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Contents

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Introduction

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

Case 1809: CISG 31; 38(3); 39
Poland: Court of Appeal in Białystok
I AGa 84/18
J. F. i A. M. (Polish sellers) v. B. (German buyer)
30 May 2018
Published in Polish: www.orzeczenia.ms.gov.pl

Abstract prepared by Maciej Zachariasiewicz, National Correspondent

The parties concluded a contract for the sale of oak wood. The contract provided for the delivery of a certain amount of wood on a monthly basis from Polish sellers to a German buyer. The wood was transported to a facility in Poland where it was packed in containers, sealed and then redirected to a port. It was then loaded on a ship and sent to faraway destinations (not otherwise defined by the court) to subpurchasers who purchased the wood from the buyer. The buyer did not examine the wood nor cause it to be examined. Only when the goods were received by the subpurchasers at their final destination were various defects discovered (including insufficient amount of wood and too boarding that was too short). The buyer then refused to make full payments for the wood. The sellers sued for the rest of the price in a Polish court. The court of first instance found for the sellers and ordered the buyer to pay the remaining part of the price.

The buyer appealed. The central question in the case was whether the buyer should have examined the goods while they were still in Poland, before they were dispatched to subpurchasers. The buyer contended that it was sufficient to examine the goods upon their receipt at the final destination by the subpurchasers. The Court of Appeals disagreed. It noted that unless otherwise agreed by the parties, the goods should be examined at the place of delivery determined in accordance with Article 31 CISG. In the case at hand this was where the wood was loaded to containers (which was in Poland). The Court underlined that it would have been reasonable to examine the goods at that occasion and not wait for them to be delivered at their final destination, which was thousands of kilometres away. The buyer could have hired an agent to examine the wood or ask the goods' carrier to do so. The Court pointed out that the alleged defects of the wood (boarding that was too short) could have been discovered upon visual, routine scrutiny before the wood was loaded to containers. In fact, the buyer never examined the goods or caused them to be examined but merely waited for the notification by the subpurchasers. The Court found Article 38(3) CISG not to be applicable.

The Court also noted that the time limit for notifying a lack of conformity ran from the moment the lack of conformity ought to have been discovered (Article 39 CISG), which in this case was the moment when the goods were to be examined. This time must not exceed what is reasonable under the circumstances. The Court found that the notification only after the buyer learned of the defects from its subpurchasers was not within the reasonable time pursuant to Article 39 CISG. Therefore, the buyer had lost its right to rely on a lack of conformity, including the remedies specified in Articles 46, 49, 50 and 74 CISG.

Case 1810: CISG 47; 82
Poland: Supreme Court
IV CSK 662/16
M.s.a.r.l. (French buyer) v. J.Z. (Polish seller)
13 September 2017

Original in Polish
Published in Polish: http://www.sn.pl

Abstract prepared by Maciej Zachariasiewicz, National Correspondent

The French buyer purchased two machines for production of PET bottles from the Polish seller. The machines were to operate in Mali, Africa, where the buyer had its production facilities. The machines were delivered but proved to be defective to the extent that one of them could not be used for the envisaged purpose. The lack of conformity resulted in the buyer failing to perform its own obligations in Mali. Thus, this latter initiated legal proceedings in Poland, claiming compensation for lack of conformity, including the reimbursement of the price paid for one of the machines and losses suffered as a result of not being able to perform its own contracts (which comprised lost profits).

The court of first instance found for the buyer, although it based its decision on the Polish Civil Code. The Court of Appeal ex officio determined that CISG applies to the contract and informed the parties that it would found its decision on the provisions of the Convention. The Court permitted the parties to present their arguments on the basis of the Convention.[1] This resulted in again finding for the buyer.

The seller challenged the decision before the Supreme Court raising a number of arguments. The Supreme Court squarely rejected them all, observing that the result of the case would be the same irrespective of whether the CISG or Polish law applied. The provisions of Polish law relevant in the case at hand were similar to the CISG.

One of the main arguments raised by the seller was that the buyer had not fixed an additional period of time of reasonable length for the performance, as required by Article 47(1) CISG. The period set by the buyer was of 10 days. The seller argued that this was too short a period to fix the defects of the machines, given that they were located in Mali, where there are no available spare parts, personnel, and generally the economic and political situation is unfavourable. The Supreme Court, however, observed that the crux of the matter laid not in the length of the additional period fixed for performance but in the seller's unwillingness to remedy the defects. The seller did nothing except for sending its representative to Mali for an inspection. It did not make any attempts to repair the defects, nor entered into negotiations with the buyer or asked for any additional time to fix the problem.

