

CISG-online 379

Jurisdiction	Arbitration
Tribunal	Arbitration Institute of the Stockholm Chamber of Commerce (SCC)
Seat	Stockholm (Sweden)
Arbitrators	Thorsten Leijonhielm (presiding arbitrator), Johan Gernandt (co-arbitrator), Robert Romlöv (co-arbitrator)
Date of the decision	05 June 1998
Case name	<i>Beijing Light Automobile Co., Ltd v. Connell Limited Partnership</i>

[...]

1. Background

According to a contract dated February 21, 1990 (the «Contract»),* Beijing Light Automobile Co., Ltd. («BLAC») agreed to purchase from Connell Limited Partnership («Connell»), through a division of Connell with the trading name «Danly Machine» («Danly»), a 4,000 ton rail press (the «Press») designed to make frame rails to be used by BLAC in the manufacture of light trucks at its factory outside Beijing.

[...]

The Press was constructed and first assembled at [seller's] Chicago plant. In late spring and early summer 1991 the plant was visited by [buyer's] representatives during the final stages of construction and assembly. In June 1991 final set-up and verification tests were made in order to ensure that the Press' functions then were in accordance with the Contract specifications. After completion and approval of the tests, the Press was disassembled so that it could be transported to China and in July 1991 delivery began and was concluded by shipment from the port of New Orleans on August 16, 1991. The Press arrived in the port of Tianjing in China on October 14, 1991, and reached [buyer's] plant outside Beijing in March 1992.

Assembly of the Press started in spring 1992. Assembly work was performed by [buyer] with the help of another Chinese company, China Mechanical Industry Installation Company («CMIIC»). When the representatives of [seller] arrived at the plant for the installation supervision provided for in the Contract, at the end of June 1992, the assembly was substantially completed and the [seller] personnel was mainly involved in the subsequent tests and checks leading up to the final approval on July 23, 1992 by both parties.

* The Contract was enclosed as Exhibit 1 to the award. In this presentation, the Contract is not enclosed. Also, in this presentation, [buyer] has been substituted for all references to «BLAC» and [seller] for all references to «Connell» or «Danly».

[Buyer] began to operate the Press on January 10, 1993. For almost three years, [buyer] used the Press continuously without incident. On November 10, 1995, the Press failed (for reasons further discussed below), resulting in damage to the Press. [Buyer] requested that [seller] send technicians to assist in the repair of the Press but the parties failed to agree on the terms for such assistance, and [buyer] had the Press repaired with the help of technicians available in China. The Press returned to operation on August 15, 1996.

Shortly after the break-down of the Press, [buyer] asserted that the failure was caused by a deficiency for which [seller] was liable. [Seller] rejected any such liability and some correspondence took place in spring and summer 1996 in an effort to try to settle the matter amicably, however without success. On February, 1997, [buyer] addressed a Request for Arbitration to the Arbitration Institute of the Stockholm Chamber of Commerce, claiming damages from [seller].

2. Procedure

According to the contract the parties agreed that all disputes in connection with the Contract would, failing a settlement, be submitted to arbitration. The relevant clause of the Contract reads as follows:

«ARBITRATION: All disputes in connection with this Contract or the execution thereof shall be settled friendly through negotiation. In case no settlement can be reached, the case may then be submitted to arbitration for settlement. The arbitration shall be conducted by the Arbitration Institute of the Stockholm Chamber of Commerce in Sweden in accordance with the status of the said institute. The fees for arbitration shall be borne by losing party unless otherwise awarded by the Commission. The arbitration shall be final and binding on both parties.»

In its Request for Arbitration, [buyer] appointed Mr. Johan Gernandt, Gernandt & Danielsson Advokatbyrå, Stockholm, Sweden, as arbitrator.

In its Reply to the Request for Arbitration, [seller] appointed Mr. Robert Romlöv, Advokatfirman Vinge, Göteborg, Sweden, as arbitrator.

On April 11, 1997 the Arbitration Institute of the Stockholm Chamber of Commerce appointed Mr. Dag Wersén, Lagerlöf & Leman Advokatbyrå, Stockholm, Sweden, as Chairman of the Tribunal. After Mr. Wersén's resignation due to conflict of interest, the Institute on May 7, 1997, appointed a new Chairman of the Tribunal, Mr. Thorsten Leijonhielm, Mannheimer Swartling Advokatbyrå, Stockholm, Sweden.

By August 13, 1997, [buyer] had paid the entire security for costs in the arbitration determined by the Institute, and the Institute referred [the] case to the Tribunal with the instruction that the award should be rendered not later than August 13, 1998.

In its reply to the Request for Arbitration, [seller] had requested that the Tribunal should make a separate award, in accordance with § 27 of the Rules of the Institute, on the issue of whether

[buyer's] claim was time-barred. [Buyer] opposed such a separate award and on October 16, 1997, the Tribunal decided that no such special reasons were present that under the Rules would allow it to make a separate award on the time-bar issue. Subsequently, and after having exchanged additional briefs, both parties agreed that a separate award should be made on the issue of [seller]'s liability in damages as such and the issue for the separate award was formulated by the Tribunal, with the approval of the parties, as follows:

«Is [seller] liable in damages to [buyer] for the failure on November 10, 1995 of the press delivered by [seller] under the contract dated February 21, 1990?»

On February 16, 1998, the Institute extended, at the request of the Tribunal, the time for rendering the award to December 31, 1998.

A hearing (originally planned as the main hearing for a final award) on the liability issue took place in Stockholm on April 20-24, 1998, during which the parties presented their cases and witnesses and expert witnesses have been heard, for [buyer], Mr. Chen Xueming, Mr. Li Cun-bring, Mr. Yang Tao and Professor Yu Xinlu, and for [seller] Mr. Ron Votava and Doctor S. Carl Uzgiris.

3. Grounds invoked by the Parties with Respect to the Liability Issue

[Buyer] has claimed that [seller] is liable in damages for the failure of the Press since the Press did not conform to the specifications under the Contract, nor was of the promised quality, and since the non-conformities caused the failure.

[Seller] has denied liability in damages on the grounds that the warranties in the Contract have according to their terms expired, preventing [buyer] from making a claim for the alleged non-conformity, that even if the claim were not time-barred under the Contract, there is no breach of either the explicit warranties in the Contract or implicit warranties under applicable law, the failure being caused by [buyer's] faulty installation and lack of proper maintenance after the installation and up to the failure, and that [buyer] discovered or ought to have discovered the alleged non-conformity at the time of installation and has by its failure to give notice thereof within the time required by applicable law lost its right to rely on any warranties.

[Buyer] has rejected [seller's] defences on the grounds that the Contract warranties did not displace the warranties under applicable law, that the non-conformity consists of a replacement of a part of the Press that was less reliable than the part normally used by [seller] and indicated in [seller's] drawings; the failure of the Press was caused by this non-conformity and no fault was made by [buyer] in connection with installation and maintenance of the Press, and that neither the Contract warranties nor the warranties under the applicable law preclude [buyer] from making its claim since the non-conformity was known to [seller] but not notified to [buyer].

The parties agree that the applicable law that governs the Contract is the United Nations Convention on the International Sale of Goods adopted in Vienna 1980 («CISG»).

4. Factual Circumstances Invoked by the Parties

To the extent deemed necessary by the Tribunal for rendering the separate award, the factual and other circumstances stated by the parties in support of their respective position in the liability issue can be summarised as follows.

[Factual circumstances invoked by buyer]

[Buyer] is a People's Republic of China joint venture company established 1988 (continuing the business of a Chinese state owned entity incorporated 1956) which operates a light and medium truck manufacturing business near Beijing. [Buyer] has appr. 6,400 employees and manufactures appr. 50,000 trucks per year. [Seller] is a United States business division holding itself out as a leader in the manufacture of large rail presses and other sophisticated heavy industrial machinery. [Seller's] principal place of business, to [buyer's] understanding, is Boston, Massachusetts, but [seller's] manufacturing plant is located in Chicago, Illinois.

[Buyer] had prior to the Contract three presses at its Beijing factory and a total of appr. 60 presses in all its factories, two of them being secondhand [seller] presses manufactured in the fifties and acquired by [buyer] from a German user in the middle of the eighties. In 1989, [buyer] decided to replace the three presses in its Beijing factory with one considerably larger press. [Buyer] identified a number of suppliers of presses and focused eventually on four, two German and two US suppliers, one of which was [seller]. In the end, [seller] was chosen by [buyer] as supplier.

[Buyer] and [seller] were introduced in early 1989 by the RSL Group, an independent United States sales company with offices in Shanghai and Beijing. [Buyer] and [seller] communicated about the proposed rail press sale for approximately a year prior to entering into the Contract. They visited each other's manufacturing facilities. [Seller] told [buyer] that it considered the proposed sale to be very important for opening the Chinese market and that the Press would be the best available and would last for at least 30 years. For [buyer] the Press would be by far the most expensive press ever bought by [buyer] and consequently, the purchase would be very important to [buyer]. The Contract was preceded by a proposed standard draft contract provided by [buyer] and received from another Chinese company and was entered into by [buyer] in Beijing without any assistance to [buyer] from an attorney. [Buyer] asked [seller] to include more detailed drawings of the Press for [buyer's] approval than so far provided by [seller] but [seller] refused to do that. The negotiations resulted in the parties agreeing in the Contract on the sale by [seller] of the Press.

After signing the Contract, [seller] built the Press at its plant in Chicago. [Buyer] sent its engineers to [seller's] plant during the Press's construction in order to learn about the Press. The part that caused the Press failure (a steel plate referred to by [seller] as a «P-52») was used to hold a lock-nut in place on the intermediate shaft (a part of the «crown» of the Press). The crown was already assembled, and the P-52 in place, when [buyer's] engineers were invited by [seller] and arrived at [seller's] Chicago plant. [Buyer's] engineers thus did not take part in assembly and installation of the crown or the P-52. They were told nothing of [seller's] use of

the P-52. The arrival of [buyer's] representatives at that stage had been foreseen by the parties, and [seller] had prepared videotapes of the assembly of the larger pieces of the Press but not of the smaller pieces such as how the intermediate shaft fit into the crown.

