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Contents

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Introduction

This compilation of abstracts forms part of the system for collecting and disseminating information on Court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). The purpose is to facilitate the uniform interpretation of these legal texts by reference to international norms, which are consistent with the international character of the texts, as opposed to strictly domestic legal concepts and tradition. More complete information about the features of the system and its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1/REV.1). CLOUT documents are available on the UNCITRAL website (www.uncitral.org/clout/showSearchDocument.do).

Each CLOUT issue includes a table of contents on the first page that lists the full citations to each case contained in this set of abstracts, along with the individual articles of each text which are interpreted or referred to by the Court or arbitral tribunal. The Internet address (URL) of the full text of the decisions in their original language is included, along with Internet addresses of translations in official United Nations language(s), where available, in the heading to each case (please note that references to websites other than official United Nations websites do not constitute an endorsement of that website by the United Nations or by UNCITRAL; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Abstracts on cases interpreting the UNCITRAL Model Arbitration Law include keyword references which are consistent with those contained in the Thesaurus on the UNCITRAL Model Law on International Commercial Arbitration, prepared by the UNCITRAL Secretariat in consultation with National Correspondents. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available through the UNCITRAL website by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

The abstracts are prepared by National Correspondents designated by their Governments, or by individual contributors; exceptionally they might be prepared by the UNCITRAL Secretariat itself. It should be noted that neither the National Correspondents nor anyone else directly or indirectly involved in the operation of the system assumes any responsibility for any error or omission or other deficiency.

Cases relating to the United Nations Convention on Contracts for the International Sale of Goods (CISG)

Case 992: CISG 2(a); 25; 35(1); 39; 74; 84
Denmark: Københavns Byret (Copenhagen District Court); BS 01-6B-2625/2005
19 October 2007
Annika Gustavsson (Denmark) v. LRF N.V. (Belgium)
Original in Danish
Published in Danish: http://cisgnordic.net/index.php/cases/danishcases/34-danish caselaw/101-2007-oct-19-dc

Abstract prepared by Joseph Lookofsky, National Correspondent

A seller in Belgium sold a pony to a buyer in Sweden. The buyer, who ran a riding school as well as a business involving the purchase and sale of horses, intended that his daughter would first use the pony to compete as a jumper in riding competitions, after which time the buyer planned to resell the pony for profit.

As part of the agreement, the seller declared the pony, which was to be used for jumping in competition, to be "fully fit". Some time after delivery, however, the buyer learned the pony was lame and for this reason claimed that the pony did not conform to the agreement. Seeking to avoid the contract and claim damages, the buyer sued the seller in Copenhagen. Since Denmark (Bregnerødgård, Zealand) was the place of delivery, the Danish court declared itself to be competent to adjudicate the case by virtue of article 5(1) of the EU Brussels Convention on Jurisdiction and Judgments (which was still applicable in Denmark at that time).

During the course of the proceedings, the parties agreed that, to the extent that the CISG was held applicable, the (unofficial) Danish translation of the Convention would apply. In this connection, the buyer claimed that the parties, during the initial stages of the litigation, had orally agreed that the CISG applied to the case and that this choice of law was binding by virtue of article 3 of the EU Rome Convention on the Law Applicable to Contractual Matters. Due to insufficient evidence to support this allegation, however, the court held that the CISG was not applicable by reason of such an express agreement. But considering that the parties had their respective places of business in different CISG Contracting States [article 1(a)], and since the pony was not purchased exclusively for personal use, the court found the CISG applicable by virtue of article 2(a).

Prior to the sale, the buyer's daughter travelled to Germany where she successfully test-rode the pony, which had previously achieved good results in competition. The buyer then arranged to have the pony examined and x-rayed by a Danish veterinarian in Belgium who found the pony to be healthy in all significant respects.

