First Instance Court, Nº 2
Elche – Alicante

COURT RULING Nº 139/09[1]

In the city of Elche, 6th of July, 2009.

Mr. ANGEL GARROTE PÉREZ, Judge of the Court of First Division number two of Elche, the present records of the proceedings of ordinary trial, following before this Court under number 595 of the year 2007 on behalf of the entity RESIDUOS, S.L. represented by the Trial Attorney Mr. A, assisted by the Lawyer Ms. B, against the entity METAL A.G., represented by the Trial Attorney Mr. C, and assisted by the Lawyer Mr. D, which draws up a counterclaim, and the proceedings accumulated following under number 965/2007 before the Court of the First Division number one of Elche on behalf of the entity RECUPERACIONES, S.A., represented by the Trial Attorney Mr. E, assisted by the Lawyer Mr. F against the entity RESIDUOS, S.L.

BACKGROUND

First.- By virtue of the representation indicated and by means of a writ corresponding to this Court pursuant to the distribution system, a lawsuit was filed by Residuos, S.L. on April 19, 2007, where in brief, alleged:

1.- That the corporate object is the collection of solid waste materials and their recycling. Last year 2006, it contacted the entity METAL A.G., that is in the business of the recycling of aluminium, through its representative Mr. M.

2.- That after several contacts, both parties agreed verbally the first delivery of scrap formed by aluminium tins, and for the financing Mr. Gifre paid in cash 19,990 euros, amount which shall be returned to him upon the defendant would have paid the entire sending.

3.- That on September 13, 2006 the goods, with the corresponding invoice for an amount of 27,720 euros, were delivered. Nevertheless, the goods were rejected by the defendant which did not pay the pending amount of 7,720 euros, reason for which the present lawsuit is filed.

METAL A.G. alleged the legal grounds which it considered applicable and finally requested a judgment ordering the defendant to pay the amount of 7,720 euros plus the corresponding interest and the court costs.

Second.- Admitted the lawsuit by means of a resolution dated May 17, 2007, the defendant was summoned and its representation appears filing a

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[1] Case translated by Patricia Pérez-Mansilla Delgado, lawyer at Baker & McKenzie Madrid, S.L. and edited by Pilar Perales Viscasillas, Commercial Law Professor at the University of La Rioja, of counsel at Baker & McKenzie Madrid, S.L.

pleading replying the lawsuit and the counterclaim dated on September 19, 2007 where, in brief, it was alleged:

1.- That it was true that its corporate purpose is the recycling of aluminium and it has been negotiating with the plaintiff, agreeing the latter to provide with 500 tons per month of clean aluminium tins for its recycling, and that a first delivery of 21 tons was agreed.

2.- That on September 13, the first delivery of the goods were received. Nevertheless, the goods sent did not conform with the terms agreed, being a scrap of several metals with a lot of dirty, reason for which it did not accept the delivery.

After alleging the corresponding legal grounds, it requested that the Court declared a judgment by virtue of which, rejecting the main lawsuit, its principal was acquitted of the proceedings carried out against it, and, upholding its counterclaim lawsuit, the purchase agreement dated on August 23, 2008 were to be validly declared avoided due to the breach of the same by the counterclaimed plaintiff, and expressly imposing the procedural costs on the plaintiff.

Third.- By means of a writ dated on September 26, 2007 the lawsuit was considered answered, admitting the counterclaim lawsuit, informing the plaintiff, who submitted a formal written answering to the counterclaim on November 2, 2007, which, in brief, affirmed the statements of its lawsuit. Emphasizing the agreement dated on August 23, 2006 was not subscribed by its principal as a result of the verbal amendments in the contract, that the goods provided did not conform with clean aluminium tins which were previously acquired to its client and supplier Recuperaciones, S.L., denying therefore that the goods provided were scrap of several metals adulterated.

After alleging the legal grounds it considered convenient, it concluded requesting the granting of a judgment by virtue of which the counterclaim lawsuit was rejected, acquitting its principal of the pleadings addressed to it.

Fourth.- By means of a writ dated December 5, 2007 the request and voluntary intervention carried out by Mr. Ricardo was rejected.

Fifth.- The pre-trial audience was held on March 5, 2008, and after trying a conciliation unsuccesfully, no other procedural exceptions were opposed. The documents and rulings filed were challenged, the contorversial and admitted facts were established, and a new conciliation was tried, unsuccesfully too.

Parties proposed the means of evidence in which they tried to base its case; all the evidence was admitted and a date for the trial was set up.

