Section 68 Arbitration Act 1996: Commercial Court sets aside part of an award for breach of the Tribunal's duty of fairness

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Butcher J in the Commercial Court handed down judgment in ***Ducat Maritime Ltd v Lavender Shipmanagement Incorporated*** [2022] EWHC 766 (Comm), setting aside part of an award made by an arbitrator in an LMAA arbitration ("the Arbitrator") under section 68 of the Arbitration Act 1996, on the grounds that the Arbitrator breached his general duty of fairness. The decision provides useful authority on the recourse a party has under section 68 where an arbitrator has made an obvious mistake but declines to make a correction under the slip rule.

The Facts

The Award in question arose from a dispute between the Owners (Lavender Shipmanagement) and Charterers (Ducat Maritime) under a time charterparty in respect of the MV Majesty. Owners commenced arbitration under the LMAA Small Claims Procedure and claimed US$37,831 by way of unpaid hire on the basis of their Final Hire Statement ("FHS"). Charterers denied that the outstanding sums listed on the FHS were due and owing – save that they admitted bank charges and additional war premiums were due – and further sought to deduct US$15,070 for the Vessel's underperformance by way of set off and counterclaim.

If the Owners were successful on every issue, they would have been entitled to US$37,831. If Charterers had succeeded on all of their defences, and succeeded on their underperformance counterclaim, they would have been entitled to US$6,258 (representing the underperformance counterclaim less the admitted sums).

The Arbitrator found that Owners' claim succeeded, save that one item, US$9,553 for damages for inadequate hull cleaning, was not due and owing. He also found that Charterers' underperformance counterclaim failed.

It was common ground that what the Arbitrator should have done was award Owners US$28,277.91. This represented the claimed sum (US$37,831.83) less the unsuccessful hull cleaning claim (US$9,553.92). Instead, the Arbitrator added the Charterers' unsuccessful counterclaim of US$15,070 to Owner's total claim of US$37,831.83, rather than simply not deducting this sum from the total claim. As a result, he awarded Owners approximately 33% more than they were entitled to.

Charterers twice applied under section 57(3) of the 1996 Act to the Arbitrator to correct the Award on the basis of a clerical mistake or error. Owners opposed the application and the Arbitrator declined to correct the Award. It was against this background that Charterers sought to have part of the Award set aside under section 68.

Serious Irregularity

Section 68 of the 1996 Act provides that the applicant must show: (a) an irregularity falling within one of the exhaustive limbs of section 68(2); and (b) that this irregularity caused substantial injustice.

Charterers submitted that there was an irregularity falling within section 68(2)(a) – failure of the tribunal to comply with section 33 of the 1996 Act (general duty of the tribunal) – on two alternative bases:

(1) The Arbitrator reached a conclusion that was contrary to the common position of the parties, without providing an opportunity for the parties to address him on the issue;

(2) He had made an obvious accounting mistake.

On the first ground, Butcher J held that there was such an irregularity. He cited at [25] a well-known passage in **Russell on Arbitration, 24th Edn** at 5-049:

> "... The parties are entitled to assume that the Tribunal will base its decision solely on the evidence and argument presented by them prior to the making of the award. If the tribunal is minded to decide the dispute on some other basis, the tribunal must give notice of it to the other parties to enable them to address the point".

He held that the parties had been in agreement that the Charterers' counterclaim did not form part of the Owners' claim. They had not made submissions on that point because there was no need to- *"That issue was not in the arena"* [29]. Butcher J also thought it significant that although the Arbitrator did not realise he made a mistake, he realised that there seemed to be a problem, in that he had calculated Owners' claim to be significantly more than was stated in their Claim Submissions.

The second ground, whilst strictly *obiter*, is of more interest. Charterers submitted that where an arbitrator makes an "obvious accounting mistake", this itself will amount to a serious irregularity. Charterers relied upon the case of ***Danae Air Transport ASA v Air Canada*** [2000] 1 WLR 395 – a case decided under the Arbitration Act 1950 – in which the arbitrators erroneously treated a *Calderbank* offer as including the value of an offer to forego a counterclaim when comparing it with the amount they had awarded. In that case the award was remitted back to the tribunal on the grounds of a "gross and obvious" injustice (Ward LJ at 408). Charterers in the present case contended that the position should be the same under the 1996 Act.

Charterers cited **Merkin and Flannery on the Arbitration Act 1996, 6th Edn,** §68.5, who considered what a party may do if faced with a "glaringly obvious error" the tribunal appears to have overlooked:

> "Under the 1996 Act, however, the position is slightly less clear. To use the example given in ***Danae***, suppose the tribunal had thought that 2+2=5 and had made an award which they refused to correct on that basis. Tuckey LJ thought that there would be no problem remitting the award, even if the error were not admitted. However, under the 1996 Act, there would be no obvious basis for remitting the award, and it is difficult to see on what grounds the award could be challenged within the confines of section 68. Our best answer is that, if the tribunal refused to correct such an obvious mistake, that would simply be "unfair" in the broadest sense of the word, and so challengeable under section 68(2)(a)".

Owners contended that section 68 is not available for challenges based on the inadequacy or illogicality of the tribunal's reasoning, as it is focussed only on due process.

Whilst Butcher J accepted this, he found that a gross and obvious accounting/arithmetical mistake may well represent a failure to conduct the proceedings fairly, *"not because it represents an extreme illogicality but because it constitutes a departure from the cases of both sides, without the parties having had an opportunity of addressing it"* [40]. The parties share a common ground as to how arithmetical processes work and to depart from this may be a procedural irregularity. He therefore concluded that *"if a 'glaringly obvious error' in the award, to use Merkin and Flannery's phrase, can be said to arise in this way, section 68 can probably be regarded as applicable, without subverting its focus on process".*

Having found that there was an irregularity falling within section 68(2)(a), Butcher J had no issues with finding that there was "substantial injustice" and accordingly set aside part of the Award.

Conclusion

The decision provides much needed clarity on the recourse a party has under section 68 when faced with an award containing a "glaringly obvious error" which the tribunal refuses to correct. A decision can be challenged, not on the basis that the tribunal was irrational or illogical in its reasoning, but on the basis that it has departed from the common ground parties implicitly share.

Joseph Gourgey of Quadrant Chambers, acting for the Charterers, was instructed by Menelaos Nicolaou and Maria Bali of Preston Turnbull LLP

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Joseph Gourgey joined Quadrant Chambers on 1 October 2021, upon successful completion of pupillage. He is developing his practice in line with Chambers' core areas of work.

He graduated from St Hilda's College, Oxford with a first in jurisprudence, obtaining the College prize in both Finals and Prelims. On the BCL he studied Commercial Remedies and Conflicts of Law, winning the Reynolds Scholarship from Worcester College, Oxford. He completed the BPTC with an Outstanding.

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