



Arbitral award set aside for ‘glaringly obvious’ accounting error amounting to ‘serious irregularity’

By Kate Holland

Successful challenges to arbitral awards in the courts are rare. There is a balancing act when it comes to protecting parties from seriously flawed awards on the one hand, and upholding the principle of finality in arbitration on the other. In [Ducat Maritime Limited v Lavender Shipmanagement Incorporated \[2022\] EWHC 766 \(Comm\)](#), the balance was tipped in favour of an applicant who successfully challenged an award in the English High Court on the basis that the arbitrator had made an ‘obvious accounting error’. The case highlights the importance of querying any discrepancies before an award is made, and it’s a cautionary tale for parties who stubbornly refuse to cooperate when errors come to light.

The parties’ original dispute and referral to arbitration

Ducat Maritime Limited (the **Charterer**) chartered a vessel from the owners Lavender Shipmanagement Incorporated (the **Owner**). The charterparty contained an agreement to refer any disputes to arbitration.

The Owner’s claims for USD \$37,831.83

The Owner initiated arbitration for various claims. Its total amount claimed was \$37,831.83. This figure included a \$9,553.92 hull cleaning claim.

The Charterer counterclaims for USD \$15,070

The Charterer disputed some of the Owner’s claims, including the hull cleaning claim. It also made a counterclaim for vessel underperformance in the amount of \$15,070.

The arbitrator’s error and refusal to correct

The arbitrator’s findings and what he should have awarded

The arbitrator found that the Charterer’s \$15,070 counterclaim failed.

He found that most of the Owner’s claims were successful, but he rejected its \$9,553.92 hull cleaning claim and deducted it.

These findings should have led to a total award of \$28,277.91 against the Charterer.

The arbitrator’s error and what he actually awarded

However, in his calculations, the arbitrator somehow mistakenly included the Charterer’s failed \$15,070 counterclaim (and interest thereon) with the amounts owing to the Owner, resulting in an inflated award of \$53,692.66.

In his decision, the arbitrator pointed out that the sum of \$53,692.66 was greater than the Owner’s original claim of \$37,831.83 and that the discrepancy was unexplained. However, instead of enquiring further or inviting the parties to comment on the discrepancy, he stated he could not award more than originally claimed and capped the award at the original claim amount. This resulted in an award against the Charterer for \$37,831.83.

Based on the arbitrator’s finding that the Owner’s

hull cleaning claim had failed, this award was \$9,553.92 (or 33%) more than what the Charterer should have been ordered to pay.

Charterer's unsuccessful applications for correction of the award

The Charterer twice unsuccessfully applied to the arbitrator for correction of the award under [section 57](#) of the Arbitration Act 1996 (the **Act**), but the Owner opposed it. The Charterer argued the award should be corrected on the grounds that there had been a clerical error because its unsuccessful counterclaim for \$15,070 (and interest thereon) was not part of the Owner's claim. The arbitrator denied an error and refused to correct the award on both occasions.

The Charterer challenges the award in the High Court

The Charterer applied to the High Court for partial set aside on the ground of 'serious irregularity' under [section 68](#) of the Act.

Section 68 challenge for serious irregularity

Section 68(1) provides that a party may apply to challenge an award on the ground of serious irregularity affecting the tribunal, the proceedings or the award. To qualify as 'serious irregularity', it must fall within the list of irregularities in section 68(2) and have caused *substantial injustice* to the applicant.

Failure to comply with section 33 general duty

The Charterer argued that the irregularity here came within 68(2)(a) of the list - a failure by the tribunal to comply with the section 33 general duty. [Section 33](#) says *the arbitral tribunal shall act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent...*

The Charterer put forward two alternative grounds of the arbitrator's failure to comply with this duty and claimed this had caused it substantial injustice:¹

- First ground:

The arbitrator had reached a conclusion that was contrary to the common position of the parties and for which neither party contended,

¹ *Ducat Maritime Limited v Lavender Shipmanagement Incorporated* [2022] EWHC 766 (Comm) at [24].

² Above at [28] and [30].

without providing an opportunity for the parties to address him on the issue.