The [buyer] representatives were present at the [seller] facility when [seller] tried to erect the crown, which would have been a time when the [buyer] engineers would have been shown how the shafts (including the intermediate shaft anti-loosening device) operated. That attempt to erect the crown failed, and the engineers were told that a second attempt would be made the next day. Instead, [seller] made a successful crown erection that night. When the engineers arrived the next morning, it was too late. The engineers, who did not have a good working knowledge of English, asked [seller's] representative to make arrangements for them to climb on top of the press where they could be made familiar with the inner workings of the crown but the request was never fulfilled.

[Seller] had a second opportunity to explain proper assembly of the intermediate shaft, including the anti-loosening device, to the [buyer] engineers when the Press was disassembled for shipment, with the engineers watching. [Seller] did instruct them on re-assembly of the intermediate gear shaft at that time, but no mention was made of the fact (as it later turned out) that [seller] had substituted another anti-loosening device (A-5750) with the P-52 or how P-52 was to be installed, even though its use with the two lock-nuts on the intermediate shafts were the only instances of its use in lieu of the A-5750, which was used with every other similar lock-nut on the Press.

As required by the Contract, and in connection with the shipment from New Orleans, [seller] certified that the Press met the Contract specifications as to «quality, specifications, and performance». Quality was provided by the Contract to be «of the best materials with first class workmanship».

The Press arrived at the Port of Tianjing, People's Republic of China, on October 14, 1991, and arrived at [buyer's] plant near Beijing in March, 1992. Ultimate delivery to [buyer] took so long because the Press was too large and too heavy to travel over the roads and bridges which formed the route from Tianjing to Beijing. The roads and bridges had to be strengthened, and some new ones had to be built, before the Press could be transshipped inland. The Press arrived with diagrams and assembly instructions from [seller]. These were not detailed enough to show precisely what kept the intermediate shaft lock-nuts in place. Using the training they had received at [seller's] plant and the assembly instructions provided by [seller], [buyer's] engineers substantially completed re-assembly of the Press during the period March – May 1992. As the two P-52s were already fixed in place on the two intermediate shaft lock-nuts on arrival to [buyer's] plant, it would have been wrong for [buyer] to have interfered with [seller's] assembly of this portion of the Press, and [buyer] did not do that. It simply completed what remained to be assembled of the Press according to [seller's] instructions, and re-installed the lock-nut and repositioned the P-52 in the same position (although inserted so that the tongue of the P-52 was pointing downwards into the keyway in the shafts, see further below) as on arrival after having temporarily removed them when inserting the intermediate shafts in the suspended intermediate gears in the crown of the Press.

As a part of the Contract, [buyer] paid \$125,000 USD for 18 man-weeks of [seller] «installation supervision.» The [seller] re-assembly and installation technicians (Mr. Wakup and Mr. Morris) did not arrive until after [buyer] had fairly well completed the re-assembly and installation work and only provided 8 man-weeks of supervision. The crown, including the intermediate shaft, had not arrived at [buyer's] plant until March 28, 1991. [Seller's] presence at the [buyer] plant prior to that would not only have been of no use, but it would have meant that [buyer] would use its entire 18 man-weeks of expensive assistance (considering that three men were scheduled to provide the assistance) before the intermediate shaft even arrived at the [buyer] plant. [Seller] did not object to the postponement of the visit until a later stage. [Buyer's] reassembly of the crown began on April 9, 1992. It took until June 1, 1992, to assemble the crown (including the main and intermediate shafts) sufficient to put it in place. The two [seller] engineers who were sent to provide the USD 125,000 of installation supervision arrived on June 25, 1992. Assembly of the crown continued until July 22, 1992. [Buyer] received no notification that [seller] must be present for the assembly of the intermediate shaft itself. However, the [seller] engineers could still properly assess whether the assembly was proper, including assembly and installation of the P-52. It would have been difficult to remove the main crown cover, but neither Mr. Wakup nor Mr. Morris ever asked anyone from CMIIC to open the main crown cover. The inspection hole covers were open, left that way for [seller's] inspection.

The two [seller] engineers were at [buyer] for a month, working daily with [buyer's] engineers and management. As far as [buyer] knows, they never requested that the crown cover be removed for their inspection of the shafts etc. Nor did [seller's] engineers voice any complaint at all about their ability to do their inspection work. There is no record of any reservation expressed.

Mr. Wakup and Mr. Morris did in fact, thoroughly inspect the assembly of the crown. The crown's assembly was at the stage where a good inspection could be made. The slide was not yet connected to the crown. The moving bolster was not re-assembled. The power system was not connected. Most important, the pitman openings beneath the crown were still open, and the intermediate shaft could be observed from that vantage point. Mr. Wakup and [buyer's] Mr. Yang Tao in fact climbed down into the crown through one of the inspection openings on June 26, 1992, and specifically inspected the intermediate shaft. Mr. Wakup expressed no dissatisfaction with any part of the shaft's assembly, and, in fact, praised the Press' assembly in general.

On July 23, 1992, after inspecting and testing the Press, [seller's] technicians pronounced the Press properly assembled and installed and ready for use.

[Buyer] first began operating the Press on January 10, 1993. The delay between [seller's] certification of the Press and [buyer's] initial operation of it was due to a PRC requirement that the Chinese government approve the Press for use. For almost three years, from January 10, 1993, until November 10, 1995, [buyer] used the Press continuously without incident. On November 10, 1995, while engaged in normal operations, the Press failed. Specifically, the lock-nut which secured the left intermediate shaft to its gear broke loose, causing one side of the machine's heavy «slide» to suddenly lose power and heavily strike the Press's uprights and slideways. The strength with which the slide struck caused a complete distortion of the Press,

separating welds, severing bolts, cracking thick steel plate, and completely shifting the machine's crown. The failure was so strong that heavy pieces of the Press were propelled to the far end of [buyer's] manufacturing facility.

[Buyer] immediately notified [seller] of the failure.

While waiting for [seller] to send its technicians, [buyer's] manager responsible for the Press (Chen Xueming) faxed [seller's] Chief Press Engineer (Ron Votava), with whom Mr. Chen had dealt at the time of the Press's purchase, and implored Mr. Votava to send a more detailed diagram of the failed lock-nut area so [buyer] could begin the repair. Mr. Chen realized immediately after the failure that the designation stamp on the lockplate (P-52) differed from the drawing E-16571 provided by [buyer] with delivery. When [buyer] received the more detailed diagram from Mr Votava, [buyer] became aware that the P-52 steel plate used to secure the lock-nut was a deviation from [seller's] own design. On evaluation, it became clear that the P-52 steel plate would not function well to secure the lock-nut, and the part on Mr. Votava's diagram known as «B-5750» (which should have been «A-5750»), shaped like an interlocking key, was much more reliable than the P-52 plate for rigidity, strength, and assembly clearance.

[Factual circumstances invoked by seller]

[Seller] was at the time of the Contract one of the largest manufacturers of industrial stamping equipment in the United States. [Seller] began operations in 1942 and ceased doing business in 1997. During its operations, [seller] built more than 3,000 presses, varying in size from 25 tons up to 4,000 tons, almost exclusively for automobile manufacturers in the United States and in Europe.

In October 1989, [buyer] and [seller] began to negotiate the terms of the Contract for the Press. Under cover of a letter dated October 13, 1989, the president of RSL Trading Company («RSL»), which acted as an intermediary between [buyer] and [seller], sent [seller] an initial draft of the Contract. This draft contained many of the terms, and was substantially in the form, of the Contract. However, between October 1989 and February 1990, [buyer] and [seller] negotiated and agreed on a number of significant amendments to the draft, among them a specific provision on the start and the length (left blank in the draft) of the «guarantee period» in Clause 13 (although the length of warranty typically included in [seller's] own standard contract was one year, in light of the extended shipment time between the United States and China, [seller] agreed to provide [buyer] with an 18-month warranty period), the inclusion of [seller's] own standard limits of liability clause, excluding consequential or incidental damages, and arbitration according to the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, instead of arbitration in Beijing under the procedures of the Arbitration Commission of the China Council for the Promotion of International Trade.

Between October 1989 and February 1990, in consultation with representatives of [buyer] and under the direction of Ron Votava, a [seller] press engineer, [seller] prepared a proposal for the design, construction and delivery to [buyer] of the Press. The proposal specified matters such as the payment terms for the Press, the general specifications of the Press, and the engineering drawings which [seller] was to prepare and submit to [buyer] for approval. The «specifications» section of the proposal dealt with such matters as the capacity, dimensions,

performance characteristics and sound level of the Press. Significantly, the proposal did not list each and every one of the tens of thousands of individual parts to be used by [seller] in constructing the Press and specifically did not list the A-5750 key retainer that subsequently was replaced by [seller] (see further below).

In addition to the proposal, [seller] prepared a «Contract Progress and Personnel Progress Schedule» setting out an intended timetable for the design, fabrication, assembly, and installation of the Press. The schedule provided, inter alia, for a visit to [seller] by a group from [buyer] for the purpose of providing final approval of all customer drawings, for a visit to [seller] by a group from [buyer] for the purpose of observing manufacturing, sub-assembly, stacking, and final assembly of press, and for supervision of the installation of the Press at [buyer] by [seller] personnel, subject to the [seller's] review of the suggested installation plan with [buyer] personnel during either the first visit or the second visit. The Contract incorporated both the proposal and the schedule as attachments to the Contract, and provided that the attachments were to be as «equally valid,» as the Contract.

