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Contents

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Introduction

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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.

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

Case 1302: CISG 74; 79; 79(1)
Poland: Supreme Court
V CSK 91/11
T.K.M.E. GmbH (German buyer) v. P.K. S.A. (Polish seller)
8 February 2012
Original in Polish
Published in Polish: www.sn.pl

Abstract prepared by Maciej Zachariasiewicz, National Correspondent

The present case is relates to the dispute between a Polish coke fuel producer and a German buyer subject of a previous decision of the Polish Supreme Court in October 2008 (case no V CSK 63/08; CLOUT abstract no. 1306). This time the Supreme Court was presented with different legal issues. The background of the dispute is essentially the same.

The parties concluded a contract for the sale of coke fuel in December 2003. In the second quarter of 2004 the Polish seller refused to deliver part of the coke fuel for the price agreed upon in the contract. Consequently, the German buyer avoided the contract with respect to the part of the undelivered goods and later sued for the damages resulting from the breach of contract, mostly consisting of the reimbursement for the value of undelivered coke fuel as of the day when the notice of avoidance was made.

The reason for the Polish party to refuse the delivery was a considerable and rapid rise in the price of coke fuel, which occurred after the conclusion of the contract. The seller argued that it could not have predicted the extent of the price increase and thus could have not foreseen the loss, nor its extent, which resulted from the breach of contract. This, in the seller's opinion, exempted it from the liability for the breach under Article 74 CISG. The Court of Appeals endorsed the argument and dismissed the claims of the German buyer. An appeal was brought to the Supreme Court.

The dispute before the Supreme Court revolved around the question whether the foreseeability of loss constitutes a general prerequisite of contractual liability, which, if not satisfied, ousts the remedy under Article 74 CISG, or whether it may only lead to reduction of damages to the extent the harm could not have been foreseen. The question in this case was whether the foreseeability of the price increase of coke fuel should affect the claim as a whole or only the extent to which the damages might be decreased.

The Supreme Court favoured the second proposition. It underlined that the foreseeability of loss under Article 74 CISG cannot be equated with the impediment beyond control, which releases the party in breach from the liability, as long as it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of contract (Article 79(1) CISG).

Because the Court of Appeals did not examine whether the radical rise of the prices of coke fuel could be treated as the impediment beyond control under Article 79 CISG, nor to what extent the party in breach foresaw or ought to have foreseen, at the time of the conclusion of contract, the loss that resulted from the

failure to deliver coke fuel, and consequently, to what extent this could affect the compensation under Article 74 CISG, the Supreme Court reversed the decision of the Court of Appeals and remanded the case for further consideration.

Case 1303: CISG 52
Poland: Supreme Court
IV CSK 331/08
Ewa D. and Stanisław D. (Polish sellers) v. S. (French buyer)
11 December 2008
Original in Polish

Abstract prepared by Maciej Zachariasiewicz, National Correspondent

The Polish producers of artistic jewellery concluded an exclusive sales contract with the French buyer in 1986. The cooperation continued for many years but became troublesome with deliveries effectuated around early 2000. Those deliveries were supplemented by unsolicited new models of jewellery worth some 33,000 francs. The French buyer refused to pay for the unsolicited goods and it failed to make payments for the ordered products that were most recently delivered. Eventually, the buyer made further orders and promised to pay the outstanding debts, but the Polish sellers refused to deliver. Later on, in order to recover moneys of the unpaid goods, the Polish sellers empowered a Swiss company to carry out the enforcement of debts, but revoked the mandate half a year later, however not informing the French buyer about the revocation. Shortly after that, the French buyer returned the unsolicited goods by sending them back to the address of the Polish sellers. The sellers in turn refused to accept the goods arguing that they had not authorized such a method of settlement of accounts.

The Polish sellers sued for the unpaid debts. The Circuit Court held at first instance that although the buyer questioned that it had ordered the new models, it did not refuse to take delivery. Rather, its behaviour indicated that it accepted delivery and was thus obliged under Article 52 CISG to pay for it at the contract rate. Consequently, the Circuit Court ordered the French buyer to pay for the goods. The Court of Appeals confirmed.