One week after delivery, however, the pony became lame. It was then re-examined by another veterinarian, who discovered serious and incurable damage to the cartilage in one of the pony's joints. During the trial, an independent expert appointed by court determined that the damage to the cartilage was initiated by a traumatic occurrence, such as a twist and/or an infection, and that due to the extensive nature of the damage, the traumatic event must have occurred several months prior to the date of the sale.

On this basis, and referring to article 35(1) CISG and the fact that the seller, at the time of contracting, had "guaranteed" the pony to be "fully fit", a term which the court understood to mean "healthy", the court held that the pony suffered from a fundamental defect at the time of delivery, article 25 CISG, entitling the buyer to avoid the contract.

On the issue of inspection, the court noted that the CISG does not obligate the buyer to undertake an examination of the goods prior to the date of sale, nor did the court see reason to apply Belgian national law with respect to such examination, as had been argued by the seller. As regards the pre-sale veterinary examination which the buyer had nonetheless undertaken on its own initiative, the court noted that the examination was sufficient and that no signs of injury had been discovered at that time.

The court also noted that the buyer, once the injury to the pony had been discovered, had continuously advised the seller as to the pony's worsening condition. Later, as soon as the final diagnosis had been determined, the buyer promptly notified the seller thereof and also declaring the contract avoided. On this basis, the court held that the buyer had properly notified the seller of the non-conformity pursuant to article 39 CISG, that the avoidance was justified, and that the buyer was entitled to recover damages under article 74 CISG, both for the purchase price and for the various expenses incurred by the buyer as a consequence of that breach, except for the subtraction of losses covered by insurance, assuming that the insurer would not demand reimbursement for these sums.

As regards interest on damages due, the parties agreed that articles 78 and 84 CISG should apply.

Case 993: CISG 72; 73; 78
Denmark: Højesteret (Danish Supreme Court)
17 October 2007
Zweirad Technik v. C. Reinhardt A/S
Original in Danish
Published in Danish: Ugeskrift for Retsvæsen 2008 p. 181 et seq.;
http://cisgnordic.net/index.php/cases/danishcases/34-danishcaselaw/100-2007-oct-17-sc

Abstract prepared by Joseph Lookofsky, National Correspondent

A Danish seller imported Japanese motorcycles and then resold large numbers of them to a German buyer for resale to its customers in Germany. In practice, the buyer ordered quantities based on forecasts of anticipated sales in Germany and the seller then ordered corresponding quantities from its Japanese supplier (i.e. the manufacturer). The parties' practice permitted minor adjustments of the orders in question, e.g. if certain colours and/or quantities were unavailable.

In the fall of 1999, the buyer ordered some 1,600 motorcycles to be delivered in instalments. The price for each instalment was payable in Yen upon delivery, whereas the total price was made subject to a bank guarantee. Later, due to exchange rate fluctuations between the Euro and the Yen, the buyer requested that the seller ask the manufacturer for a price reduction. When the manufacturer refused, the buyer nonetheless placed additional orders for 2,000 motorcycles. In December 1999, however, the buyer cancelled its orders. When the seller protested, the parties agreed that the buyer would accept delivery of half the ordered quantity

subject to a given discount by the seller and with the seller to attempt to secure an additional discount from the manufacturer. Not satisfied with the seller's efforts to obtain the additional discount, the buyer refused to take delivery of a given instalment and also cancelled the bank guarantee. Claiming that such a conduct constituted a fundamental breach, the seller avoided the contract, advising the buyer that it would resell the motorcycles concerned in Denmark.

In the litigation which ensued the buyer contested that the seller had rightly avoided the contract and that the seller was entitled to damages equal to the difference between the contract price and the price secured under cover transactions (which took the seller nearly 5 years to complete). The buyer also argued that the seller had not taken reasonable measures to mitigate, as the motorcycles in question were resold only in Denmark, where prices were allegedly lower than in Germany (an allegation the seller disputed). Finally, the parties disagreed on how interest, if payable, should be calculated.

