AUDIENCIA PROVINCIAL DE MADRID, 10 marzo 2009

Translation by Iñigo Basurto

Courts: Civil
Appeal num. 759/2008
Final Judge: Judge Paloma García de Ceca.

Provincial Court number 14, Madrid.
Decision: 00085/2009.
Magistrates: Pablo Quecedo Aracil, Amparo Camazón Linacero, Paloma García de Ceca Benito.

Madrid, 10 March 2009.

Appeal initiated by the plaintiff before Section 14 of the Madrid Provincial Court. From ordinary proceedings 492/2007 in the Courts of First Instance, related to roll 759/2008. As the appealing party represented by clerk Mr. Gumersindo Luis García Fernández appealed VIGOS & BODEGAS, S.A. who opposed the appeal, represented by clerk DOÑA SUSANA ESCUDERO GÓMEZ, claiming the avoidance of the contract and execution of payment. The magistrate in this case was Mrs. DOÑA PALOMA GARCÍA DE CECA BENITO.

I. PREAMBLE

FIRST

The number 37 First Instance Court issued a resolution dated 28 May 2008, whereby it declared:

- To partially uphold the lawsuit initiated on behalf of REXIM LEBENSMIGTTEL PRODUKTIN KG against VINOS Y BODEGAS, S.A. and I hereby declare the agreement signed between the parties terminated, only in relation to 13.980 bottles of semi-sweet red wine denominated "Las Cuatro Estaciones", condemning the defendant to remove the product from the establishment of the plaintiff at the expense of the former, as well as to indemnify the plaintiff in the amount of € 9.506,40

- That said amount shall accrue interest as established in section 576 of the Spainsh Civil Rules of Procedure (hereinafter, the "LEC"), as of today until full payment has been executed

- That there shall be no judgment on trial costs and expenses regarding procedural expenses."

SECOND

Having been notified the abovementioned resolution, REXIM LEBENSMIGTTEL PRODUKTIN KG filed an appeal, which was opposed by VINOS Y BODEGAS, S.A., and the procedure was finally initiated before this Court according to sections 457 and similar of the LEC.

THIRD

By decision of this Section, deliberation, vote and resolution was agreed on 3 March 2009.

FOURTH

All legal rules of procedure have been duly followed in relation to the present proceedings.

II. LEGAL BACKGROUND

FIRST

The lawsuit filed by REXIM LEBENSMIGTTEL PRODUKTIN KG (Rexim) against VINOS Y BODEGAS, S.A., pursued the avoidance of the sales contract concluded between the parties on the basis that the goods purchased by the plaintiff were not fit for the purpose, as well as the condemn to VINOS Y BODEGAS, S.A. to remove at its expense the unfit remaining deposited goods and to indemnify the plaintiff in the amount € 37.900,12 for breach of contract, plus expenses derived from the deposit of the goods until effective removal, plus legal interests accrued from the filing of the lawsuit, until full payment is executed. During the course of the proceedings, the claim was subsequently reduced to € 20.076,12. All the above, taking into account that, on 4 September 2003, Rexim issued an order to purchase 20.160 bottles of red semi-sweet wine "Las Cuatro Estaciones", that were distributed among its customers. On 4 September 2003, Rexim issued a second order to purchase 20.880 at the price of € 0,68 per bottle, for a total price of € 14.198,40. The price was duly paid and invoiced on 2 March, and the goods were received on 5 March. During the distribution of the goods, claims began to be received and some goods were sent back due to the deficient quality of the product. As a consequence, Rexim was obliged to reimburse the price of 5,197 bottles returned. This fact motivated subsequent claims by phone to Vinos y Bodegas, S.A. In response to the first claim received in writing dated 15 October 2004, Vinos y Bodegas, S.A. answered not denying the deficiencies of the product (recognized sterilization with sorbic acid). The second claim in writing was made on 8 November and announced the return of 13.980 deficient bottles still stored. Vinos y Bodegas, S.A. agreed orally to the return, however the return was expected to take place on 29 November 2004, however Vinos y Bodegas, S.A. finally refused to receive the bottles in breach of the abovementioned agreement. Said refusal was the consequence of Rexim

not renouncing to its right to exercise any further claim. Between 6 and 15 December, cross communications took place, where Vinos y Bodegas, S.A. never recognized its responsibility. On 20 December 2004, the parties agreed to ask for an expert's opinion on the quality wine, more precisely to assess the presence of benzoic acid in the wine; something which had previously been denied by Vinos y Bodegas, S.A. by fax on 10 January 2005. The examination performed by the laboratory Dialab Schnabel concluded that the samples contained Benzoic acid, not allowed for the wine enologic treatment. The presence of benzoic acid was communicated to the defendant without response and was corroborated by means of analysis carried out by a technical advising company for vinicultures, called SERVINO.