The Press designed and constructed for [buyer] was over 50 feet (16 meters) high, over 44 feet (13 meters) wide and about 28 feet (6 meters) deep, weighed one million eight hundred and fifty thousand pounds, and consisted of tens of thousands of individual parts. The dispute between the parties centers on the failure of one part known as the P-52 lockplate, which was the anti-loosening device for one of the lock-nuts on the intermediate shaft gear assembly. The P-52 lockplate measures 3 3/4 inches wide, 1 1/8 inches long and 1/8 inch thick, with a tongue that is 1 1/8 inch wide, 3/4 inch long and 1/8 inch thick. It is a commercially available part costing under USD 20. The A-5750 key retainer was a part manufactured by [seller] at a similar cost. The A-5750 key retainer is only 1/2 inch wide, narrower than the P-52 lockplate, and is just over 1/2 inch long and 1/2 inch thick, with a tongue that is 1/2 inch wide, 3/16 inch long and 1 inch thick.

Between February 1990 and June 1991, [seller] designed and manufactured the Press in accordance with the contractual specifications set out in the proposal attached to the Contract. Before [seller] commenced construction and assembly, [buyer] approved customer drawings of the Press prepared by [seller] in accordance with the schedule attached to the Contract. The proposal did not contemplate that [buyer] would give its approval to each and every part on the Press, and [buyer] did not in fact do so. The specifications for the intermediate gear assemblies, including the lock-nut and any lock-nut securing devices (key retainers or lock-plates) were left entirely to [seller's] discretion and were not among those drawings or specifications either intended to be or actually approved by [buyer].

The circumstances in which [seller] selected and installed the P-52 lockplate on the Press and its function on the Press are as follows. In common with other [seller] presses, the Press uses a series of geared shafts to transfer power to the slide (the portion of the press which stamps out the frame rails). The shafts, and the gears attached to them, rotate at high speed when the Press is operating. In order to fix the gears firmly to each shaft so that the shaft will «drive» or cause each gear to rotate along with the shaft, a channel is machined into both the inner surface of each gear and into the shaft itself. During assembly of the gears to the shaft, these channels (known as «keyways») are lined up and a metal bar (the «key») is inserted tightly into the keyway to fix the gear to the shaft. While the Press is operating, the rapid rotation of

the shaft, combined with the vibration of the Press as a whole, may cause the key to work loose from the shaft. A retaining lock-nut is used to prevent this occurrence. The lock-nut is tightened onto threads cut onto the shaft until it holds the gear in position on the shaft tightly against the gear's shoulder and also blocks the opening to the keyway, preventing the key from sliding out.

If the lock-nut is fully tightened on to the shaft, it cannot rotate in a clockwise direction. However, when the Press is stopped, inertia may cause the lock-nut to rotate in a counter-clockwise direction and thereby loosen it. To prevent counter-clockwise rotation of the lock-nut, a key retainer or a lockplate is fitted to the lock-nut. Properly fitted, either a key retainer or a lockplate will perform the same anti-loosening function. Each should be attached firmly to the lock-nut in such a position that its tongue protrudes into the keyway on the shaft with the tongue resting flush against the counter-clockwise edge of the keyway. Thus, clockwise rotation of the lock-nut is prevented by its being fully tightened against the gear, and counter-clockwise rotation of the lock-nut is prevented by the tongue of the lockplate or key retainer being positioned against the counter-clockwise edge of the keyway.

As originally designed, [seller] had intended to use its own custom-made part, known as the «A-5750 key retainer», as the designated anti-loosening device on the intermediate shaft of the Press. This part was designed to fit into one of several pre-machined slots on the face of the lock-nut where it was to be secured by a single screw. Although the thickness of the A-5750 key retainer varied between 1/2 inch and one inch, and was therefore thicker than the P-52 lockplate, the tongue of the A-5750 key retainer which protruded into the keyway was only 1 wide, considerably narrower than the tongue on the P-52 lockplate, which was 1 1/8 inches wide.

[Seller] believes that during assembly of the Press, it was determined that when the lock-nut was fully tightened against the gear, the slots pre-machined on the face of the lockplate did not line up with the counter-clockwise edge of the keyway. Therefore, with the lock-nut fully tightened, the A-5750 key retainer could not be inserted into the keyway so that its tongue would be flush against the counter-clockwise edge of the keyway. The A-5750 key retainer was used on other parts of the Press where there was a keyway barely wider than the A-5750 key retainer itself. In such a keyway, in the eventuality that one of the slots did not line up with the keyway, the lock-nut could be loosened a small fraction of a revolution and the key retainer installed in a manner that would still fix the lock-nut in place, because the narrowness of the keyway would prevent movement. However where the keyway was 3 inches wider than the A-5750 key retainer, as was the 3 1/2 inch keyway on the intermediate shaft, a loosened lock-nut could not be fixed tightly in place because the key retainer would not be tightly held between both edges of the keyway. In these circumstances, simply loosening the lock-nut would not permit the installation of the A-5750 key retainer in a position that would ensure that it remained flush against the counter-clockwise edge of the keyway. A substitute anti-loosening device for the A-5750 key retainer was therefore required.

The P-52 lockplate was therefore selected as a substitute for the A-5750 key retainer. The P-52 lockplate is an industry standard part, specifically designed for use on lock-nuts as an anti-loosening device. On [buyer's] Press, the substitution of the P-52 lockplate for the A-5750 key retainer was a minor hardware change.

If installed correctly, the P-52 lockplate is a strong and reliable anti-loosening device. Since the keyway on the intermediate shaft was 3 1/2 inches wide, wider than either the tongue of the A-5750 key retainer (which is only 1/2 inch wide) or than the tongue of the P-52 lockplate (which is 1 1/8 inches wide), installation in the correct position was a critical factor in either part's reliability. Correct installation required the assembler to fit the P-52 lockplate to the lock-nut so that its tongue was flush to the counter-clockwise edge of the shaft keyway. The assembler would then transfer the location of the P-52 securing holes to the lock-nut, using the P-52 as a template, and then drill and tap the two holes in the lock-nut. Installed in this position, with the lock-nut fully tightened against the gears, the static loading stress level placed on the P-52 lockplate during operation of the Press would be insufficient to cause the part to fail. Incorrect installation, as, for example, where the P-52 lockplate is fitted so that its tongue is in the center of the keyway, leaving large gaps between the keyway's edges and the lockplate on both sides, permits the lock-nut to rotate until the tongue strikes the counter-clockwise edge of the keyway, thereby subjecting the tongue of the lockplate to dynamic loading which could eventually cause the P-52 lockplate to fail.

From April through July 1991, various [buyer] representatives visited [seller's] Chicago plant in order to observe the construction and assembly of the Press and for its checkout and verification prior to disassembly and shipment to China. Apparently, however, due to difficulties in obtaining Chinese authorization for U.S. visas, [buyer's] engineers arrived later than both parties had planned and after the assembly of the intermediate shaft gears (including the attachment of the P-52 lockplate) was complete and the crown (the housing for the drive of the press) was already assembled, and the P-52 in place. Therefore, [buyer's] engineers did not learn how to properly attach the P-52 lockplate to the lock-nut. This would not have been critical, however, had [buyer], as explained below, not prevented [seller] from supervising [buyer's] installation of the Press as had been contemplated in the Contract.

Between June 3 and June 7, 1991, after completing the initial construction and assembly of the Press, [seller] performed its standard final set-up and verification tests. Testing of the Press was performed in order to verify that the Press operated satisfactorily in accordance with the performance and safety requirements set out in the Proposal. The tests also involved an inspection of the operational Press by [buyer] personnel. The purpose of these final tests was not to ensure that [seller] had installed each and every part of the Press in strict conformity with [seller's] own design for the Press, but rather to assure that it functioned and performed in accordance with the Contract specifications. On June 7, 1991, [seller's] assembly foreman and service manager, George Bayer, and a representative of [buyer], together signed [seller's] standard Press Acceptance and Release for Shipment form.

After completion of final tests in June 1991, the Press was completely disassembled for shipment to [buyer] in China. In particular, the intermediate shaft assembly was removed from the crown and the intermediate gear was disassembled from the intermediate shaft and boxed separately for shipment. The intermediate shafts, along with their pinion (small) gears were packed together with the lock-nut and lockplate, which were likely attached to the shaft to prevent their loss during shipment. However, upon arrival at the [buyer] factory in Beijing, the lockplate, lock-nut and one pinion gear would have had to have been removed from the shaft in order for the intermediate shaft and intermediate gear to be reassembled to the Press.

The date of departure from port of shipment of the Press, for the purposes of the guarantee period in clause 13 of the Contract, was August 16, 1991. Save for the date of the arrival of the Press in Xingang on October 14, 1991, [seller] has no direct knowledge of the matters relating to transportation of the Press to [buyer]. On October 14, 1991, however, [seller's] Senior Project Coordinator, Hank Marszalek, wrote to [buyer's] Zhang Ya Jun enclosing a «proposed installation schedule» for the Press, stating that the schedule required [seller's] mechanical serviceman to arrive at [buyer] at the point the main gears are being installed and timed, and asking [buyer] for assistance in arranging invitations for [seller's] servicemen for visa purposes. The schedule attached to the letter made clear that the intermediate gears were to be installed after the main gears. Irrespective of the provisions of the Contract, this was [seller's] policy, namely to supervise the assembly and installation of significant parts of its presses, and to be present during the time of the installation of the main and intermediate shafts and gears. Consequently and consistent with the Contract and this policy, [seller] servicemen were thus scheduled to arrive in Beijing prior to the installation of the intermediate shaft gears. These servicemen were fully knowledgeable as to proper assembly of the Press (including all lock-nuts and lockplates), and were expected to be in a position to ensure that gear assembly was properly completed.

