

Case 1591: CISG 74; 75; 77

Poland: Supreme Court

III CSK 103/05

B. (German Buyer) v. Cementownia N. (Polish seller)

27 January 2006

Original in Polish

Published in Polish: www.sn.pl

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The parties concluded a long-term framework contract for the sale of metallurgical sand. In the course of contract performance, however the Polish seller failed to fulfil its obligations.

Metallurgical sand supplied by the seller was a component essential for the German buyer roof tiles process production. The seller's failure to deliver all contracted sand resulted in serious difficulty for the buyer which had to return to its former, more expensive, technology of production, involving use of cement. In effect, the buyer suffered considerable economic harm and it eventually sued for damages plus interest.

The Court of first instance dismissed the claim on the grounds that the additional costs of production claimed by the buyer did not necessary correspond to damages. According to the Court, in the case at hand the damages suffered by the buyer could have consisted in loss of profit, regarding the sale of roof tiles produced with a more expensive technology. But the buyer did not prove the actual loss.

The Court of Appeals disagreed and partly revised the decision of the lower court awarding monetary compensation to the buyer. This was calculated by multiplying the tons of metallurgical sand that the seller should have supplied by the price difference of the material used for the production of the roof tiles. Pursuant to Article 74 CISG, the damages were partly granted and the remainder of the action was dismissed as unfounded. The Court of Appeals did not apply Article 75 CISG because the contract was not effectively avoided.

Both parties appealed to the Supreme Court, which mainly focused on the application of Articles 74 and 75 CISG.

According to the Supreme Court, in light of Article 75 CISG the question which should be assessed is whether a buyer who bought goods in replacement can recover the difference between the contract price and the price in the substitute transaction by claiming damages. The assessment is to be based on criteria of reasonable manner and reasonable time of purchase. Article 74 CISG, on the other hand, requires to prove damages for breach of contract suffered by the aggrieved party. Under this provision, a method for determining the amount of damages cannot directly be based on the price of the substitute transaction. The scope of responsibility is limited by the rule that such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, as a possible consequence of the breach of contract. The amount of damages should thus be determined with more objective criteria than the price of the substitute transaction determined by the aggrieved party. Additionally, the Supreme Court noted that in the case at hand, the buyer refers to the price effectively paid for the substitute transaction without proving that this was the market price.

The Supreme Court added that in cases of partial delivery, the loss suffered by the buyer as a result of the breach of contract, within the meaning of Article 74 CISG, can only refer to the need to purchase the amount of goods necessary to replace the non-delivered goods.

Moreover, the Court underlined that, contrary to the seller's allegations, the CISG provisions also apply to framework sale agreements, since in the course of contract performance the buyer must specify the amount of goods of each delivery.

As to the alleged violation of Article 77 CISG, the Court concluded that the buyer took measures to mitigate the loss, such as returning to the previously applied method of production.

Since the Court of Appeals erred in its decision, its judgment was partially reversed and the case was remanded for further consideration. The Supreme Court drew to the attention of the lower court that since the contract was partly executed, damages related to breach of contract should be determined in light of the amount of the metallurgical sand supplied by the seller under the contract. Particular attention should be also drawn to the question whether the seller may invoke the exemption of its liability for breach of contract.