

CISG-online 6331	
Jurisdiction	Denmark
Tribunal	Sø- og Handelsretten (Maritime and Commercial Court)
Date of the decision	15 May 2023
Case no./docket no.	BS-48358/2019-SHR
Case name	<i>Dominion Denmark A/S v. Polytex Composite s.r.o.</i>

Abstract

*by Kasper Steensgaard**

The Buyer (Denmark) has sold a chimney with a glass-reinforced polyester lining (GPR lining) to a German company's plant in Finland. To be able to fulfil this contract, the Buyer entered into an agreement with the Seller (Poland) for the purchase of the GPR lining. The contract between them included, among other provisions, a penalty clause and a 5-year guarantee. Together the Parties installed the lining in the chimney at the Buyer's facility in Poland, while the Seller alone oversaw the lamination of the lining.

The chimney was installed at the plant in Finland on 1 December 2014.

On 2 June 2017, the End buyer complained to the Buyer about severe cracks in the lining, and on 5 June 2017 the Seller was involved. Several tests were performed in June 2017. In September 2017, the Seller attempted to remedy the defects. It was disputed whether the Seller was under a duty to do so or did so *ex gratia*.

Primo June 2018, the lining was examined again, and the Parties disagreed on the results of the review and the way forward.

On 10 June 2018, the Buyer sent a notice of avoidance. On 20 June 2018, the Seller refused to replace the lining but offered to repair it with another material. On 8 August 2018, the seller made a cover purchase of GPR lining from another manufacturer, which was then installed.

The Buyer filed suit to recover its losses, which included the cover purchase and costs of installing the new liner. It furthermore claimed payment under the penalty clause.

The court found that the delivered GPR lining was defective and that the Seller was liable. At the time of avoidance in primo June 2018, the defects were too severe to remedy, and the Seller's refusal to replace the lining amounted to a waiver of its right to repair under Art. 48 CISG. The court further found that the Buyer had notified the seller of the defects in June 2017 and that this was timely.

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The court then relied on an expert report to find that more causes could have attributed to the severity of the defects. The Seller was, therefore, only liable for 40% of the loss. Therefore, the court also denied the request for payment under the penalty clause.