In the first instance, the Danish Maritime & Commercial Court (*Sø- og Handelsretten*) decided in favour of the seller, holding that the seller had rightfully avoided under article 72 CISG and that the cover sales were made in a reasonable manner and within a reasonable time. On this basis, the Maritime & Commercial Court awarded the seller DKK 3.9 million in damages, corresponding to the difference between the contract price and the cover price. Referring to article 78 the Court also awarded the seller interest calculated from the date of resale (cover).

Reviewing this decision on appeal, and citing article 73 CISG, the Supreme Court (*Højesteret*) unanimously affirmed that the seller had been entitled to avoid. As regards damages a majority (3 of 5 judges) voted to reduce the High Court's award of damages by approximately 50 per cent, holding that the seller failed to re-sell the motorcycles at a sufficiently high price or within a reasonable period of time. Basing this reduction on a "discretionary calculation", the majority voted to award damages in the amount of 2 million DKK. Without referring to article 78 CISG, the majority held that the seller was entitled (only) to interest calculated as of the commencement of the action. A minority of 2 Supreme Court judges, while not commenting on article 78, saw no reason to criticize the cover sales by the seller or the damages originally awarded by the Maritime and Commercial Court.

Case 994: CISG 35(1); 35(2)(a); [38]; 39; 48; 74
Denmark: Vestre Landsret (Western High Court); B-0397-03
21 December 2004
Buyer ApS (Denmark) v. Seller s.r.l. (Italy)
Original in Danish
Published in Danish: www.cisg.dk/VLD21122004DANSKVERSION.HTM

Abstract in Danish: Henschel, Erhvervsjuridisk Tidsskrift, No. 2., p. 224 et seq.

Abstract prepared by Joseph Lookofsky, National Correspondent, and René F. Henschel

An Italian seller and a Danish buyer entered into contracts for the sale of 1,241 check-valves for installation of petrol stations in Denmark and elsewhere in Scandinavia. Prior to the sale the buyer had requested that the seller confirm that the valves "can be used with petrol" and the seller subsequently confirmed that the valves were "for petrol".

Some months after delivery and installation of the valves, one of the buyer's customers complained that the rubber gaskets in 35 of the valves installed had cracked, and that these cracks had caused the valves to leak. Subsequently, the cracks were found to be due to the influence of MTBE, which is an additive used in Scandinavia as a means to increase the octane value in petrol.

The buyer commenced an action against the seller, claiming that the valves delivered were defective, because they could not resist MTBE and that the buyer was entitled to damages incurred as a result of costs incurred in connection with the replacement of the valves delivered with other valves capable of resisting the MTBE additive. The seller contested that the valves which it had delivered were defective, maintaining in this connection that the use of MTBE in petrol was unusual and limited to countries within Scandinavia. The seller further maintained that the buyer had failed to examine the goods and that the buyer had not provided the seller with sufficient notice of the alleged nonconformity. For these reasons, the seller disputed that the buyer was entitled to damages.

The High Court held that the seller was obligated to deliver valves which could be used with petrol containing MTBE. In the Court's opinion, the seller had not established that the use of MTBE in petrol was limited to the Scandinavian countries, nor had the seller established that it was not obligated to take into account that the valves were to be used with petrol containing MTBE. For these reasons, the goods did not conform to the contract under article 35(1) CISG, just as the goods as delivered were not fit for the purposes for which goods of the same kind would ordinarily be used, article 35(2)(a) CISG.

As regards notice of nonconformity, the High Court held that the buyer's notice was sufficient under article 39 CISG, even though the notification only related to some of the valves in the order concerned. Although the High Court did not refer specifically to article 38 CISG, the court of first instance had held that the buyer was not obligated to test the valves prior to their resale and use by its customers.

Noting that the seller had not taken the initiative to repair the nonconformity pursuant to article 48 CISG, the High Court held that the seller was liable for what the Court (while not referring specifically to article 74 CISG) described as the "foreseeable" loss incurred by the buyer in connection with the replacement of the nonconforming valves.

