Neutral Citation Number: [2019] EWHC 1118 (Comm)

Case No: CL-2018-000644

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERT COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
IN THE MATTER OF AN ARBITRATION CLAIM

Royal Courts of Justice
7 Rolls Buildings
Fetter Lane, London, EC4A 1NL

Date: 03/05/2019

Before :

THE HON. MR JUSTICE POPPLEWELL

- -

Between :

	K	**Claimant**
	- and -	
	A	**Defendant**

- -
- -

Michael Nolan QC (instructed by **W Legal Limited**) for the **Claimant**
Lawrence Akka QC and Oliver Caplin (instructed by **Hill Dickinson LLP**) for the **Defendant**

Hearing dates: 17 April 2019

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Approved Judgment

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MR JUSTICE POPPLEWELL

Mr Justice Popplewell :

Introduction

1. By a (corrected) arbitration award dated 2 October 2018 ("the Award") the GAFTA Board of Appeal ordered the Claimant ("K") to pay to the Defendant ("A") US$161,616.93 plus interest as the balance of the price due from K as buyers of a cargo of sunflower meal under a contract of sale dated 16 September 2015. The shortfall arises out of complications in the payment to A's bank following the hacking of email accounts by a fraudster and forged payment instructions which gave details of a fraudulent account for payment. K seeks to challenge the Award under sections 67, 68 and 69 of the Arbitration Act 1996 ("the Act"). Having considered K's applications on paper, Butcher J rejected A's application to dismiss the section 68 application without a hearing, and ordered that it be heard together with the section 67 application and the application for permission to appeal under section 69, with the section 69 appeal to follow at the same hearing if permission were granted.

The facts

2. The following facts are taken from the Award or were common ground.

3. By a written contract confirmation dated 16 September 2015 drawn up by Vicorus SA ("Vicorus") as intermediary broker, and signed on behalf of the parties, A agreed to sell and K agreed to buy 5,000 metric tonnes 2% more or less at sellers' option of Romanian sunflower meal in bulk for US$229 per m.t. FOB stowed/trimmed 1 safe berth, 1 safe port Galati, Romania, for shipment in the second half of October 2015.

4. The payment provision (with correction of an obvious typographical error) was as follows:

> "100% Net cash within 2 banking days to Sellers' bank upon presentation of scan/fax copies of the following original documents to [Buyers].
>
> Commercial Invoice …"

5. The contract also incorporated the terms of GAFTA Form 119 which provided by Clause 18:

> "Notices.
>
> All notices required to be served on the parties pursuant to this contract shall be communicated rapidly in legible form……..A notice to the Brokers or Agent shall be deemed a notice under this contract."

6. On 2 November 2015 A loaded the goods on the vessel MV Sea Commander, which it was common ground constituted good delivery. At 1344 on 2 November 2015 (all times are CST unless otherwise stated) A sent an email with an attached invoice. The invoice, dated 30 October 2015, was for US$1,167,900, the correct contract price, and sought payment to Citibank NA, New York branch, account number 36323207 with a SWIFT number and a reference ending 3886. I shall refer to this as "the correct A account". Vicorus' email account purported to show that the email was forwarded by

Vicorus to K at 1505 with the attached invoice. However K denied receiving that email. K received an email which appeared to come from Vicorus at 1550 which contained an attachment directing payment to a different account at the London branch of Citibank NA.

7. Shortly after A had sent the first email, it sent another email to Vicorus at 1452 on 2 November 2015 with a message saying that the invoice date was being corrected. The new invoice which was attached contained the same details for the correct A account but was now dated 2 November 2015. Again Vicorus' email records purport to show that A's email with invoice attachment was forwarded by Vicorus to K at 1555 but K denies receiving that email. K received an email which purported to come from Vicorus at 1514 attaching a new invoice correcting the invoice date. The new invoice contained payment instructions for remittance via Citibank NA's New York branch in favour of Citibank NA at its London branch, giving the destination account details as sort code 185008 and account number 114111624 (reflected in an IBAN reference), with the customer beneficiary identified as A and a quoted reference "00101013480693280lsheikmancons". It emerged in due course that it was an account in the name of Ecobank. I shall refer to this for convenience as "the fraudulent account", because it was the destination directed by the fraudster, but I should make clear that this epithet is not intended to suggest fraud or wrongdoing by Ecobank itself.

