

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)

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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.