As either the A-5750 key retainer or the P-52 lockplate would have had to have been installed flush against the counter-clockwise edge of the keyway, there was no reason for [seller] to assume that substitution of the P-52 lockplate for the A-5750 key retainer required special instructions to [buyer] personnel, particularly in light of the Contract's provision for [seller's] supervision of the installation of the gear assemblies. Consistent with this policy – and, indeed, within the limitations of practicality – [seller] did not provide [buyer] with written instructions to indicate how each and every part of the tens of thousand of parts of the Press (including the P-52 lockplate) was to be installed.

[Buyer], however, decided not to use [seller] to supervise assembly of the Press despite the fact that [buyer] personnel had not observed the assembly of the intermediate shaft at [seller's] plant. According to [buyer's] documents, on October 26, 1991, [buyer] entered into a contract with CMIIC whereby CMIIC agreed to assemble and install the Press at [buyer's] plant. Presumably with the assistance of CMIIC, [buyer] substantially completed re-assembly of the Press between March and May 1992. Despite repeated requests from [seller], beginning in January 1992, indicating the continuing readiness and availability of [seller] personnel to travel to China in order to supervise assembly of the Press in Beijing, it was not until June 18, 1992, that [buyer] finally sent [seller] personnel invitations to visit the [buyer] facility. It appears that the motivation behind [buyer's] delay was [buyer's] desire to save money. By delaying [seller's] arrival in China until after the Press was completely assembled, [buyer] limited its use to only about half of the man-hours of installation supervision provided for in the Contract. Following completion of the press checkout, [buyer] attempted to persuade [seller] to refund a portion of the Contract amount in respect of unused installation supervision. Thus, despite [buyer's] admission that its technicians had not witnessed assembly of the intermediate shaft in Chicago and were likely unaware of the proper method of installation of the P-52 lockplate and other parts of the Press, [buyer], in an attempt to save money, negligently failed to utilise the installation supervision provided by [seller], resulting in the improper installation by [buyer's] contractor, CMIIC, of the P-52 lockplate.

On June 24, 1992, [seller] service engineers, George Wakup and Woodie Morris, finally were permitted to visit the [buyer] plant in China. Upon his arrival at the [buyer] plant, and before the Press had become operational, Wakup asked CMIIC to have the covers removed from the crown of the Press in order that he could verify the assembly work on the gears, including the intermediate gear where the P-52 lockplate was located. Apparently offended by the implication that they had not properly assembled the crown of the Press, [buyer's] workers did not permit Wakup either to remove the covers or to inspect the assembly work inside the crown. Mr. Wakup did not climb through the inspection opening (which was much too small for a man of his size to climb through), and did not specifically inspect the intermediate shaft.

Between June 24 and July 15, 1992, Wakup and Morris worked together with [buyer] personnel to achieve acceptable lineup of the Press. Between July 16 and July 21, 1992, Wakup and Morris checked out the Press in accordance with [seller's] standard checkout agenda, which mirrored the tests performed on the Press in Chicago in June 1991. As with the June 1991 tests, the purpose of the tests performed in July 1992 was not to ensure that [buyer] had installed each and every part of the Press in strict conformity with [seller's] design for the Press, but instead to verify that the Press operated satisfactorily in accordance with the performance, design and safety requirements set out in the Proposal. Neither of [seller's] engineers pronounced the Press «properly assembled and installed.» They were in no position to make any such pronouncement since assembly was completed prior to their arrival and, despite their desire to do so, [buyer] had refused to permit [seller's] engineers to inspect or verify the assembly and installation work on the Press.

Apparently, [buyer] negligently failed to maintain the Press during the time leading up to the accident. [Buyer's] own experts acknowledge that the breaking of the P-52 would have led to «the gradual loosening of the retaining nut ... from the threads of the intermediate shaft», which in turn led to the exit of the key from the shaft, and [buyer's] report from the accident concludes that «the lock-nut dropped out and the key retreated from keyway gradually». The lock-nut had to have been loose for tens of thousands of Press cycles before the P-52 fractured completely, and after the fracture of the P-52, the lock-nut had to unscrew completely from the intermediate shaft (approximately twenty revolutions), and the key had to work its way out of the keyway for a distance of nearly 16 inches. Thus only a continuing pattern of neglecting the maintenance of the Press over a period of several months or more could have caused the problem to go unnoticed and led to the Press' breakdown.

The service manual for the Press, provided by [seller] to [buyer] with the Press, contained a section dealing with «Monthly Scheduled Maintenance», together with a checklist for, among other parts, the crown of the Press. Item number five on the checklist for the crown required [buyer] each month to remove inspection covers and check all studs and nuts inside the Press. Removal of the covers of the small inspection holes on the crown of the Press would have permitted [buyer's] engineers to observe the intermediate shaft with the aid of a flashlight from a distance of approximately four feet. On this basis, the lock-nuts on the intermediate shaft could have been routinely inspected through the inspection holes on the crown of the Press and without any disassembly of the Press.

[Seller] has no direct knowledge of the matters relating to the manner in which the breakdown of the Press occurred. [Seller] was first informed of the Press breakdown by a facsimile dated November 10, 1995, from RSL's Gary J. Stockey to [seller's] then President, Michael S. Kady. The facsimile attached a report prepared by one of RSL's Beijing workers, Lu Wei, who had visited the [buyer] plant on November 10, the day of the breakdown. In the report, prepared on that day from information supplied to him by [buyer], Lu Wei indicated that the P-52 lock-plate had broken and that the E-16571 drawing (which he attached as an exhibit) indicated that [seller] had originally specified that a B-5750 key retainer be used in its place. (The B-5750 was a typographical error which was actually a reference to an A-5750 key retainer.)

Drawing E-16571 is the drawing which [buyer] contends it first received from [seller's] press engineer Ron Votava on an unspecified date after November 10, 1995. This is untrue. In fact, the E-16571 drawing was included in the service manual which was shipped to [buyer] along with the Press in August 1991. Although on November 27, 1995, in response to a separate request for drawings, Votava did send Chen Xueming of [buyer] copies of engineering drawings of the lock-nut and the A-5750 key retainer, contrary to [buyer's] assertion, the drawings Votava sent did not include drawing number E-16571.

Since the E-16571 drawing was included in the service manual originally provided to [buyer], it was apparently available to Lu Wei during his visit to the [buyer] plant on the day of the Press breakdown, and was not among the drawings sent by Ron Votava to Chen Xueming on November 27, 1995, [buyer] had the E-16571 drawing from the date the Press was unpacked in Beijing, well before the Press was assembled. Particularly in light of the fact that it had chosen to dispense with [seller's] supervision of the assembly, minimal prudence would have dictated that [buyer] and/or CMIIC review the E-16571 drawing and the other design drawings contained in the service manual during re-assembly of the Press. As evident from the November 10, 1995 RSL report, by using the E-16571 drawing, [buyer] was able to determine on the date of the breakdown that the P-52 key retainer had been substituted for the A-5750 key retainer. In fact, [buyer] knew or should have known of the substitution when it supervised re-assembly of the Press in 1992.

[Buyer's rebuttal]

With respect to the circumstances of the exchange of the key retainer A-5750 for the P-57 lockplate, [buyer] has commented upon [seller's] statements as follows. The problem of fitting the A-5750 to the lock-nut was not simply a matter of the keyways «not lining up» as [seller] states. There was no 1/2 inch wide keyway machined on the intermediate shaft as there should have been in order to use the A-5750 key. The 3 1/2 inch wide slot which [seller] states [seller] tried to use was not a keyway machined on the intermediate shaft for this purpose. The other keyways machined on the intermediate shaft, where the A-5750 lock-nut was used, are 1/2 inch wide. There are no other places where the P-52 is used with the lock-nut B-12446-A. [Seller] simply tried to fix a mistake inexpensively and it did not work, to the significant damage of [buyer], who [seller] probably thought would not figure out what happened if something went wrong.

While the P-52 might be a «commercially available part» which performs well in some functions to prevent gear loosening, it does not properly perform the anti-loosening function in

the one place where it was used on the subject 4,000 ton press. The combination of a lock-nut such as B-12446-A (which was the lock-nut to which the P-52 was fitted in this one instance on this press) and a key A-5750 is a typical anti-loosening device used in the mechanical industry. But the P-52 lockplate is not commonly used in the industry with the type of lock-nut [seller] called «B-12446-A».

This makes a big difference, particularly in the situation presented by the 4,000 ton press. The «anti-cutting area» or «anti-loosening ability» of the A-5750 key retainer is 161.29 square millimeters, while the «anti-cutting area» of the P-52 lockplate is less than one-third of that – 50.8 square millimeters. The P-52 lockplate is too thin and its stability is too weak. When its tongue is under pressure, it can too easily be deformed and break.

Supporting the inappropriateness of use of a plate to perform the intermediate shaft anti-loosening function is the experience of the southern Chinese company Zhanjiang Sanxing Motor Enterprise (Group) Corporation, which purchased a similar 4,000 ton press from [seller] after [buyer] had concluded its purchase from [seller]. If [seller] thought the P-52 plate was an improved anti-loosening device, it would have used a P-52 with the intermediate shaft on this machine, but it did not.

The same assembly company [buyer] used to assist it in assembling the 4,000 ton press (CMIIC) assisted Zhanjiang in assembling its 4,000 ton [seller] press. CMIIC noticed that there was no anti-loosening device on the intermediate shaft of the Zhanjiang press at the place where the [buyer] press used the P-52 lockplate. When CMIIC called that to [seller's] attention, [seller] immediately corrected the deficiency, suggesting an L-shaped metal plate to be welded onto the lock-nut keyway. [Buyer] suggests that the reason [seller] did not use the A-5750 on the intermediate shaft lock-nuts on the [buyer] and Zhanjiang presses is that [seller] forgot to machine the 1/2 inch slot on these two intermediate shafts and the specially designed A-5750 key retainer did not fit without that slot.

