

Case 1128: CISG 33 (b); 34; 39 (1); 40; 44

Spain: Supreme Court

Previously heard by Valencia Provincial High Court, 7 June 2003

(available at <http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg/espan39.htm>, (CLOUT case No. 549))

9 December 2008

Complete text: www.uc3m.es/cisg/sespan76.htm, Aranzadi/Westlaw (2009/15)

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The buyer (of the United States of America) lodged an appeal before the Supreme Court against the judgement of the Valencia Provincial High Court of 7 June 2003 (CLOUT case No. 549), which had found in favour of the Spanish seller. The parties were in dispute over which of them had committed breach of contract. The buyer considered that the defect in the colour intensity of the concentrated red must purchased under the contract had occurred when the must was made, while the Spanish seller attributed the defect to the period of time that passed before the must was collected and the use of inadequate transportation, both of which were attributable to the actions of the buyer, which had delayed in taking delivery of the goods once they had been made available and had not transported them in an appropriate container to prevent colour deterioration.

Firstly, the Court considered the application of article 33 (b) of CISG, understanding that, once the goods had been made available, the buyer could choose when to collect them. According to the Court, the buyer, which was aware that must took seven to ten days to produce and that concentrated red must lost the intensity of its colour over time, had delayed in collecting the must and had not used adequate transportation (refrigerated drums instead of flexitanks), which had contributed to the colour deterioration. The Court also considered that the parties had agreed an “ex factory” clause, as a result of which risk was transferred from the time when the goods were made available by the seller to the buyer, and their being made available did not constitute actual handover. If the goods were in perfect condition at the time when they were made available and the defect (loss of colour intensity) occurred as a result of the buyer’s delay in collecting them and use of inadequate transportation, the seller could in no way be considered to have been in breach of contract.

In relation to article 34 of CISG, the buyer claimed that the seller had deliberately breached the contract by not including information on the colour of the goods in the quality certificate. The Court rejected that claim on the grounds that that omission was irrelevant to the case and that the must had met the requisite colour condition when it was made available to the buyer; the buyer could therefore have checked the must upon receipt rather than postponing doing so until its arrival at the buyer’s premises, being aware of the terms of the contract and the specific characteristics of the goods, namely that the colour of the must changed over time and deteriorated as the result of the use of inadequate containers for transportation.

The buyer also claimed that article 39 (1) of CISG had been incorrectly applied by the appeal court in relation to articles 40 and 44. The Court rejected that claim also, on the grounds that it was not relevant to the proceedings as the burden of proof that the colour of the goods was defective at their point of origin was on the buyer, which could (and ought to) have checked the goods on collection rather than at their destination, given that the buyer was perfectly aware of, or at least could not be unaware of, the effect of time and transportation on the colour of the must.