

**Case 549: CISG 1(1)(a); 1(1)(b); 2; 3; 7(1); 7(2); 19; 33; 39(1); 40**

Spain: Provincial Court of Valencia, Sixth Division, 405/2003

Americana Juice Import Inc. v. Cherubino Valsangiacomo S.A.

7 June 2003

Background: Court of First Instance No. 16 of Valencia, 2 December 2002

Full text: <http://www.uc3m.es/cisg/sespan39.htm>

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The parties were in dispute over whether there had been a contractual breach in regard to a contract for the international sale of 1,500 tons of concentrated grape must and also over the sum payable as damages. In its ruling, the lower court ordered the buyer to pay the seller damages of approximately 17 million pesetas.

The buyer (appellant) claimed that the CISG applied. The court of appeal applied the Convention on the basis of article 1, paragraph (1)(a).

The court also made interesting observations relating to the interpretation of the Convention. Firstly, referring to paragraphs (1) and (2) of article 7, it drew attention to the need for uniform interpretation, a principle found in other conventions, which reflects a current trend in international trade law. Secondly, it referred to the relevance, in interpreting the Convention, of the commentary by the UNCITRAL Secretariat on the 1978 draft of the Convention, citing specifically the comments on article 6 of that draft. Thirdly, it referred to the importance of the legal principle that calls for an independent interpretation of the Convention vis-à-vis national law, for which purpose it is necessary to adopt a methodology different from that used in applying domestic law. Fourthly, the court pointed out that the only way in which to ensure uniformity in its application was to take into account what other courts in other countries had done when applying it in cases brought before them and to seek the expert opinion of legal writers in achieving such uniformity. The court referred specifically to the CLOUT system.

The court concluded this issue by stating that the CISG, precedents of other national or foreign courts, Spanish domestic law, contractual agreements, the claims of the parties and evidence presented would be the means by which the subject-matter of the dispute would be dealt with.

Turning to substantive issues, the sales contract contained an ex factory clause, which the court interpreted in the light of Incoterms 2000. The court also referred to the UNCITRAL recommendation regarding the use of Incoterms. The facts of the case showed that the buyer had failed to meet its obligation to collect the goods from the seller's establishment within the agreed period of time. The goods suffered significant loss of colour as a result of the delay; that delay was caused by problems experienced by the buyer in opening documentary credit, which was not done until the end of November 1997. The buyer claimed that it was entitled to collect the goods at any time between the end of October 1997 and February 1998. The court, however, pointed out that that period was not intended to benefit the buyer, such a contention not being provided for under article 33 or article 7 CISG (principle of good faith). The period for collection of the goods was closely linked to the nature of the goods, whose manufacture required the raw material to be available sufficiently in advance and entailed a complex process of preparation that was impossible to improvise. It was therefore unreasonable to argue that, in the absence of any express agreement, the matter should be left in the hands of the buyer, with the grave risk that such an arrangement represented for the seller. From the contractual documents the court concluded that the parties had agreed that the goods should be made available and delivered on a staggered basis between the end of October 1997 and February 1998.

Referring to the complaint of lack of conformity, the court concluded that the buyer had not lodged the complaint within a reasonable period. It alluded to CLOUT Cases 98 and 81 with a view to determining what constituted a reasonable period. In the case in question, in which there was an ex factory clause, it held that the buyer had not acted with due diligence, since it had not examined the goods—it only collected part of the total agreed quantity—until their arrival at their destination in the United States of America, which was particularly important in the case in question since grape must loses intensity of colour over time; also, the transportation had been inadequate. Citing CLOUT Case 251, the court ruled that the burden of proof was on the buyer.

Of those goods that had not been collected, the seller was able to sell only a part to third parties (resale). The profit gained through the resale had to be deducted from the damages in order to avoid unjust enrichment, since the amount of damages would have been increased by the lost profit on the goods that the buyer had failed to collect.