The 'common position' between the parties, that the arbitrator departed from, was that the Charterer's counterclaim did not form part of the Owner's claim.

- Second ground:

The arbitrator had made an obvious accounting mistake.

The Court's reasoning for allowing the challenge

The Charterer was successful on both grounds and in its claim that there had been substantial injustice. The Court held that *a serious irregularity affected the award*, and set aside the disputed amount of \$9,553.92.

The first ground of challenge:

Concerning the Charterer's first ground of challenge, the Court agreed that the arbitrator's failure to adhere to the common ground without providing opportunity to comment was a failure to comply with section 33:²

I agree...that, in the present case, there was an irregularity, constituted by the Arbitrator's failing to adhere to the common ground between the parties, in deciding how much was owed on a basis which had not been argued by either party, without giving them the opportunity to comment on it...

... while he did not realise he had made a mistake, the Arbitrator did realise that there seemed to be a problem...he thought that it had not been explained...Without asking for an explanation...he should not have proceeded to resolve the problem as he did, without giving the parties the opportunity of commenting on it. Had he done so, the error would have come to light.

The second ground of challenge (obvious accounting error)

Concerning the arbitrator's 'obvious accounting mistake', the Owner's defence relied on

established authorities that an arbitrator's irrational or illogical reasoning is not a form of serious irregularity and that section 68 is about whether there has been a failure of due process, not whether the tribunal got it right. The Court agreed, but found that section 33 did apply because the error had arisen through a serious flaw in procedural fairness, not mere illogicality on its own:³

a gross and obvious accounting mistake ... may well represent a failure to conduct proceedings fairly, not because it represents extreme illogicality but because it constitutes a departure from the cases put by both sides, without the parties having had an opportunity for addressing it ... if a "glaringly obvious error" ... can be said to arise in this way, section 68 can probably be regarded as applicable, without subverting its focus on process.

Court's reasoning that there was substantial injustice

The Owner argued that in any event, there had been no substantial injustice because of the irregularity, emphasising that the amount in question (\$9,553.92) was small. The Court disagreed on the basis that the sum was to be viewed within the context of the full claim value, adding:⁴

I regard it as substantially unjust that a party should ... be ordered to pay about 33% more than was due by way of principal, and be ordered to pay interest on its own unsuccessful counterclaim.

The Court also gave short shrift to the Owner's argument that the sum in dispute had been far exceeded by the legal cost of the proceedings and held it accountable for the arbitrator's refusal to correct the award in the first place:⁵

As to the comparison with the costs of putting the mistake right, I have no doubt that these would have been very much less had the mistake been accepted by the Owners earlier. This would doubtless have meant that the Arbitrator would have admitted his mistake, and ... corrected the award.

3 Above at [40-42].

4 Above at [47].

5 Above at [49].

6 *Kyburn Investments Limited v Beca Corporation Holdings Limited* [2015] NZSC 150

Challenging an arbitral award in New Zealand

The process and result may have been much the same, had the seat of the arbitration been New Zealand. The Charterer's first step would have been to apply to the arbitrator for correction of the error under [rule 34 of Schedule 1](#) to New Zealand's [Arbitration Act 1996](#) (the **NZ Act**).

If the arbitrator refused to correct it, the Charterer could have applied to challenge the award in the High Court under rule 34(2)(b)(ii) of the NZ Act, on the ground that the award was in conflict with the public policy of New Zealand (as a breach of natural justice under rule 34(6)) and that this breach had a 'material effect' on the outcome.⁶

Conclusion

As well as highlighting the merits of co-operation between parties when errors come to light, the case is a reminder of the importance of querying unexplained discrepancies before issuing a final award. Had the arbitrator gone back to cross-check the amounts when he noticed the discrepancy, or had his decision been peer reviewed, an obvious error such as this could have been picked up and resolved. At [the ADR Centre](#), all awards are scrutinised by an independent peer reviewer to ensure awards are of the highest quality, minimising the risk of correction after the fact or challenge through the courts.

About the author



Kate is a research clerk in NZDRC's Knowledge Management team. She has recently joined us after working in trust law and succession planning. Previously, she has practised as a solicitor in the UK with an international commercial firm.