The court also considered the seller's argument that the buyer had lost its rights to claim damages since it could not return the alleged defective machines in the same condition in which it had received them (Article 82 CISG). The Supreme Court, however, observed that the goods could not be treated as not being in the same condition for the mere fact that they were used only for a short time. The seller's argument was thus rejected.

[1] Polish jurisprudence has established that although courts apply law from their own motion (including uniform international laws such as CISG), they should not do so without informing the parties in advance and without permitting the parties to present arguments based on the law that the courts consider applicable.

Case 1811: CISG 49(2)(a); 71
Poland: Court of Appeal in Warsaw
I ACa 265/16
G.W. (German seller) v. M. C. (Polish buyer)
30 August 2017
Published in Polish: www.orzeczenia.ms.gov.pl

Abstract prepared by Maciej Zachariasiewicz, National Correspondent

The parties were in a contractual relation for a number of years. The German seller sold clothing to the Polish buyer, that was regularly behind schedule with its payments (even up to 100 days). At the end of 2008, the seller suspended delivery, as the buyer had not paid the outstanding invoices. When the buyer settled its debt, the seller resumed delivery, which took place in January, 4 months later than established under the parties' agreement. The buyer refused to pay and suspended all its orders from the seller. After replacing the seller with a new supplier, the buyer declared the contract avoided in July 2009. The seller sued for the payment of the outstanding price before a Polish court. The buyer counterclaimed for compensation.

The court of first instance noted that the dispute was governed by the CISG and with respect to matters not regulated therein (e.g. rate of interest) – by German law (since the place of business of the seller was in Germany). Moreover, the court deemed that the Limitation Convention applied. According to the court, the claim was not barred either under the Convention (4 years) or under German law (3 years). It thus rejected the buyer's argument in that regard. Applying the provisions of the CISG, the court found for the seller.

The buyer appealed. The Court of Appeals affirmed that the seller was allowed to suspend the delivery of the ordered clothing under Article 71 CISG. The court reasoned that the buyer was regularly in arrears, and that it often paid the outstanding amounts only when faced with the suspension of delivery. Hence, there was a risk of non-performance by the buyer under Article 71 CISG. Since the seller was entitled to suspend its performance, delivering the disputed shipment 4 months later than scheduled could not be treated as a breach of contract and the suspension of performance by the seller was thus consistent with the scope of Article 71 CISG. Therefore, the buyer could not invoke non-performance by the seller, if that non-performance was caused by the buyer's conduct.

Moreover, the Court pointed out that the buyer's avoidance of the contract could not be effective because it was not declared within a reasonable time after the allegedly late delivery (as required by Article 49(2)(a) CISG). In determining whether the avoidance is timely, one needs to take into account the general practical experience, professional standards of diligence in the given area of business and security of trade. The Court contended that in this case it was important to take into account the chronological order of events and the conduct of both parties, i.e.: the date of actual delivery, resale of the clothing by the buyer, discontinuing the orders for further deliveries, the buyer's decision to replace the supplier and the notification of avoidance to the seller only at the end of this course of action.

Therefore, the Court of Appeals upheld the decision of the court of first instance.

Case 1812: CISG 49; 50; 52(2); 80
Poland: Supreme Court
II CSK 603/16
M. (Polish seller) v. R.V. (Bulgarian buyer)
2 June 2017
Original in Polish
Published in Polish: http://www.sn.pl

Abstract prepared by Maciej Zachariasiewicz, National Correspondent

A Polish seller sold food products to a Bulgarian buyer for resale in Bulgaria. The buyer ordered them by email and telephone. It was agreed that their "shelf life" was to be as long as possible, generally not shorter than 6 months. The consignment that led to the dispute was received in June 2013. It included products that had a "shelf life" shorter than 6 months. Moreover, the seller delivered cream-coffee chocolate that was never ordered by the buyer. Within a few days, the buyer informed the seller of the defective products and proposed negotiations aiming at a price discount. It did not, however, make any specific declarations as to the use of remedies under the contract of sale. Eventually, some of the products that the buyer could not sell had to be destroyed.

A year later, in July 2014, the buyer declared partial avoidance of the contract and since it refused to pay the full price for the goods, the seller sued it in Poland. The court of first instance found for the seller and ordered the buyer to pay the outstanding price.

