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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 1674: CISG 1(1); 7(2); 39; 50; 78
Croatia: High Commercial Court of Croatia
P-934/05
P.HU.P. DAREK CO v. ORKA STUDIO D.O.O. ZAGREB
24 February 2009
Original in Croatian

A Polish corporation filed a claim in the Commercial Court of Zagreb against a Croatian buyer for the payment of goods delivered by it to the defendant. The Commercial Court found that the buyer had failed to notify the seller in a timely manner of the lack of conformity of the goods and subsequently ordered the buyer to pay the due amounts. The buyer appealed the decision, stating, among other things, that the parties' relation was not based on the contract for the sale of goods, but rather on a commission agreement.

On appeal, however, the High Commercial Court of Croatia decided that the parties had concluded a sales contract because the buyer failed to submit any relevant proof to the contrary; the delivery of the goods by the seller was undisputed by both parties, which provided the plaintiff with adequate proof of the obligation of the defendant.

The Court upheld the lower court conclusion that the buyer-defendant had failed to notify, in a timely manner, the seller-plaintiff about the lack of conformity of the goods. The Court, however, found that the lower Court erred in applying the proper substantive law, since, due to the international nature of the party conflict, the CISG was applicable. The Croatian Obligations Act, the domestic counterpart to the CISG, is to be applied only to matters that are outside the scope of the Convention, or that could not be settled in conformity with the general principles on which the Convention was based (Article 7(2) CISG). The Court added that the provisions of the Convention are to be applied in cases of international sale of goods, except when the parties expressly excluded its application or when they agreed upon the application of the domestic law of one of the parties.

The Court noted that the Convention would be applicable in any event in the case at hand, since by virtue of Article 1(1) CISG, the Convention applies to international sales contracts not only when the parties have their place of business in two different Contracting States, but also when the rules of private international law lead to the application of the law of a Contracting State. Therefore, since in the case at hand the rules of private international law pointed to the application of the law of Poland (the place of business of the seller), the provisions of the CISG were applicable.

The Court further determined that in accordance with Article 39 CISG, the buyer loses its right to rely on a lack of conformity of the goods if it does not give notice to the seller specifying the nature of a lack of conformity within a reasonable time after it has discovered or ought to have discovered it. Under that obligation, the buyer should have notified the seller in writing, describing the defects of the goods, and the variation in their quality. Here, however, the buyer did not provide timely notification to the seller and even if it had done so, it would then only have been entitled to reduce the price in accordance with Article 50 CISG. As a result of this failure, the buyer had an obligation to pay the seller for the delivered goods and was also ordered to pay interest on the obligation starting from the time the payment of the goods was due.

Case 1675: CISG 1(1); 7(2); 23; 53; [74]; 78
Croatia: High Commercial Court of Croatia
Pz-1988/05-3
EURAMIK s.r.l. v. STUDIO GRADNJA — TRGOVINA D.O.O.
4 March 2008
Original in Croatian

The Italian seller commenced an action against the Croatian buyer in the Commercial Court of Zagreb for the payment of delivered goods. The Commercial Court found in favour of the seller and ordered the buyer to pay the due amounts, upon which the buyer appealed the decision to the High Commercial Court of Croatia.

On appeal, the High Commercial Court noted that the lower court had erred in its application of substantive law; it had applied the Croatian Obligations Act rather than the CISG, but the Court reasoned that such an error did not affect the validity of the decision. The case dealt with a dispute of international nature and since the disputing parties had not made an explicit choice of applicable law, according to the Conflict of Laws Act of Croatia, the CISG was applicable. It was ensured that Italy's substantive law ought to be applied only to matters that were outside the scope of the Convention or that could not be settled in conformity with the general principles on which the Convention was based (Article 7(2) CISG). The Court subsequently noted that the prerequisites for the application of Article 1(1) CISG were met, as the parties had their place of business in two different contracting States to the Convention, and that the CISG would be the applicable law likewise by virtue of the rules of private international law, which pointed to the application of Italian law (a contracting State of the Convention).

Examining the long lasting business relationship between the parties, the Court observed that, in accordance with Article 7(2) CISG, the buyer was familiar with the prices and samples of the goods at the time of the order and that it had made the order for goods in writing. Hence, the Court decided that the parties had concluded a valid contract (pursuant to Article 23 CISG), had agreed upon the price of the goods, and given that the seller had delivered the goods to the buyer, the buyer was required to fulfil its obligations to pay the price in accordance with Article 53 CISG.

