In the Matter of an Arbitration before the Arbitration Institute of the Stockholm Chamber of Commerce

between

Claimant of the People's Republic of China
and
Respondent and Counterclaimant of Brazil

Award

Neil Kaplan CBE,
QC Sole Arbitrator

5 April 2007

Under the Rules of Arbitration Institute of the Stockholm Chamber of Commerce

Table of Contents

I. BACKGROUND

A. The Parties

1. The Claimant in this arbitration is a limited liability company incorporated and existing under the laws of the People's Republic of China (hereinafter "[Buyer]").

2. [Buyer] is represented in this arbitration by [...] of Beijing, P.R. China ("Counsel for [Buyer]").

3. The Respondent [and Counterclaimant] in this arbitration is a company incorporated and existing under the laws of the Republic of Brazil (hereinafter "[Seller]").

4. [Seller] is represented by [...] of New York, USA ("Counsel for [Seller]").

5. [Buyer] and [Seller] are together referred to as the "Parties" in this Award.

B. The Arbitration Agreement

6. The present dispute between the Parties arises out of a License to Use & Integrate [Seller]'s Pressure Sensor Agreement (" Agreement") which was concluded by the Parties in Houston, USA on 25 April 2002.

7. Article 17 (a) of the Agreement reads as follows:

> *"Any disputes arising out of or in connection with this Agreement shall be settled without recourse to the courts by one arbitrator, the award being final and binding. The arbitration shall be held in Sweden. The language to be used throughout the arbitration proceedings shall be English.*"

8. In April 2005, after the present dispute had arisen, the following terms regarding the administration of the arbitration were agreed between the Parties:

a. All disputes between the Parties shall be settled by arbitration in accordance with 1he Rules of the Arbitration Institution of the Stockholm Chamber of Commerce ("SCC Rules");
b. The venue of the arbitration shall be Stockholm, Sweden;
c. The language to be used in the arbitration proceedings shall be English;
d. Pursuant to Article 16(5) of the SCC Rules, the sole arbitrator shall be appointed by the Arbitration Institution of the Stockholm Chamber of Commerce ("SCC");
e. The Parties shall each have one and only one time right to request the SCC to replace the selected arbitrator without cause within 7 days after being notified of the selected arbitrator if such an arrangement is acceptable to the SCC.

9. It should be noted that in addition to the above agreed terms, [Seller] raised the requirements before the commencement of these proceedings that (a) the discovery rules and laws of the United States of America shall govern the arbitration; and (b) any award granted by the arbitrator shall not include legal fees or costs (although costs associated with payment of the fees of the arbitrator and the SCC shall be governed by the SCC Rules).

10. In a letter dated 13 May 2005, however, [Buyer] rejected these two additional requirements.

11. This arbitration is therefore conducted before the SCC in accordance with the agreed terms set forth in paragraph 8.

C. The Appointment of the Sole Arbitrator

12. On 13 October 2005, SCC notified the Parties that it had appointed Neil Kaplan CBE, QC, a national of the UK, as the Sole Arbitrator in this arbitration. This appointment was accepted by both Parties.

D. Pre-hearing Proceedings

13. On 1 July 2005, [Buyer] filed before the SCC its Request for Arbitration dated 30 June 2005 and thus commenced the proceedings of this arbitration.

14. On 15 August 2005, [Seller] filed before the SCC its Reply to Request for Arbitration, Set-off Claims and Counterclaims.

15. On 23 August 2005, [Buyer] submitted to the SCC its Comments on [Seller]' s Reply, Set-off Claims and Counterclaim.

16. On 2 September 2005, [Seller] filed before the SCC its responsive comments on [Buyer]'s Comments dated 23 August.

17. In November and December 2005, after a series of correspondence and telephone discussions between counsel for the Parties and with the benefit of my suggestions, the Parties reached agreements on many pending preliminary issues with respect to submissions of statements of case and defence, use of witness statements, pre-hearing submissions, etc. However, the Parties could not agree on the applicable rules on documents disclosure and production.

18. However, [Seller] accepted my recommendations and agreed to adopt the IBA Rules on the Taking of Evidence in International Commercial Arbitration ("IBA Rules") and it dropped its request to apply the US discovery rules. However, [Buyer] declined to adopt IBA Rules and suggested that each party shall only be obliged to produce documents upon which it intends to rely.

19. Based on this correspondence between the Parties, on 30 December 2005, I issued Procedural Order No. I which, among other things, set out a first timetable to be followed by the Parties in this arbitration and confirmed the Parties' agreement that the applicable law in this arbitration shall be the UN Convention on Contracts for the International Sale of Goods ("CISG") with the exception of Article 11 and other provisions related to Article 11.

20. As to document disclosure and production, instead of directing that the US discovery rules or the IBA Rules shall apply, Procedural Order No.1 stipulated that both parties shall produce documents it relies upon and each party has the right to request specific production from the other party when it is not satisfied with the documents already produced.

21. On 30 December 2005, immediately after Procedural Order No.1 was issued, [Buyer] served its Statement of Claim.

22. On 7 February 2006, I issued Procedural Order No.2 which, responding to the Parties applications, extended the deadlines in Procedural Order No.1 for the Parties to submit their pleadings.

23. On 24 February 2006, pursuant to Procedural Order No.2, [Seller] served its Statement of Defence, Set-off Claims and Counterclaims.

24. On 10 March 2006, pursuant to Procedural Order No.2, [Buyer] served its Reply to [Seller]'s Statement of Defence, Set-off Claims and Counterclaims.

25. On 24 March 2006, pursuant to Procedural Order No.2, [Seller] served its Reply to [Buyer]'s Reply dated 10 March.

26. On 31 March 2006, in a letter from the SCC to me and the Parties, the SCC confirmed that upon request made by me, the time for rendering the award had been extended until 1 December 2006.

27. Disclosure and production of documents started after Procedural Order No.2 was issued. In April 2006, each party served on the other documents upon which it intended to rely in this arbitration.

28. On 30 April and 1 May 2006, the Parties exchanged their first set of document requests. Production of documents by each side responding to the requests of the other side followed.

29. On 22 June 2006, [Seller] sent to me a letter claiming that [Buyer]'s production of documents was deficient and inadequate. [Seller] addressed in detail [Buyer]'s response to each of the request it considered to be inadequate and indicated a teleconference between the Parties and the Sole Arbitrator would be necessary to discuss these issues. [Seller] also requested the relevant dates in this arbitration fixed by Procedural Order No.1 be adjusted.

30. On 4 July 2006, [Buyer] responded to [Seller]'s 22 June complaints in a letter to me and [Seller]. In this letter, [Buyer] denied [Seller]'s allegation that [Buyer]'s production was inadequate and asserted that it was in full compliance to Procedural Order No.2. [Buyer] submitted that the requests imposed by [Seller] were *"unduly burdensome, unnecessary and mostly impractical'*. [Buyer] further claimed that [Seller]'s request for information relating to [Buyer]'s product CDS3l5l was irrelevant to the current proceedings.

31. On 5 July 2006, after reviewing the correspondence between the Parties regarding [Buyer]'s document production, I directed [Buyer] to clarify the existence of the documents [Seller] requested and its grounds for withholding [Seller]'s inspection to those existing ones.

32. On 7 July 2006, upon my request, [Buyer] submitted its detailed response to each production request [Seller] claimed to be inadequately dealt with. [Buyer] submitted that it objected to [Seller]'s first set of document requests in general as it deemed them to be *"overbroad and unduly burdensome, vague and ambiguous"*.

33. On 11 July 2006, as agreed by the Parties, a teleconference was held between the Parties and myself to address the pending document production issues. Both Parties were represented by their legal counsel and each side was given full chance to make its respective positions.

34. As a result of this teleconference, on 13 July 2006, I issued Procedural Order No.3 which gave the Parties directions on each disputed production request. It also directed the Parties to provide quantification of the claims not yet quantified and reset the dates for exchange of witness statements. The hearing date was also rescheduled to 18 October 2006.

35. On 20 July 2006, in a letter to the Parties, I advised both sides that I had decided to exercise my power under article 17 of the SCC Rules to appoint Dr. M..., an expert with relevant expertise, to assist me in this arbitration. After reviewing the qualifications of Dr.

M..., both parties accepted his appointment. Dr. M... acted throughout as an Assessor to assist me in understanding the highly technical evidence presented by both sides. It is important to note that neither party engaged the services of an Expert witness. Dr. M... was only instructed shortly before the commencement of the hearing due to delays in payment of additional deposits requested by the Stockholm Chamber.

36. On 20 July 2006, pursuant to Procedural Order No.3, [Buyer] submitted its quantification of its lost profit claim in the estimated amount of US $693,797.

37. On 29 July 2006, pursuant to Procedural Order No.3, [Buyer] served a Statement and an Explanation and Confirmation by Mr. C..., Vice General Manager of [Buyer], with respect to certain document production issues. In the attachment to Mr. C...'s Statement, each disputed document production request was further addressed and responded.

38. On the same date and in a separate letter addressed to me, [Buyer] complained that the *"extensive discovery is improper for the current case because it is costly, time-consuming and intrusive"*. [Buyer] also expressed its concern over the *"imbalance"* between the legal counsel on each side due to their different levels of familiarity with the discovery procedure.

39. On 3 August 2006, [Seller] sent a letter requesting a two-week extension for submission of its quantification of its counterclaims. [Seller] also claimed in this letter that [Buyer] had failed to comply with Procedural Order No.3 and the letter from [Buyer] on 29 July was irrelevant to the proceedings.

40. In response to [Seller]'s 3 August letter, on 4 August 2006, I wrote to the Parties and gave further directions to [Buyer] with respect to its compliance with Procedural Order No.3. The letter also extended the time for [Seller] to quantify its counterclaims *"by 14 days from the date the protective order becomes effective"*.