8. Later that afternoon K emailed A directly asking for the invoice to be reissued with K's correct name and A responded by email directly to K that it would do so.

9. At 0911 on the following day, 3 November 2015, A sent an email both directly to K and to Vicorus attaching a new invoice. The invoice corrected K's name but was otherwise in the same terms as that which had been sent to Vicorus the previous day, therefore seeking remittance in favour of the correct A account at the New York branch of Citibank NA. Vicorus' email records purport to show that the email sent to Vicorus was forwarded to K at 0946. K denies receipt of the emails, both that sent directly from A and that purportedly forwarded from Vicorus. At 0929 K received an email purporting to come from A with a new invoice which repeated the remittance details given the day before, seeking remittance in favour of the fraudulent account at Citibank NA's London branch and giving the sheikmancons reference.

10. It was common ground that the invoices received by K providing for payment into the London account were fraudulent. At the hearing before the GAFTA First Tier Tribunal and the Board of Appeal, there were rival allegations as to where the fraudulent email manipulation had taken place, whether at any or all of the offices or servers of A, K, and/or Vicorus; submissions were made on the basis of rival allegations as to who was at fault for the manipulation, and who bore vicarious liability. In the Award, the Board of Appeal concluded that on the evidence adduced it was impossible to determine where or how the fraudulent manipulation had taken place, and it decided the appeal on that basis.

11. On 5 November 2015 K instructed its bank, Rietumu Bank, Riga, to make payment of the full price to A. The instruction was for a SWIFT payment via Deutsche Bank Trust Company America's New York account, through Citibank NA New York as an intermediary, in favour of the fraudulent account at the London branch of Citibank

NA. On the same day, and in response to a request for an update as to payment from A, K confirmed by email that the payment had been made.

12. A requested a SWIFT confirmation of the payment for the purposes of tracking the funds, and at 2016 on 5 November 2015 K sent a copy of the SWIFT payment confirmation to A which identified the destination account as the fraudulent account in London. A however received a SWIFT confirmation purporting to be sent at 2028 on 5 November from K confirming that the amount had been remitted for credit to the correct A account. Although not expressly stated in the Award, the implication from other findings is that this had been manipulated by the fraudster.

13. On 6 November 2015 A sent K a message that no funds had been received and seeking payment. A asked K to confirm that the reference number had been added, and requesting if it had not that K do so immediately.

14. There are two further emails which purport to be from K to A. One asked A to confirm that the reference number which needed to be added was the sheikmancons one. The Award's findings accept that this was received by A. The second attached a further SWIFT confirmation showing payment to the fraudulent account at Citibank NA London Branch. There is no finding that this was received in this form by A.

15. A then sent a further message chasing payment and asking K to check with their bank, identifying that payment should have been made to Citibank NA New York Branch for account 36323207, i.e. to the correct A account. On 9 November at 0924 A again chased K for payment. On 10 November 2015 A continued to chase K for payment and relayed a recent advice from Citibank NA in New York that the funds were not visible and had not been received on their side.

16. On 13 November 2015, K emailed A asking for confirmation that funds had been credited to A's account. K advised that its bank had been told by Citibank NA New York branch that the latter had had payment confirmed by the London branch on 10 November 2015. It also recorded that Citibank NA London branch had sent a message through the banking chain requesting confirmation from the buyers' side that all due diligence had been performed on the payment "as last payment for same beneficiary has been recalled because fraudulent." That may explain the fact that the funds were not removed from the fraudulent account in London.

17. The payment of US$1,167,900 was converted by Citibank into £ sterling before being credited to the fraudulent account (in the name of Ecobank) in the amount of £768,372.45. The reasons for the conversion are not the subject of any findings, but it may simply have been the result of that being a £ sterling denominated account in London.