Furthermore, the Court upheld the decision of the lower Court to grant the seller's right to interest on all sums in arrears owed by the buyer (Article 78 CISG). In this respect, the Court emphasized that the party that is entitled to interest also retains any claim for damages under Article 74 CISG. Since the Convention did not specify the interest rate to be applied, the Court stated that Italian law was the applicable law on this matter as per Article 7(2) CISG.

Case 1676: CISG 1(1); 7(2); 11; [53; 58; 59; 61; 62]; 78
Mexico: Fourth Civil Court of Tijuana, Baja California
Case number: 1484/2009
AAA (United States of America) v. BBB and CCC (Mexico)
3 September 2010
Original in Spanish
Published at: http://www.cisgspanish.com/seccion/jurisprudencia/mexico/

Abstract prepared by Pilar Perales Viscasillas[1]

The dispute related to the failure by the buyers to pay the price resulting from a contract for the international sale of metals between a seller in the United States and Mexican buyers.

The case mainly revolved around proving the existence of the contract, which the court found to be proven on the basis of article 11 of the Convention on Contracts

[1] At the time the abstract was submitted to the UNCITRAL Secretariat, Ms. Viscasillas was the CLOUT National Correspondent for Spain.

for the International Sale of Goods (CISG) and the existence of invoices. The court referred to the importance of the international and uniform interpretation of the Convention, indicating that the UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods was an instrument that the judge was "obliged to take into account, on the grounds of the provisions of article 7 of the Convention" and the "uniformity that can be achieved only by considering the decisions taken by courts in other countries".

The judge therefore found that the existence of the contract for the international sale of metals was proven and, on the basis of various provisions of the Convention (arts. 30, 31(b), 53, 58, 59, 61 and 62), ordered the buyers to pay the price they owed plus interest paid at the legal rate (art. 78 CISG), calculated on the basis of the applicable interest rate in Mexico given that it was a matter not expressly settled in the Convention (art. 7(2) CISG).

Case 1677: CISG 39; 49(1); 49(2)(b)(i); 52(2); 53; 82(1); 82(2)
Poland: Court of Appeals in Poznan
I ACa 1041/15
G. K., P. K., v. R. V
3 March 2016
Original in Polish
Published in Polish: LEX no 2012920

Abstract prepared by Natalia Otlinger and Maciej Zachariasiewicz,
National Correspondent

Since 2010, the Bulgarian buyer has purchased confectionery products from the Polish seller. The parties never concluded a written contract and their relation was based on the following scheme: the Bulgarian buyer would contact the seller via email or telephone and propose the quantity, kind and price of the goods it wished to order. The seller would then prepare the specified list of goods available with their actual prices. After receiving the list, the buyer would confirm or modify the order and arrange the delivery accordingly. Additionally, the parties were in agreement that each delivered product should have an expiration date not shorter than six months.

In June 2013, the seller delivered a batch of goods to the buyer, which took their delivery. In an email, a week later, the buyer gave the seller notice of the non-conformity of parts of those goods for the following reasons: first, some of the products had an expiration date shorter than six months; and second, some of the products delivered were not listed on the confirmed order (i.e. 1,500 bars of a cream-coffee flavour chocolates). After giving notice, however, the buyer did not return the goods to the seller and continued to offer them to its clients. The buyer refused to pay the price for the allegedly non-conforming goods and tried to negotiate a price reduction. Around November 2013 the negotiations ended unsuccessfully. The buyer, however, never returned any goods and initially declared its intention to pay the remaining part of the price requesting an extended payment deadline. At the end of 2013, the products' expiration date passed and they were recycled in accordance with Bulgarian food laws. The Polish seller sued the buyer for the unpaid part of the price in a Polish court at which point (July 2014) the Bulgarian buyer declared the contract avoided in relation to the unpaid products.

The court of the first instance (District Court) established that according to Article 82(1) CISG the buyer lost its right to declare the contract avoided since the goods were consumed and the buyer could not make restitution of the goods substantially in the condition in which it had received them. Therefore, the buyer was ordered to pay for the remaining part of the goods.

The Court of Appeals disagreed. It found that the Court of first instance wrongly assumed that Article 82(1) CISG applied. The Court noted that the impossibility of restitution of the goods was not caused by any buyer's act or omission. Rather,

consumption of the products was mandatory under Bulgarian food regulations. Therefore, in line with the exceptions provided for in Article 82(2) CISG, Article 82(1) CISG could not be applied in the case at hand.