The Court of Appeals affirmed the judgment of the lower court although for different reasons. In particular, it found that the 6 months "shelf life" was informally agreed upon between the parties. Moreover, the Court found that the buyer had not effectively made use of its remedies under Articles 49, 50 and 52(2) CISG and therefore dismissed the appeal. The buyer challenged that decision before the Supreme Court.

The Supreme Court first noted that the lack of conformity of the goods under the CISG has to be understood broadly. It encompasses not only situations when the goods are not of the quality required by the contract but also delivering goods different than ordered (*aliud*). Thus, in the case at hand, both the delivery of the goods with a "shelf life" shorter than that agreed upon in the contract, as well as the delivery of unordered products, constituted lack of conformity and breach of contract.

The Supreme Court also found that Article 52(2) CISG did not apply in the case at hand. Such Article covers only situations in which the seller delivers goods in a quantity greater than that provided for in the contract. It does not cover instances when the goods delivered were not agreed upon in the contract at all (*aliud*). In those cases, the buyer should rather rely on general remedies resulting from lack of conformity under the CISG (Articles 45, 46, 50, 74–77). The court found that the buyer had not done so effectively and it upheld the Court of Appeals' conclusion that the avoidance of the contract was not effective because it had not been declared within a reasonable time pursuant to Article 49 CISG (the contract had been avoided over a year after the breach and more than half a year after the negotiations with respect to the disputed consignment ended).

The Supreme Court further discussed how Article 50 CISG is to be applied. It underlined that the reduction of the price does not occur automatically (*eo ipso*) but the buyer must express its intention in that regard. Such expression does not have to take any particular form, it may even be implied, however, it must be unequivocal. Citing Swiss case law, the Supreme Court held that although the buyer does not have to indicate the amount of reduction in the declaration, such amount must be specified during the court proceedings at the latest. Merely opposing to the claim brought by the seller is not sufficient, the buyer must indicate the amount of the price reduction. The buyer failed to do so in the case at hand.

Finally, the Supreme Court rejected the buyer's argument relying on Article 80 CISG. It stated that the action or omission within the meaning of that provision cannot be

regarded as inadequate performance of the contract by either party. Article 80 CISG applies only to situations where actions or omissions by one party preclude the performance of the contract by the other party, in other words when they constitute a lack of cooperation of the creditor with the debtor performing the contract.

Therefore, the Supreme Court upheld the judgment of the Court of Appeals.

Case 1813: CISG 8; 29
Poland: Court of Appeal in Białystok
I Aca 715/16
Debt collection agency v. E.B. (Polish seller)
25 January 2017
Published in Polish: www.orzeczenia.ms.gov.pl;

Abstract prepared by Maciej Zachariasiewicz, National Correspondent

The parties – a Polish seller and a Latvian buyer – concluded a contract for the sale of table sugar. The price was to be paid in advance. A few days later, the parties entered into another contract for the delivery of raw sugar to be processed in factories in accordance with the EU Single CMO Regulation (Regulation No 1234/2007). The buyer made advance payments to the seller's account. The seller, however, delivered only part of the contracted sugar. It did not deliver the raw sugar because it did not possess the necessary authorization for such operations, that is required under the EU Regulation. The buyer assigned its claim to a debt collection agency which sued the seller in Poland for the return of the advance payment. The court of first instance decided for the plaintiff applying the Polish Civil Code to the dispute.

The seller appealed. The Court of Appeals first noted that the case must be decided under the CISG, since the parties have their place of business in contracting states (Poland and Latvia). With regard to the merits of the case, the main issue was the question whether the parties have tacitly terminated the second contract which related to raw sugar. The court pointed out that according to Article 29 CISG a contract may be modified or terminated by the mere agreement of the parties. It is only when the contract contains a provision that requires modification or termination to be made in writing that the termination must be carried out in such a form. The parties did agree in the contract that modification or addition of new elements to the contract must be in writing. The contract was silent, however, as to its termination. The Court observed that the mere fact that the parties concluded their contract in writing does not itself mandate the written form for the termination of the contract. Moreover, under Article 8 CISG the parties may express their intention by conduct. It follows that the termination of the contract can also be implied with reference to the conduct of the parties.

The Court of Appeals found that, in the case at hand, there was tacit termination of the contract for the raw sugar. At the moment when it was revealed that the seller could not deliver the raw sugar (because it did not have the required authorization) the parties discontinued their contractual obligations. The buyer made no further payments, while the seller ceased to source the sugar and stopped the deliveries. Neither of the parties attempted to enforce their contractual rights nor expressed any interest in continuing their relationship. This situation lasted until the buyer assigned its claim to the plaintiff.

