

**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.