18. By 23 November 2015 the parties suspected fraud. Funds remained in the Ecobank account in London. On that date A emailed K stating that there were two errors with the payment, one being that it was not credited to the correct account and the other being that it was converted from US dollars into £ sterling. The message recorded the advice of Citibank that in order to remedy the position it was necessary for Citibank to repay the funds and receive a second payment which was correctly designated. The email suggested that the intermediary bank, Deutsche Bank, should recall the funds from Ecobank and then remit them to the correct beneficiary account in A's name,

namely account 36323207 at the New York branch. K reverted attaching the (fraudulent) invoice it had received and stating it did not see any of the account details which A had now quoted. K asked for confirmation that the new account details were the correct ones. This is consistent with this being the first time K had seen the correct destination account details.

19. On 24 November 2015 Ecobank approved the debit from their account of £674,831.46. This was less than the sum credited of £768,372. Citibank explained the difference on the basis of fluctuations in foreign exchange rates. The £674,831.46 was transferred to A's correct account on 18 December 2015. Conversion at the prevailing exchange rate made this equivalent to $1,006,253.07, leaving a shortfall from the contractual price of US$161,646.93, which was the sum claimed by A in the arbitration commenced on 12 January 2016.

20. The GAFTA First Tier Tribunal made an award on 7 July 2017. It appears from passages in the Board of Appeal Award that the First Tier Tribunal approached the issue on the basis that the loss should be borne by the party whose email account was hacked. It is not necessary, however, to consider the First Tier Tribunal decision because under the GAFTA arbitration rules an appeal to the Board of Appeal operates as a complete rehearing de novo, and the relevant findings of fact are those made by the GAFTA Board of Appeal. The hearing of the appeal before the Board of Appeal took place on documents only, with written submissions from the parties' representatives.

The Award

21. The Board's reasoning involved the following steps:

    (1) Although it appeared to be common ground that a fraud had occurred and that an email account was likely to have been manipulated, the Board considered that it could not make any finding on the evidence before it as to how the fraud occurred. What the parties and Vicorus variously alleged must have happened had to be treated as supposition. The Board therefore declined to make any finding on when or how the fraud occurred but proceeded on the basis that it had to identify the allocation of liability based on risk (Award paragraph 9.9).

    (2) The claim was for payment of the balance of the price, not a claim for damages (Award paragraph 9.19).

    (3) The emails and invoices sent by A to Vicorus contained the correct bank details for payment into A's nominated bank account. By reason of clause 18 of GAFTA 119, the emails and attachments sent by A to Vicorus constituted good notice under the contract because Vicorus were acting in their capacity as Broker (Award paragraph 9.28).

    (4) Accordingly under the contract it was K which bore the risk of receipt of the incorrect bank details which was what caused payment to be made into the incorrect account. K's duty was to transfer the price "into the account nominated by [A]", which K had failed to do. "Accordingly, WE FIND THAT Sellers did send a correct invoice under the Contract to Buyers via Brokers (or direct) and further that Buyers were in breach of contract by their

failure to pay Sellers the correct value of the goods into the correct bank account nominated by Sellers". (Award paragraph 9.29).

(5) "Sellers had satisfied their obligations to Buyers under the Contract by delivering goods and were entitled to payment as per their invoice sent to Vicorus. It was therefore up to Buyers to fulfil their obligations. THE BOARD FINDS THAT Sellers were entitled to receive 100% of the invoice amount as per Contract and, in the Board's opinion, it was not sufficient that Buyers had demonstrated that 100% of the invoice amount had been paid; Buyers' obligation was to ensure that 100% of the amount in cash equivalent was received by Sellers in the nominated bank account……….Accordingly, the difference between the amount paid to Sellers by recovery of the amount from Sellers' bank and the amount invoiced for the goods (whether a cost of foreign exchange or not) is recoverable by Sellers as this was a consequence of payment by Buyers into the incorrect account." (Paragraphs 9.31 and 9.32).

22. In relation to interest the tribunal not only awarded interest on the disputed sum of US$161,616.93 but also on the full purchase price of US$1,167,900 for the period between 6 November 2015 when it was due and 18 December 2015 when £674,831.46 or its dollar equivalent was received into the correct A account.