41. On 11 August 2006, a teleconference was held between the Parties and myself. Further directions were given by me to move the proceedings forward. Further, at the request of both parties the venue was changed to London.

42. On 16 August 2006, [Seller] submitted to a request for rescheduling the arbitration timetable. In particular, [Seller] submitted that due to the heavy burden it bore to translate and analyze the voluminous Chinese documents recently supplied by [Buyer], an adjournment *'for a significant period'* of the hearing and the submissions thereafter would be necessary. Also, at this hearing, it was confirmed by the Parties that the venue of the evidential hearing would be held at [...]'s London office.

43. On 21 August 2006, [Buyer] submitted the witness statements of Mr. C... and Mr. M... to the Arbitrator and [Seller].

44. On 4 September 2006, pursuant to my directions, [Seller] submitted its Statement Quantifying its Counterclaims.

45. On 19 September 2006, [Seller] requested an extension of the time for submitting witness statements to 27th September 2006, due to the considerable time that [Seller] required to translate the documents produced by [Buyer].

46. On 21 September, [Buyer] replied with no objection to [Seller]'s request to extend the time for submitting the witness statements on 27 September 2006.

47. On 22 September, I agreed to extend the time limit to submit the supplemental witness statements until Wednesday 27 of September 2006.

48. The parties served witness statements as follows;

The [Buyer]'s witness statements:

(a) C... submitted his statement on the 21st of August, 2006.
(b) M... submitted his statement on the 21st of August 2006.
(c) C... submitted his supplementary statement on the 27th of September, 2006.
(d) M... submitted his supplementary statement on the 27th of September, 2006.

The [Seller]'s witness statements:

(a) O... submitted his statement on the 21st of August, 2006.
(b) B... submitted his statement on the 21st of August, 2006. Mr. B... amended his statement on the 11th of October, 2006.
(c) M... M... submitted his statement on the 21st of August, 2006. Mr. M... M... amended his statement on the 11th of October, 2006.
(d) C... C... submitted his statement on the 21st of August, 2006. Mr. C... C... amended his statement on the 11th of October, 2006.
(e) B... submitted his supplementary statement on the 28 of September, 2006.
(f) M... M... submitted his supplementary statement on the 28th of September, 2006.
(g) C... C... submitted his supplementary statement on the 28th of September, 2006.

49. Written opening submissions were served by [Seller] on 11th of October, 2006. In addition both parties served bundles of documents upon which they sought to rely at the hearing

D. The Evidential Hearing

50. The hearing took place at [...]'s London office [...] in the City of London. It commenced at 10 am on Wednesday 18th October 2006 and completed at 5:15 pm on Saturday 21st October 2006. All witnesses who gave statements attended and were cross-examined and re-examined. Chinese and Portuguese interpreters assisted throughout. A Livenote transcription service was provided. Dr. M... attended throughout.

51. The parties were represented as follows: [...].

F. Post Hearing Developments

52. At the conclusion of the evidential hearing it was agreed by the parties that both sides would exchange written closing submissions on December 4, 2006 and that they would exchange responsive written submissions on January 15, 2007. It was accepted by both sides that I could request further clarification of either party and that any time limit for rendering the award should run from the date of the last such clarification

53. The time for service of post hearing briefs was extended to December, 2006. The [Buyer]'s post hearing brief was dated December 10, 2006 and the [Seller]'s dated December 9, 2006. The [Buyer]'s brief contained a statement that it was expecting a Report from Dr. M.... By an email dated December 13, 2006 I informed the parties that I was requesting a report from Dr. M... on two issues. The first was the validity and conditions of the various tests relied upon by both parties. The second was whether in Dr. M...'s professional opinion any similarities in the source codes and sensor board design could be accounted for by coincidence.

54. On December 14, 2,006 the [Seller] noted its objection to a Report being sought from Dr. M... but in the event that a Report was requested sought a re-phrasing of the question. On December 15, 2006 the [Buyer] contended that a report should be obtained and also sought a re-phrasing. On December 16, 2006 I emailed the parties with my decision that a report would be requested from Dr. M... and that on the basis that he would serve this before Christmas the parties had until January 10, 2007 to submit written questions to him which he would answer by Jan 15 2007. I specifically stated '*No argumentative material will be admitted. This must be reserved for the written closing submission. I will decide whether any questions are improper*'.

55. Dr. M... served his report on December 20, 2006. However, in spite of the clarity of my Order the [Buyer] served a 42 page document on January 10, 2007 which was, in effect, a critique of Dr. M...'s report of December 20 2006. Not surprisingly, the [Seller] complained. Rather than let the matter escalate and the costs increase further I decided to ask Dr. M... whether anything contained in this 42 page document made him alter any of the opinions he had expressed and if so why. I, further, instructed him to ignore any materials referred to in this 42 page document that had not been placed before me during the hearing in London. Dr M... responded to the questions in a written Report dated January 22, 2007. Further, at the request of the [Buyer] and with consent of the [Seller] I extended the date for service of the written reply submissions to February 5, 2007.

56. The written reply submissions were timely received. The [Buyer]'s reply submission ran to 14 pages and the [Seller]'s to 11 pages.

57. The SCC has extended the time for delivery of the Award from time to time but lastly *until* 31 March, 2007. However both parties agreed in writing to extend this date until 5 April, 2007. By letter dated 30 March 2007 SCC confirmed that the date of delivery of the final award shall be extended until 5 April 2007.

II. THE DISPUTE

A. Summary of Agreed Facts

58. [Buyer] manufactures and sells a range of pressure transmitters in China. [Seller] develops a line of process control instruments and, among other things, manufactures and sells pressure sensors to be used in pressure transmitters.

59. In late 2001, [Buyer] entered into discussions with [Seller] with a view to purchasing from [Seller] pressure sensors with high accuracy and quality which were to be integrated and used on [Buyer]'s new series of pressure transmitters.

60. On 25 April 2002, [Buyer] and [Seller] entered into a License to Use & Integrate [Seller]'s Pressure Sensor Agreement ("Agreement") in Houston, USA.

61. According to this Agreement and among other things, [Seller] shall supply pressure sensors ("[Seller]'s Sensors") to [Buyer] and license [Buyer] on a non-exclusive basis to use and integrate these pressure sensors with [Buyer]' s new products to be sold in Asia. In return, [Buyer] shall pay [Seller] certain amount of purchase prices and fees for the [Seller]'s Sensors supplied, services provided and license granted.

62. In accordance with the Agreement, in June/July 2002, [Buyer] dispatched a total of four engineers to [Seller]'s facilities in Brazil to participate in the Engineering Services and Case Study in order to develop means for the integration of [Seller]'s Sensors.

63. On 31 July 2002, after a series of performance tests jointly conducted by the engineers from both sides at [Seller]'s Brazilian facilities, a joint report titled "Validation Test Conclusions for [Buyer]'s Main Electronic Circuit Board Functioning together with [Seller]'s Sensors" ("**July 2002 Report**") was submitted to [Buyer]. In this Report, it was revealed that, in some cases, the deviations in performance exhibited by [Seller]'s Sensors used in the tests in temperature ranges 3 and 4 were outside the standards of deviation set forth in the specifications for [Seller]'s LD301 Series of pressure transmitters ("Specifications").

64. Before further tests could be carried out jointly by the engineers from both sides, on or about 1 August 2002, all [Buyer]'s engineers left Brazil and returned to China.

65. Beginning on or about 6 August 2002, without participation of [Buyer]'s engineers, [Seller] conducted further tests on [the] Sensors to be sold by [Seller] to [Buyer]. These further tests resulted in a report titled "Complimentary Test Conclusions to the Validation test for [Buyer]'s Main Electronic Circuit Board functioning together with [Seller] Sensors from July 31, 2002" ("**August 2002 Report**"). A copy of this August 2002 Report was immediately delivered to [Buyer] on 15 August, 2002.

66. In this August 2002 Report, it is indicated that [Seller]'s Sensors performed satisfactorily in accordance with the specifications.

67. In reliance upon this August 2002 Report and pursuant to the Agreement, [Buyer] paid [Seller] US $300,000 for [Seller] Sensors to be delivered pursuant to the Agreement and US $129,600 as Lump Sum License Fee

68. In November 2002, the first batch of [Seller] Sensors was delivered to [Buyer] by [Seller] in accordance with the Agreement.

69. Upon receiving the first batch of [Seller] Sensors, [Buyer] notified [Seller] that it found the sensors delivered could not perform in compliance with certain specifications with regard to performance under certain temperature ranges.

70. In July 2003, [Seller] delivered to [Buyer] the second batch of [Seller] Sensors. After receiving the second delivery, [Buyer] notified [Seller] that it had discovered problems similar to those found in the first batch, in these newly delivered [Seller] Sensors and requested [Seller] send personnel to [Buyer]'s facilities in China to conduct a joint test on these [Seller] Sensors.

71. In response to [Buyer]'s notification and request, in or around September 2003, [Seller] dispatched two engineers to [Buyer]'s facilities in China. Beginning on or around 22 September 2003, engineers from both sides were present at a series of performance tests on the second batch of [Seller] Sensors.

72. The results of these performance tests were set out in a report dated 27 September 2003 ("**September 2003 Report**") which concluded that some [Seller] Sensors did not perform within the standards of deviation set forth in the Specifications for certain high temperature ranges.

73. Based on the September 2003 Report, by a letter dated 9 October 2003, [Buyer] notified [Seller] that [Buyer] rejected [Seller]'s Sensors and demanded [Seller] to take back [Seller]'s Sensors delivered and compensate [Buyer] for the losses incurred thereby. Such requests were refused by [Seller].

74. In April 2004, [Buyer] informed [Seller] that it deemed the Agreement terminated and demanded a refund of fees paid under the Agreement.