Case 995: CISG 69
Denmark: Randers Byret (Randers City Court); BS 2-2229/2002
8 July 2004
Seller (Denmark) v. Buyer GmbH (Germany)
Original in Danish
Published in Danish: www.cisg.dk/RETTEN_I_RANDERS_8_JULI_2004.HTM
Abstract in English: www.cisg.law.pace.edu/cisg/biblio/lookofsky10.html

Abstract prepared by Joseph Lookofsky, National Correspondent

A Danish seller agreed to sell and deliver a mobile grain dryer to a buyer in Germany. The dryer was to be delivered by truck to Wiesenburg, Germany, a few kilometres from the field where the buyer intended to use the machine. Upon arrival of the truck, the driver (seller's employee) requested the buyer to help unload the dryer. After the buyer's personnel, using their own tractor and chain, had

successfully lifted the dryer down from the truck and then driven a few metres, the chain holding the dryer broke, causing substantial damage to it. Some time later, hidden deformities attributable to the accident were discovered which made the drier unsuitable for its intended use.

When the buyer refused to pay for the dryer, the seller brought suit against the buyer in Denmark. Making a general reference to article 69 CISG, the court found it natural to interpret the contract between the parties to mean that delivery of the dryer took place at the latest when the buyer took possession, i.e., when the dryer was unloaded from the truck by the buyer's personnel. For this reason and since the court found that the accident was not attributable to the seller or its personnel, the court held the buyer liable to the seller for the agreed price.[1]

Case 996: CISG [7]; 40
Denmark: Højesteret (Supreme Court), No. 333/2003
22 April 2004
Birkemose A/S v. Interstuhl Büromöbel GmbH
Original in Danish
Published in Danish: Ugeskrift for Retsvæsen 2004, p. 1869 et seq.
http://cisgnordic.net/index.php/cases/danishcases/34-danishcaselaw/94-2004-apr-22-sc#original

Abstract prepared by Joseph Lookofsky, National Correspondent

A Danish seller and a German buyer contracted for the delivery of chrome plated steel tubes for use by the buyer in connection with the manufacture of furniture. Due to problems attributable to its subcontractor, the seller could not deliver all the tubes as originally agreed. In February 1999 the parties agreed that the seller should deliver as many chrome plated tubes as possible and at the same time deliver the remaining number of tubes in raw steel. Following delivery by the seller of a quantity of uncoated tubes, the buyer ceased to place further orders. Later, in July 1999 the buyer notified the seller that it would not pay for prior deliveries of uncoated tubes, claiming that uncoated tubes had been delivered later than the date agreed and that the buyer was entitled to a set-off sums paid by the buyer to a German subcontractor for chrome coating.

Denying that any deadline had been agreed for the seller's delivery of uncoated tubes and further denying that it had agreed to pay for the chroming of uncoated tubes delivered, the seller sued the buyer for payment. The seller also argued that the buyer had lost any alleged right to a set-off in any case, as the buyer first gave notice of this claim in July 1999; in reply to this argument, the buyer argued that it was not necessary to notify the seller of its claim, as the seller had known of the delays concerned.

The City Court of first instance held that the buyer had accepted a modification of the contract in February 1999 and that there was no evidence that the parties had set

[1] Although the court's opinion does not indicate whether its decision was based on article 69(1) or 69(2) CISG, the fact that paragraph (1) applies only to delivery at the seller's place of business suggests that the court based its decision on paragraph (2) which provides that the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place — requirements which accord with the circumstances of the case.