The French buyer brought an appeal to the Supreme Court, arguing that the application of Article 52 CISG was not justified under the circumstances of the case. In particular, it alleged that not returning the unsolicited goods after their receipt cannot be treated as taking delivery under Article 52 CISG. The Supreme Court found that the review carried out by the Court of Appeals was insufficient, because it failed to assess whether not returning the goods by the buyer could have been treated as taking delivery under Article 52. In particular, the Court of Appeals did not examine to what extent the Circuit Court's failure to hear a witness, who was to testify on crucial issues of the unsolicited goods, and the lack of their return by the buyer, could have affected the outcome of the case. For that reason, the judgment of the Court of Appeals was reversed and the case was remanded for further consideration.

Case 1304: CISG 8; 9; 53; 58; 58(3)
Poland: Supreme Court
V CSK 261/08
Y. I. & T. CO v. Przedsiębiorstwo Przemysłu Chłodniczego F. S.A.
28 November 2008
Original in Polish

Abstract prepared by Maciej Zachariasiewicz, National Correspondent

The Polish defendant, entered into business negotiations with a Chinese company aiming at a contract for the sale of machines to produce "dumplings". What eventually came out of this business relationship was however a contract for materials such as umbrellas, pens and wastebaskets that the Polish party ordered from the Chinese seller. The details of the contract were principally contained in a pro forma invoice of 4 May 2003, including a FOB clause determining city N. in China as the place of delivery. After the goods were shipped to Poland, it turned out that all the umbrellas were defective. The representative of the seller, during its visit to Poland, acknowledged this and promised to replace the goods. Additionally, it offered reduced prices for another shipment of materials next year. The parties agreed that the shipment would be delivered to Poland, since the representatives of the Polish party declared they did not want to travel to China to carry out the inspection. E-mail negotiations followed in which the parties discussed various options. Eventually, in the pro forma invoice of 17 March 2004, the Chinese seller indicated city N. in China as the place of loading and city W. in Poland as the place of destination. The terms of payment were also established, with a 50 per cent of the price to be paid after the inspection of the goods. The pro forma invoice also carried a FOB (city N.) clause.

After negotiations between the parties as to the time when the payment should be made (i.e. when the goods were dispatched from China or delivered to Poland), the materials eventually arrived to city H. in Europe. Because of the insufficient quality of the umbrellas, the buyer refused to take delivery and to pay part of the price. Unable to sell the goods in Europe, the Chinese seller ordered them to be shipped back to China.

The seller sued before a Polish court, requesting the remaining part of the price and the damages for the costs incurred as a result of the goods being stored in city H. and for the cost of shipping them back to China. The dispute centred around a question whether the parties agreed on the place of delivery in city W. (Poland) or N. (China), and whether the payment depended upon the inspection carried out by the buyer. Applying Article 8 CISG in order to reconstruct the true intent of the parties, the court of first instance (Circuit Court) compared the pro forma invoices of the contract in question (17 March 2004) with the invoice of the previous parties' agreement (4 May 2003), taking also all other circumstances into account. It concluded that the parties consciously intended to depart from the previous terms and to determine city W. in Poland as the place of delivery, while the FOB (city N.) clause was found to be irrelevant. Moreover, the Circuit Court underlined that the FOB clause does not regulate the time of payment of the price, and so its applicability in the case at hand could not have changed the outcome of the dispute anyhow. In accordance with Article 58 CISG, the payment of the price depends primarily on the parties' agreement, i.e. in this case the price was to be paid after the inspection of the goods in Poland. Since the inspection in city H. revealed defects in

the goods and no inspection was ever carried out in Poland, the buyer was not obliged to pay the price, as provided for in Article 58(3) CISG. This also made the claim for damages unjustified.

The judgment was reversed by the Court of Appeals, which assessed all the circumstances concerning the conclusion of the contract, taking into account Articles 8 and 9 CISG, and found the pro forma invoice of 4 May 2003 as inadmissible evidence. The Court held that in the new contract the FOB clause had been agreed upon by the parties and that it prevailed over other arrangements. This in turn meant that the inspection of goods was supposed to be carried out in China, before the goods were shipped. In light of Article 53 CISG, the payment of the price thus became due. The compensation was however not awarded as unsubstantiated.

The Supreme Court reversed the decision of the Court of Appeals on procedural grounds. In particular, it held that the Court of Appeals wrongly rejected the pro forma invoice of 4 May 2003 as inadmissible evidence. Since this was crucial in order to establish the content of the parties' agreement, the case was remanded to the Court of Appeals for further consideration of that document. The Supreme Court also observed that while under Article 9 CISG the parties are free to incorporate Incoterms clauses into their agreement, they are also free to modify these terms in their contract, both expressly and tacitly. The court further underlined that the guiding principles for the interpretation of the parties' agreement are contained in Article 8 CISG.