B. Submissions of the Parties

1. [Buyer]'s Case and Claims

75. [Buyer]'s fundamental case, as set forth in the Statement of Claim, is that by failing to provide [Seller] Sensors that can meet warranted technical specifications set out in the Agreement and failing to cure the material defects found in [Seller] Sensors within a reasonable period of time, [Seller] has fundamentally breached the Agreement.

76. The relevant article in the Agreement upon which [Buyer] relies is Article 11(d), which reads:

> "11. *Warranty*
>
> (*d) [Seller] warrants that the [Seller] Pressure Sensor, when delivered to [Buyer] and properly installed and operated, will perform as described in [Seller]* 's *current user documentation for such device. Errors reported to [Seller] will be handled without undue delay according to the normal practice of [Seller]. [Seller] shall not be held liable for performance or malfunctions of devices not manufactured by [Seller]."*

77. [Buyer] contends that [Seller] warranted in Article 11(d) that [Seller] Sensors, when properly installed and operated, will perform as described in its current user documentation for such pressure sensors. However, the first batch of sensors delivered in November 2002 could not perform in compliance with certain significant specifications as described in user documentation. The second batch of [Seller] Sensors delivered in July 2003 had similar problem.

78. [Buyer], also, contends that [Seller] warranted in Article 11(d) that [Seller] shall resolve errors reported to it without undue delay. However, after [Buyer] timely notified [Seller] about the defects found in both batches of [Seller] Sensors, a substantial time period passed but [Seller] still failed to provide [Buyer] with any proven satisfactory solution to cure the reported defects.

79. [Buyer], further, submits that the discovered defects in [Seller] Sensors are of such a significant nature that they not only impair the commercial value of [Buyer]'s new series of pressure transmitter in which [Seller] Sensors are to be installed, but also may cause users' safety problems. As a result, [Buyer] cannot integrate [Seller] Sensors to its products and suffered great losses.

80. [Buyer], therefore, claims that by failing to perform its contractual obligations and breaching the warranties given under Article 11(d), [Seller] has fundamentally breached the Agreement.

81. A second and consequential claim [Buyer] brought in this arbitration is the claim for lost profits or, in the alternative, actual cost and expenses incurred for the transaction.

82. [Buyer] contends that a party who suffers damages as a result of another's breach of contract is entitled to be compensated for the profits which would otherwise have been gained from such contract if it is duly performed. [Buyer] submits that it is therefore entitled to be compensated for the profits it lost due to [Seller]'s breach of the Agreement.

83. In the alternative, [Buyer] claims that the breaching party shall compensate the non-breaching party for losses caused by its breaching behaviour that could be foreseen by it. Among other things, [Buyer] claims that it has invested time and money in developing auxiliary configurations toolkit and special module, printing related marketing materials, and other preparation and marketing works related to the new series of pressure transmitters using [Seller] Sensors. [Buyer] contends that due to [Seller]'s breach of the Agreement, it was forced to abandon its marketing plan for the new series of pressure transmitters and all the time and money invested therein were wasted. Therefore, [Buyer] claims that it is entitled to be compensated for the costs and expenses wasted due to [Seller]' s breach.

2. [Seller]'s Case Defence Counterclaims and Set-off Claims

84. In its Statement of Defence, Set-off claims and Counterclaims, [Seller] put forward a quite different story. Based on its own version of the facts, [Seller] asserts that it has not breached the Agreement and denies its liability with respect to the performance of the Agreement in its entirety. [Seller] also sets out two set-off claims and further brings its counterclaims against [Buyer] for infringement of [Seller]'s proprietary and confidential technology.

85. According to [Seller] they contractually agreed to provide [Buyer] the following distinct and separately priced components:

a. [Seller] Pressure Sensor Integration Engineering Services ("Engineering Services") at the price of US $120,000;

b. Case Study at the price of US $9,600;

c. [Seller] Sensors and a license to use such sensors in limited applications at the price of US $300,000. (¶2, Statement of Defence, Set-off Claims and Counterclaims).

86. [Seller] claims that during the period of time in June and July 2002 when [Buyer]'s engineers were at the facilities of [Seller] in Brazil to participate in the Engineering Services and Case Study, [Seller] *"trained them to integrate [Seller] Sensors with other technologies"* in accordance with the Agreement. [Seller] also claims that [Buyer] *"received significant*

amount[s] of confidential and proprietary information belonging to [Seller]". Such information, as [Seller] claims, is *"critical to [Buyer]'s ability to produce and market and its new line of pressure transmitters"* (¶5, Statement of Defence, Set- off Claims and Counterclaims).

87. [Seller] asserts that in or about late July 2002, the integration with the hardware and software selected by [Buyer] was completed *"to [Buyer]'s satisfaction"*. In particular, [Seller] claims that [Buyer]'s engineers, through the integration process,

> *"had learned how to connect [Seller] Sensors to the hardware and software selected by [Buyer] so that the hardware and software could communicate with and process signals from [Seller] Sensors*". (¶6, Statement of Defence, Set-off Claims and Counterclaims)

88. [Seller] does not dispute the fact that on or about 1 August 2002, all [Buyer]'s engineers left [Seller]'s facilities in Brazil and returned to China. However, [Seller] submits that the reason they all returned at that time was because

> *"they had learned what they needed to learn with respect to the Engineering Services and Case Study, and they were satisfied with [Seller]'s explanation for the likely cause of the deviations revealed by the July* 31, 2002 *Report"*. (¶10, Statement of Defence, Set-off Claims and Counterclaims)

89. [Seller] does not dispute that, after delivery of the first batch of [Seller] Sensors in November 2002, [Buyer] notified it of certain performance deviations found by [Buyer]. However, [Seller] claims that in its notification, [Buyer] also expressed its suspicion that the transmitter flanges it used to mount these [Seller] Sensors could be the cause of such alleged deviations.

90. [Seller] admits that in the September 2003 Report, it was concluded that some [Seller] Sensors did not perform within the standards of deviation set forth in the Specifications. However, [Seller] doubts the validity of the tests and claims that any deviations exhibited can only be found in some [Seller] Sensors and only at high temperature ranges. Further, [Seller] submits that before entering into this transaction with [Buyer], it has sold [Seller] Sensors to *"thousands of customers"* and never received any complaint of similar deviations, nor had any customer ever claimed any problems in practical applications attributable to such deviations. Therefore, [Seller] did not believe the deviations found are material.

91. As to communications between the Parties after [Buyer] reported defects in the second batch of [Seller] Sensor and before [Buyer] delivered its notification to terminate the Agreement, [Seller] claims that in or around December 2003, [Buyer] sought to classify [Seller] Sensors as low-end sensors and requested a reduction in the price for the [Seller] Sensors commensurate with lowered specifications. [Seller] in response requested [Buyer] to supply the new specifications adjusted pursuant to the lowered classification. (¶17, Statement of Defence, Set-off Claims and Counterclaims)

92. However, [Seller] asserts that, the new specifications it later received from [Buyer] are "*essentially the same as those set forth in the Specifications* ". [Seller] claims that by requesting [Seller] to reduce the price but to guarantee the same performance of [Seller] Sensors, [Buyer] was in fact asking for a reduction of price without reducing the technical burdens on [Seller]'s shoulder. According to [Seller], at the same time, [Buyer] also requested

[Seller] to supply [Seller] Sensors without oil and temperature compensation as a further attempt to obtain a discounted price. (¶18, Statement of Defence, Set-off Claims and Counterclaims)

93. [Seller] submits that it was at that time [Seller] believed that [Buyer] was negotiating in bad faith.

94. Based on the facts it asserts, [Seller] claims that [Buyer] is not entitled to any refund of the fees for the Engineering Services or Case Study, as all such services were rendered to and accepted by [Buyer] to its *"complete satisfaction"*. Moreover, [Seller] claims that [Buyer] significantly benefited from such services, which include, but not limited to, knowledge of the procedures for integrating [Seller] Sensors and functional equivalents thereof with hardware and software selected by [Buyer] for the production and marketing of a new line of pressure transmitters.

95. In addition, [Seller] claims that [Buyer] is not entitled to any refund of the fees for [Seller] Sensors, including the license and use thereof, or any damages or costs allegedly arising from [Seller]'s breach of the Agreement, because:

(a) [Seller] worked diligently in its normal business practice to investigate and remedy the deviations reported by [Buyer], all in full compliance with Section II (d) of the Agreement;
(b) [Seller] offered [Buyer] fully-conforming replacement [Seller] Sensors, but [Buyer] refused to accept them;
(c) the reported deviations are not material;
(d) [Buyer] maintains possessions of a number of [Seller] Sensors; and
(e) [Buyer] is in material breach of its obligations under the Agreement by misappropriating [Seller]'s confidential and proprietary information.

96. Besides the defences [Seller] sets out above, [Seller] brings counterclaims against [Buyer] for its breach of Section 2(c), 3(a)(ii), 3 (b) and 14 of the Agreement.

97. These sections or relevant parts of these sections of the Agreement are quoted below:

> "2. *Definitions*
>
> *c. '[Seller] Pressure Sensors License to Use' shall refer to the rights for [Buyer] to use the [Seller]'s Pressure Sensors to integrate with is devices and to only resell separately the [Seller]'s sensors to attend customer spare parts request. Under no circumstances shall [Buyer] resell the [Seller]'s sensors to third parties for integration with any other devices.*
>
> 4. *[Buyer] License to Use and Market products that Incorporate the [Seller] Pressure Sensor*
>
> *a. ... ...*
>
> > *(ii) [Buyer] has no rights to sub-contract any of the product development and/or manufacturing (i.e. make & modify) to third party sub-contractors without [Seller]'s written consent, and parts of [Buyer]'s Devices that integrate the [Seller] Sensors and/or any of [Seller]'s Technology are protected under terms of confidentiality.*

b. [Buyer] and its affiliates per definition item 1.a have no rights of sub-licensing its products that contain the [Seller] Pressure Sensor and/or any [Seller] Technology without [Seller]'s written consent.