a deadline for the delivery of uncoated tubes. Describing the buyer's claimed right of set-off as a claim for damages, the court of first instance further held that the buyer, by failing to notify the seller of its various claims until July 1999, had lost the right to claim a set-off by reason of passivity under general principles of the Danish law of contract and sales law. In this connection the court noted that the situation could also be expressed as a violation by the buyer of the generally applicable obligation of contracting parties to act in accordance with the principle of Danish domestic law which requires contracting parties to act loyally towards one another. While not referring specifically to article 7 CISG, the City Court noted that it saw no evidence that this principle was confined to obligations governed by Danish domestic law or that the principle did not apply under the CISG. On the contrary, the court noted, the parties to an international transaction have a particular need to be able to "count on one another". For these reasons the court held that any claim for damages which the buyer might otherwise have against the seller was barred by reason of passivity. For the reasons stated, the buyer's claim for damages was denied, and the buyer was held required to pay the agreed price.

On appeal to the Western High Court, the buyer relinquished its claim that deliveries had been delayed, claiming instead that deliveries of uncoated steel after the alleged deadline for such deliveries constituted nonconforming delivery; in this connection, the buyer maintained that the seller was barred for claiming late notice under article 40 CISG. Rejecting these arguments, the High Court affirmed the decision of the court of first instance. The buyer then appealed the decision of the Western High Court to the Supreme Court, but only as regards the amount of damages awarded to the buyer under domestic procedural law for costs incurred in connection with the translation of German legal documents into Danish. The decision of High Court, affirming the court of first instance with respect to the substantive issues in the case, was thus allowed to stand.

Case 997: CISG [8; 9; 35(1)]; 38(1); 39(1); 44
Denmark: Sø- og Handelsretten (Copenhagen Maritime Commercial Court)
31 January 2002
Dr. S. Sergueev Handelsagentur v. DAT-SCHAUB A/S
Original in Danish
Published in Danish: Ugeskrift for Retsvæsen 2004, p. 1869 et seq.;
http://cisgnordic.net/index.php/cases/danishcases/34-danishcaselaw/88-2002-jan-31-cmcc#danish
Translation in English: http://cisgnordic.net/index.php/cases/danishcases/34-danish caselaw/88-2002-jan-31-cmcc#english
Abstract in English: Henschel, Conformity of Goods in International Sales, p. 107 et seq.

Abstract prepared by Joseph Lookofsky, National Correspondent

A Danish seller sent a telefax to a German buyer offering to sell "80 tons of mackerel, Whole Round". Upon the buyer's request for a more detailed specification, the seller passed on information provided by its Dutch supplier, describing the goods as "Tiefgefrorene Mackerel — Whole Round" with the latin designation "Trachurus Symmetricus Murphyi". In this connection, the date of production was designated "November/Dezember 1996".

In a subsequent telex addressed to the buyer's Russian customer, the seller described the goods as "Bastardmakrele" (Bastard/Mongrel Mackerel), also adding the Latin designation. In the seller's order confirmation, however, as well as in the invoice sent by the seller to the buyer, the goods were designated "Whole Round mackerel" without the Latin or German specifications.

When the goods were shipped in frozen condition from the Netherlands to Russia, the documents designated them as "frozen Mackerel, Whole round" and also provided the Latin designation. In this connection a Dutch health certificate attached to the shipping documents provided: "The fish or/and fishery product is/are fit for human consumption."

Shortly after delivery of the fish in Russia in February 1999 the buyer's customer complained the goods did not conform to the contractual description, and the buyer promptly passed this complaint on to the seller. A long correspondence ensued, during which time the frozen fish were stored in a Russian warehouse. In September 1999 the Russian health authorities declared the goods to be unfit for human consumption, designating them as "Frozen fish for furry animals". The buyer then avoided the contract and sued the seller in Denmark for damages, including the return of the purchase price. In this connection the buyer alleged that the species of the fish delivered did not conform to the contractual designation and that they were of inferior quality, both because they had been caught prior to the time specified by contract and because they had been declared unfit for human consumption.

