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LMAA Award Set Aside Due To *Unfairness* By High Court

In a just released judgment, *Ducat Maritime Ltd v Lavender Shipmanagement Incorporated* [2022] EWHC 766 (Comm), on ground of a breach of general duty of fairness of the arbitrator, the LMAA award was set aside pursuant to section 68 of the Arbitration Act 1996 (hereinafter '1996 Act').

Facts

- Dispute between, Lavender Shipmanagement (the Owners) and Ducat Maritime (the Charterers) pursuant to time charterparty in respect of the MV Majesty.
- Owners commenced arbitration under the LMAA Small Claims Procedure and claimed USD37,831 by way of unpaid hire.
  - Charterers denied that the outstanding sums and highlighted Final Hire Statement. However, admitted bank charges and additional war premiums were due
  - Further sought to deduct USD15,070 for the Vessel's underperformance by way of set off and counterclaim.
  - If Charterers were to succeed, they would have been entitled to USD6,258
- Owners' claim succeeded, but for USD9,553 for damages for inadequate hull cleaning, was not due and owing and Charterer' claim failed completely on all issues.
- By error, the arbitrator added the Charterers' unsuccessful counterclaim of USD15,070 to Owner's total claim of USD37,831.83, and awarded Owners more than they were entitled to.
- Charterers twice applied under section 57(3) of the 1996 Act to the Arbitrator to correct the Award and Arbitrator declined to correct the Award.
- Charterers appealed to set aside the Award pursuant to section 68 of 1996 Act.

Charterer's and Owners' Submissions & Law

Section 68 of the 1996 Act provides that the applicant must show *Serious Irregularity* –

1) an *irregularity* falling within one of the exhaustive limbs of section 68(2); and
2) that this irregularity caused substantial injustice.

Charterers highlighted a failure of Arbitrator to comply with section 33 of the 1996 Act that provides the general duty of the tribunal – on two alternative basis, and this was highlighted as '*irregularity*':

- 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;
- The arbitrator made an obvious accounting mistake.

Owners contended that section 68 of 1996 Act challenge is only available to issues of *due process* and not on the issue of whether the award is logical.

AWARD

The arbitrator agreed with Owners' reasoning but considered serious accounting issue as an issue of due process.

It is a general practice that the issue of charterers' claim under the Owners' claim was not part of the issue and Tribunal, if was deciding on this basis must give notice of it to other parties to address the issue. Charterers also submitted that arbitrator makes an "*obvious accounting mistake*", and accordingly there was "*substantial injustice*" and accordingly set aside part of the Award.

FDD department of ALCO advice to Andrew Liu's clients is:

a) Appeal from an arbitration award is a very difficult task and FDD department view is that in this case, Charterer was lucky to find a sympathetic judge even though everything was in their favour from beginning!

b) In case of small claims arbitration, under the LMAA rules, there is no provision of appeal, and it is just like impossible to highlight in any appeal that facts were not interpreted correctly or missed out during the analysis, and accordingly the award is illogical. Appellant has to prove that there was the fault in due process and in my experience all arbitrators ensure fairness is seen to be done.

c) FDD department recently has the case where a client was receiving all the e-mails but not receiving the e-mails about appointment of arbitrator and thereafter notices of appointment of opponent's choice of the arbitrator as a sole arbitrator. Case is ongoing as to why they did not receive emails and client's objection to accept opponent arbitrator as a sole arbitrator and such issues are arising a lot and even cases like this highlighted in – https://www.ft.com/content/9c20e13e-10fc-46b3-bf92- 6b728635261c?segmentID=554dac65-fd02-3d4f-7f24-8aa24fc42d22&twclid=11514767831417516036&s=08

d) Clients will therefore need to be careful with *electronic evidence* as there are players in shipping industry, who knows how to participate in arbitration very well to tactically gain advantage. As mentioned in our previous articles, arbitration is only good as long as you are in control of an arbitration process to decide your case. If you give up this important aspect by agreeing to give power to arbitral institution to appoint an arbitrator on your behalf or agreeing to other side's sole arbitrator, you are taking a big risk, even if your case is 100% in your favour. In our experience, there are very good arbitrators and even lousy arbitrators. The important thing to realise is that unlike judges in a court system in any country that go through a very strict procedure of selection, training and ethical training, it can't be said of every arbitrator.

e) FDD department can be contacted 24 x 7 to discuss on selection of arbitrator or subtle aspects of arbitration. Merits of a case are just one aspect, but how to conduct arbitration tactically is altogether a different aspect.

Source of Information: Andrew Liu & Co., Ltd www.andrewliu.com.hk