...

14. *Confidential Information*

a. each party acknowledges that in the course of performing its obligations hereunder, it may receive information, which is confidential and proprietary to the other party. Each party agrees that it shall obtain no rights to use such information except in the performance of this Agreement and that it shall not disclose such information to third parties, without first obtaining the disclosing party's written consent. The *parties agree that separate confidentiality agreements shall be executed if requested by either party.*

... ..."

98. [Seller] contends that [Buyer] never had the genuine intention to perform its obligations under the Agreement. In fact, [Seller] alleges that [Buyer] entered into the Agreement as a tactical step to obtain access of [Seller]'s confidential and proprietary technology in order to develop, manufacture and sell the pressure sensors which will directly compete with those manufactured and sold by [Seller].

99. [Seller] claims that, based on information it obtained, [Buyer] had begun to manufacture and sell devices, including a type labeled CDS-3151 pressure transmitter that incorporates proprietary [Seller] technology.

100. [Seller] also claims that [Buyer] may have also provided another Chinese manufacturer with access to [Seller]'s proprietary technology, which may have also allowed third parties to manufacture and sell competing pressure transmitters incorporating [Seller] proprietary technology.

101. [Seller] analysed tests on [Buyer] Sensors and concluded that the signal responses exhibited by [Buyer] Sensors are identical or substantially similar to those exhibited by [Seller] Sensors. [Seller] claims that such identity or substantial similarity is unlikely unless [Buyer] Sensors incoporate [Seller]'s proprietary technology including its software.

102. [Seller] contends that [Buyer] obtained access to [Seller]'s proprietary information. [Seller], also, contends that [Buyer] may have reversed engineered the [Seller] Sensors it had in its possession.

103. [Seller], therefore, contends that [Buyer], by using [Seller]'s proprietary and confidential information to develop, manufacture and sell competing devices but not *"in the performance of this Agreement* " as specified in Section 14 and by disclosing said information to their parties without [Seller]'s written consent, breached Section 14 of the Agreement.

104. [Seller] also contends that by virtue of Section 2(c) of the Agreement, [Buyer] is only permitted to integrate [Seller] Sensors with its devices and sell [Seller] Sensors as separate units to customers who require spare parts. Under the same section, [Buyer] is also expressly prohibited from reselling [Seller] Sensors to third parties for integration with any other

devices. However, by manufacturing and selling sensors that are essentially identical to [Seller] Sensors, where such sensors are not integrated with [Buyer]'s devices or such sales are not to customers who require spare parts, [Buyer] has violated Section 2(d) of the Agreement.

105. Furthermore, [Seller] claims that Sections 3(a)(ii) and (b) of the Agreement prohibit [Buyer] from (a) subcontracting the development and/or manufacture of devices that incorporate [Seller] Sensors and/ or [Seller] technology without [Seller]'s written consent, and (b) sublicensing its products that contain [Seller] Sensors and/or [Seller] technology without [Seller]'s written consent. However, by providing a third party with access to [Seller]'s proprietary technology so as to enable that party to manufacture sensors that are identical or substantially similar to [Seller] Sensors, [Buyer] has violated Sections 3(a)(ii) and (b) of the Agreement.

106. In addition to the defences and counterclaims set forth above, [Seller] also submits set-off claims against [Buyer].

107. [Seller] submits that due to the fact that [Buyer] still keeps possession of [Seller] Sensors worth approximately US $40,000, in the event my award is in [Buyer]'s favour, the award should be set off by the amount of US $40,000.

108. [Seller] also submits that although [Seller] received US $429,600 from [Buyer] under the Agreement, [Seller] was required to remit US $25,000 of that amount as an introduction fee. Accordingly, [Seller] submits that in the event my award is in [Buyer]'s favour, any such award should be set off by the amount of US $25,000.

3. [Buyer]'s Defence to the Counterclaims

109. In its Reply to Statement of Defence, Set-Off Claims and Counterclaims, [Buyer] vigorously disputes both the facts alleged and claims brought by [Seller].

110. Contrary to what [Seller] claims in paragraph 84 above, [Buyer] submits that although separately priced, the three components mentioned therein are indispensable components of one single business transaction between the Parties and must be analysed as a whole,

111. In [Buyer]'s submission, the Engineering Service and Case Study are integration services to be provided by [Seller] which requires [Seller] to develop means to obtain information from [Seller] Sensors and generate a normalized signal (proportional to the pressure range within the sensor rated accuracy and specifications) that can be read by [Buyer]'s devices. The purpose of such integration services is to enable compatibility and communication between [Seller] Sensors and [Buyer] devices so that those sensors can be used on [Buyer]'s pressure transmitters. This is, as [Buyer] explains, why the Engineering Service and Case Study are required and necessary. (¶4 Reply to Statement of Defence, Set-off Claims and Counterclaims)

112. [Buyer] denies [Seller]' s allegations referred to in paragraph 86 above. [Buyer] submits that the technical information provided by [Seller] during the integration development process are limited and most are for the purpose of enabling compatibility and communication between [Seller] Sensor and [Buyer] devices, as well as usage, maintenance, calibration and testing of [Seller] Sensors.

C. Relief Sought by the Parties

***1. Relief Sought by* [*Buyer*]**

113. In its Statement of Claim, [Buyer] seeks from me:

a. declaratory award that by failure to provide goods as warranted in the Agreement, [Seller] has fundamentally breached its obligations to [Buyer] under the Agreement;

b. a declaratory award that due to [Seller]'s fundamental breach of the Agreement, the Agreement therefore be deemed terminated;

c. an award that [Seller] be ordered to take back the defective pressure sensors already delivered at its own costs and repay to [Buyer] US $300,000 for those defective pressure sensors as well as the Lump Sum License Fee of US $129,600;

d. an award that [Seller] be ordered to pay to [Buyer] an amount equal to the lost profit which [Buyer] has suffered as a result of [Seller]'s breach of the Agreement, or in the alternative, an amount equal to the actual cost and expenses which [Buyer] has incurred for the transaction, including but not limited to insurance premium, freight, cost of manufacturing module and advertisement, etc.;

e. an award that [Seller] be ordered to reimburse [Buyer] for all costs and expenses incurred by [Buyer] in connection with this arbitration, including but not limited to legal fees, arbitration fees, etc.

114. Pursuant to Procedural Order 3, on 20 July 2006, [Buyer] submitted its quantification of the above *"lost profit"* claim in an estimated amount of US $693,797.

***2. Relief Sought by* [*Seller*]**

115. In its Statement of Defence, Set-off Claims and Counterclaims, [Seller] requests that I:

a. dismiss [Buyer]'s claims, with prejudice, in their entirety;

b. set off an award, if any, in favour of [Buyer] and against [Seller] in the amount of

i) approximately US $40,000, due to [Buyer]'s retention of a number of [Seller] Sensors; and
ii) US $25,000, representing the amount remitted by [Seller] as an introduction fee;

c. enjoin [Buyer], its officers, agents, servants, employees, attorneys, successors and assigns, and all persons or entities acting on behalf of or in concert or participation with them or any of them from:

i) unauthorized use and disclosure of [Seller]'s confidential information; and
ii) development, manufacture and sale of sensors that are based upon [Seller]'s proprietary technology;

d. direct [Buyer] to account to [Seller] for its profits arising from the conduct complained of herein;

e. award damages to [Seller] in an amount to be determined at the conclusion of this arbitration proceeding;

f. award [Seller] its costs and expenses, including reasonable attorneys' fees, incurred in defending against [Buyer]'s claims and in pursuing [Seller]'s counterclaims, in the event that the arbitrator determines that legal fees and costs may be awarded notwithstanding the parties' failure to reach agreement as to the arbitrator's authority to grant such relief; and

g. award [Seller] such other and further relief as the arbitrator deems just and proper.

116. In [Seller]'s 4 September 2006 Statement Quantifying Counterclaims, [Seller] submitted that the damages it seeks arising from its counterclaims will depend upon whether the Sole Arbitrator issues an injunction against [Buyer] that prohibits [Buyer] *"from using and disclosing [Seller]'s confidential and proprietary technology"*. If such an injunction is issued, [Seller] seeks as damages a minimum amount of US $911,000, which [Seller] claims to be "*[Buyer]'s profit resulting from its use of [Seller]'s confidential and proprietary technology"*. In the event that I do not issue an injunction with the said effect, [Seller] seeks a substantially higher amount as damages from [Buyer] in the rough range of US $9.8 million. According to [Seller], such figure reflects (a) a projection of [Buyer]'s sale revenue of the CDS-31S1 transmitter over the next ten years plus (b) the value of the confidential and proprietary technology developed by [Seller] and *"misappropriated by [Buyer]"*. [Seller] further seeks punitive damages against [Buyer] in an amount to be [determined by] me. [Seller] also reserves its right to modify the above figures.

III. DISCUSSION

A. The Claim

117. The submissions in this case have been quite lengthy and technically challenging. I have read and considered them all. I do not propose to set out each and every argument as I have endeavoured to summarise them above and will deal with the crucial ones below.

118. However, despite the plethora of documents and submissions in this case, the claim is essentially a simple one. [Buyer] claims that because the pressure sensors delivered by [Seller] did not comply with what they contend is the specification therefor they are entitled to terminate the Agreement under the provisions of Articles 25 and/or 35 of CISG and recover the sums they have paid together with their loss of profits.

