore were being made voluntarily by Valla Yachts: para [143]. The Tribunal agreed with Nobiskrug that on the basis of its earlier contractual analysis, Valla Yachts was not entitled to recover payments made to suppliers on a purely voluntary basis unless it could establish that Nobiskrug was obliged to make the relevant payment to a Supplier pursuant to an Approved Contract: para [144]. The Tribunal continued:

> "[145] That, however, is not the end of the matter here. The Purchaser [Valla Yachts] contends that the payments were made on the express basis that liability for those sums would be resolved 'by some form of dispute mechanism'. If that is correct, and if the Purchaser can demonstrate that the payments to Ismotec were made under a reservation of rights, it is entitled to recover them."

34. On the basis of the evidence, outlined in summary earlier in the judgment, the Tribunal was satisfied that the first payment of €750,000 was made by the Valla Yachts "subject to a reservation that liability for that sum would be determined later, including in this arbitration reference, if that were required": para [148] The same was true in respect of the further payments of €542,976, 43 €500,000, and €1,459,875 because, inter alia, each was made "against the backdrop of the agreement surrounding the first payment and the Purchaser's [Valla Yacht's] reservation of rights…": para [149].

35. With the Muehlhan claim, the Tribunal stated that it was common ground that there was no dispute that the sum claimed was due and owing under the Approved Contract: para [157]. For Nobiskrug to recover the €475,000 paid to Muehlhan, it needed to demonstrate an agreed Change Order/MPA, but could not do so: paras [159]-[160]. Valla Yachts' counterclaim was the mirror image of Nobiskrug's claim and succeeded for the same reason that Nobiskrug's claim failed: para [161].

36. With the other Suppliers' claim, the Tribunal recorded at paragraph [191] that they were advanced in restitution, alternatively as damages for breach of Nobiskrug's project management obligations. As regards the claim in damages, Valla Yachts had failed to explain how any of the costs claimed were caused by Nobisdrug's project management failures and that claim therefore failed. It then turned to the restitution aspect of these claims.

37. Thus the Magna claim succeeded since payment was made subject to express reservation: para [222]. As to the W. Sander Handel claim there was no evidence that Valla Yachts made payment subject to a reservation and it was not alleged that the payment was made pursuant to any agreement that the question of liability would be resolved in the arbitration reference: para [226]. The Tribunal added:

> "227 In the circumstances, the Purchaser can only recover the sums paid to W Sander Handel if it can establish that the Builder was obliged to make the payment as part of the 'fixed price' payable under the relevant Approved Contract. Otherwise, the Purchaser's payment was a voluntary payment. Since we were unpersuaded by either of Mr Kloosterman's [from Valla Yachts] explanations for the over-run, we conclude that the Purchaser has failed to do so."

***The appeal***

38. Butcher J gave permission in relation to one of the two questions of law Nobiskrug raised in its section 69 application. The question on which permission was granted is as follows:

> "In relation to payments made by the Purchaser to third party Suppliers, whether, where the Purchaser has failed to establish that the Builder was under a liability to make payment to the Suppliers, the Purchaser is entitled to recover those sums from the Builder in restitution, solely on the basis that it made those payments subject to a reservation of rights."

39. Mr Constable QC for Nobiskrug submitted that the key error in the Tribunal's approach (evident at para 50(2) of the Reasons) was that the mere statement by Valla Yachts that it reserved its rights when paying the sums demanded by a third party Supplier like Ismotec could not give rise to an obligation on the part of Nobiskrug to repay the sums without a finding of the Supplier's entitlement it. Mr Constable submitted that the Tribunal made no finding of Nobiskrug's liability to pay Suppliers like Ismotec which Valla Yachts discharged on Nobiskrug's behalf by making payment in the face of Nobiskrug's refusal to do so. In the absence of that, he continued, Valla Yachts did not have a legal basis, contractual, in unjust enrichment or otherwise, to recover the sums it paid to the Suppliers.

40. As described earlier in the judgment, the Tribunal set out Nobiskrug's position that Valla Yachts had to meet any claim made by a Supplier properly due under an Approved Contract regardless of the cause of its own liability (see para 35 of the Award). The Tribunal went on to construe the Agreement, and its interpretation was in line with Valla Yacht's case that it was responsible for only the fixed prices in the Approved Contracts unless there was an express written agreement between it and Nobiskrug about an increase. Those findings were encapsulated in paragraphs 43-44 of the Award.

41. However, those findings were in relation to the parties' obligations under the Agreement, not to the issue of Nobiskrug's obligations identified at para 50(1) to make payment under the Approved Contracts. Valla Yachts might have no liability to make payments under the Agreement depending on Nobiskrug's obligations vis a vis the Suppliers. Mr Constable contended that Valla Yachts' payments to Ismotec and the other Suppliers were voluntary in the absence of a finding by the Tribunal that Nobiskrug had any obligation to make the payments or, to put it another way, that the Suppliers had any entitlement to receive them.

42. Mr Constable accepted that the Tribunal found that there was a liability in relation to the Muehlhan claims. There Nobiskrug's case had been that the sums claimed by Muehlhan were legitimately demanded and due to it, but that under the Agreement they were for Valla Yacht's account. Therefore there was no dispute that there was an underlying liability to Muehlhan under the Approved Contract. The question was simply which party ought to bear it. But that left the position whether there was any liability with respect to the claims by Ismotec and some of the other Suppliers.