Grounds of challenge on this application

23. K's arguments can be summarised as follows:

(1) The Board made an obvious error of law in holding that K's payment obligation was to ensure payment into A's account at Citibank NA. On the true construction of the contract the obligation was only to pay the price to the seller's bank, who were the seller's agent to receive payment. That obligation was fulfilled by payment to Citibank NA irrespective of any account details.

(2) If contrary to (1) above, payment to Citibank to or for a designated account was required, there was a serious irregularity in the tribunal holding that Vicorus could be treated as agents of K for the purpose of receiving the account details by reason of clause 18 of GAFTA 119 because that argument had not been advanced by A before the Board, and K had not had any opportunity to deal with it (s. 68); alternatively, the Board's decision was wrong and constituted an error of law (s. 69).

(3) The tribunal failed to deal with the following arguments advanced to it by K (s. 68):

(a) If the obligation was one to make payment to or for an account designated by A, K performed that obligation in that messages from Mr Gey of A on 9 and 10 November 2015 amounted to instructions to pay the price to the fraudulent account with the fraudulent reference.

(b) The cause of the loss was the action of Citibank NA paying the funds into the wrong account in breach of its mandate from A.

(c) The cause of the loss was the action of Citibank NA in converting the sum into £ sterling and thereby incurring the foreign exchange losses which led to the shortfall.

(4) In awarding interest between 6 November and 18 December 2015 on the full price of the goods, the Board exceeded its jurisdiction (s.67), decided a point which had not been advanced by A and on which K had had no opportunity to be heard (s. 68) and made an obvious error of law (s.69).

24. The interest point can be disposed of shortly. The amount in question is only about US$5,500. Following the issue of these appeal proceedings A made clear that it would undertake not to seek to enforce that element of the Award because arguing about such sum was disproportionate to the amount at stake. On the basis of that undertaking, I decline to address the issue or grant any relief in relation to that element of interest. It would not further the overriding objective to take court time to consider the section 67 application which would be of no practical effect. Equally it is not a matter which could give rise to of substantial injustice for the purposes of section 68 or which substantially affects the rights of the parties for the purposes of section 69. I need say no more about it.

The principles applicable to s.68 and s.69 applications.

25. The applicable principles were not in dispute. So far as s.68 is concerned, it was common ground that the relevant principles are those which I endeavoured to summarise in paragraphs [12] to [15] of *Reliance Industries Limited v The Union of India* [2018] 1 Lloyds Reports 562. Further helpful guidance is to be found in the judgment of Akenhead J in *Secretary of State for the Home Department v Raytheon Systems Limited* [2014] EWHC 4735 (TCC) at paragraph [33]. For s. 69 applications leave to appeal is only to be granted on questions of law; and, save for questions of general public importance, only where the tribunal's decision is obviously wrong, a test which imports a high hurdle: see the authorities cited in *Reliance* at [57]. Mr Akka QC also relied upon the principle sometimes characterised as one of benevolent reading of awards, particularly of trade arbitrators, as more fully explained and articulated in a large number of cases following the oft cited dictum of Bingham J in *Zermalt Holdings SA v Nu-Life Upholstery Repair Ltd* (1985) 275 EG 1134 that the courts do not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards with the object of upsetting or frustrating the process of arbitration": see for example Colman J in *General Feeds Inc Panama v Slobodna Plovidba Yugoslavia* [1999] 1 Lloyd's Rep 688 at 695 and Teare J in *Pace Shipping Co Ltd v Churchgate Nigeria Ltd (The "PACE")* [2010] 1 Lloyds' Rep 183 at paragraph [15].

The payment obligation

26. The contractual payment obligation is to pay the price in "net cash" to A's bank within 2 days of presentation of documents, which must include a commercial invoice. An obligation to pay in cash, against the background of modern banking practice, permits any commercially recognised method of transferring funds, providing it is equivalent to cash, that is to say that it gives the payee the unconditional and unfettered right to the immediate use of the funds: see *Tenax Steamship Co Ltd v Reinante Transoceanica Navegacion SA (The Brimnes)* [1973] 1

WLR 386 per Brandon J at p. 400 endorsed by the Court of Appeal [1975] 1 QB 929 per Edmund Davies LJ at p. 948 and Megaw LJ at p. 963. The latter said that the payee does not have the equivalent of cash unless and until he has credit available at the bank upon which in the normal course of banking practice he can draw, if he wishes, in the form of cash. So where payment is made to a bank for a subsequent value date, the payment does not occur until that later value date, because in the meantime the payee's access to the funds is not an unconditional right to the full sum: see *A/s Awilco of Oslo v Fulvia S.p.A Di Navigazione of Cagliari (The Chikuma)* [1981] 1 WLR 314.