Further evidence that the P-52 was an improper part is provided by [seller's] decision after failure of the [buyer] press to design and recommend a totally different anti-loosening device to be used on the intermediate shaft of this 4,000 ton press. Both [buyer] and Zhanjiang were provided with a design for a very large key retainer which had 87 times the anti-cutting area of the P-52 and 26.7 times the anti-cutting area of the A-5750. That new large key retainer is what both companies now use to prevent loosening of the lock-nut on the intermediate shaft gear.

[Buyer] did the required inspection and maintenance on the Press. In fact, at the maintenance performed from September 23, 1995, to October 7, 1995, Mobil Oil, which supplied [buyer] its lubrication oil, was asked by [buyer] to assist it in checking for surface wear of the gears. Mobil assisted [buyer] in the Press' maintenance check, and no sign of loosening of the B-12446-A lock-nut was found.

The inspection of the crown interior (where the shafts were located) could be done through the covered inspection holes in the crown designed for that purpose. But the maintenance inspections would not necessarily reveal any weakness in the adequacy of the P-52 and the failure would, in any event, not have happened in the gradual fashion which [seller] asserts.

An understanding of the size and configuration of the Press will illustrate the truth of [buyer's] position. While obviously a very significant piece of the Press, the P-52 lockplate is tiny compared to the intermediate shaft or the Press itself. Once the Press was completely assembled and operational, the inspection holes in the crown allowed a small person to climb into the crown to make a general inspection of the intermediate shaft area if external light was provided, but the P-52 lockplate on this particular gear would be visible only periodically. The shaft obviously turns rapidly, and it cannot be stopped in any particular position. It would not be at every regular inspection that one could see the P-52, even though one could view the lock-nut. That is why it was so important that [seller] used an anti-loosening device such as the A-5750 key, which had more strength and durability than the P-52 plate.

[Seller's rebuttal]

At the maintenance performed by Mobil Oil, Mobil was apparently simply checking the Press for surface wear of the gears. Ensuring that the gear teeth are not overly worn is very different from inspecting the P-52 lockplates, the lock-nuts, and the keyways of the intermediate shafts, and there is no reason to believe that the Mobil personnel would be qualified to inspect these parts properly. The Press' micro-inching motor allows the Press to operate at a rate of one stroke per minute (and which would rotate the intermediate shaft 4.6 times per minute) and would allow the Press to be operated slowly or stopped in any position for thorough inspection.

Evidence

The parties have in support of their factual presentation presented documentary evidence in the form of correspondence, manuals, certificates, technical reports and opinions. The Tribunal will revert to the documentary evidence and to the testimonies by witnesses and experts further on in the award.

5. Elaboration by the Parties of the Grounds Invoked in View of the Factual Circumstances

The parties have elaborated their legal positions on the liability issue, with due regard to the factual circumstances, as follows (when presenting [buyer's] position, the Tribunal includes for convenience's sake the counter-arguments forwarded by [buyer] against [seller's] defences).

[Buyer's position on the liability issue]

The 18-month warranty or guarantee period does not, by the wording of the Contract, clearly apply to [seller's] basic promise that the Press would meet certain specifications and quality requirements. The 18-month warranty relates only to [seller's] obligations for 18 months to solve problems emerging within that period with the Press despite the compliance of the Press with the Contract at delivery and irrespective of cause. Thus, the warranty does not set aside or derogate from the general and broader warranties according to Articles 35 and 36 of CISG, which consequently applied to the non-conformity alleged by [buyer] at the time of delivery. The mere existence of the term in the Contract which is different from what CISG provides

cannot in and of itself establish that the parties intended that the CISG term would not apply. At least [buyer] did not have such intention. Nor does the warranty period limitations in Article 39 of CISG (or of the Contract, if applicable) apply, since such limitations are set aside as a result of Article 40 in CISG (see further below).

As for the non-conformity issue, [buyer] does not dispute that [seller] had the right to substitute a part for the A-5750, provided that the substitution performed equally well. The non-conformity is not a design defect but a design deviation. The Press was supposed to last a minimum of 30 years but the P-52 lockplate lasted only three years. [Seller] can therefore not be deemed to have supplied the Press in accordance with the warranties in Articles 35 and 36 of CISG, specifically the fitness for purpose warranties in Article 35(2). Even if «properly installed», the lockplate would have failed eventually. [Buyer] was entitled to install the lockplate as it did, since [seller] had not given any specific instructions concerning the installation. Furthermore, [buyer] regularly did the required quarterly and monthly inspection of the Press, including the intermediate shaft area. It was not expected, nor is it reasonable that [buyer] in the course of such maintenance should check the condition of the lockplate, considering its location and difficulty in access, which is why it was so important that an anti-loosening device was used with sufficient strength and durability. Therefore, [buyer] has not lost any rights of recourse against [seller] either due to [buyer's] installation or due to any lack of maintenance.

The Press failed after the expiry of both the 18-month guarantee period under the Contract and after the 2-year warranty period of CISG. However, [buyer] is entitled to recover since the «merchantability» guarantee that the Press would be in a certain condition on delivery is not limited by the 18-month warranty limitation (or by the limitations in CISG), and since none of the warranties expire at the end of two years because Article 40 of CISG extends them. As for Article 40 of CISG (which the parties have not derogated from), [buyer's] position is that since [seller] knew or could not have been unaware of the lack of conformity, and since [the] non-conformity was not notified to [buyer], at least not in a way that can be considered a disclosure under Article 40, [buyer] is entitled to hold [seller] liable in damages also after the lapse of any periods under the Contract or under CISG.

[Seller's position on the liability issue]

First, [buyer] is no longer entitled to make any claim against [seller] alleging that the Press did not meet specifications and was not of a certain quality. Such a claim is barred by the contract which expressly provides that the period of [seller's] guarantee relating to these items was 18 months from the date of shipment of the Press. It is undisputed that the breakdown giving rise to [buyer's] claim occurred 2 years and 9 months after the expiration of this negotiated contractual guarantee period. The guarantee in Clause 13 of the Contract covers all types of alleged non-conformity, specifically such defects attributable to the design of the Press that [buyer] alleges with respect to the P-52 lockplate. By agreeing to the 18 month limitation on the contractual guarantee of quality, the parties have derogated from or varied the effect of Articles 35 and 36 in CISG. The derogation from CISG need not be explicit but apparent only from the contractual clauses effectively replacing corresponding clauses in CISG. Consequently the 18-month warranty time limit of the Contract replaces the warranties in CISG, and [buyer] is not entitled to make any claim due to non-conformity after the expiry of the 18-month period.

Second, there was no breach of either the contractual guarantee of quality, or, if they were applicable at all, of Article 35 or 36 of the Convention. The Press conformed to the specifications approved by [buyer] and the A-5750 key retainer, for which the P-52 lockplate was substituted by [seller], was not contained in a drawing or specification requiring approval by [buyer]. [Seller] was therefore not obligated to use the A-5750 key retainer and the replacement of that item with the P-52 lockplate cannot in itself be a non-conformity. Additionally, and as shown by the fact that the Press was used without any problem for a period in excess of both the Contract and the Convention warranties, if the latter were applicable, the P-52 lockplate is an industry standard part used to prevent the counter-clockwise rotation of a gear shaft lock-nut of a specification and quality which, if installed properly, would not have failed and would have performed the task for which it was intended. Therefore, there is no non-conformity neither under the Contract nor under CISG. The cause of the failure in this case is the improper installation by [buyer] after [buyer] having neglected to use the services of [seller] during assembly. In addition, [buyer] should in the course of maintenance have inspected the lockplate and would in such case have noticed the gradual deformation or misplacement of the lockplate, in which case the Press would not have failed. For the foregoing reasons [buyer] is not entitled to claim any damages from [seller].

Third, even if Articles 35 or 36 of the Convention were applicable, and [buyer] were able to establish that [seller] had breached either of those provisions, [buyer] lost any right to rely on the lack of conformity on which it bases its claim by failing to give notice thereof to [seller] within two years from the date on which the Press was handed over to [buyer]. The drawings provided by [seller] to [buyer] in 1991 would, if properly utilized during assembly of the Press by [buyer's] contractor in Beijing in 1992, have disclosed to [buyer] that [seller] had substituted the P-52 lockplate for the A-5750 key retainer. [Buyer] is therefore not entitled to rely on Article 40 of the Convention. In any event Article 40 in CISG relates only to the warranties in Articles 38 and 39 of CISG, and not negotiated and agreed absolute warranty limitation such as the parties agreed in the Contract.

6. Reasons

6.1 Undisputed facts

By and large, the facts relating to some basic technical issues of relevance can be considered undisputed and can be summarized as follows.

The reason for the failure of the Press in the autumn of 1995 was that the P-52 lockplate on the left intermediate gearing shaft at some point in time collapsed, with the result that the lock-nut securing the key and the intermediate gear to the shaft unwound permitting the key to fall out which caused the intermediate gear in its turn to lose its driving power during operation of the Press. The most plausible reason for the lockplate's failure was that the tongue of the lockplate inserted into the keyway in the shaft struck the inner wall or walls of the keyway during the operation of the Press due to inertia forces from accelerations or decelerations of the shaft and lock-nut clockwise or counter-clockwise at various stages of the press cycle. This eventually caused metal fatigue of the lockplate and its subsequent failure.

The P-52 lockplate was not intended by [seller] to secure the lock-nut when the Press was designed. Instead, and as appears from one of the drawings of the Press, the A-5750 key retainer was intended to be used as was the case in other similar presses built by [seller]. This key retainer was designed to fit exactly a narrow keyway on the shaft, and properly installed would not be subject to the forces resulting from striking the inner walls of the thread since there would be no space for it to move or at least gain sufficient momentum through inertia forces clockwise or counter-clockwise. However, in this case no keyway fitting the width of the key retainer had been made on the shafts for the intermediate gears. Since the only keyway cut on the intermediate shaft, intended to allow insertion of the key after installation of the shafts into the intermediate gears, was several inches wider than the key retainer, it could allow the key retainer to move between, and strike, the inner walls of the keyway.