In the Court of Appeals's view, the key point of the case was lack of proper avoidance of the contract. The buyer complied with Article 39 CISG by sending notice of lack of conformity in its email of June 2013. However, this notice itself could not be considered as a declaration of avoidance since the buyer continued to negotiate a price reduction and to offer the products to its customers. The Court of Appeal found that under Article 49(1) and 49 (2)(b)(i) CISG the buyer should have declared the contract avoided without delay, which in the case at hand meant immediately after the failure of the negotiations between the parties especially considering the non-durable character of the confectionery products. The declaration of avoidance of the contract made over one year after the notice, in July 2014, cannot be considered as made within a reasonable time. The fact that the goods with an expiration date shorter than six months were not in conformity with the contract was of no significance, since the contract's avoidance was in any event belated. The buyer was thus obliged to pay the full contract price under Article 53 CISG.

With regard to those goods that according to the buyer were not ordered (i.e. cream-coffee flavour chocolates), the Court of Appeals quoted the second sentence of Article 52(2) CISG. Accordingly, since the buyer had taken delivery of the excess quantity of the goods, it was obliged to pay for it at the contractual price. The Court further highlighted that the carrier arranged by the buyer received no instructions as to the specification of the ordered goods. The carrier was only informed of the number of the pallets that were supposed to be delivered. The buyer, being a professional trader, should have precisely described to the carrier the ordered goods.

The Court of Appeals thus dismissed the buyer's appeal and ordered the buyer to pay for the additional goods delivered.

Case 1678: CISG [30]; 35(2); 38; 38(1); 38(2); 39(1); [46; 49; 50; 53; 70; 71; 72; 73; 74; 75; 76]
Poland: Court of Appeals in Łódź
F.P.S.P.A. v. H. sp. z o. o.
17 February 2016
Original in Polish
Published in Polish: *LEX Nb 2005584*

Abstract prepared by Karolina Scheller and Maciej Zachariasiewicz,
National Correspondent

The Polish buyer (the defendant) and the Italian seller (the plaintiff) concluded a contract for sale of meat seasonings. The goods were prepared for the delivery at the plaintiff's premises in accordance with the parties' arrangements. The Italian seller possessed all the quality certificates as regards the seasonings. The Polish buyer took over the seasonings at the Italian seller's premises and did not raise any concerns regarding the quality or amount of the seasonings. Several months after the delivery, the buyer commenced the production process — the purchased seasonings were mixed with meat in order to produce hamburgers. Even though the buyer used the same quantity of seasonings as in hamburgers made with seasonings obtained from another supplier, the buyer's customers complained about the flavour of the final product. As a result, the buyer decided to return the remaining seasonings to the Italian seller and refused to pay the outstanding price. The seller refused to accept the return of the seasonings. It argued that the goods possessed all the required quality certificates. After several reminders, the seller sued the buyer for the unpaid part of the contract price.

The Court of first instance stated that since the parties have their place of business in different countries, the contract shall be governed by the CISG. The Court

underlined that the CISG takes priority over the national provisions by virtue of Article 91 of the Polish Constitution. Further, since the parties did not choose the applicable law to the contract, the court concluded that further to Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), a contract for the sale of goods shall be governed by the law of the country where the seller has its place of business, i.e. Italian law in the case at hand. On substance, the Court concluded that the seller complied with all its obligations as set forth by Article 30 CISG. Therefore, the buyer was obliged to pay the price of the goods as per Article 53 CISG. The Court also mentioned that this result is consistent with Article 1498 of the Italian Civil Code.

The defendant argued that it is not obliged to pay the price because of the alleged non-conformity of the goods. The Court found the buyer's defence without merit and underlined that the buyer's customers not enjoying the flavour of the hamburgers does not equal to the lack of conformity of the seasonings. The decisive criteria is not the taste of the customers but the objective features of the goods, which were not questioned by the buyer in the course of the transaction, in particularly after receiving the seasonings. The seller-plaintiff enclosed all relevant quality certificates and the quality of seasonings was also not contested by any expert evidence. The Court noted that the defendant, being a professional trader, should have examined the goods.

