

Case 1086: CISG 3; 8; 9; 38; 39 (1); 40 [45; 46; 47; 48; 49; 50; 51; 52; 75; 76; 77]

Court of Arbitration of the International Chamber of Commerce

Arbitration Case No. 9083

August 1999

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The claimant (the seller) entered into contract with the respondent (the buyer) to print and supply books to be resold to supermarkets and cut-price bookshops. The seller delivered the books in four instalments. About thirty-three days after the fourth instalment the buyer informed the seller that it would not pay, alleging discrepancies between the quantities delivered and those agreed upon and delay in the delivery of the books and the restitution of the films used for printing. The buyer argued that it was contractually entitled to compensation from the seller, which should be used to offset against the seller's claim. The seller brought suit before the Arbitral Tribunal sitting in Vienna, which determined that Austrian law was to be applied in accordance with the printing contract.

The Tribunal held the CISG applicable to the dispute as the parties had chosen Austrian law to govern the contract and the CISG is part of Austria's legal system. The printing contract was considered a sales contract as it related to goods to be produced and delivered by the seller (Article 3).

On the substance of the dispute, the tribunal noted that pursuant to Article 38 CISG, the buyer has a duty to examine the goods, or cause them to be examined within as short a time as practicable under the circumstances. Pursuant to Article 39 CISG, the buyer also has a duty to provide notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered or ought to have discovered the defect. Under the circumstance, the tribunal held that the buyer did not comply with either Articles 38 or 39 CISG nor did it offer any evidence to establish a reasonable excuse pursuant to Article 44. Thus the buyer was not able to avail himself of the remedies of article 45 CISG. The tribunal commented on the Supreme Court of Austria's decision that fourteen days is a reasonable time for an overall inspection and complaint when there are no special circumstances in support of a reduction or extension. In this case, the buyer did not notify the seller of the discrepancies in quantity until 3 July 1995, more than a month after the last instalment, 31 May 1995. No special circumstances or reasonable excuses were alleged by the buyer.

The Tribunal also considered whether the buyer could benefit from article 40 CISG, which prevents the seller from relying on Articles 38 and 39 where the lack of conformity relates to facts of which the seller knew or could not have been unaware and did not disclose to the buyer. Here, for the two deliveries of March 1995 and 17 April 1995, the seller disclosed the shortages in its accompanying invoices; thus, Article 40 was inapplicable.

The Tribunal also considered whether the shipment of 27 April 1995, in which the seller made up for the deficiencies in the two prior shipments by sending more than the contracted quantity would allow the buyer to avail itself of Article 40. The issue presented was whether delivery shortages in the small proportions as here, which are made up for in later deliveries within the overall delivery period, may be deemed not to be in conformity with the contract. The Tribunal denied the non-conformity of such a temporary shortage because the contract did not contain provisions for quantity discrepancies. If the buyer wanted a literal application of the contract then it should have informed the seller of its objection upon the first insufficient or excessive delivery. Since no such complaints were made, the seller was reasonable in assuming that it had complied with the contract and the buyer has no claims for deficiency or delay. The tribunal also stated that trading practices must be taken into consideration when interpreting the contract. The tribunal noted that up to 5 per cent of discrepancies are to be tolerated by the contractual partners especially when the difference is made up within the overall delivery time by subsequent deliveries.