As regards the contractual designation, the court noted that the seller and buyer had traded fish on a prior occasion using Latin designations and that this practice was in accordance with the custom of fish merchants generally. On this basis the court held that the buyer could not deny that the fish delivered were not the kind specified in the contract. Although the opinion of the court does not make specific reference to articles 8, 9 and 35(1) CISG, these provisions are consistent with the court's holding on this issue.

As regards the fact that the date of production was earlier then that specified in the contract, the court noted that the buyer could easily have adduced that fact at the time of delivery by examining the production dates stamped on the packaging. The court also held that the buyer could not rely on the alleged nonconformity regarding the condition and quality of the fish delivered, as it had failed to thaw a sample and examine its quality as soon as was practicable after delivery, article 38(1) CISG, nor had it given the seller notice of nonconformity within a reasonable time, article 39(1) CISG. In this connection the court rejected the buyer's contention that its prior notification with respect to the contractual designation provided a reasonable excuse under article 44 CISG for its subsequent failure to notify with respect to the production date and the quality of the goods.

Case 998: CISG [6]; 9; 31(a)
Denmark: Højesteret (Supreme Court), No. 569/1997
15 February 2001
Damstahl A/S v. A.T.I. s.r.l.
Original in Danish
Published in Danish: Ugeskrift for Retsvæsen 2001, p. 1039 et seq.
www.cisg.dk/hd15022001danskversion.htm
Commentary in Danish: Lookofsky & Hertz, Ugeskrift for Retsvæsen 2001, p. 558 et seq.
English translation: www.cisg.dk/DANISH_SUPREME_ COURT_15012001.HTM

Abstract prepared by Joseph Lookofsky, National Correspondent

In this case an Italian seller sold steel pipe to a Danish buyer. The goods, which were produced in Italy, were transported to Denmark, where they were resold and delivered to a buyer in Norway. Alleging that some of the pipes did not conform to the contract, the Danish buyer sued the Italian seller in a Danish court, claiming damages equivalent to a claim brought by the Norwegian buyer against the Danish buyer.

The seller challenged the juridical jurisdiction of the Danish court, raising a preliminary issue as to whether the parties in their sales contract had opted out [article 6 CISG] of the "place of delivery" rule in article 31(a) CISG. The buyer's order provided for delivery "franko Skanderborg", which according to Danish law means that the seller bears the freight costs and that place of delivery is at the destination, in this case Skanderborg, Denmark. In the seller's order conformation, however, the delivery term was "F.CO DOMIC. NON SDOG" (franco domicile non sdognato) which, according to Italian law, does not indicate the place of delivery, but only that seller is to bear cost of freight.

Having decided that the parties had not agreed upon delivery in Skanderborg, the Supreme Court held that the default delivery rule in article 31(a) CISG applied, and that the goods were delivered in Italy. For this reason, the Danish courts did not have juridical jurisdiction under article 5(1) of the then-applicable EU Brussels Convention on Jurisdiction and Judgments, so the Danish courts were not competent to rule on the merits of the buyer's nonconformity claim.

Case 999: CISG 1; 4; 6; 7(2); 8(2); 16(2)(b); 25; 35(1); 35(2); 46(3); 49; 74; 77; 92
Denmark: Ad hoc Arbitral Tribunal
10 November 2000
Construction Acton Vale Lteé (Canada) v. KVM Industrimaskiner A/S (Denmark)
Original in English
Excerpts published in Danish: Ugeskrift for Retsvæsen 2006 p. 2210 et seq.;
http://cisgw3.law.pace.edu/cases/060503d1.html

Abstract prepared by Joseph Lookofsky, National Correspondent

A Canadian buyer instituted ad hoc arbitration proceedings against a Danish seller. The subject matter of the sale was a large block machine and mould designed for the production of cement pig slats, with the seller to install the machine in Canada and help the buyer start production there. As the buyer needed to produce pig slats normally used by pig farmers in Canada, it provided the seller with specifications

for a mould larger than the one previously manufactured by the seller for use with a similar machine in Denmark. In this connection, an express term in the contract provided as follows: "The seller guarantees that the machine will function, however the seller does not warrant for the quality of the products made on the machine." The sales contract also incorporated the Nordic Standard Conditions of Delivery (NL) which, in the case of avoidance, limit the seller's liability to 15 per cent of the contract price, unless the seller's breach is attributable to gross negligence. The NL also provides for the arbitration of contractual disputes in accordance with the "law of the vendor's country".