Case 1305: CISG 6; 7; 49(1)(b); 81(2); 84(1)
Poland: Warsaw Court of Appeals
I ACa 1258/07
20 November 2008
Original in Polish

Abstract prepared by Maciej Zachariasiewicz, National Correspondent

A Polish seller and a Ukrainian buyer concluded a contract for the sale of a Mercedes Actros truck. The contract contained a clause according to which "it was valid until 8 August 2006", which stood 90 days after its conclusion. The seller failed to deliver and refused to return the price paid by the Ukrainian party, who sued before a Polish court.

The court of first instance (District Court) dismissed the claim as premature. It found that the buyer had not set an additional period of time as required by Article 49(1)(b) CISG and had never declared the contract avoided. The court concluded that the parties were still bound by the contract and that the buyer could not yet request the reimbursement of the price.

The Court of Appeals reversed the decision and ordered the seller to reimburse the price. It found that Article 49(1)(b) cannot be relied upon in the case at hand because of the express clause in the contract providing for its termination within 90 days from its conclusion. The court reasoned that the parties were entitled under Article 6 CISG to shape the contract as they saw fit, which inter alia allowed them to introduce a provision for an automatic termination of the contract within a certain period of time. In the opinion of the Court of Appeals, the lower court wrongly assumed that the "90 days validity" clause had no meaning. Conversely, it found

that the clause was dictated by the Ukrainian customs regulations, which require to complete any international business transaction within 90 days from the conclusion of the contract and which provide sanctions for violating that rule. Thus, the parties, having been aware of the said regulation at the time of the conclusion of the contract, consciously established a period, after expiry of which the contract was to come to an end.

The Court of Appeals further stated that the Convention does not expressly govern the consequences of the termination of a contract as a result of the lapse of contractually established time limit. However, in light of Article 7 CISG, which calls for the application of the general principles on which the Convention is based, the rules governing the effects of the avoidance of contract must be considered. More specifically, the issue is regulated by Article 81(2) CISG which provides that a party who has performed the contract may claim restitution of whatever it has paid under the contract to the other party. Consequently, the Court ordered the Polish seller to reimburse the full price to the Ukrainian buyer and to pay the interest from the date on which the price was paid, as required by Article 84(1) CISG.

Case 1306: CISG 74; 75; 76; 78
Poland: Supreme Court
V CSK 63/08
T.K.M.E. GmbH (German buyer) v. P.K. S.A. (Polish seller)
9 October 2008
Original in Polish
Published in Polish: www.sn.pl

Abstract prepared by Maciej Zachariasiewicz, National Correspondent

Note that the dispute at hand, after being remanded to the lower courts for further consideration, later returned to the Supreme Court and was subject to its decision of 8 February 2012 (case no. V CSK 91/11; CLOUT abstract no. 1302).

The parties concluded a contract for the sale of coke fuel in December 2003. In the second quarter of 2004 the prices in the international market for coke fuel doubled, particularly as a result of high demand from China. The Polish seller, arguing that such a dramatic change of prices alters the contractual arrangement between the parties, refused to deliver the remaining part of coke fuel for the price agreed upon in the contract. The parties attempted negotiations but they did not come to an agreement. Consequently, the German buyer avoided the contract with respect to the part of the undelivered goods and later sued for the damages resulting from the breach of contract, mostly consisting of the reimbursement for the value of the undelivered coke fuel as of the day when the notice of avoidance was made.

The court of first instance dismissed the claim, pointing out that the German buyer unduly deferred the notice of contract's avoidance while the prices for coke fuel were rapidly going up, which was speculative and in violation of the duty of good faith. The Court of Appeals, disagreeing, reversed the decision. The seller filed an appeal to the Supreme Court.

The Supreme Court had to deal with various legal issues that were contentious between the parties. First, it compared the calculation of damages under Article 75 and 76 CISG. The judges explained that while the former is based on the price of the

actual substitute transaction (a "concrete" method), the latter refers to the current price of the goods that were not delivered (an "abstract" method). Since Article 76 is relevant in the case at hand, the Court underlined that it is up to the claimant to establish the current price of the goods. This requires showing a general price for the goods charged in the relevant market. Providing examples of individual transactions is not enough.