119. In respect of the claim it is important to bear in mind that [Buyer] has the burden of establishing the claim on the balance of probabilities. Although this may seem to be a trite observation, it is not without significance in the circumstances of this case. Until I engaged the services of Dr. M..., with the consent of both parties, I was faced with no independent evidence whatsoever. I merely had the rival contentions of both parties. I am not suggesting that the parties are anything but expert in this field but it is unusual, in a technically challenging case, not to be provided with expert evidence on behalf of both parties or, at least, invited, at an early stage, in the proceedings to appoint an expert on behalf of the Tribunal.

120. Another point to bear in mind is that the only evidence relied upon by [Buyer] in support of its claim is the result of the various tests to which I have made reference above. There is no other evidence, independent or otherwise, that supports the claim save the result of tests, the results of which are not agreed.

121. It was for this reason that I invited Dr M... to express an opinion on the reliability and validity of those very tests. If I am to find for [Buyer] I would have to be satisfied on the balance of probabilities that I could rely on one or more of these tests. I will now consider each of those tests in turn;

(i) July 2002 Tests

122. These were undertaken at [Seller]'s premises in Brazil. It is clear that these tests were part of a larger activity than mere conformance testing. It does not appear to be disputed that these tests were performed in accordance with [Seller]'s test protocol using properly calibrated test equipment. It is also not disputed that some of the units tested showed some deviation.

123. [Buyer] rel[ies] on these test results to establish their claim that they were entitled to reject these goods as not being in conformity with the contract.

124. [Seller] on the other hand contends that the sensors used in these tests were general laboratory usage samples which had been used outside of permitted maximum operating conditions and that accordingly the test results were unreliable. [Buyer] did not positively assert that the sensors used in this test were other than as alleged by [Seller],

125. The witness who explained matters most clearly was Mr. C... C... He graduated in electronic engineering from the University of San Paulo. He has 20 years experience in controlling automatic systems. He has worked for 15 years in the development of field devices. I am quite certain that his evidence was truthful and reliable. He explained why in the July 2002 tests the sensors used were not new. He explained that the purpose behind the first test was to check the software and hardware integration so an ordinary used transmitter from the laboratory was used for this purpose.

126. Dr. M... expressed his view in paragraph 14 of his 20 December 2006 report that:

> *'it is certainly the case that, if transducers of the type in this dispute had previously been subjected to operating conditions outside of their specified maximum/minimum, they might have sustained damage that would lead to them being unsuitable for use in performance tests. It would be poor practice to rely on such samples in any formal testing procedure although their use in general integration testing would be acceptable.'*

127. Accordingly, [Seller]' s evidence is supported by Dr. M...' s opinion. His opinion, in the light of the facts as I find them, is that the July 2002 tests were not a reliable basis on which to establish either conformance or non-conformance with the specification. Accordingly, any claim to reject or claim damages based on the July 2002 tests fails.

(ii) August 2002 Tests

128. [Seller] claims that, in the light of the complaints made by [Buyer], it carried out further tests in August 2002 on a new batch of sensors. It is important to note that [Buyer] did not

participate in these tests and thus is unable to accept or challenge the results. [Seller] contends that the tests were successful and the sensors were then delivered to [Buyer]. [Seller] contends that these tests were performed in accordance with its protocols and the units met their specifications

129. The evidence from [Seller] as to these tests was provided by Mr. O.... In his witness statement the accuracy of which he confirmed Mr. O... stated that these tests were completed by [Seller] on 15 August 2002 using brand new sensors. The tests were satisfactory and were contained in a Report ([Seller] hearing exhibit 8) which was delivered to [Seller]. It is accepted by [Buyer] that they received this Report. No challenge to his evidence was put in cross examination.

130. I am inclined to accept [Seller]'s evidence as to the August 2002 tests but I cannot base my decision solely on them given [Buyer]'s absence from those tests. However, if they fit in with the rest of the evidence they form part of the relevant factual background. However the important point is that these tests do not support [Buyer]'s case and thus provide no evidence in support thereof.

(iii) September* 2003 *Tests

131. [Buyer] claims that after receipt of a delivery of sensors from [Seller] they performed a number of tests themselves that suggested non-conformity. Discussions took place and in September 2003 [Seller]'s engineers travelled to China and yet further tests were carried out.

132. Regrettably, the results of these tests are hotly in dispute. [Buyer] says that these tests were sufficient to establish that a significant proportion of the tested products failed. [Seller], on the other hand, relies on certain deviations from the test protocols. [Seller] also refer[s] to the fact that non-[Seller] components had been introduced, such as flanges and o-rings. Further, [Seller] contends that some of the tests relied upon by [Buyer] encountered quality problems such as leaking test systems. As a result of all of this, [Seller] contends that I should not rely upon these tests to support [Buyer]'s claim as there is good reason to doubt the reliability of such tests.

133. The evidence given at the hearing on behalf of the [Seller]'s witnesses was compelling. Mr. C... C... was carefully and skillfully cross examined by Mr. C... He had to deal with very technical issues and it is not surprising that at times the questions and the answers were not crystal clear. This was then exacerbated by interpretation difficulties. However, it became very clear that what [Seller] was contending was that when these tests were carried out in China they were not carried out in accordance with [Seller]'s catalogue. I accept that these tests were carried out and arranged at [Buyer]'s premises by [Buyer]'s people using [Buyer]'s equipment. Furthermore, [Buyer] was aware of the ambient temperature. In answer to questions from Dr. M..., Mr. C... C... confirmed that [Buyer] arranged everything including preparing the sensors and mounting them on flanges. What this meant was that [Seller] did not have an appropriate opportunity to inspect the testing apparatus and decide for themselves whether they were satisfied with the testing apparatus.

134. I accept Mr. C... C...'s evidence that these tests were not in accordance with [Seller]'s procedures. It was not correct to base these tests using 10C increments instead of the specified 20C increments. I accept that this had the effect of doubling the deviations in respect of temperature drift. It was also objectionable to start the test at range 100KPa as opposed to range zero KPa. It also seems more probable than not that that there was some leaking that

may have contributed to the unreliability of these tests (see [Seller] exhibit 9 and Mr. M...'s evidence at pp 68/6920 October transcript).

135. Having given this matter very careful thought I accept the [Seller]'s evidence relating to the September 2003 tests. Based on that evidence Dr. M...'s conclusion that these tests were unreliable to prove either conformance or non-conformance is a conclusion with which I agree and accept.

136. In his final written post hearing submission Mr. C... takes the point that [Seller] is in some way estopped from contesting the result of these September 2003 tests. This submission did not appear in [Buyer]'s pleadings nor was it referred to at the hearing. Accordingly, I consider it too late to raise it now. However, I can find no basis for such a submission on the facts of this case. To say that [Seller] agreed that these tests showed that they were in breach of the Agreement is a travesty of the evidence.

IV. CONCLUSION

A. The Claim

137. Having considered all the evidence in this case, it seems to me clear that [Buyer] has failed to establish that, on the balance of probabilities, the sensors delivered pursuant to the agreement were defective and that accordingly [Buyer] had no right to terminate the agreement, nor had it any right to claim damages. The plain fact of the matter is that [Buyer] rel[ies] upon certain tests, the validity of which has not been established to my satisfaction. I cannot leave this aspect of the case without remarking that it seems to me to be most unfortunate that once [Buyer] thought they had a quality claim they did not submit the sensors to independent testing as would be most usual in a case of this nature. To then present their case without any independent expert evidence only compounded the problem.

138. [Buyer]'s case is based on deviations from specifications. A point to be emphasised is that there is some real doubt about the specification upon which they seek to rely. As Dr M... pointed out in paragraph 2.10 of his first Report;

> "*In this case, there appears to be an absence of a detailed specification for the actual product being supplied by [Seller] (which is a sub-set of the finished [Buyer] product consisting of sensors, sensor board and one of the CPUs) and an absence of a specific test protocol. However, there is a specification for a [Seller] product containing the [Seller] sensor and sensor board* [see [Seller] exhibit 1 tabs 5 and 7] *and there is a [Seller] test protocol for testing that product. This is far from an ideal situation, where a specific product should hove a unique specification against which it can be tested.* "

139. In his 22nd January Report in response to [Buyer]'s 42 page critique of his first Report Dr M... returned to this point where he said at paragraph 2.1.12;

> *"There was much discussion of the validity of 10C and 20-C increments during the hearing. I stated in my initial report that it was unsatisfactory to have no specific specification and test procedure for the equipment and that we were left with the LD* 301 *brochure and the disclosed temperature test protocol as a fall-back. It should be noted that the W* 301 *brochure defines Temperature Effect over 20C steps. Similarly, the LD* 301 *brochure "Performance Specification" section calls for "range starting at zero". It is very unusual to draw specifications from one document and measurement*

methods from another (largely unrelated) document, but in this case, in the absence of a single specification and test methodology, it has been necessary to interpret both documents and attempt to establish a technically consistent meaning."

140. The fact that there is a real doubt concerning the specification for the sensors in dispute makes [Buyer]'s case based on a breach of it even more problematical. They put their case fairly and squarely on a deviation from specification. For this, they rely on tests which I have found to be inconclusive one way or the other. There is, thus, no evidence before me to justify a claim for breach of any of the implied warranties set out in the CISG. Yet again, the absence of independent testing and/or evidence to consider such a claim is a major defect in [Buyer]'s case.

141. It follows, therefore, that [Buyer]'s claim based on Article 35 of CISG fails. Although not strictly necessary, it might assist if I briefly gave my view on the legal issues raised under the CISG.

142. Article 35 of CISG provides as follows:

(1) *The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.*
(2) *Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:*
(a) are fit for the purposes for which goods of the same description would ordinarily be used;
(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.
(3) *The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.*

143. If, as in this case, there is no credible evidence to support the contention that the goods delivered by [Seller] did not comply with the quality or description required by the contract, the claim, based on a breach of express terms of agreement, has to fail.

