

Case 237: CISG 7(2); 35(2); 38; 39; 40

Arbitration Institute of the Stockholm Chamber of Commerce

(Arbitral award issued on the basis of liability; separate award to be issued on amount of damages)

5 June 1998

Unpublished (English)

(Abstract prepared by Peter Winship)

A manufacturer in the United States contracted with a joint venture in the People's Republic of China to sell a press. The contract guaranteed that the press was made of "the best materials with first class workmanship, brand new and unused." During manufacture, the seller substituted a different lockplate for the lockplate described in the design documents given to the buyer. The seller did not inform the buyer of this substitution or of the need to install the lockplate properly.

The seller shipped the disassembled press from the United States to China and when the buyer reassembled the press in China the lockplate was installed improperly. Slightly more than four years after the seller shipped the press, the lockplate broke, causing significant damage to the press. The buyer immediately notified the seller. When the seller rejected any liability for the breakdown, the buyer requested arbitration.

The issues before the arbitral tribunal were whether the U.S. seller made a non-conforming tender of goods and whether the Chinese buyer's claim of non-conforming goods was timely.

The arbitral tribunal found the seller liable for damages for the failure of the press. The tribunal concluded that the tender of the press did not conform under article 35(2) CISG. The seller was aware of the possibility that the substitute lockplate would probably fail if it was not properly installed. The seller, nonetheless, failed to inform the buyer of the need to install the lockplate properly. The mere inclusion of an express guarantee in the contract did not exclude the obligations set out in article 35(2) CISG. The tribunal further found that the buyer was not negligent when it installed the lockplate or later maintained the press.

A majority of the tribunal also found that the buyer's claim was timely because under article 40 CISG the seller was not entitled to rely on the time limits set forth in article 39 CISG. The tribunal stated that it did not matter whether the non-conformity resulted from breach of the contract guarantee or breach of article 35 CISG. Even if articles 38 and 39 CISG were concerned only with examination and notice of non-conformity under CISG, article 40 CISG states a general principle that applies to contractual obligations by virtue of article 7(2) CISG. The majority of the tribunal concluded that article 40 CISG excused notice by the buyer because the seller "consciously disregarded facts which were of evident relevance to the nonconformity".

*Addendum*

Document A/CN.9/SER.C/ABSTRACTS/21 (Arabic, Chinese,  
English, French, Russian, Spanish)

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Commented on in French: Limbach, [1999] Recueil Dalloz, No. 41, 365