Second, the Supreme Court underlined that under Article 74 the damages for the breach of contract are to be limited in light of the foreseeability rule, whether the concrete or abstract method of calculation applies. In the present case the foreseeability referred to the changes in prices of coke fuel on the international market. In that respect, the Supreme Court reprimanded the lower court for not calling an expert opinion, who would assess the foreseeability of the price development.

Third, the Supreme Court rejected the defendant's argument that the interest can only be counted as from the moment when the compensation is established by court decision, since before that date there is no concrete amount from which the interest could arise. The court found that according to express wording of Article 78, the party is entitled to interest on any sum that is in arrears (and not just the price). This includes damages.

Fourth, the Court discussed the issue of the law applicable to interest. It observed that although an obligation to pay the interest results from Article 78 CISG, the Convention does not set the rate of interest. Rejecting other possibilities (such as attempts to create a uniform rule) the Court invoked case law from other European countries (such as Germany, Netherlands and France) and concluded that the rate of interest should be established in conformity with the law applicable by virtue of the rules of private international law of the forum. In accordance with Article 27 § 1 of the old Polish Private International Law Act (1965) (then still in force), which determined the law applicable to the contract, Polish law, as the law of the place of business of the seller, was to be applied. This solution was contested by the defendant who argued that it was more appropriate to rely on the law that governs the currency (Euro) in which the contract payments were to be made (*lex valutae*). Such a proposition amounted to an effective *depeçage*. After careful consideration it was rejected by the Court, which observed that the differences in rates of interests between the laws in question (Polish and German) were not material and thus could not result in a significant imbalance in favour of one of the parties. Consequently, the Court ruled that the Polish Civil Code provision that governs rates of interest can be applied to both Polish and foreign currency.

Since the Court of Appeals made important errors in its decision, its judgment was reversed and the case was remanded for further consideration.

Case 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 1307: CISG 1(1)(a); 6; 7(2); 50; 78; Limitation Convention (amended text) 3(1)(a); 3(1)(b)
Poland: Supreme Court
I CSK 105/08
L.M. v. Grażyna S.
17 October 2008
Original in Polish
Published in Polish: www.sn.pl

Abstract prepared by Maciej Zachariasiewicz, National Correspondent

The Italian seller, the applicant, delivered fabric to be used in the production of clothing to the Polish buyer. The buyer, alleging that the goods were not of the quality required by the contract paid only one fourth of the price. The seller sued in Poland for the remaining part. Both the District Court at first instance and the Court of Appeals found that the allegations of the lack of conformity were not proved and thus entered in a judgment for the plaintiff.

The Polish buyer brought an appeal to the Supreme Court asserting numerous breaches of the substantive and procedural law. All but one were rejected by the Supreme Court, which extensively discussed the legal issues arising in the case at hand.

At the outset, the court explained that since both parties had their place of business in CISG Contracting States (Italy and Poland), the Convention applies by virtue of Article 1(1)(a). The judges acknowledged the possibility of excluding the application of CISG, pursuant to Article 6. Such exclusion can be express or tacit, and may also occur after the conclusion of the contract. Since both parties were — at certain stages of the proceedings — putting forward arguments under Polish law, a question arose whether such concerted behaviour should be treated as a choice of Polish domestic law and an exclusion of the CISG. The court first underlined that circumstances such as: filing a suit before a Polish court, invoking Polish law in the pleadings, and not contesting the other party's reliance on a given law, are not a sufficient proof of a tacit choice of Polish law. Circumstances of such kind do not indicate an intention to submit the contract to a particular governing law. They rather constitute an expression of the parties' legal representatives, who, however, had no authority to choose the applicable law on behalf of the parties. The court then argued that even if one assumed the choice of Polish law, this would not automatically result in an exclusion of the CISG under Article 6. Referring to case law from other countries, the Supreme Court further explained that unlike the choice of law of a non-contracting state which could indicate an intention to exclude the CISG, the choice of the law of a contracting state cannot amount to such an exclusion. Consequently, the Court found that the dispute was governed by the CISG and as to the matters not regulated therein — by the Italian law, being the law of the seller. The latter conclusion was drawn from article 27§ 1 point 1 of the old

Polish Private International Law Act of 1965 (then still in force),[1] which with respect to contracts of sale called for application of the law of the seller's place of business.

The Court also discussed the issue of the law applicable to interest. It observed that although an obligation to pay interest on the payment in arrears results from Article 78 CISG, the Convention does not set the rate of interest. It follows from Article 7(2) CISG that the rate of interest, being an "internal gap" should be established in conformity with the law applicable by virtue of the rules of private international law of the forum, since there are no general principles in that regard. In the case at hand this meant that the rate of interest is to be determined under Italian law.