144. Having concluded that, there is no evidence to support the claim based on Article 35(1) that the goods did not match their contractual requirement, the enquiry then proceeds to consider whether the implied warranties as to fitness for purpose set out in Article 35(2) of CISG have been breached. Here, too, [Buyer] has a problem because even if they had satisfied me that the goods had the defects about which they complain the defects themselves are minor and could be easily avoided by an end user. It has to be noted that there is considerable case law on this topic to the effect that flawless goods are not required unless specifically catered for. Various cases were cited to me under the CISG jurisprudence which illustrates this principle. In one case a catalogue was printed with an entire line out of place but the court

held that this did not decrease the value of the printed catalogues nor affect the legibility of the text.

145. Whether [Buyer] can rely on CISG Article 49(1)(a) to avoid the contract depends on whether the so-claimed defects actually constitute a fundamental breach of the contract. The concept of fundamental breach in Article 25 has been narrowly construed under the CISG. A breach must concern the essential content of the contract in order for it to be considered fundamental. In *FCF S.A.* v. *Adriafil Commerciale S.r.1., BGE 4C.105/2000, Sept. 15,* 2000, *(Switz),*[1] it was held that the breach must concern the essential content of the contract and it must lead to *"serious consequences to the economic goal*" pursued by the parties. The burden remains on the buyer to prove that due to the nonconformity, the goods provided were *("substantially"* below what was stipulated in the contract. (See e.g. *BGHZ Ji1I1 ZR* 51/95, *the "blue cobalt" case*;[2] where the buyer was unable to demonstrate that it was *"substantially*" deprived of what it was entitled to expect under the contract.)

146. In this case temperature effect is a minor factor of all the contributing factors to the error rate of a pressure transmitter. I accept Mr. C... C...'s evidence that deviations in temperature effect have an imperceptible effect on the total error rate of a pressure transmitter. Further, it should be noted that it is not alleged that [Seller]'s sensors failed to meet their accuracy rating. I was also impressed by the evidence that the alleged effect of temperature drift could have been avoided quite easily by [Buyer] and its end users by avoiding measurement of process fluids i.e. the liquid gases or vapours that are the subject of measurement at extreme temperatures. Thus, the deviation from specification claimed by [Buyer] has neither *"substantially*" deprived what [Buyer] was entitled to expect under the contract, nor led to *"serious consequences to the economic goal*" pursued by [Buyer]. I am satisfied that no fundamental breach has been established in this case.

B. The Counterclaim

147. It is alleged by [Seller] that [Buyer] copied its source codes which was a breach of the confidentiality provisions of the agreement.

148. At the outset, however, I have to deal with an argument raised by Mr. C... at the commencement of the hearing in London. Because both parties wished to protect their confidential information during the course of this arbitration, there was much discussion pre-hearing on this topic. When the hearing commenced, Mr. C... handed in an undated letter addressed to me and entitled' *Announcement on [Seller]'s serious violation of the arbitration procedure'*. Mr. C... pointed out that when on 10 August 2006 he produced documents to [Seller]'s Counsel the package contained a confidentiality warning which stated,

> *'The documents* (1233 pages) *contained in this package are highly confidential and/or privileged. The documents are intended to be reviewed initially by only the legal Counsels of [Seller]... for the sole purpose of arbitration proceedings pending with the Arbitration Institute of the Stockholm Chamber of Commence between [Buyer] ... and [Seller]... If the reader of the documents in this package is not the intended recipient, you are hereby notified that any review, dissemination or copying of the documents in this package or the information contained herein is prohibited.*

149. Mr. C... then stated that in his communication of 14 August 2006 he had stated:

'The produced materials shall be handled by the Counsels of [Seller] subject to the protection of the Stipulated Protective Order. Notwithstanding the above, it is hereby specifically brought to the attention of the Counsels of [Seller] that the documents numbered from 1176 *to* 1233 *are highly confidential materials on source code ('source code materials). The Counsels of [Seller] are hereby required NOT to disseminate, transfer or disclose in any form such source code materials to the employees, officer,) or directors of [Seller] without prior written consent from [Buyer].'*

150. Mr. C... submitted that it had been the intention of [Buyer] that their source code materials would be limited to review by [Seller]'s legal team and would not be shown to [Seller] staff. He stated that it had been the intention that the source codes would be exchanged simultaneously.

151. [Seller]'s counsel wrote on 16 August 2006 claiming that it was necessary for [Seller]'s staff to review and analyse [Buyer]'s source code material. Mr. C... responded to this on 18 August 2006 when he stated as follows:

'Fifth, as to the source code, [Buyer] has clearly conveyed its concern about protecting its core technology and that the current protective order may not be sufficient to protect [Buyer] rightful interests. Nevertheless, to demonstrate [Buyer]'s utmost good faith and to facilitate the process of the proceeding, we have offered as a bottom-line compromise that identified [Seller] staff may be allowed to review the source code but shall be strictly forbidden from duplicating and/or disseminating any portion of the source code. Since external unrelated technician experts are not subject to this special restriction except for the general protection offered under the Protective Order, we trust that [Seller] is with the ability to prosecute its counterclaim if it does have any case ' (sic)

152. In a further communication on 23 August 2006, Mr. C... wrote:

'We reiterate our request that the source code provided by [Buyer] may only be reviewed but cannot be copied or disseminated in other way even if the intended recipients have signed the agreement to abide by the Protective Order.' (sic)

153. Mr. C... then went on to make the point that [Seller]'s Exhibit 27 entitled '*Source Code Comparison* dated 27 September 2006 prepared by Mr. M... M... stated *'this confidential report uses a copy of PDF file from [Buyer] as base line with superimposed [Seller] equivalent files.* ' He went on to complain about this because he only produced documents in paper form and neither he nor [Buyer] ever provided [Buyer]'s source code to [Seller]'s counsel in PDF form. Accordingly, he alleged that [Buyer]'s source code had been reproduced in e-format and disseminated to [Seller]'s staff without notification to [Buyer] nor their consent.

154. All this lead to his statement in the letter that *(the violation ... brings the danger and possibility that [Seller] may have fraudulently revised its source code to mimic those of [Buyer] in support of its counterclaim.* ' This letter ended with an allegation that [Seller] had broken the agreed procedure and injured [Buyer]'s lawful rights and interests and all their rights were reserved and on that basis only did they attend the hearing.

155. Mr. C... raised this matter orally before me at pages 3-6 of the transcript for 18 October 2006. He contended that what had occurred was a breach of the Confidentiality Agreement and he also stated that *'it makes things blurred, because we cannot know whether they copy us or we copy them.*' I responded to this by saying that we would have to wait and see how the evidence went and I added:

> *'... if you think they have broken the terms of the Confidentiality Agreement, then you have certain rights under that Agreement. If you think that something unfair has happened, "you can bring it to my attention in due course, and we will see whether it has any impact on the way the case is handled. At the end of the day, I have to deal with the evidence and decide whether the sensors were in accordance with the contract, and; if not, what the consequence is and discuss, and look at their counterclaim, so why don't we get on with it now?'*

156. At page 85 of the transcript Mr. S... responded to Mr. C...'s allegations. He told me that only three people at [Seller] had seen the [Buyer]'s source code and all of them were present at the hearing, namely Messrs. C... C..., B... and M... M.... Mr. S... then pointed out that there had been no dissemination of the source code. In fact fewer than the number of people who had signed the Confidentiality Agreement had seen it and all of these individuals had signed the Confidentiality Agreement. I then asked whether Mr. O... had seen the [Seller]'s exhibit and was told that he had seen it but just at the hearing and it had not be provided to him previously. He further went on to say that Mr. M... W... had not seen it or participated in dealing with the source code. He explained, as he had done to Mr. C... at an earlier stage in the proceedings that he had to deliver the document to his client in Brazil so that necessarily this involved some copying and it was sent by PDF, so that it could not be altered and was password protected and thus could not be manipulated. I asked specifically where the PDF e-mail that attaches the PDF files was and it was confirmed that it had been destroyed. Mr. S... responded that these allegations were extremely seriously. I ended this discussion by addressing Mr. C... and making it clear to him that he could either respond to what Mr. S... had said *"or you can ask these gentlemen questions on this topic when the time comes"*. Mr. C... replied *'OK, in cross-examination?'* I replied *'If you wish, of course, yes.*' Mr. C... replied *'OK, thank you.'*

157. It was, therefore, with some surprise that when the [Seller]'s witnesses gave evidence it was never specifically suggested to any of them that they had deliberately changed their source codes to make it look as if [Buyer] had copied theirs. This, of course, would have been a very serious allegation indeed and one that should have been put specifically. I accept, of course, that Mr. C... may not be as used to the common law procedures as Mr. S... or myself, but the fact remains that he was specifically invited to put these serious allegations to the [Seller]'s witnesses in cross-examination and he did not do so until instructed to do so by me. In order to make sure that I was not being unfair to Mr. C... 1 wrote to him asking for references in the transcript where he put this very serious allegation to [Buyer]'s witnesses. On 12th March Mr. C... kindly replied by referring me to the transcript at day 4 pp 139-146. At page 140 I specifically asked Mr. C... whether it was his client's case that [Seller] had altered their source code after seeing [Buyer]'s source code. He replied with typical frankness "*I cannot say for sure yes or no."* I asked him whether he thought it a possibility and he replied affirmatively. I then invited him to put the matter specifically to Mr. M... M... His questions then became a little confused so I invited Dr. M... to put the question for him. Dr. M... said;

"*Mr. M... M..., I believe there is a suggestion that having received a copy of [Buyer]'s code for CPU A, [Seller] has subsequently made some changes to its own code in order that it might illustrate bigger similarities between the two. Are you are aware if any such changes have been made?"*

Answer: "*No, I have never done that, not this one."*

158. I have seen and heard the [Seller]'s witnesses and I have formed a favourable impression of their reliability and honesty. I do not for one moment accept the allegation that anyone on the [Seller]'s side copied the [Buyer]'s source code in such a way as to make it look as if [Buyer] had copied [Seller]'s source code. It is not without significance that [Seller] launched their counterclaim long before the source code was produced. Accordingly, I unhesitatingly reject this allegation. If Mr. C... thinks that there has been a breach of the Confidentiality Agreement, then he has the right on behalf of [Buyer] to take such steps in relation thereto as he thinks appropriate. There can be no question of ruling that any of [Seller]' s evidence should be ruled inadmissible as suggested by Mr. C...