Since the contract was terminated, the seller was obliged to return the advance payments. The Court of Appeals then addressed the question of the law applicable to the restitution of the payments received under a contract terminated by mutual agreement of the parties. The Court found that CISG did not apply (since it only regulates the consequences of the avoidance of the contract – Articles 81–84). It then determined under Rome II and Rome I Regulations that the law applicable to the restitution of the payments is Polish law, as the law of the seller's place of business. The advance payments thus had to be returned, as mandated by Polish Civil Code. The judgment of the court of first instance was upheld.

Cases relating to the United Nations Convention on Contracts for the International Sale of Goods (CISG) and to the Convention on the Limitation Period in the International Sale of Goods (amended 1980) (Limitation Convention)

Case 1814: CISG 35; 45; 74; Limitation Convention 8; 12(2); 18(2)
Poland: Court of Appeal in Białystok
I Aca 942/16
W. (German buyer) v. I. sp. z.o.o. (Polish seller)
18 April 2017
Original in Polish
Published in Polish: OSAB 2017, No 2-3, p. 15

Abstract prepared by Maciej Zachariasiewicz, National Correspondent

The German buyer and the Polish producer concluded a number of contracts for the sale of filing cabinets and chests of drawers. The contracts expressly provided that the furniture and the materials used to its production must meet various TL technical standards including a requirement that the furniture is covered with the melamine-resin foil. The furniture was to be resold to the German army ("Bundeswehr") and delivered directly thereto, which the seller knew.

The furniture proved defective. In particular it was covered with a finish foil and not the melamine-resin foil as required by contract. The buyer was sued in Germany by the German Federal Republic (representing the Bundeswehr) for breach of contract. The dispute ended with a settlement according to which the buyer had to repay the Federal Republic of Germany plus costs of legal proceedings.

The buyer then sued the seller in Poland for the repayment of these costs as damages suffered as a result of the seller's breach of contract.

The court of first instance upheld the buyer's argument that the seller must pay damages for the lack of conformity of the goods. The court also dismissed the claim for the costs of transportation of the furniture incurred by the buyer and the costs of legal proceedings, as unrelated to the seller's breach. Both parties appealed.

The Court of Appeal first examined the question relating to the period of limitation (the claim was brought in March 2014 while the deliveries took place between July 2009 and May 2010). The Court deemed the Limitation Convention applicable although it did not state the basis of such decision (the lower court had determined that the contract was governed – besides CISG – by Polish law, being the law of the seller's place of business, which rendered the Limitation Convention applicable). The Court of Appeals noted that when goods are delivered in instalments, the period of limitation for each instalment would commence on the date on which the particular breach occurs (Article 12(2) Limitation Convention). Since the limitation period under the Convention is 4 years this would normally mean that a large part of the claim would be barred. Nevertheless, the Court found that the limitation period had ceased to run by virtue of Article 18(2) Limitation Convention. The Federal Republic of Germany, as the buyer's subpurchaser, had commenced legal proceedings in Germany against the buyer and this latter had informed the Polish seller in writing, Therefore, the buyer's claim against the Polish seller was not time-barred.

With respect to the lack of conformity of the furniture the Court of Appeals had little doubts that the seller had breached the contract. The court reasoned that covering the furniture with finish foil was not in conformity with the TL technical standards agreed in the contract, which called for melamine-resin foil to be used. The court added that the furniture did not fit the particular purpose made known to the seller and the seller knew that the furniture was intended for German army and that it must meet specific technical standards. Moreover, each contract was accompanied by the seller's declaration that the furniture complied with the required TL standards.

The Court dismissed also the seller's argument that the buyer could and should have discovered the defects upon the examination and therefore had lost the right to rely

on lack of conformity (Articles 38 and 39 CISG). The Court established that the lack of conformity could not have been discovered without specialist knowledge. Only an expert in wood work technology would have been able to discover the lack of conformity and only upon a closer examination (the court inter alia stressed that in the proceedings in Germany, some pieces of furniture had to be cut through so to be examined by an expert). Moreover, the Court referred to Article 40 CISG underlying that the seller, as a specialist producer of furniture, could not have been unaware of the defectiveness of the goods that it sold to the buyer.

Therefore, the judgment of the court of first instance was affirmed.