Sixth.- By means of a writ dated July 8, 2008 submitted by the Provincial Court of Alicante (Section ninth situated in Elche), it was resolved the accumulation of the proceeding carried out before the Court of First Instance No. 1of this city under number 965/2007, to this one, consolidating all the procedural actions done by means of a court order dated July 30, 2008. Such proceeding

started filing a lawsuit by the procedural representation of the entity Recuperaciones, S.L. on June 28, 2007, where, in brief, it was alleged:

1.- That its principal, which its corporate purpose is the acquisition and recovery of all kinds of metals, its preparation and sale, sold to the defendant the sale detailed in the invoice attached as document two for an amount of 18,900 euros.

2.- That such goods were timely delivered to the defendant, which received it without protest. However, the amount owed has not been paid so far.

After alleging the legal grounds it considered convenient, it concluded requesting the granting of a judgment by virtue of which the defendant was ordered to pay to his principal the sum of 18,900 euros.

Seventh.- Such lawsuit was admitted by means of a resolution issued by the Court of First Division One of this city dated 5 September 2007, summoning the defendant Residuos who filed a formal written on October 25, 2007, where, in brief, it was alleged:

1.- That goods subject to the agreement aimed to supply a German entity, Metall A.G., being loaded on September 7, 2006, packaged and palletised.

2.- That when that goods were delivered in Germany on September 13, 2006, they were rejected by the final consignee, qualifying the receipt as scrap of several adulterated metals, instead of aluminium tins, informing the plaintiff about such circumstance.

3.- That in any case, the invoice sent by the plaintiff does not correspond to the real content of the negotiations, as the price agreed for the goods was not 900 Euros per ton.

4.- That the bad quality of the goods and the excess price established in the invoice had forced its principal not to pay the goods to the plaintiff.

After alleging the legal grounds considered convenient, it concluded requesting the granting of a judgment by virtue of which the lawsuit filed were to be rejected, acquitting its principal of the pleadings addressed to it, and subsidiary, in case its principal were ordered to pay the goods, a judgement were granted by virtue of which the sum to be paid to the plaintiff is 400 euros per ton, which makes up a total amount of 8,400 euros, and expressly imposing the procedural costs on the plaintiff.

The counterclaim referred to the facts established in the lawsuit, where it was held that Recuperaciones, S.A. has breached the contract by delivering a different good, which has caused a lot of professional and economic damages, as the German entity has not paid the invoice issued by the commercial transaction, which amounts to 27,720 Euros.

After alleging the legal grounds considered convenient, it concluded requesting the granting of a judgment by virtue of which the counterclaim was entirely allowed and states:

1.- That the sales contract of 8 September, 2006 be declared avoided due to the breach of the contract by Recuperaciones, S.A.

2.- That the entity Recuperaciones, S.A. was ordered to accept the aforemantioned statement and to pay for damages to its principal for such breach valued at 27,720 Euros, or the quantity finally established in the execution of the court ruling.

3.- That the counterclaim defendant was ordered to pay the procedural costs.

Eighth.- By virtue of a written issued by the Court number one of this city, it was admitted the counterclaim and the defendant was summoned, who filed a pleading replying the lawsuit on February 27, 2008, where inbrief, it was alleged:

1.- That it denied the connection between its commercial transaction and the one held by the counterclaim palintiff and the entity Metall, A.G., as it only sold the goods detailed in the invoice, noting that clean aluminiun tins have never been contracted for.

2.- That it has duly complied with the delivery of the goods agreed, which amount to 20 tons of scrap of aluminium tins.

3.- That in any case the opposing party could not deny the payment as the action exercised in its counterclaim lawsuit has expired, because it did not claim within the deadlines provided for sections 336 and 342 of the Commercial Code, and in any case, the action would expire as the deadline of section 1490 of the Civil Code has not been fulfilled.

4.- It concluded stating that the position of the counterclaim plaintiff was incoherent and their requests were incomprehensible.

After alleging the legal grounds considered convenient, it concluded the granting of a judgement by virtue of which the counterclaim lawsuit was rejected, and the counterclaim plaintiff was ordered to pay procedural costs.

Ninth.- By virtue of a written dated on October 20, 2008, resolutory of the appeal for reversal, the proceedings more developped, 595/2007, were cancelled, calling the parties of the proceeding 965/2007 to hold a Previous Audience, which took place on November 4, 2008, in the terms established in the court records.

Tenth.- Unifying the procedure of both proceedings, the oral trial was held on April 22, 2009 where all the evidences admitted where examinated, except the ones ehich have been resigned. Tha parties orally express their conclusiones and court records were ready for the court ruling.

Eleventh.- During the procedure of the present proceeding, all the legal requirements have been complied, except the deadline for granting the judgment, due to the excess volume of the starting and pending proceedings, and the pace of assignation of days for trial made by this Court.