SECOND

The decision issued in first instance starts rejecting the expiration of the limitation opposed by the defendant because, as the decision confirms, the action filed by the defendant is the avoidance of the contract by fundamental breach of the seller, in the terms stated by the United Nations Convention on Contracts for the International Sales of Goods (CISG), adopted in Vienna, 11, April, 1980, and incorporated to Spanish Law by means of an Adhesion Instrument on 17, July, 1990, which article 39.2 states that the "buyer loses his right to claim if he does not give the seller notice thereof, at the latest, within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee". The First Instance Court considered, in the present case that, Rexim Lebensmittel Produktion KG had given notice to the seller before the aforementioned period and also brought the suit within the general period of 15 years stated by the article 1964 of the Civil Code. This argument is only applicable to the second order of wine supplied by Vinos y Bodegas, S.A, but not to the first, delivered on 4 September 2003, provided that in the first order two years period has passed without making any claim.

With regard to the core issue raised and, after considering the evidence collected during the process, the decision states that the plaintiff has not proved that, at the time the wine was supplied to its clients, any claims were lodged or the goods were returned. In addition, the decision states that Rexim did not reflect the truth in the facts described in the claim by which Rexim was supposed to keep in deposit the goods to be returned and refusing to claim the expenses incurred for such deposit. The decision declares undisputed, pursuant to the analyses considered along the with the process, that the wine was defective due to its high level of acid and the vinegary taste, and also because the wine contained a non-authorised additive, the benzoic acid, recognizing the plaintiff's right to file the action for the rescission of the contract. Likewise, it is asserted Rexim´s right to be indemnified for the price of those bottles which amounts to EUR 9,509.4. Nevertheless, it is not asserted Rexim´s right to be indemnified for the expenses incurred transporting the bottles in the amount of EUR 21.634 because the decision to return the bottles to the seller's place of business was due to a plaintiff's unilateral decision. It is not granted either, the right to recover the expenses derived from the chemical analysis of the wine in the amount of EUR 1.695,92 because the report issued does not amount to expert evidence. Besides, it is not granted the right to recover the lost profits, due to the lack of commercialization, for a total amount of EUR 6,710.4, taking into account that article 74 of the United Nations Convention on Contracts for the International Sales of Goods states 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"

For all of the above mentioned, the decision partially asserts plaintiff's claim, without any reference to the courts costs and attorney's fees.

THIRD
Rexim Lebenmittel Produktion KG appealed against the judicial decision issued in first instance, arguing that the decision states that the action filed by Rexim for the first order of defective bottles of wine was brought beyond the deadline. Said order was delivered on 4 September 2003, and the Court based its decision on the two years period established in the article 39.2 of the CISG. Nevertheless, Rexim does not include any reference in its claim related to the first order and only refers to the second, delivered on 4 February 2004.

The issue raised by the plaintiff is trivial, providing that, as the appellant accepts, the judicial decision only covers the second order (4 February 2004) and it does not influence in the first order delivered by Vinos y Bodegas, S.A. But in any event, it is the plaintiff who raised the issue concerning the alleged low quality in nine bottles of wine included in the first order through the narrative of the facts of the case.

FOURTH
Rexim alleges an error in the way the evidence was assessed, particularly the reasoning used by the Court in its decision concerning the lack of written documents supporting the claims and the returning of the goods made by its final clients. It also contests the non performance of the examination by Rexim´s representative, who was proposed but eventually rejected by the defendant, Vinos y Bodegas, S.A. Through this witness statement, Rexim would have justified those claims and returned the goods.

The argument is once again irrelevant. In first place, because the defective quality of the wine is undisputed according to the tests attached to the present procedure. These must be considered as fully uncontested evidence of a scientific character. Furthermore, it shall not be contested by any other secondary means such as the claims and the returning of the goods made by Rexim´s clients. In second place, because the declaration of the legal representative of Rexim would not have ever been sufficient to prove the existence of those claims (nor any other positive fact for the benefit of said entity), according to section 316.1 of the LEC, which only provides certainty to "facts recognized as such by one party if he was personally involved and such certainty is entirely harmful for him". With regard to the remaining facts, the common sense rules do not recommend to attribute certainty to a disputed fact by the mere interested declaration of the party to which the fact benefits.

FIFTH

In the following appeal ground, it is explained an absence of intention by Rexim to abstain from relying on the truth of the recital of facts with regard to the deposit of the wine, and with regard to the amounts claimed for that purpose on the lawsuit, which were later renounced.

According to the argument of the appealing party, initially, the amounts claimed related to the storing expenses of the defective bottles of wine for a total of EUR 7.394,71 for the weeks from 38 of 2004 to 4 of 2005, of EUR 6.909,54 during weeks from 5 of 2005 to 19 of 2006, and the amount of EUR 3.519,75 during weeks from 20 of 2006 to 5 of 2007, all of them renounced to in the first audience and in the ordinary proceedings, alleging a quantification error.

According to the present proceedings, such expenses never took place. In the resolution it is not assessed an intentional alteration of the truth by Rexim, and it is only established that the existence of such expenses was in fact uncertain. Once again, the issue is irrelevant for the present proceedings and for the appeal, due to the fact that the claim was renounced to and the renounce admitted, without appreciating procedural bad faith or wilful misconduct by the appellant.

