K v A [2019] EWHC 1118 (Comm)

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Cybercrime is a live issue in today's technological world. The recent case of *K v A* considered which party to a contract (buyer or seller) carries the risk of fraud, and whether paying monies into the incorrect account constituted a breach of contract.

Using an intermediary broker, A and K entered into a written contract for A to sell K 5,000mts of sunflower meal for USD 229 per mt fob stowed/trimmed 1 safe berth, 1 safe port Galati, Romania, shipping in the second half of October 2015.

The contract included the following terms;

- K was to pay A in full and in cash within 2 banking days upon being presented (by scan or fax) with copies of A's commercial invoice.
- GAFTA Form 119, in which clause 18 stated; "...A notice to the Brokers or Agent shall be deemed a notice under the contract"

On 2 November 2015, A loaded the goods on board the vessel, and also sent the broker an email attaching an invoice for USD $1,167,900. The invoice included A's requisite bank details. The broker sent this to K. However, and unbeknown to both parties, the bank details on the invoice had been changed by a fraudster.

On 5 November 2015, K instructed its bank to make the payment. K's bank converted the funds to GBP £768,372.45, and credited the fraudulent account at Citibank.

By the end of November both parties suspected fraud, the funds were recovered from the fraudulent bank account as the fraudster had not removed the file. By this point, the exchange rate had changed, resulting in only GBP £674,831.46 being transferred into A's correct bank account. This left a difference of GBP £93,540.99 and USD $161,646.93.

A commenced arbitration proceedings against K for the USD $161,646.93 difference before GAFTA.

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Held at First Instance:

The GAFTA Board of Appeal made an order against K, whereby K had to pay A the USD sum of $161,646.93 plus interest. They found that the emails and invoices from A to K via the broker constituted legitimate notice under the terms of the contract. Furthermore, K bore the risks of the fraud and was liable for the USD $161,646.93 by its failure to pay the correct bank account the correct monies meant.

On Appeal:

- K appealed on the grounds of serious irregularity and on a point of law under the Arbitration Act 1996 ("AA 1996"). K's payment obligation was merely to pay the price to the seller's bank. K had fulfilled this obligation when it had made the payment, whether or not the account details were correct. If this position was incorrect, and payment to a designated account was required, then the broker could not be treated as an agent of K for the purpose of receiving the account details under the GAFTA terms because A had not pleaded this argument.

- On appeal, the High Court held that the Board had reached the correct conclusion regarding the payment obligation on K, and, on the facts, these had not been fulfilled by K. The obligation on K required K to make payment to the bank account details that A had specified. Without these specific details, the transfer could not be completed.

- K was granted leave for appeal based on its arguments regarding notice under the GAFTA terms. K had not had the opportunity to address these arguments to the Board, and this was adequate for appeal under s68 AA 1996.

What is the impact?

Hacking and cyber security is an ongoing problem, and precautionary measures should always be taken before transferring funds, particularly by the party obliged to make the payment.

Contracts should also include provisions for dealing with cyber fraud, to ensure clarity on each party's obligations and to who bears the liability. BIMCO brought in, in 2019, a Cyber Security Clause for use in various shipping contracts. It obliges both parties to, amongst other things, "*implement appropriate cyber security measures and systems*", and "*use reasonable endeavours to maintain its cyber security*".[1] Most crucially, it places obligations on both parties to notify the other should fraud be detected, and caps liability to a specific amount.

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[1] https://www.standard-club.com/risk-management/knowledge-centre/news-and-commentary/2019/06/web-alert-new-cyber-security-clause-from-bimco-now-available.aspx

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