Apparently an effort was made to find a position for a new, ninth slot on the lock-nut where the A-5750 could be secured and at the same time line up with the counter-clockwise edge of the keyway. Ultimately, however, the A-5750 key retainer was replaced by the P-52 lockplate which could be custom installed by driving and tapping two holes on the face of the lock-nut so that when the lock-nut was fully tightened the lockplate tongue would be flush against the counter-clockwise edge of the keyway.

[Buyer] was not present when the decision was taken to replace the key retainer with the P-52 lockplate, or when the lockplates were installed. [Seller] did not inform [buyer] of the replacement or how the lockplate was to be installed. [Seller] was not present when the intermediate gears and shafts were assembled and the lock-nuts and the P-52s were installed. [Buyer] used the only holes with threads that had already been drilled onto the face of the lock-nut when fastening the lockplate to the lock-nut. When [seller's] representatives came to [buyer's] plant the Press had already by and large been assembled and the crown was in place. No mention was made of the installation of the lockplate.

6.2 The time bar issue

One of [seller's] grounds for rejecting [buyer's] claim is that any claim relating to non-conformity is precluded both under the Contract and under CISG. As noted above, [seller] requested at the outset of the proceedings a separate award on the time-bar issue. This request was not granted by the Tribunal but the Tribunal's decision was without prejudice to any final determination in the matter. Such final determination has to be made in connection with the separate award now at hand, and since that determination in its turn is decisive for the need for any further discussion on [seller's] liability in damages as such, the Tribunal will now first address the time-bar issue. Also, [buyer] has, at least implicitly, taken the position that neither the Contract nor CISG contains any limitations for notices of the alleged non-conformity. It is alleged that [seller] orally assured [buyer] that the Press would last for at least thirty years, and that this promise was not superseded or excluded by the Contract or CISG. Therefore no limitations for notices under the Contract or CISG are applicable. This issue should also, in the Tribunal's opinion, be addressed before any discussion on non-conformity as such and other issues related to [seller's] liability in damages.

As for the first issue, namely [seller]'s claim that the parties have through the Contract derogated from or set aside Article 40 of CISG, this calls for an interpretation both of the Contract and of CISG.

Article 40 in CISG reads as follows:

«The seller is not entitled to rely on the provisions of Article 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.»

The provisions of Article 38 and 39 of CISG concern the buyer's examination of goods and his notice of lack of conformity to the seller. Specifically, Article 39(2) sets a cut-off date for any notices of non-conformity from the buyer at two years from the date on which the goods were actually handed over to the buyer, «unless this time-limit is inconsistent with a contractual period of guarantee». [Seller] claims that Articles 38 and 39 relate only to the warranties in CISG (i.e., in Article 35), and that the parties through the provisions in Clauses 13, 14 and 15 of the Contract have derogated both from CISG's provisions on warranties in Article 35 and from Articles 38 and 39. Consequently, the parties have also derogated from the provisions in Article 40.

The Tribunal cannot share this view. It is true that contracting parties may derogate from almost all provisions of CISG, either explicitly or implicitly. But even assuming that the parties have derogated from the provisions on warranties and notices of CISG (a matter that will be discussed further on), it does not follow that they have thereby implicitly also derogated from the provisions of Article 40. Nor does it follow from the wording of Article 40 that it would only relate to warranties according to CISG. The reference to Article 38 does not say anything more than that the buyer will, if Article 40 is applicable, be excused from his failure to examine the goods within a certain time: if such examination is related to non-conformity according to the Contract or according to CISG is of no relevance. The same applies to Article 39. And even if it was assumed that Article 40, as would follow from its wording, is only concerned with examination and notice of non-conformities according to CISG (as some authors would seem inclined to hold), the provisions of Article 40 would, in the opinion of the Tribunal, still be indirectly applicable to the examination and notices requirements under the Contract, since the rules in Article 7(2) of CISG on the interpretation of CISG provisions lead to the same result as though Article 40 was directly applied. It should be noted that the provision of Article 40 is intended to be a «safety valve» for preserving the buyer's remedies for non-conformity in cases where the seller has himself forfeited the right of protection, granted by provisions on the buyer's timely examination and notice, against claims for such remedies. Such «safety valves» exist in the domestic laws of many countries, triggered as a result of instances of fraud, bad faith, gross negligence, etc. on the part of the seller. Thus, the Article 40 is an expression of the principles of fair trading that underlie also many other provisions of CISG, and it is by its very nature a codification of a general principle. A derogation from such a general principle can hardly be inferred from the contractual provisions cited by [seller]. For that matter, even if an explicit derogation was made – a result of drafting efforts and discussions that stretch the imagination – it is highly questionable whether such derogation would be valid or enforceable under various domestic laws or any general principles for international trade practices.

The Tribunal therefore concludes that the parties have not derogated from Article 40 of CISG.

As for the other issue, namely [buyer's] contention that the parties have agreed that no limitation period should apply to the alleged defect in this case, excluding even the two year cut-off period according to Article 39(2) of CISG, the Tribunal cannot share this view either. It may well be that the representatives of [seller] have indicated or even «promised» that the Press would last for at least thirty years. It may certainly be assumed that [buyer] expected the Press to last for a considerable number of years even in the absence of such a promise, and that [seller] realised this. This obviously has a bearing on the issue of non-conformity as such, but the statements by [seller], if any, or [buyer's] expectations cannot be construed to set aside or derogate from the limitation periods for examination and notices either under the Contract or under CISG. A contractual provision to the effect that the remedies under the contract or under CISG would be available to the buyer throughout the lifetime of a sophisticated engineering product, irrespective of the seller's good faith, would obviously differ from normal trade practices and would, in fact, be very exceptional.

The Tribunal therefore concludes that the question of [seller's] liability in damages as such turns on whether [buyer's] claim meets the test under Article 40 of CISG.

6.3 Applicability of Article 40

It is undisputed that [buyer's] notice of the alleged non-conformity was made well beyond the two year limitation period under Article 39(2) of CISG (and, of course, the 18-month guarantee period under the Contract). Therefore, [seller] will be liable for any non-conformity only if it relates to facts that [seller] could not have been unaware of and that were not disclosed to [buyer]. The Tribunal will address in turn the issues of non-conformity, [seller's] awareness and disclosure to [buyer].

a) Non-conformity

In order to determine whether the Press, with the A-5750 key retainer replaced by the P-52 lockplate, conformed to the Contract the obvious starting point is the contractual documents. The next step is to interpret the Contract to determine whether the Contract is to be supplemented by any or all of the warranties according to CISG.

However, in this case there is no contractual specification relating to the devices securing the lock-nuts on the intermediate gears (see further below), and the contractual warranties are, even if the CISG warranties were applicable, general in their nature. The Tribunal finds it necessary to analyze the technical aspects of the failure of the lockplate before a meaningful match can be made against these general warranties.

The fact that the P-52 lockplate failed does, of course, not in itself prove non-conformity, but on the other hand it is obvious that [buyer], generally speaking, is entitled to expect a professionally designed and manufactured, major piece of machinery of the magnitude of the Press to operate, if properly installed and maintained, for a considerably longer period than two-three years without serious failure. Thus, the Tribunal cannot agree with [seller's] position, as it is understood, that the guarantee period under the Contract should be construed to mean

that non-conformity only is at hand if a defect or a deficiency appears during that period, i.e., that [buyer] should not be entitled to expect the Press to perform satisfactorily for a longer period than that. Non-conformity as such is a matter which is separate from the issue of whether a claim for non-conformity can be brought after a certain period of time.

As stated above, it is clear – and undisputed – that the A-5750 key retainer is not specified in the contractual documents proper (but only in the service manual accompanying the Press at delivery; see further below). It is also undisputed by [buyer] that [seller] was entitled to replace the A-5750 key retainer with another part or arrangement, provided that this was equally secure and suitable as the A-5750 key retainer arrangement. Consequently, and though the use of the P-52 in fact did not «conform» to [seller's] intended design or the assembly diagram included in the service manual, the replacement of A-5750 does not amount to a non-conformity in itself.

When it comes to the technical properties and performance of the P-52 lockplate in the Press, the disagreement between the parties is considerable and most of the evidence submitted for the separate award has concerned the technical characteristics of the P-52 as compared to the A-5750. On some issues, however, there is, or seems to be, a common view. Thus, if the intermediate gear, the lock-nut and/or the P-52 lockplate is installed in such a way as to permit the P-52 lockplate to strike, with sufficient force, the inner walls of the keyway (or one of them) in the course of the operation of the Press, the parties agree that the lockplate could eventually fail. If properly installed the lockplate would according to [seller] not be subjected to metal fatigue and therefore not fail. [Buyer's] expert concedes that if the lockplate was installed with the left edge of the tongue flush against the counter-clockwise wall of the keyway «this would have been better», but it would not prevent ultimate failure

If it were shown that the lockplate, even if properly installed, eventually would have failed within, say, three to five years, it is clear, in the Tribunal's opinion, that the Press would not be up to the standard set by the general warranties in CISG, at least in the absence of special and highlighted instructions on careful and frequent inspection of the lockplate as a part of the regular maintenance (an issue that will be discussed further on). However, with the conflicting views of the experts in this matter and without any calculations or similar evidence supporting [buyer's] claim of the ultimate unavoidable failure of the lockplate, the Tribunal cannot find that [buyer] has produced sufficient proof to convince the Tribunal of the inadequacy of the P-52 lockplate even if properly installed. If the lock-nut and the lockplate were properly installed the lockplate would not be able to move clockwise, and the only momentum it could gain before striking the counter-clockwise wall of the keyway (against which it would initially have been tightly installed) would come from a 1 mm gap between the screw fastening the lockplate to the lock-nut and the corresponding screw hole in the lockplate. This gap is considered by [seller's] expert to be too small to be of importance, and although the Tribunal realizes that the shocks and vibrations of the Press in operation may influence also the performance of the screw and the screw hole, the Tribunal cannot on the basis of the available evidence find otherwise. The Tribunal therefore concludes that [buyer] has not proven the inadequacy of the P-52 irrespective of installation and that, consequently, the adequacy of the P-52 depends on proper installation.