27. Of course a payment to a bank account is not strictly speaking a payment to the payee. The relationship between a bank and its customer is that of debtor and creditor, and the payment itself is to the bank not the customer as such. As Lord Russell observed in *Mardorf Peach Ltd v Attica Sea Carriers Corporation of Liberia (The Laconia)* [1977] AC 850 at 889G, one cannot pay "into" an account whether you are tendering cash or its equivalent. But that does not mean, as Mr Nolan QC argued, that payment to the bank is all that is required and that it is the bank who in this contract must have unconditional use of the funds, not A, because the contract provides for payment to "the Seller's bank." It is commercially impossible to transfer funds to a bank which are intended for the benefit of a customer without identifying the beneficiary and the destination account by branch and account name and number. The contract in this case clearly contemplated that in order to enable K to pay the price "in cash" A would not only notify the identity and branch of their bank, which was not identified in the contract itself, but would nominate the destination account details which K would need in order to be able to make a payment which was equivalent to cash. Notification of those details was no doubt contemplated as part of the function of the commercial invoice, presentation of which was a precondition to the right to payment, because commercial invoices commonly contain such details, although it would have been open to A to give notice of the details separately. But without those details the payment could not be made. Mr Nolan posed the possibility that the seller's bank might have provided trade finance to the seller and be entitled to the beneficial receipt of the money itself. There was no evidence or finding to that effect in relation to this contract, but it would not affect the payment obligations; in such a case the buyer would still need notification of destination account details, whether in the Bank's name or by way of a restricted customer account, in order to be able to make payment.

28. Mr Nolan's central attack on the Board's findings was that it treated the payment obligation as one to ensure payment by Citibank to A's account (or more accurately crediting of the account), which he submitted was contrary to the decision of Lloyd J in *Afovos Shipping SA v R. Pagnan & Filli (The Afovos)* [1980] 2 Lloyd's Rep 469 at 473 and the tentative obiter dicta in *The Laconia* of Lord Salmon at p. 880, Lord Russell at p. 889 and (in different terms) Lord Fraser at pp. 884-5, all of whom treated the moment of payment not as being when the customer's account was credited, but when the funds were received by the bank, or in Lord Fraser's case, the end of a period after receipt by the bank which represented the normal processing time for crediting the client account.

29. In my judgment that attack is unsound. It is true that paragraph 9.31 of the Award talks of the obligation being one to ensure that 100% of the price was received by A into the nominated bank account, which read literally would be overstating the extent

of the obligation. The buyer is not the guarantor of the correct processing of the payment between the seller's bank and its customer. But reading the Award as a whole without an unduly critical attempt to pick holes in it, it is clear that the Board's reasoning was that the payment obligation was not fulfilled unless transfer instructions were accompanied by the destination account details notified by A, because without such details there could be no question of a transfer which was equivalent to net cash. That conclusion seems to me to be obviously right. The contractual obligation is to make payment to the seller's bank for the account of the sellers, in the sense that it must be accompanied by the account details which the seller has notified. This is in substance what the Board held.

30. The cases relied on by Mr Nolan were concerned with the moment at which hire transferred to shipowners' banks could be said to have been paid to shipowners themselves within the meaning of the hire payment clause in the relevant time charter, a matter of importance because of the withdrawal clause in the charterparty. But in those and other cases where the timing point has arisen, the transfer had been accompanied by the correct account details, and the debate was simply whether the moment of payment is receipt by the bank, a reasonable time thereafter in which to credit the customer's account, or the moment at which the account is in fact credited. Those cases lend no support to the proposition that payment can be treated as made when accompanied by incorrect destination account details.

