

Case 1636: CISG 1(1)(a); 25; [39]; 61(1); [62]

People's Republic of China: Zhejiang High People's Court Zhe Shang Wai Zhong Zi

No. 144 (2013)⁶

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The buyer, a United States company, and the seller, a Chinese company, entered into two machine purchase contracts in 2008, pursuant to which the seller undertook to manufacture the machine according to the requirements specified in the plans attached to the contracts. If the seller were to visit the buyer in order to train the buyer's technicians or to test and service the machine, all hotel charges and air fares would be borne by the buyer. The seller would provide a 12-month conditional warranty service for replacement of damaged parts free of charge.

In October 2009, the buyer paid the entire cost of the machine and the machine was delivered to the buyer in March of the following year. Later on, the seller visited the buyer twice for testing and servicing the machine. In December 2012, the buyer concluded that there was a serious defect in the machine and filed a lawsuit, requesting the court to allow avoidance of the contract and to order the seller to return the payment for the machine. The seller counterclaimed requesting the buyer to pay the round-trip air tickets for its visit to the buyer to adjust and test the machine.

The Court held that the case constituted a dispute over a contract for the international sale of goods and the Convention would apply pursuant to Article 1 (1)(a) CISG, in accordance with Article 142, Paragraph 2, of the General Principles of Civil Law of the People's Republic of China. Moreover, the Court noted that the application of the Convention had not been excluded by the parties.

The plaintiff claimed it had expressly indicated that it would not agree to repair the machine and insisted on avoidance of the contract and the return of all sums paid for the machine. Whether such a claim should be supported was subject to a fundamental breach of contract by the seller as defined in Article 25 CISG. The central point of the dispute was whether the machine was defective and could not be repaired, as a result of which the purposes of the contract would be unachievable. The Court held that since the buyer had paid the full cost of the machine and had accepted delivery, this would constitute preliminary recognition by the buyer of the conformity of the machine to the contract. Further, the seller had twice sent its representatives to the United States for the purposes of adjusting and servicing the machine, that action falling within the scope of normal after-sales maintenance and repair. Thirdly, according to the provisions of Article 39 CISG, the buyer loses the right to rely on a lack of conformity of the goods if it does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after it has discovered it or ought to have discovered it. Two years had passed between the time of actual receipt of the machine and the filing of the lawsuit, and the buyer had not provided evidence that it had given the seller notice of a serious quality defect in the machine in question. The buyer should therefore be deemed to have lost its right to claim for the machine's defect. Therefore, the plaintiff's claim for avoidance of the contract and the return of all sums paid for the machine could not be established.

With regard to the counterclaim of the defendant, according to Article 61 (1) CISG, the matter was whether the seller visited the buyer in order to train technicians and to test and adjust the machine. The court held that the main purpose of the two visits by the seller's representatives was to test the machine and train personnel, and that that fact supported the seller's request for payment by the buyer of the air tickets purchased for those visits.

The Court thus ruled against the plaintiff and supported the counterclaim of the defendant. The plaintiff appealed, however the Court of second instance ruled that there was no error in the judgment of the lower court and dismissed the appeal, affirming that judgment.

⁶This case is cited in the CISG Digest (2016 Edition), available at: www.uncitral.org.