The question remains, then, if the undisputed fact that the lockplate, if not properly installed, could eventually fail makes the Press non-conforming. In this connection it should be noted that [seller] under the Contract did not undertake to assemble or install the Press at [buyer's] premises, but only to supervise the installation as requested by [buyer]. In other words, [seller] assumed no contractual liability for the installation as such apart from what follows from the supervision, and the circumstances of [seller's] supervision in June and July 1992 are invoked by [buyer] or [seller], not as grounds for liability or non-liability due to [seller's] performance of its supervisory undertaking, but only as evidence of whether [buyer] or [seller] had any reason or possibility to detect or consider the proper or improper installation of the lockplate. The crucial issue is whether the possibility of the improper installation of the P-52 lockplate makes the Press non-conforming already when it was shipped from New Orleans. In determining this question several aspects have to be considered.

Firstly, the contractual and other documents provided to [buyer] (such as the service manual, drawings, etc.) do not contain any detailed descriptions of how the P-52 lockplate should be installed (or for that matter how the A-5750 key retainer should be installed). [Seller] has stated that [seller] did not provide customers with descriptions or drawings of every detail of the Press for proprietary reasons. Instead [seller] provided supervisory services to the customers in order to ascertain proper installation. But in this case the installation of the P-52 was not foreseen in [seller's] own design, wherefore there are no descriptions or drawings concerning the P-52 arrangement on the intermediate gears even in [seller's] own documentation. Thus, it would appear that neither party had at the time of installation of the Press at [buyer's] premises access to any documentation on the proper installation of the lockplate.

Secondly, while the A-5750 key retainer was «fool-proof» in the sense both that there would be little, if any, room for improper installation and that it would, when installed, not fail, there would seem to be several possibilities for installing the P-52 in an improper way. According to [seller] a failure to position the shoulder of the shaft tightly against the hub of the intermediate gear, or to tighten the lock-nut sufficiently against the hub of the gear, or to install the lockplate with the left edge of its tongue flush against the counter-clockwise wall of the keyway, could all result in permitting the lockplate to gain sufficient momentum before striking the counter-clockwise wall of the keyway during the operation of the Press which could eventually cause its failure.

The combined effect of the absence of detailed instructions and the possibilities of improper installation makes the change from the A-5750 key retainer to the P-52 lockplate a potentially dangerous substitution in an important part of the Press, and in this regard the Tribunal finds that the Press thereby is rendered inferior in quality compared to the intended design. On the other hand, it may be argued that elementary technical or mechanical knowledge and sound installation practices should have made it impossible for [buyer] to misconstrue the proper installation of the lockplate, and in such case there would, of course, be no significant loss of quality. Neither party has presented much argumentation or evidence concerning this, and the Tribunal has not been convinced of the extent to which the P-52 arrangement differs from the practices in the industry in general or from [buyer's] experience or knowledge in particular. But from the facts available to the Tribunal, it would seem that at least the positioning of the lockplate on the lock-nut is not self-evident. The two holes without threads made by [seller] on the lockplate indicate to the Tribunal that [seller] itself made at least one attempt

to position the lockplate differently than the position indicated by the threaded holes, possibly due to different positions of the lock-nut depending on how tightly it was screwed onto the shaft. It is difficult to see why [buyer] should be in a position to question the location of the lockplate that the designer and manufacturer of the Press had itself apparently determined when assembling the Press in its own factory. The present consensus on the possibility of ultimate failure of the lockplate if improperly installed is the result of technical expert analysis after the failure, and such an analysis cannot be expected to be made by [buyer] at installation. The Tribunal concludes that [seller] has not shown that [buyer] in using the threaded holes for installing the lockplate in a position that left a gap between the left edge of the tongue of the lockplate and the counter-clockwise wall of the keyway has failed to observe such elementary or normal installation practices as [seller] would be entitled to expect from [buyer]. Nor can the Tribunal find, for the same reasons, that [buyer] was negligent in not seeking [seller's] advice on the installation.

However, there is still the question whether other mistakes at the installation have contributed to the failure of the lockplate. This has been denied by [buyer] who claims that the hub of the intermediate gear was positioned tightly against the shoulder of the shaft and that the lock-nut was tightened as firmly as was possible. The damage to the tongue of the lockplate and the other facts or circumstances would, in the Tribunal's opinion, seem to bear this out. If the hub of the intermediate gear had not rested tightly against the shoulder of the shaft, the threaded holes of the lock-nut would not have been able to reach the keyway on the shaft at a fully tightened position but only in a position at least one full thread before that. In that case it seems likely that the lock-nut during the operation of the Press in a fairly short period of time would have been permitted to move more freely than the damages on the lockplate or the facts relating to the failure indicate. As for the tightening of the lock-nut itself, the damage to the lockplate, again, seems to indicate that [buyer] – as its witnesses claim – had fully tightened the lock-nut. In fact, the gap that apparently existed between the tongue of the lockplate and the counter-clockwise edge of the keyway, in combination with the at least substantially more serious and visible damage to the left edge of the tongue compared to the right edge, could be the result from [buyer] tightening the lock-nut even more firmly than [seller] did when [seller] made the threaded holes on the lock-nut. Both these installation aspects (the hub tightly against the shoulder and the lock-nut fully tightened) also seem considerably more normal and elementary than the positioning of the lockplate and it seems unlikely that [buyer] would have failed to attend to them in a proper way.

As for the question whether the full use by [buyer] of [seller's] supervisory services would have resulted in a rectification of the installation of the lockplate, or whether [seller] in fact did inspect and approve of the installation, this has, as indicated above, a more indirect relevance in this connection. According to the service manual provided to [buyer] with the Press, the crown of the Press should have been put in position before [seller's] supervisors visited [buyer's] factory. If, as [seller] claims, it would be difficult, if not impossible, to properly inspect the installation of the lock-nuts on the intermediate gears once the crown was in place (except for the use of the micro-inching function) this would indicate that this part of the installation was normally not considered a critical issue, as indeed it would not have been if the intended A-5750 key retainer arrangement had been employed. Even if the schedule subsequently proposed by [seller] indicated that the supervisors would be in place when the inter-

mediate gears were installed, a proposal that [buyer] did not avail itself of just as [buyer] refrained from availing itself of the full 18-man-weeks of supervision included in the Contract, there is no indication by [seller] that its supervision of the installation of the intermediate gears was critical or even desirable. Irrespective of whether [seller's] representative actually went into the crown or not to inspect the installation, it is clear from [seller's] own position that it would have been possible by using the micro-inching function to inspect the installation of the lock-nut and the lockplate if this had been considered important. In the Tribunal's opinion there is nothing in the facts and the evidence presented by the parties that indicate anything but that [buyer] was entitled to assume that [seller] did not consider it important to inspect or supervise [buyer's] installation of the P-52 lockplate in the holes prepared by [seller].

Finally, with respect to [buyer's] maintenance of the Press the service manual does not indicate that any regular check should be made of the lock-nut. According to the experts examined in the proceedings, the initial metal fatigue strain would in any event be difficult to observe and the final collapse could develop rapidly after the first crack appeared in the upper part of the lockplate. The time required for the subsequent unwinding of the lock-nut is difficult to assess but could in any event lapse between two monthly inspections.

To summarize, the Tribunal finds that the change to the P-52 lockplate arrangement resulted in potentially dangerous deterioration in the quality of the Press and that the failure of the lockplate cannot be blamed on [buyer's] negligence at installation (or failure to avail itself fully of [seller's] supervision services) or maintenance.

The Tribunal now turns to question whether these findings make the Press non-conforming.

The Contract contains only one provision concerning the quality of the Press that has a bearing on the issue at hand. According to this provision, in Clause 13, [seller] «guarantees that the commodity hereof is made of the best materials with first class workmanship, brand new and unused ...». In the subsequent clauses dealing with inspection and remedies, etc. (Clauses 14 and 15) the concept of non-conformity is used without specific reference to Clause 13, but there is a reference to the guarantee period according to Clause 13. Neither in these clauses nor in any other clause of the Contract there is an explicit derogation from the provisions of CISG.

Article 35 of CISG stipulates at the outset (35(1)) that the goods shall conform to, among other things, the quality and description required by the contract. The article further states (35(2)) that except where the parties have agreed otherwise the goods shall be fit for the purposes for which goods of the same description would be ordinarily be used (a) and for any particular purpose expressly or impliedly made known to the seller unless the buyer did not rely on the seller's skill and judgement (b).

The principle of the buyer's reasonable expectancy with respect to the general and particular purpose of the goods that has found this expression in CISG appears in many domestic laws and can hardly be regarded as controversial. It is of course, possible to limit the seller's liability for non-conformity with such purposes and this is often done in both standard contract forms

and individual contracts, especially in the United States. Without explicit contractual provisions dealing with these natural expectations of the buyer, it is difficult to see how this provision of CISG can be effectively set aside. In the Tribunal's opinion, it cannot be sufficient to include in the contract warranties dealing in positive terms with general aspects of quality, as is the case in the present Contract. In fact, Clause 13 of the Contract would seem to contain exactly the sort of undertaking to which Article 35(1) refers and which shall be supplemented, unless the parties agree otherwise, with the subsequent general «guarantees» of the article. Hence, the Tribunal cannot find that the parties have derogated in the Contract from CISG's provisions on fitness for purpose.

Consequently, the Press must meet the test under CISG in order not to be non-conforming.