31. Indeed Mr Nolan's submission that it was the bank alone who needed to have unfettered access to the funds, irrespective of destination account details being correctly given, seemed to me necessarily to lead to the conclusion that if the payer gives account details which are known not to be those of the payee but of a wholly unrelated third party, the payment obligation is fulfilled by transfer for the benefit of that third party merely because the accounts are held at the same bank, which would be a commercially absurd result.

32. Mr Nolan sought to advance an alternative argument that if that were the true nature of the obligation, it was fulfilled on the facts of this case (independently of the argument relying on the emails of Mr Gey of 9 and 10 November which I address below). However it became apparent that the submission depended upon messages which were not included in the findings of fact made by the Board and were not Aissible before me on a section 69 application. The Board reached the right legal conclusion on the nature of the payment obligation and found on the facts that it was not fulfilled. This argument is therefore not available to A on this application.

33. It follows that permission to appeal under s. 69 is refused.

Clause 18 of GAFTA 119

34. It was common ground that A had not relied on clause 18 as a basis for treating notification of the destination account details to Vicorus as broker as sufficient to constitute notification to K itself. It follows that K was not given any opportunity to address the point. This was a serious irregularity within the meaning of section 68: see the judgment of Gloster J in *OAO Northern Shipping Co v Remolcadores de Marin SL* [2007] 2 Lloyd's Rep 302 at paragraphs [18] to [22] and the cases there cited.

35. Mr Akka QC advanced three arguments on this point. The first was that there could be no substantial injustice because at the moment when payment was due K had had the cargo and was liable to pay the full price, so that it suffered no injustice by having to pay the balance which A had not received. This ignores the fact that K transferred the full price. The Board has held that it bore the risk which eventuated in A not receiving the price in full and is liable to make up the difference. That involves K paying more than the contract price. If the Board was wrong to hold that it was liable to do so, that is a substantial injustice.

36. Secondly, Mr Akka submitted that reliance on clause 18 was not an essential part of the Board's reasoning, which included findings that the correct account details had been notified direct to K and a finding that Vicorus received the notification as agents for K irrespective of clause 18. The latter submission depended upon a reading of paragraphs 9.15 and 9.16 of the Award which their language will not bear. The former depended upon the language of paragraphs 3.3, 3.7 and 3.12-3.14 of the Award which stated in respect of the emails to Vicorus on 2 November 2015 that they were "forwarded by Vicorus to Buyers" and in relation to the email of 3 November 2015 that "According to Sellers the email was forwarded by Vicorus to Buyers", albeit followed in each case by words recording that the Buyers denied receipt of the email; and the words "or direct" in parenthesis in paragraph 9.29 quoted above. However on a fair reading of the Award as a whole it is clear that the Board was not proceeding on the basis of a finding that there was actual receipt by K of the supposedly forwarded emails from Vicorus, or receipt of the email "sent" directly by A on 3 November 2015. The Board accepted that there had been a fraud by manipulation of emails and the whole premise of the difficulties which arose was that K had not received the correct account details; otherwise their conduct in not at least querying two sets of inconsistent account details would be inexplicable. The Board was clearly drawing a distinction between what was "sent" or "forwarded" and what was received, which was a distinction of importance in the context of hacking of email accounts. The reference to the correct invoice being sent "via Brokers (or direct)" in paragraph 9.29 was to the actions of the sender, not a finding as to receipt. Had the Board intended to find that K had in fact received the correct details, the Award would have been bound to have said so. Reliance on clause 18 comes in the passage at the heart of the Board's conclusive reasoning, and would be unnecessary if there had been actual receipt by K.