159. I now turn to the substance of the complaints. [Seller]'s case, as supported by its witnesses, is that the similarities between the two source codes show conclusively that [Buyer] directly copied [Seller]'s source codes. [Buyer], however, contends that it independently developed its own source codes and that any similarities between the two are mere coincidence or result from the common use of codes provided by Texas Instruments.

160. I have of course looked at the similarities very carefully and to a layman it seems quite obvious that there are substantial similarities. However, having no experience of developing a source code I thought it essential to invite Dr M... to express an opinion whether, given his considerable experience, there is any scope for the involvement of chance or coincidence. He expressed the view quite clearly that there was none. That view also has the effect of supporting the evidence given to the same effect by the [Seller]'s witnesses, particularly Mr. M... M...

161. It should be noted that there are not just one or two similarities in relation to the source codes. Dr. M... expressed his expert view that there were no less than ten. In order to make good the point I can do no better than set out the relevant parts of his 20 December 2006 report:

"In its Post-Hearing Memorandum, [Seller] points to ten areas of similarity. These are analysed individually below:

1. Software structure and modularisation: In my opinion the similarities in structure are unlikely to be the result of a coincidence or common use of Texas Instruments code.
2. *Filenames are the same: In my opinion the similarities in file names are unlikely to be result of a coincidence or common use of Texas Instruments code.*
3. *Use of 'SMR' in name: In my opinion the similarities are unlikely to be the result of a coincidence or common use of Texas Instruments code.*
4. *Register Definitions: In my opinion the similarities in this code usage and structure are unlikely to be the result of a coincidence or common use of Texas Instruments code.*
5. *Designation of odd and even addresses: In my opinion, while it is possible that different software engineers might use '0' or 'e' to denote odd and even in a personal*

naming convention, it is by no means obvious or certain that they would do so.
6. *Commenting changed code: In my opinion the commenting-out of changed code in this way is a strong indication that the code came from a common source and cannot be explained by coincidence. If writing new, unique code, a software engineer would have no reason for including the two commented-out lines.*
7. *Short-circuit reading value: In my opinion the similarities are unlikely to be the result of a coincidence or common use of Texas Instruments code.*
8. *Constant value and comment: In my opinion the similarities are unlikely to be the result of a coincidence or common use of Texas Instruments code.*
9. *Duplicated typographical error: In my opinion the similarities are unlikely to be the result of a coincidence or common use of Texas Instruments code.*
10. Reference to odd, unused variable: In my opinion the similarities are unlikely to be the result of a coincidence or common use of Texas Instruments code."

162. There is also an allegation that there are similarities in sensor board design, Dr M... reviewed the schematic diagram disclosed by both parties, the reported similarities produced by [Seller] and testimony of both parties at the Arbitration Hearing and subsequent submissions.

163. [Seller]'s case is that the sensor board developed by [Buyer] substantially copied its sensor board design. [Buyer]'s response is that any similarities are either coincidental or based on publicly available information such as from component suppliers.

164. Again I can do no better than quoting from Dr M...'s 20 December 2006 Report.

"To an experienced electronics engineer, it can be seen from the two schematics that the two designs are virtually identical in many respects. For example, there are significant similarities in areas including:

1. EEPROM type and usage
2. Use of transistor-based temperature sensing method
3. Capacitance conversion using frequency and switching between high and low capacitance measurement
4. Signal transfer using pulse transformer and capacitive coupling
5. Signal isolation and sensor signals from transmitter
6. Primary Power Supply method and device pin-out
7. Secondary Power Supply method
8. Sensor Signal Interface

In my opinion, it is very unlikely that such similarities could be the result of coincidence or the adoption of publicly available information. In most of the areas discussed above there are a number of different design approaches open to a designer with a clean sheet of paper, so the appearance of identical design approaches in all of these areas by way of coincidence is highly unlikely. "

165. In relation also to the sensor board the evidence of [Seller]'s witnesses is supported by Dr M...'s report.

166. I note of course the strong denial by the [Buyer]'s witnesses. However, when forced to choose between the evidence of the [Seller]'s witnesses and the evidence of the [Buyer]'s witnesses I unhesitatingly prefer the [Seller]'s witnesses. In coming to this conclusion I have

taken into account that both sides' witnesses gave evidence through interpreters and that the subject matter of interpretation was complex and challenging for both interpreters. Nevertheless, I believe the [Seller]'s witnesses whose evidence on technical issues was supported in part by Dr M...'s two reports and he was a completely independent expert with no previous relationship with either party or with myself.

167. One incident referred to in the evidence given by the [Seller]'s witnesses had the ring of truth about it and is not without significance given the allegations contained in this case. At the end of July 2002, Mr. M... of [Buyer] was in Brazil working with the [Seller]'s engineers, including Mr. M... M... Mr. M... ... told me (see page 63 of transcript on 21 October 2006) that there was an instance when there was some difficulty with the communication between CPU A and CPU B and he had to use the emulator to de-bug in real time. It was then that he realised that his laptop did not have enough speed to run this de-bug on-line. Accordingly, he had to use Mr. M...'s laptop to run the de-bug because his laptop only ran at a speed of 130 megahertz, whereas Mr. M...'s was running at something in the region of 600 megahertz. There then followed a lot of technical evidence, about this procedure. I attempted to clarify matters. Mr. M... M... confirmed that he was in the same room with Mr. M... when this transfer took place and he confirmed that he was with Mr. M... and Mr. W.... After the download took place, the problem was detected and it was fixed. I then asked Mr. M... M... what happened when the de-bugging process finished. He replied *'You know, when we finished, knowing it was proprietary software, we just asked Mr. M... 'Oh, let us wipe this out'* and then he just said *'.yes'*, I then asked whether he wiped it out there in front of Mr. M... M..., who replied that he did not see that because at that time *'we were working in partnership with all trust in each other*.' I then asked whether Mr. M... M... had let Mr. M... go away with his laptop containing the information which had been inputted and Mr. M... M... replied' *Yes, probably it was there in his laptop, it had remained in his laptop.'* When asked whether he had ever confirmed that it had been deleted he said he was not concerned about that at that time and unfortunately did not check afterwards to see whether it had in fact been deleted, Whatever one makes of this incident, it was obviously an opportunity, rather freely offered, for [Buyer] to receive and keep certain confidential information which belonged to [Seller]. I think this incident may add some support to the [Seller]'s claim, but in the main I am forced to decide this case on the basis of the similarities.

168. In this case it would stretch incredulity too far to conclude that all the similarities were the result of chance. I therefore conclude that [Buyer] did copy [Seller]'s confidential information and that this was a breach of the agreement entitling [Seller] to relief.

C. Loss to [Seller] as a result of misuse of confidential information

169. [Seller] claims injunctive relief and damages. If injunctive relief is denied then [Seller] claims very substantial damages.

170. However, the damages issue is not as clear cut as [Seller] would have it. In this case, I am dealing with technology, which we all know is a fast-developing subject. I believe that the first question that I must pose is whether, without the unauthorised use of [Seller]'s proprietary information, [Buyer] would have developed the necessary information itself over a period of time.

171. I think it highly likely that [Buyer] would have developed the necessary technical answers to the problems given a reasonable amount of time. I think that Mr. M... and Mr. C...

in particular were extremely able and skilled and would have, so to speak, cracked the code in any event.

172. So what [Buyer] got by reason of the misuse of confidential information was a head-start or a springboard. The question is how long do I think it would have taken [Buyer] to develop this technology. From what I have learned about this technology during the course of this interesting and challenging case I cannot believe that [Buyer]'s technical people would have taken any more than 24 months to develop the necessary technology. The period of time, namely 10 years, posited by [Seller], upon which their counterclaim is based is both extravagant and unrealistic.

173. In those circumstances I must limit the damages to that 24 month period. It would not be a correct exercise of my discretion to grant an injunction because that 24 month period has long since passed. Having considered all the facts of this case I think it fair to take only 24 months period commencing from 1 January 2004.

174. The appropriate enquiry is -- what profits have [Buyer] earned during that 24 month period? I have some sympathy with [Seller] on damages because I doubt whether full disclosure has been made but I have to do the best I can using the material placed before me. [Seller] elected to proceed despite its misgivings on production. I cannot believe any useful purpose would be served by putting off the damages issue and requiring [Buyer] to produce any further documentation which goes to damages. As I say, I must do the best on the information before me.

