

Case 553: CISG 8(2); 25; 35(2)(b); 46(2); 46(3)

Spain: Provincial Court of Barcelona, Sixteenth Division, 862/2003

Sociedade de Construções Aquino & Filho Lda. v. Fundició Benito 2000 S.L.

28 April 2004

Background: Ruling by Court of First Instance No. 2 of Vic, 14 July 2003

Full text: <http://www.uc3m.es/cisg/sespan31.htm>

Abstract prepared by María del Pilar Perales Viscasillas (National Correspondent)

The dispute concerned the sale of metal inspection covers for sewerage systems, for which a Portuguese company (the buyer) had concluded a contract with a Spanish company (the seller) in 1999 with the aim of fulfilling its commitments as a contractor for two public works projects in Portugal. The covers ordered were of the Transit and Delta models. The Portuguese company alleged that the product did not meet the specifications set out in the contract and that the covers supplied were faulty, and it therefore claimed reimbursement of part of the price already paid plus damages for the loss incurred through the removal of the unusable covers already installed and their entire replacement with new ones (replacement covers were purchased from third parties). The seller filed a counter-claim, denying breach of contract and seeking payment of the outstanding sum. The lower court ruled in favour of the seller. The buyer lodged an appeal.

The court of appeal held that the parties had agreed that the CISG should apply. Regarding breach of contract, it examined firstly the allegations of the buyer that the Delta covers failed to meet the resistance standards indicated in the seller's catalogue and that there were certain defects in the polyethylene seals of the covers. The court pointed out that a lack of conformity with the resistance standards indicated could not be concluded from the expert reports. However, the seller had admitted that there had been defects in the seals and offered to replace them free of charge, an offer which had been rejected by the buyer. The court considered that the seller had complied with the provisions of paragraphs (2) and (3) of article 46 CISG and it had not been proven that replacement was not viable.

As regards the Transit covers, the buyer alleged firstly that the product was highly unsuitable for the purpose for which the buyer had intended it, that purpose being known to the seller. The court rejected the buyer's claim, citing article 35(2)(b) of the Convention. Firstly, it pointed out that the fact that the seller had achieved a business quality accreditation (International Standard ISO 9001) did not mean that it was under any obligation to be familiar with the needs of the buyer. Secondly, it rejected the contention that the way in which the various models of covers were presented in the seller's catalogue could have misled the buyer, since the buyer was a qualified public works contractor. Therefore, the buyer could not have been unaware that the project under which the Transit covers were to be installed required type D400 covers with a diameter of 600 mm, which neither matched the specifications given for the Transit covers in the catalogue nor was evident from the prior negotiations between the parties. In fact, the court held, citing article 8(2) CISG, that the seller had not been informed of the requirements of the works for which the covers were intended and that, at the buyer's request that the covers bear the inscription "D400", the seller had replied that that would require the purchase of a different model, which had been confirmed following the conclusion of the contract, when the seller sent to the buyer a sample of the inscription, which did not incorporate what had been requested by the buyer.

Secondly, the buyer alleged that there were resistance deficiencies in the Transit covers. The court considered that allegation to be correct. The catalogue indicated a resistance of up to 40 tons, which according to experts allows tolerances of ± 3 . The seller's own resistance test carried out prior to delivery showed resistance indices of 25 to 35 tons, in spite of which the seller proceeded with the delivery. The court held that the seller had committed a fundamental breach (article 25 CISG).

However, since the buyer had also made an error in selecting the product (having ordered covers suitable for footways and verges, which it then installed on the carriageway of a road), the court found that the conduct of each of the contracting parties had contributed to the final outcome and it therefore reduced by 50 per cent the sum payable to the seller for the sale of the Transit covers.