The Court further found that the defendant gave notice of the lack of conformity of the goods a few months after the goods were delivered. On this aspect, the reasoning of the Court was twofold, based both on Italian law and CISG. The Court noted that according to Article 1495 of the Italian Civil Code the buyer should have notified the seller of the non-conformity within 8 days from the moment it detected defects in the goods. The duty to examine the goods stems also from Articles 38(1) and (2) CISG according to which the buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances. If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination. The buyer must also give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered or it ought to have discovered it (Article 39(1) CISG) — otherwise it loses its right to raise the lack of conformity of the goods, to require performance (Article 46 CISG), to declare the contract avoided (Article 49 CISG), to reduce the price (Article 50 CISG) and to claim damages (Articles 74-76 CISG), and above all, it is obliged to pay the price of the goods even if the goods are useless, constitute *aliud* or were provided in the insufficient quantity. The Court concluded that since the buyer received the goods and did not give any notice of lack of conformity within a reasonable period of time, it could no longer allege that the contract was not properly performed.

The defendant appealed. It argued, inter alia, that the court of first instance erred when it concluded that the defendant did not examine the quality of the purchased goods as per Article 38 CISG and did not raise objections on their quality within reasonable time. The buyer could only discover the non-conformity and raise objections only after commencing the production of the hamburgers. The Court of Appeals found the defendant's arguments unpersuasive. It indicated that the defendant failed to meet the burden of proof as to the non-conformity and reiterated that the defendant did not comply with the obligation to examine the goods in due time.

The Court reaffirmed the reasoning of the lower court that if the customers do not enjoy the flavour of the final products, this does not mean that the goods were non-conforming (Article 35(2) CISG). The Court also noted that the seasonings were only one of the ingredients used in the production process, with the other ingredients coming from different sources, and that other factors might have influenced the customers not enjoying the flavour of the hamburgers.

Furthermore, the Court rejected the defendant's argument that it could only examine the goods once it commenced producing the hamburgers. According to the Court, the defendant should have examined the goods before production consistently with article 38(2) CISG which does not allow to arbitrarily postpone the examination, thus dismissing the appeal of the defendant.

Case relating to the Convention on the Limitation Period in the International Sale of Goods (1980, amended text) (Limitation Convention)

Case 1679: Limitation Convention (1980, amended text) 7; [14; 15]; 17(1); 17(2)
Poland: Supreme Court
V CSK 240/15
C.M. v. B.
17 December 2015
Original in Polish
Published in Polish: *LEX nr 2004219*

Abstract prepared by Karolina Scheller and Maciej Zachariasiewicz,
National Correspondent

The plaintiff brought action against the defendant before Polish courts for the payment of outstanding sums stemming from a contractual relationship between the defendant and a third party, which had later on assigned its rights to the plaintiff. Under that contractual relationship, for a number of years the defendant used to buy wooden products from the third party. In response to the claim brought by the plaintiff, the defendant argued that any outstanding payment was already made and it also contended that the limitation period had expired and for that reason the claim was time-barred.

The District Court found that the defendant settled solely part of the amount due and it was still obliged to pay certain sums. The legal basis for the decision were the provisions of the CISG and of the Polish Civil Code for those matters on which the CISG is silent (Polish law being applicable under Article 4(1) of the Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)). The District Court also applied the Limitation Convention and found that the limitation period established under Article 17(2) Limitation Convention was not yet expired.

The Court of Appeals rejected the decision of the lower court, and the plaintiff brought an appeal to the Supreme Court. The Supreme Court stated that the CISG and the Limitation Convention create a uniform legal system that govern cross-border sales all over the world. Therefore, interpretation and application of those Conventions through recourse to domestic legal institutions and methods of interpretation proper of the domestic legal system can only be done in so far as it is allowed by the Conventions. With respect to the Limitation Convention, the legal basis for its interpretation is to be found in Article 7, according to which "regard shall be had to" its international character and the need to promote its uniform application. The provisions of the Limitation Convention should thus be interpreted "autonomously" (i.e. without recourse to national law), although, of note, the result of such autonomous interpretation could be similar to the application of domestic law. The Court also noted that the interpretation of the Convention should not be based on the so called linguistic methods but that priority should instead be given to the functional methods. This gives due regard to the purpose of the provisions of the Convention and the promotion of its uniform application. The Court further pointed out that the Limitation Convention constitutes a lex specialis in respect to the provisions of the Polish Civil Code (although there is no legal equivalent of Article 17 Limitation Convention in the Polish Civil Code).