V. DAMAGES

175. [Buyer] has produced some documents which indicate that between 6 April 2004 and 19 July 2006 sales via [Buyer] of its CDS 151 transmitter totalled $911,000. On 13 July 2006 I made Procedural Order No 3 in which I directed [Buyer]:

> *'within* 14 *days of today, the [Buyer] shall produce all its invoices relating to all of its sales of the CDS* 151 *transmitter suitably redacted to exclude the names of its customers. Unless the [Buyer] also produces its documents showing that such invoices were not paid it will be assumed that all invoices were duly paid on or about their due dates. The [Buyer] is also permitted to produce any documents upon which it wishes to rely showing the costs and expenses incurred in obtaining the gross sales being the sum total of the invoices produced hereunder.'*

176. In response to this Order, [Buyer] produced the documents that are now contained in [Seller]'s Hearing Exhibit 35. At no stage prior to or during the hearing did [Buyer] produce any documents showing the costs and expenses incurred in obtaining the gross sales the sum total of the invoices produced. Procedural Order 3 could not be clearer. Furthermore, it was preceded by a teleconference in which I made it crystal clear to Mr. C... that he was at liberty to produce the cost of sales documents but that, if he did not, I would, if I had to consider damages on the Counterclaim, work on the gross sum. At the hearing, Mr. C... attempted to resile from this approach but I am absolutely clear, and my recollection accords with that of [Seller]'s attorneys who were present on the same teleconference, that I made the above position perfectly clear to Mr. C... and that he fully understood the situation.

177. I should add that throughout this case the production of documents has been a difficult and sensitive issue. I well recognise the divergence of approach between the US and UK

common law system, on the one hand, and the civil law approach adopted by China, on the other. I have tried very hard to steer a fair course between these two systems. That is why I suggested the adoption of the IBA Rules on the Taking of Evidence in International Commercial Arbitration which attempt to bridge the extremes and arrive at a set of rules that incorporate different approaches to this subject. I explained all this to Mr. C... during the course of several teleconferences and some e-mails. The position in this case is stark. Unless [Buyer] produces the sales documents there would be no way for [Seller] to be able to quantify their losses. I permitted redaction of customer names so confidentiality could not have been a major problem. It is not enough for [Buyer] to say that [Seller] has to prove their case. In international commercial disputes of this nature some form of discovery is necessary in order to achieve justice between the parties. It is particularly important in cases such as this where it is alleged, and I have found, that one party has derived a benefit from the misuse of another party's confidential and proprietary information.

178. Accordingly, given the level of discovery in this case I can do no better than rely on the documents actually produced by [Buyer]. However, there was evidence before me from the [Buyer]'s witness, Mr. C... that [Buyer]'s first sale may have been in late 2003 whereas in fact the first invoice is dated 6 April 2004. Furthermore, letters in June 2003 and February 2004 were produced (Exhibit RH1 and RH2) in which customers were complimenting [Buyer] on their CDS3l51. These documents indicate an earlier sales date than any document contained in [Seller] Exhibit 35.

179. I doubt very much that [Buyer] has made a full discovery of the documents to show the total sales of this CDS transmitter. I was not much impressed with [Buyer]'s explanation for the earlier documents, namely that they were backdated for some promotional purpose.

180. There is no scientific way to assess damages in cases of this nature. It is even more difficult in this case because of the paucity and unreliability of the discovery provided by [Buyer].

181. I am quite satisfied on the evidence I have heard and seen that it is highly likely that more sales took place than are admitted by [Buyer]. However, I think I have to look at the period from April 2004 when I see that documented sales began to take place. Having a suspicion is not enough. I have to base this Award on such evidence as to quantum that I have.

182. The quantification of [Seller]'s counterclaim necessarily depends on [Seller]'s Exhibit 35 which comprises the invoices produced by [Buyer]. These they total at US $911,000) however, these invoices contain VAT at 17% and I think I am entitled to assume and do assume that [Buyer] would only receive the net of that figure. Thus, the US $911,000 figure has to be reduced by 17% making it US $756,130. [Buyer] appears to have declined my invitation to let me know whether any of the sales set out in Exhibit 35 are irrelevant for my purposes. [Buyer] cannot have it both ways. They have declined to be of much assistance on the damages issue and they thus cannot be heard to complain if I work on the only evidence I have on this issue.

183. I have already held that I do not accept the [Seller]'s approach to quantification of their counterclaim which leads to a claim of approximately US $9,000,000. As stated above, I intend to take only a 24 month period which will be from the beginning of 2004 to the end of 2005. One approach may be to take the 2004 and 2005 sales figures from Ex 35. They appear to comprise approximately 83% of the total. However, 2005 was the only full year for which I

have figures. The figures for 2004 only cover a 9 month period and 2006 only a 7 month period. It seems to me that a fairer way of looking at this matter is to take the total sales disclosed by Ex 35 and work out a monthly average and then multiply that by 24 months. $756,130 divided by 28 = $27,004 x 24 = US $648,111.

184. The parties have agreed that I add interest on any damages awarded. [Seller] wrote to me suggesting that I apply the New York Civil Practice Laws and Rules which sets 9% per annum. Mr. C... contested [Seller]'s proposal and counter-proposed the rate applied by the Chinese Courts, namely 7.56% per annum. I propose to exercise my discretion in a broad brush manner by taking the rate of 6% from 1 January 2006 until payment to be compounded twice yearly.

VI. COSTS

185. Both sides sought the costs of the arbitration together with their legal and other costs pursuant to the SCC Rules which govern this arbitration.

186. [Buyer]'s total claim for legal costs is US $32,500. [Seller]'s total claim for legal costs is US $442,769.

187. It seems to me to have been accepted by the parties that costs should follow the event. [Seller] was clearly the prevailing party as they defeated [Buyer]'s claim and have had a measure of success on their counterclaim although nothing like as much as they had claimed.

188. Accordingly, I will order [Buyer] to pay [Seller]'s costs of this arbitration.

189. The basic costs of the arbitration are straightforward. The problem lies in the huge disparity between the parties legal costs. [Buyer]'s are $32,500 and [Seller]'s are US $442,769. Mr. C... tells me that he has charged on a fixed lump sum basis which is normal in China and [Seller's counsel] have charged on an hourly rate basis which is normal in USA and UK.

190. Let me make clear that I accept that both sides have charged their clients the sums claimed. The question I have to ask myself is what is the proper sum to be awarded to [Seller], in respect of their legal costs, in the special circumstances of this case.

191. It seems to me that I should have regard to the following factors in the exercise of my discretion on costs:

(a) the parties agreed on a SCC arbitration where the arbitration costs are base[d] on the sums in dispute;
(b) the quantification of the counterclaim turned out to be highly extravagant;
(c) the amount awarded on the counterclaim is not substantially more than the legal costs claimed;
(d) at first blush there must be something wrong when it takes half a million dollars in legal costs to recover a sum less than a million dollars and defeat a relatively straightforward claim;
(e) the costs in this case were exacerbated by difficulties in production which were mainly caused by [Buyer];
(f) the parties have widely differing expectations relating to costs;
(g) I have found that [Buyer] did act in breach of the Agreement by deliberately

misusing [Seller]' s confidential information, benefited by it and denied it throughout;
(h) An award of costs should not be used to punish the payer but only to make reasonable re-imbursement to the successful party.

192. I have some sympathy with Mr. C...'s submission on costs where he refers to the disparity and continues, '*We therefore believe that the legal fees of the [Seller] is unreasonable and pray for your discretion in this regard. We believe it shall be the core interests of international arbitration to prevent itself from becoming another version of expensive and consuming litigation* ".(sic) Having given the matter careful thought I accept Mr. C...' s submission that [Seller]'s legal costs should be reduced.

193. It seems to me that justice will be achieved in this case if I order [Buyer] to pay [Seller] US $250,000 only in respect of [Seller]'s legal costs and expenses.

194. The SCC has fixed and determined the costs of this Arbitration as follows;

i. Arbitrator's Fee [...]
ii. Arbitrator's Expenses [...]
iii. M...'s Fee [...]
iv. SCC Administrative Fee [...]

195. [Seller] incurred the following expenses in respect of this arbitration apart from legal fees, namely;

i.	Deposits paid to SCC	US $32,076
ii.	Transcription Service Fees	6,282
iii.	Travel Expenses for Counsel	8,671
iv.	Interpreter's Fee	1,731
v.	Photocopying Charges	6,952
vi.	Long Distance Telephone Charges	824
vii.	Courier/Mail Charges	1,384
viii.	Computerized Legal Research Fees	146
ix.	Travel Expenses for Witnesses	17,067
Total		**US $75,133**

196. Accordingly, it seems appropriate to order [Buyer] to pay [Seller] the additional sum of US $75,133 in respect of the costs of the arbitration in addition to paying [Seller] US $250,000 in respect of [Seller]'s legal costs.

VII. CONCLUSION

197. I, Neil Kaplan CBE QC, sole arbitrator, having read all the material placed before me and heard all the evidence and submissions at the oral hearing heard in London DO HEREBY AWARD, ORDER AND DIRECT as follows;

(1) [Buyer]'s claims for monetary and declaratory relief are dismissed;
(2) [Buyer] shall pay [Seller] the sum of US $648,111 in full and final settlement of all [Seller]'s counterclaims such sum to include interest at the rate of 6% per annum from

1 January 2006 until payment to be compounded twice yearly;
(3) [Seller]'s claim for injunctive relief is denied;
(4) [Buyer] shall pay [Seller] US $250,000 in respect of [Seller]'s legal costs;
(5) [Buyer] shall pay [Seller] US $75,133 in respect of the costs of this arbitration incurred by [Seller] in this arbitration proceedings.

198. I would like to express my thanks to counsel on both sides for their assistance and courtesy throughout this arbitration. My thanks also go to the witnesses who travelled a long distance in order to assist me by giving evidence in this arbitration.

DATED THIS 5th DAY OF APRIL 2007 - Stockholm, Sweden

SIGNED _____

Neil Kaplan CBE QC, Sole Arbitrator

FOOTNOTES

1. Switzerland 15 September 2000 Supreme Court [4C.105/2000] (FCF S.A. v. Adriafil Commerciale S.r.l. [translation available] [Cite as: <http://cisgw3.law.pace.edu/cases/000915s1.html>]

2. See BGHZ VIII ZR 51/95, Apr. 3, 1996, (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/960403g1.html> (known as "blue cobalt" case as well as the cases cited by [Seller].