43. In relation to these Mr Constable contended that throughout the payment process and at the hearing Nobiskrug's position was that the sums demanded by Ismotec and the other Suppliers were not properly due from it or Valla Yachts, whether under the Agreement or as a matter of German law. Yet in its submission the Tribunal incorrectly decided at paragraphs [145]-[151] that in circumstances where a Supplier demanded sums not due to it, and Valla Yachts nevertheless paid, Nobiskrug was liable to reimburse it. The fact was, Mr Constable submitted, neither it nor the Suppliers could have compelled Valla Yachts to pay the sums it did.

44. To my mind the Tribunal made a number of findings relevant to Nobiskrug's liability to Valla Yachts. First, it found that Nobiskrug was in breach of its project management responsibilities under the Agreement: see paras 92, 107. Secondly, the Tribunal recorded that Ismotec had threatened to stop work, and at one point had done so. The Tribunal returned to that in the context of Nobiskrug's project management failures at

paragraph 92, where it found that Nobiskrug failures in this regard had placed Valla Yachts in an extremely difficult position.

45. That latter comment is unsurprising: Nobiskrug was not properly managing the Suppliers; initially it made demands for payment from Valla Yachts outside the Approved Contracts which Nobiskrug simply passed on; given the nature of its work on the yacht Ismotec in particular had a pivotal role in its completion but would not continue work without payment; Nobiskrug's response became that Ismotec should not be paid as a matter of German law even if Nobiskrug itself was at fault; and Nobiskrug agreed to an independent inquiry into Ismotec's entitlement to further payments which it never pursued.

46. Further, the Tribunal found that Valla Yacht's first payment to Ismotec had been made on the basis of an agreement with Nobiskrug in January 2015 (see para 148). Under that agreement Valla Yacht's payment was subject to a reservation that the question of liability as between Ismotec and Nobiskrug should go to arbitration (including under the Agreement). The Tribunal determined that except for the January 2017 payment all the payments made to Ismotec were against a backdrop of that agreement. Yet, as the Tribunal noted, Nobiskrug had never referred the matter to the dispute resolution procedure of the Hamburg Chamber of Commerce or to arbitration under the Agreement.

47. Mr Constable accepted that there was a reservation of rights by Valla Yachts. However, he contended that this did not create a right or a cause of action against Nobiskrug for the recovery by Valla Yachts of sums it paid to Suppliers, even when coupled with its failure to refer the dispute over what it had to pay Ismotec. Valla Yachts' payment was voluntary, and all the reservation of rights meant was that Valla Yachts had not waived its right to recover, or would otherwise be estopped, from pursuing its counterclaims.

48. In my view it cannot be said in light of the Tribunal's findings that it determined that Valla Yachts was entitled to payment of the sums it had paid to Suppliers like Ismotec simply on the basis that it made them subject to a reservation of rights. In other words the premise of Question 1 on which permission was given was false. What the Tribunal said at paragraphs 50(2) and 145 must be read in context. The Tribunal had concluded at paragraph 50(1) that Valla Yachts was not entitled to recover payments made to Suppliers on a purely voluntary basis unless it could establish that Nobiskrug was obliged to make them under an Approved Contract (reiterated at para 144). However, that left open the Tribunal's findings on Nobiskrug's liability.

49. Mr Rigney QC for Valla Yachts contended that the Tribunal had established all the elements as far as its claim in restitution was concerned. It found that Nobiskrug had abrogated its project management responsibilities; that that placed it, Valla Yachts, in an extremely difficult position; and that Nobiskrug failed (i) to investigate the claims advanced so that Valla Yachts was unable to form a proper assessment of whether the payments demanded were due and (ii) to manage their resolution effectively so as to minimize any disruption caused to the build. It followed, he submitted, that Valla Yachts was compelled to make the payments if the yacht were to be completed. Its action in making the payments was to the benefit of Nobiskrug. It was discharging Nobiskrug's project management responsibilities, or at least mitigating its breach of those responsibilities. Payment allowed the project to continue and Nobiskrug to earn

the contract price. Therefore Nobiskrug was unjustly enriched and Valla Yachts had a valid restitutionary claim.

50. There is considerable force in these submissions. The difficulty is that in relation to Ismotec and some of the other Suppliers this or an alternative analysis in unjust enrichment is not spelt out completely on the face of the Award. Moreover, there is no finding that Nobiskrug's project management failures caused Ismotec and some of the other Suppliers additional costs. At paragraph 107 the Tribunal said that Valla Yachts would be entitled to damages provided that it could show that the project management failures were an effective cause of any particular item of Supplier Costs claimed. It said that it would return to the issue as necessary, but in light of its other conclusions did not find it necessary do to.

51. Under section 69(7) of the Arbitration Act 1996 the presumption is in favour of remission of an award rather than setting it aside: *Russell on Arbitration*, 24th edition, paras 8.171-8.172. In my view it would not be inappropriate to follow this course in relation to both the unjust enrichment and damages issues given the extent of the Tribunal's findings described earlier in the judgment.

52. Accordingly, the appeal is allowed and the Order will be that these issues are remitted to the Tribunal for further consideration.