Reasoning on the application of Article 17(2) of the Convention, the Court noted that the additional period of one year granted to the creditor to file a claim, under the circumstances established by that article, runs from the date when "the legal

proceedings ended". The Court thus went on to discuss the meaning of "end of legal proceedings". The judges considered to what extent this concept should be interpreted autonomously and to what degree it is to be understood in light of the domestic procedural laws. One possibility noted by the Court is to establish a general and autonomous notion of the "end of legal proceedings" (as indicated by the principles of autonomous interpretation provided for in Article 7 of the Convention). Such "end of legal proceedings" would then be deemed to occur at the moment when the last activity of the decision-making body overseeing the proceedings is carried out — after that time no other activity directly related to the proceedings in question may be undertaken. The Court explained, however, that since the parties may submit the disputes to arbitration (Article 14 Limitation Convention) or to other legal proceedings (Article 15 Limitation Convention) discerning one uniform point in time of the "end of the proceeding" may not be possible. The issue must thus be decided in light of the domestic procedural law.

In this respect, the Court also discussed the question of which domestic procedural law should govern the meaning of "end of proceedings". It thus observed that the term "end of the proceedings" should not be understood solely in light of the lex fori (the law of the country where the new proceedings are instituted). Rather, the Court stated that proper regard should be given to the procedural provisions of the country (if different) in which the original proceedings that ended without a binding decision on the merits took place (Article 17(1)). In the circumstances of the case at hand, such provisions were those of Polish law and according to Polish law, the end of the proceedings for the purposes of Article 17(2) Limitation Convention is when the decision of the court is final. The Supreme Court stated that this occurs only when the party can no longer lodge any recourse against the judicial decision. As long as legal actions (e.g., an appeal) can be brought against the decision, the decision cannot be considered final. Since in the case at hand, the one year period from the end of the proceedings had not yet expired, the claims were thus not time-barred. Therefore, the Supreme Court partly annulled the decision of the Court of Appeals and remanded for further consideration.

Case relating to the United Nations Convention on the Use of Electronic Communications in International Contracts (ECC)

Case 1680: ECC 10(2)(4)
Australia: Supreme Court of New South Wales
File Number: 2012/230241
Bauen Constructions Pty Ltd v. Sky General Services Pty Ltd & Anor
18 September 2012
Published in English: [2012] NSWSC 1123 at http://www.austlii.edu.au/

This case deals with the requirements for determination of the time of receipt of an electronic communication.

The plaintiff sought relief on various basis for two adjudication determinations, and further declaration that each of the adjudication determinations are to be qualified as void, or alternatively quashed. The defendant denied that the plaintiff is entitled to any of the reliefs sought.

Initially, the parties entered into a trade contract to carry out painting work. The defendant served a payment claim for the work that was completed approximately 15 months before, after which the plaintiff served a payment schedule for the withholding payments. On 25 May 2012 the defendant responded via its solicitors, claiming that the payment schedule was served out of time, and constituting a notice for the adjudication. The plaintiff served an adjudication response on 21 June 2012 to the nominating authority Adjudicate Today Pty Ltd (Adjudicate Today) and to the defendant. However, the adjudicator did not consider the adjudication response, based on the assumption that there had been no adjudication response. On 12 September 2012, it was discovered that the emails, including the adjudication response sent by the plaintiff on 21 June, had been received but withheld by the

spam filter of Adjudication Today. Consequently, the plaintiff claimed that it was denied natural justice due to the fact that adjudicator failed to consider its adjudication response.

The Court had to analyse if an adjudication response was lodged in the sense of Section 20 of the *Building and Construction Industry Security of Payment Act 1999*. The defendant claimed that such a term ought to be distinguished from the term "serve". The defendant further pointed on the dictionary meaning of the term "lodge" that needs to be seen in the light of "presenting, formally to proper authority", and claimed that the emails were not lodged, due to the fact that they were not accessed (opened) and read. Moreover, by referring to the case law interpretation, the defendant stressed that an email that was notified by the server to the recipient's mail box was "not received" until it was opened.

In turn, the plaintiff referred to the terms set in the NSW *Electronic Transactions Act 2000* section 13A, that corresponds to ECC Articles 10(2) and (4), and states that *the time of receipt of the electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee.* The Court found that this choice of words aptly described the position in the present case, adding that the email was clearly received, even though it was caught by the spam filter. Additionally, the Court noted that the words "capable of being retrieved" certainly do not require an email to be opened, or read. Adjudicate Today's spam filter caught an email, that was archived and accessible via its external IT consultant. Consequently, according to the Act when an email was sent and was capable of being retrieved, but had not been actually opened or read, it could be considered as being received by the addressee, and thus "lodged" on any view of that word. For that reason, the Court accepted the plaintiff's claim of being denied natural justice, and decided that both adjudications should be set aside.