Based on the foregoing discussion on the properties and performance of the P-52, the absence of any information on the installation or follow-up by [seller], and the circumstances related to [buyer's] installation, the Tribunal is of the opinion that the Press in respect of this item falls short of what [buyer] was entitled to expect under the provisions of CISG. The Tribunal considers the P-52 part of the Press, in view of the possibility of improper installation and the resulting possible or even probable ultimate failure of the lockplate, not to be fit for the long, continuous operation of the Press without serious failure that unquestionably was [buyer's] reasonable expectancy and the purpose of its investment. Thus, the Tribunal concludes that the Press was not in conformity with the Contract as a result of the substitution of the A-5750 key retainer arrangement for the P-52 lockplate arrangement.

b) [Seller's] awareness

Article 40 of CISG is, as stated above, to be considered a safety valve for the buyer. Its application results in a dramatic weakening of the position of the seller, who loses his absolute defences based on often relatively short-term time limits for the buyer's examination and notice of non-conformity, and instead is faced with the risk of claims only precluded by the general prescription rules under applicable domestic laws or possible international conventions (such as the 1974 Convention on the Limitation Period in the International Sale of Goods).

It follows that Article 40 of CISG should only be applied in special circumstances. A seller is normally (through his employees) aware of the actual state of goods delivered from his plant, but the fact that he also may be aware that some part of the goods may fail to meet the standard set by CISG cannot automatically lead to Article 40 being applicable. In such case the time limits for claims under many contracts governed by CISG would become illusory.

The doctrine on the issue of the seller's awareness according to Article 40 also reflects the difficulty in reaching a common denominator for the qualification of the necessary «awareness». There is, not unexpectedly, general consensus that fraud and similar cases of bad faith will make Article 40 applicable. But some authors are of the opinion that also what can be described as gross negligence or even ordinary negligence suffices, while others indicate that slightly more than gross negligence (approaching deliberate negligence) is required. As a clear case of the requisite awareness has been mentioned a situation where the non-conformity has already resulted in accidents in similar or identical goods sold by the seller and been made

known to him or to the relevant branch of the industry. But also in the absence of such relatively clear cases awareness may be considered to be at hand if the facts relating to the non-conformity are easily apparent or detected. Some authors indicate that the seller is not under an obligation to investigate possible instances of non-conformity but others say that he must not ignore clues and some go so far as to suggest that the seller, at least in certain cases, has an obligation to examine the goods to ascertain their conformity.

In this case, [seller] had not for several years before the Contract built a 4,000 ton press and there is no evidence that a P-52 lockplate has been used in or intended for presses of similar sizes before or after the Contract. The intended, «foolproof» design involved the A-5750 key retainer and a keyway with corresponding width. [Seller] has stated that the problem resulting in the change to the P-52 appeared at the stage where the lock-nut was to be secured in its position on the shaft tightly against the hub of the gear. The ninth slot and the two unthreaded holes on the lock-nut bear the mark of improvised efforts to solve the problem. [Seller] has stated that it would have been possible to remove the shaft and machine a new key way for the A-5750 key retainer but this would entail a cost of some USD 2,000–3,000 and a delay of 2–3 days. Instead [seller] tried to solve the problem with the P-52 lockplate. No record has been found of the exchange of the locking devices.

However, this does not conclusively prove that [seller] foresaw the ultimate failure of the P-52 lockplate if improperly installed. In fact, one possible explanation for the absence of any information or, as contended by [seller], of any subsequent inspection of the installation of the lockplate is that [seller] itself did not fully appreciate the risk. But the alternative positioning marked by the two unthreaded holes on the lock-nut indicates that [seller] realized the necessity or at least desirability of a correct positioning of the lockplate, and it stands to reason that this was caused by the concern that impact forces otherwise could have a detrimental effect on the durability in the long run of the lockplate.

Whatever the reason for the absence of records or information or follow-up on the P-52 lockplate, the Tribunal is of the opinion that it is not defensible to replace, apparently in an impromptu fashion, in a new and «custom made» press of a size that [seller] for many years had not built, a planned design intended for an important security function with a new device without ascertaining its performance or installation. These are the circumstances that in the Tribunal's opinion distinguishes this case from the situation where a seller is generally «aware» that the goods manufactured in his ordinary course of business are not of the best quality or leave something to be desired. But that is not in itself enough to meet the test under Article 40. The requisite state of awareness that is the threshold criterion for the application of Article 40 must in the Tribunal's opinion amount to at least a conscious disregard of facts that meet the eyes and are of evident relevance to the non-conformity.

The absence of any document or witness showing [seller's] internal deliberations when replacing the A-5750 with the P-52 lockplate does not prevent the application of Article 40. The article as phrased is intended to alleviate the burden of proof on the buyer in respect of the seller's awareness, a burden that otherwise often would be impossible. If the evidence and the undisputed facts show that it is more likely than not that the seller is conscious of the facts that relate to the non-conformity, it must be up to the seller to show that he did not reach the

requisite state of awareness. It is in the nature of things when applying Article 40 that considerable time may have passed since manufacture or delivery of the goods and that the evidentiary situation may be difficult. But once the buyer has sufficiently established the basis for his claim under Article 40, it is the seller that must assume the risk of not being able to counter-balance this with evidence on his own design and manufacturing process that, after all, he is in a better position to secure than the buyer.

In this matter, the Tribunal can draw no other conclusion from the available facts than that [seller], when substituting the P-52 for the A-5750 arrangement, was aware that the positioning of the P-52 lockplate was critical (as indeed also is stated by [seller] in its briefs). Yet there is no evidence or even claim from [seller] that [seller] either intended or made any effort to ascertain that the P-52 was in fact properly installed. It must therefore be assumed that [seller] did not have any such intention. It is not for the Tribunal to speculate on the reason for this. What is relevant is that [seller] cannot have been unaware of the fact that proper installation was critical, the fact that the possibility of improper installation by [buyer] could not be ruled out, the fact that there was a clear risk that this could lead to serious failure of the Press within a period of time that certainly differed from what [buyer] was entitled to expect under the Contract, and that [seller] did not do anything to eliminate this risk. The Tribunal therefore concludes that [seller] must be assumed to have consciously disregarded apparent facts which were of evident relevance to the non-conformity and which, in fact, caused the failure of the Press.

c) Disclosure

In order to avoid liability for non-conformities of which the seller cannot be unaware, he must disclose them to the buyer. It is not sufficient that the buyer should be able, from documents available to him, to deduce that some alteration has been made in the design of a machine or such like. The fact that «A 5750» was indicated in the service manual and that the actual locking device in the same place was stamped «P-52» does not amount to a disclosure by [seller] to [buyer] of the non-conformity in this case. As already stated in the foregoing, the non-conformity of the P-52 relates to the installation, and it is thus the failure by [seller] to instruct on or supervise installation that has resulted in the non-conformity being permitted to cause the failure of the Press. In other words, even if [seller] had informed [buyer] of the exchange as such (and without any further information on proper installation or the risks involved in the arrangement, etc.) this would not be enough; to disclose in the sense of Article 40 is to inform the buyer of the risks resulting from the non-conformity.

6.4 Summary

The Tribunal concludes that [buyer] is not precluded from presenting a claim under Article 40 of CISG, and that the failure of the Press was caused by a non-conformity that related to facts of which [seller] could not have been unaware and which [seller] did not disclose to [buyer]. [Seller] is therefore liable in damages for the non-conformity of the Press. The extent of [seller's] liability is a matter for the final award in the arbitration.

7. [Majority award (separate award on liability for damages)]

The Tribunal finds that [seller] is liable in damages to [buyer] for the failure on November 10, 1995 of the press delivered by [seller] under the contract dated February 21, 1990.

The Tribunal will separately issue a procedural order for the continuance of the arbitration.

[8.] Dissenting opinion by the arbitrator Robert Romlöv

I disagree with my two co-arbitrators with respect to what [seller] was entitled to expect from [buyer] with regard to installation skills and practice.

Consequently, I do not concur with the reasoning of my co-arbitrators ... starting with «It is difficult to see why [buyer] ...» and leading up to the conclusion that [seller] has not shown that [buyer] failed to observe elementary or normal installation practices.

Except for that point I agree with the reasoning of my two co-arbitrators up to ... where we conclude that application of Article 40 of CISG requires at least a conscious disregard of facts that meet the eyes and are of evident relevance to the non-conformity.

I confirm my conclusion from the evidence ... that even though the P-52 was an inferior locking device compared to the A-5750 it has not been demonstrated that it would not have functioned properly if mounted close against the counter-clockwise wall of the keyway. With a properly tightened lock-nut the inertial forces upon the lockplate would then have been very small. It amounts to non-conformity and negligence on the part of [seller] not to have given instructions to [buyer] regarding the correct positioning of the P-52 lockplate, at least when it became apparent that [seller] would not participate in or supervise that part of the assembly.

Based upon common sense and particularly upon the technical skills that could be expected from a professional buyer like [buyer] it is, however, my opinion that [seller] – for the purpose of application of Article 40 – was entitled to expect [buyer] to understand that a device intended to prevent a tightly secured large nut from unscrewing shall be mounted so as to prevent that nut from unscrewing, i.e., from turning at all in a counter-clockwise direction.

The arbitrators agree ... that Article 40 shall only be applied in special circumstances. I would be inclined to use the words «exceptional circumstances» as I consider it a principle of fundamental importance from the point of view of predictability that a manufacturer shall normally be able to rely upon the expiry of an agreed guarantee time to represent the end point of his liability for defects (non-conformity). My reading of the requirement for the seller's awareness is therefore more restrictive. The test of awareness or «conscious disregard» on the part of the seller requires in my opinion a higher degree of subjective blameworthiness than the one demonstrated by [seller] in this instance by their not supplying installation instructions for the P-52 lockplate.

I thus vote that [buyer] shall now be precluded from advancing its claim against [seller].

I agree with my co-arbitrators in their finding that the non-conformity was not validly disclosed to [buyer] under Article 40.