

**Case 1829: CISG 74; 75; 76; 79**

Poland: Appellate Court in Katowice

V ACa 204/12

*T.K.M.E. GmbH v. P.K. S.A.*

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The case concerned a dispute between a Polish coke fuel producer and seller and a German buyer. The dispute was already brought before the Polish Supreme Court (compare V CSK 63/08; CLOUT case No. 1306, V CSK 91/11; CLOUT case No. 1302). The factual background of the case is the same.

The parties concluded a contract for the sale of coke fuel in 2003. In 2004 the defendant (seller) refused to perform the contract because of a significant change in the market price. The claimant (buyer) declared the contract avoided with respect to its remaining instalments and sued for damages. The dispute reached the Appellate Court for the fourth time as the previous judgment was reversed by the Supreme Court.

The earlier judgment of the Supreme Court specified that the defendant is liable for foreseeable damages. The Appellate Court in the present case was tasked with the assessment of the quantum of damages taking into account their foreseeability. The Appellate Court appointed an expert to supplement the expert opinion given in earlier judgments on the extent to which a change in the market price could be foreseen.

The Appellate Court, taking into consideration the new expert opinion and the one given previously, recognized that a variety of global economic factors contributed to the unprecedented increase in the price of coke fuel.<sup>10</sup> However, the Appellate Court decided that the liability of the seller could not be exempted under article 79 CISG as the seller had the financial possibility to purchase the coke fuel for delivery to the buyer. The Appellate Court also noted that the parties had not agreed on a hardship clause in the contract or on the possibility to renegotiate the price of the goods in case of significant price change. It further indicated that price fluctuations are possible and should be taken into account in the contract.

The Appellate Court stated that the defendant was only in position to foresee a 20 per cent increase in price and that accordingly it should only be liable for

<sup>9</sup> For further details on this point, see the CLOUT abstract on the same case to be published as a decision applying the UNCITRAL Model Arbitration Law.

<sup>10</sup> In the relevant time period, the price of the coke fuel had increased by over 100 per cent.

20 per cent of the loss to the buyer. To determine the loss, the Appellate Court first calculated the difference between the price fixed in the contract and the market price at the time of avoidance in accordance with article 76 CISG. The Appellate Court then calculated 20 per cent of that amount to determine the foreseeable damage that the defendant was ordered to compensate.