37. Thirdly Mr Akka argued that the irregularity caused no substantial injustice because the Board was correct in its interpretation and application of clause 18. Mr Nolan countered with arguments as to why the Board was wrong on the point. For s. 68 purposes it is not necessary for K to show that the result would necessarily or even probably have been different if it had had the opportunity to address its arguments on the point to the Board; it is enough if the Board might well have reached a different view. Having heard the rival arguments on the point I am satisfied that that test is met. Given that the matter will therefore have to be remitted for further consideration of the point by the parties' chosen trade tribunal, it would be inappropriate to descend into any more detailed analysis of the merits of the rival arguments. Nor is it appropriate to do so in the context of K's alternative argument under s.69. There was some debate about whether the question could fall within s.69 as one which the arbitrators were asked to determine given that it was not raised by the parties. I agree with the view expressed in *Merkin on Arbitration Law* at paragraph 21.32 that s.69 is

apt to permit appeals on points adopted by the arbitrators of their own motion as part of the reasons for their conclusions. However where that forms a successful ground of challenge under s. 68, the appropriate course is to remit the question to the parties' chosen tribunal rather than for the Court to address the merits of the point under s. 69, as was suggested by Richard Siberry QC sitting as a Deputy High Court judge in *Omnibridge Consulting Ltd v Clearsprings (Management) Ltd* [2004] EWHC 2276 (Comm) at paragraph [51].

The s. 68 grounds of failure to address K's arguments

38. The first of these three points is a complaint that the Board failed to deal with the argument that K performed the payment obligation because messages from Mr Gey of A on 9 and 10 November 2015 amounted to instructions to pay the price to the fraudulent account with the fraudulent reference.

39. I cannot accept that the Board failed to deal with this argument. In the section containing its essential reasoning, at paragraph 9.11 it referred to the initial message of 6 November 2015 upon which the argument was based, namely that from K seeking confirmation that the sheikmancons reference should be added. The Board notably did not make findings of fact in relation to the other messages upon which K sought to rely before me to support the argument. Instead the Board did make findings in relation to other communications which undermined the argument, including importantly that the 6 November 2015 message from K was followed by an email from A giving the correct account details. The Board then referred again at paragraph 9.33 to K's email of 6 November 2015 seeking confirmation of the sheikmancons reference before specifically making a finding of fact at the end of that paragraph that K did not make payment to an account in accordance with A's instructions. That deals with the argument in question, albeit briefly and without any lengthy reasoning.

40. If there were doubt about this, it is dispelled by the corrected Award. Following publication of the award K made an application to the Board under s.57 of the Act for clarification of their reasons, which complained that this point (and those considered below) had not been dealt with, amongst other corrections sought. In issuing its corrected Award, the tribunal said that nothing which remained uncorrected constituted an omission or needed correction. The corrected Award recorded at paragraph 1.7 (as had the uncorrected Award) that the Board had considered all the submissions. There can be little doubt that it must have considered the argument now under discussion since it was specifically identified in the s.57 application as an omission.

41. The second argument under this head is that the Board failed to address K's argument that the cause of the loss was the action of Citibank NA paying the funds into the wrong account in breach of its mandate from A. There is no merit in this criticism. The Board specifically recorded the argument at paragraph 6.2 of the Award. It made a finding of fact as to causation at paragraph 9.19, holding that "causation was clear" and that it was payment by K with incorrect destination account details which had caused the loss, so that the issue depended upon whether K had complied with its contractual payment obligation. That was a finding which dealt with the issue, which is fatal to the point now being advanced. Again the course of the s. 57 application and terms of the corrected Award put this beyond doubt.

42. The same is true of the third argument under this head, that the Board failed to address K's argument that the cause of the loss was the action of Citibank NA in converting the sum into £ sterling and thereby incurring the foreign exchange losses which led to the shortfall. The point was specifically recorded by the Board at paragraph 6.27 of the Award and was dealt with by the finding on causation in paragraph 9.19. Again the course of the s.57 application and terms of the corrected Award put this beyond doubt. Mr Nolan submitted that on any view there had been a failure to deal with a variant of this point contained in the submissions to the Board, namely that the exchange losses were "bank charges in Seller's Bank" which the contract provided were to be borne by A. The short answer is that this point is dealt with and disposed of by the Board's findings that the claim was for the price, not damages, and that the loss was caused by the failure to comply with the payment obligation.

Conclusion

43. The only relief to which K is entitled on these applications is remission to the Board to reconsider its reliance on clause 18 of GAFTA 119 with the benefit of submissions from the parties on the point. The applications will otherwise be dismissed.