Soon after the machine was installed on the buyer's premises and production commenced, the buyer complained about the quality of the slats produced and demanded that the seller repair or modify the machine. While offering to help the buyer produce slats of better quality, the seller maintained that the buyer's difficulties were attributable to the mould dimensions provided by the buyer and/or the ingredients in the concrete mix used by the buyer. After repeated failed attempts to remedy the problem, the buyer, claiming the seller had fundamentally breached its obligations to deliver a machine capable of producing pig slats in accordance with the contractual specifications, declared the contract avoided and demanded repayment of the price. When the seller refused to accept the buyer's avoidance, the buyer revoked its avoidance and took steps to secure the necessary repairs and modifications by third parties in Canada. Later, the buyer commenced arbitration proceedings in Denmark, demanding damages for both the cost of repairs as well as for lost production. In its reply, the seller denied that the machine was nonconforming, in this connection also referring to the contract clause disclaiming any warranty for the quality of products produced as well as to the NL liability limitation.

As regards the applicable law, the arbitral tribunal noted that the CISG was part of "the law of the vendor's country" (Denmark) and that the CISG was therefore applicable to the substance of the dispute. Due to Denmark's declaration under article 92 CISG, however, Danish domestic law would apply to issues relating to contract formation, as well as to validity issues regarding the NL liability limitation, article 4 CISG.

Having considered the testimony of experts, the tribunal concluded that the machine and mould delivered did not conform to the contract, since it could not produce products in accordance with the contractual specifications, article 35(1) CISG, and that it was unfit for ordinary purposes and the buyer's specific purpose, article 35(2)(a) and (b) CISG. The fact that the buyer had provided the seller with mould specifications could not relieve the seller of its obligation to deliver a machine and mould fit for these purposes, nor could the warranty disclaimer regarding the quality of the products manufactured reasonably be interpreted to have such an effect, article 8(2) CISG.

Furthermore, as the seller had not repaired the machine within a reasonable time, as it could have by modifying the mould, the seller had breached its repair obligations under both NL and article 46(3) CISG. In this respect, the seller had committed a fundamental breach of its obligations under both the NL and the CISG, thus entitling the buyer to avoid, articles 25 and 49(1)(a) CISG. But as the seller had unjustifiably refused to accept the buyer's avoidance, the buyer was entitled to revoke its avoidance in accordance with CISG general principles, articles 7(2)

and 16(2)(b) CISG. The buyer was then entitled to repair the machine and recover damages for the expenses incurred, article 74 CISG.

As to the NL liability limitation, the seller was not guilty of gross negligence, but the tribunal held that the limitation should be narrowly interpreted: when the seller failed to repair in accordance with its NL and CISG obligations and then unjustifiably refused to accept buyer's avoidance, the buyer was placed in an untenable position and thus a situation for which the NL liability limitation had hardly been designed. As a consequence, the seller was held liable for the buyer's loss, including the price of repairs and (documented) loss of profits. However, the tribunal reduced the amount of damages to some extent, since the buyer's failure to promptly inform the seller of its decision to revoke its termination and initiate its own repairs prevented the seller from reassessing its position, thus constituting a failure by the buyer to fully mitigate its loss. In addition, the tribunal reduced sums otherwise payable for foreseeable loss, article 74 CISG, by reference to the Danish Liability Act which authorizes the limitation of liability for disproportionate loss, as this provision reflects a principle similar to the prohibition against unfair contract terms pursuant to the validity rules of the Danish Contracts Act.