Another contentious issue was the length of the limitation period. The Court first clarified that the UN Convention on the Limitation Period in the International Sale of Goods of 1974 cannot apply, neither under Article 3(1)(a), nor under Article 3(1)(b), since Italy is not a party to it (although Poland is). Applying Polish conflict-of-law rules (and in particular article 13 of the old 1965 Act), the Supreme Court found that the limitation period of the claims sought in the dispute is governed by Italian law. The Court held that under article 2946 of the Italian civil code, the limitation period applicable to claims for the price under contract of sale is 10 years.

The defendant eventually prevailed for procedural reasons. When the Polish buyer raised the defines of the low quality of the fabric before the lower courts and requested that the price is decreased under Article 50 CISG, the court appointed an independent expert to assess the quality of the goods. The expert, however, failed to provide any meaningful opinion. Still the lower courts felt satisfied. The Supreme Court believed that in such a case, the courts should have called ex officio for a second expert to give an additional opinion. Consequently, the court remanded the case to the lower courts so that they could correct that error.

[1] The Act has been replaced by the new Act of 2011.

Cases relating to the UNCITRAL Model Law on Electronic Signatures (MLES)

Case 1308: MLES 6
France: Nancy Court of Appeal, Decision No. 442/12
Company CB, successor in interest to Company SPP, v. W.M.
14 February 2013
Original in French
Published (partially) in French: *La semaine juridique*, general edition, No. 18, 29 April 2013, p. 867.

Comments in French: Eric A. Caprioli, "*Dématérialisation du contrat de crédit à la consommation*" (Dematerialization of a consumer credit contract), *Communication commerce électronique*, No. 43, April 2013, pp. 43-45; Eric A. Caprioli, "*Première décision sur la preuve et la signature électronique d'un contrat de crédit à la consommation*" (The first decision on proof and the electronic signature of a consumer credit contract), *La semaine juridique*, general edition, No. 18, 29 April 2013, pp. 866-9; Isabelle Renard, "*E-commerce: une bonne et une mauvaise nouvelle pour la signature électronique des contrats B to C*" (E-commerce: good and bad news for electronic signatures accompanying business-to-customer contracts), *Expertises*, No. 378, March 2013, pp. 103-104.

The case concerns the admissibility of a credit contract signed with an electronic signature as evidence of proof of transaction.

In this instance, the creditor granted the debtor revolving credit of a specified quantity for a specified period on 23 September 1996. The total credit was increased by three successive supplementary agreements, the first two accompanied by a handwritten signature and the last, on 4 September 2008, by an electronic signature. The loan was to be repaid in monthly instalments. When the borrower stopped paying the instalments from 5 April 2009, the lender instituted legal proceedings on 21 January 2011 to recover the debt.

The judge of the court of first instance found that the electronic signature was not valid and declared the proceedings barred. In the judge's view, the evidence of proof of transaction presented by the creditor was "a simple printed document, without any guarantee of authenticity or explanation of the security offered", rendering the electronic signature insufficiently reliable to consider a contract concluded. Consequently, the judge ruled that the last supplementary agreement "had not been signed" by the borrower. Accordingly, the judge cited the two-year limitation period, prescribed under article L.311-52 of the Consumer Code, from 1 March 2006, the date on which the second supplementary agreement was made. Given that two years had passed before 21 January 2011, when legal proceedings were instituted, the judge declared the proceedings barred. The creditor lodged an appeal against this decision.

The Court of Appeal set aside the decision of the court of first instance, ruling that the electronic signature had probative value. The Court came to that conclusion recalling that, pursuant to article 1316-4 of the Civil Code and Decree No. 2001-272 of 30 March 2001, an electronic signature "is a reliable form of identification that guarantees its connection to the act that it accompanies. When an electronic signature is created, the identity of the signatory assured and the integrity of the act guaranteed, it shall be presumed reliable unless proved otherwise". By confirming

that the number of the supplementary agreement was included in the electronic document proving the transaction, the Court established the link between that document, which contained the borrower's electronic signature, and the third supplementary agreement of 4 September 2008. As there was no contradictory evidence, the Court decided that the signature should be presumed reliable and it ruled that the supplementary agreement signed with the electronic signature was valid. The proceedings were not barred and the Court ordered the borrower to repay the loan with interest.