SIXTH

The appealing party challenges the argument of the contested resolution that dismisses the claim of damages in relation to the transportation expenses for the return of the defective wine to Vinos y Bodegas, S.A., and the expenses incurred for the issuance of a report on the quality of the wine by the German laboratory Dialab Schnabel. With regard to this issue, the resolution argues that the decision to transport the goods to Spain after assessing the defective quality was unilaterally adopted by Rexim. However, the appealing party considers that the agreement to return the wine is undisputed. Furthermore, this party considers that the return of the goods is well established in sections 8 and 9 of the CISG, which consider that "in determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties", and that "the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves". "The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned".

According to this claim, it is undisputed that Rexim announced Vinos y Bodegas, S.A. the return of 13.980 useless bottles of wine. Rexim arguments that there was a valid verbal agreement for the return of the goods, which motivated the return of the goods to the sellers warehouse in Ciudad Real where, however, the reception of the goods was refused. The plaintiff points out that said refusal was the consequence of the plaintiff not accepting to renounce to all actions against the seller.

The problem is not the efficacy of the described verbal agreement, but the demonstration that in fact the transportation of the goods was agreed between the parties. In this respect, only the unilateral declaration of the plaintiff is available, expressly denied by the defendant (the legal representative of Vinos y Bodegas S.A. maintains that he never agreed to the return of the goods, and this could not be agreed by the company since there was nobody with sufficient power to execute such agreement but the legal representative. Neither the reception was agreed nor notice was taken of the bottles of wine returned in Ciudad Real). Consequently, according to the

contested resolution, there is no proof of an agreement between the parties to return the goods. It is then an expense exclusively decided by the appealing party, which use or necessity has not been proved, therefore it cannot be claimed against the seller.

The return of the defective goods cannot either be qualified as "reasonable" to be borne by the seller according to articles 8 and 9 of the CISG. Being goods that cannot be sold, there is no cause that would oblige their transport from Rexim place of business to the warehouse of Vinos y Bodegas S.A. in Ciudad Real, nor the impossibility or the higher cost of destroying or rejecting the goods in the place where they were sitting.

SEVENTH

The appealing party is properly including within the damages, among others, the expenses derived from an expert's opinion analysis of the wine by the laboratory Dialab Schnabel. As mentioned by the contested resolution, such analysis cannot be considered as a procedural expert report, neither its cost can be included as a judicial expense. However, the issue is not to consider the report as equivalent to a procedural experts opinion, nor as a preparatory report of the procedure, but to consider it as a measure to test the quality of the wine to which Rexim was obliged to in a purely contractual relationship, extra procedural, as the only mean to asses the defective quality of the goods, and even the potential harmful effect for consumers, as well as in order to claim Vinos y Bodegas S.A. for the consequences of the breach of the contract. Therefore, the claimed expense, directly derived from the breach of contract attributed to Vinos y Bodegas, S.A. shall be borne by the seller.

EIGTH

Finally, in order to recognize Rexim a right to damages for the loss of profit, equivalent to the gain not obtained because the wine could not be commercialized, due consideration is to be given to articles 74 and 76 CISG mentioned in the contested resolution, i.e; it depends on whether the lost suffered "was foreseen, or could have been foreseen, at the moment of the conclusion of the contract" by the breaching party.

Contrary to the contested decision, it is accepted that the loss suffered for such event was certainly foreseeable at the time of the conclusion of the contract. Vinos y Bodegas, S.A. knew that the wine had been added benzoic acid, and as a merchant in the sector knew the inappropriateness of adding such product to the wine. Therefore, it was fully foreseeable for him the possibility to sell the wine to third parties and as such the loss to be suffered by Rexim, who had the condition of a wholesaler and not of a consumer and based its profit on the resale of the wine. Accordingly, the defective quality of the wine evidenced the potential cause of consequential damages.

NINTH

It can not be assessed the alleged recklessness by Vinos y Bodegas, S.A. attributed by the appealing in relation to litigation expenses condemn according to section 394.2 L.E.C. The recklessness of the parties shall be assessed on grounds of the procedural behaviour of the parties by way of their opposition, despite the lack of a truthful or arguable basis, with the consequence of creating a larger damage to the counterparty than the one reasonably admissible. In this case, the behaviour of the defendant cannot

be taken as such, taking into account that some of the claims of the plaintiff have not been entirely upheld and others have been renounced to by the later, therefore, to some extent, the opposition by the defendant was justified.

TENTH

Partially estimating the appeal and according to section 398 L.E.C., and express condemn on litigation expenses does not proceed.

III. JUDGEMENT

This Court partially upholds the appeal made by Mr. García Fernández on behalf of Rexim, against the resolution of the Court of First instance 37 of Madrid, under number 492 of 2007, and we shall revoke partially said resolution, to the extent of establishing the amount of damages in EUR 17.912,72 owed by Vinos y Bodegas, S.A., and confirming the remaining pronouncements.