LEGAL GROUNDS

First.- In the present court ruling, two accumulated proceedings must be resolved, both connected with aluminium tins purchase agreement. In the initial proceeding followed before this Court, the entity Residuos, S.L. sues the Germany entity Metall A.G. for the part of the price not paid after the delivery of the 21 tons of aluminium tins, which amounts to 7,720 Euro. In turn, Metall A.G. opposes to the payment of the price and files a counterclaim requesting the conclusion of the agreement, as it understands that the delivered goods do not conform with the agreement, not being fit for the expected purposes. On the other hand, in the proceeding started before the Court of First Division number One of this city, the entity Recuperaciones, S.L. claims to Residuos the entirely price which was not received after the delivery of the 21 tons of scrap of aluminium tins, which amounts to 18,920 Euros. The entity Residuos, S.L. opposes to the payment of the price stating that the price agreed was 400 Euros per ton, instead of 900 Euros, and furthermore files counterclaim requesting the avoidance of the agreement, as it alleges these tins were acquired for the supply of the German entity Metall A.G. which rejected its reception due to the bad quality. Therefore, it is required that the lawsuit shall be not allowed and, subsidiarily, the price of sale shall be fixed at 8,400 Euros. And in the counterclaim lawsuit, it is required the avoidance of this purchase agreement, and that the main plaintiff shall be ordered to pay for damages valued at 27,200 Euros, corresponding to the amount that the German entity has refused to pay.

Therefore this court ruling must analyze the obligational content and the legal efficacy of these purchase agreements in order to establish whether it persists the obligation of the defendants to pay the price agreed or if, on the other hand, it must be understood that the plaintiffs have fundamentally breached the obligations they assumed, being appropriate the avoidance of the agreements and, regarding the counterclaim request of the entity Residuos, the payment of damages caused.

Second.- Once established in general terms the controversial matters, we are ready to analyze the first agreement, i.e, the one entered into between Residuos and the entity Metall A.G.

The parties agree that after previous negotiations, they entered into an international purchase agreement by virtue of which the plaintiff sold to the defendant 21 tons of aluminium tins for its recycling for 1,320 Euros per ton, and that Mr. Ricardo participated in those negotiations as intermediary, who personally delivered to the plaintiff a prepayment valued at 19,900 Euros. They also agreed that the goods were to be delivered in Germany on September 13, 2006, being denied by the defendant its reception and the payment of the price agreed. On the other hand, the main disagreement between the parties stem from the quality of

the goods supplied, because the plaintiff declares that he complied with the agreement, whereas the defendant assures that goods delivered did not conform with the characteristics agreed, not being fit for expected purposes.

This first agreement is an international sale of goods contract, which is governed by the United Nations Convention on Contracts for the International Sale of Goods made in Vienna on April 11, 1980, in force in Spain by means of an Accession Agreement dated on July 17, 1990. The buyer has the obligation to pay the price of the goods and to receive them in accordance with terms established in the contract and in the convention (section 53 and followings), section 35 establishes the delivery of the goods as the main obligation of the seller, which quantity, quality and type conform with the ones provided for in the contract, contained or packaged in the manner required by the contract. The goods are not in conformity with the contract in cases where they are not fit for the purposes for which goods of the same description would ordinarily be used, they are not fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, or they do not possess the qualities of goods which the seller has held out to the buyer as a sample or model.

Article 49 of the Convention entitles the buyer to declare the contract avoided "a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract", analyzing this matter in the recent court ruling issued by the Supreme Court on January 17, 2008 where it is established that "the Regime of the liability content of the deals subject to the scope of application of the Convention is regulated in its first part, where the first Chapter starts with the statement included in section 25 EDL 1990/14101, pursuant to it, the breach of contract committed by one of the parties will be fundamental if it results in such detriment to the other party as substantially to deprive him of what he was entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such result. The system of the Convention, which adapts to the inspiring principles of the common law, distinguishes the fundamental breach from the breach which could be qualified as incidental, which do not cause substantial damages, or cause damages which can be resolved by means of a reparation and rectification of the fault, with a compensation or a decrease of the price (sections 25, 45, 46, 47, 48, 49, 50 and 51 EDL 1990/14101 q). The fundamental breach corresponds to the rule "*fundamental breach of the contract*", from the Anglo-saxon law, which has not a literal translation in continental laws, from which derives a contractual responsibility system, based on an objective accusation criteria, mitigated by exceptions – which correspond to fortuitous reasons or force majeure established by the internal law – and on a reasonability parameter (section 25, in fine EDL 1990/14101). The regime of the Convention is formed by the provisions related to the obligations of the seller – delivery of goods, sections 31 and followings EDL 1990/14101, and lack of conformity of the goods, section 46 EDL 1990/14101 – and to the buyer – payment of the price and reception of goods, section 53 and following EDL 1990/14101 – as well as the provisions related to the rights and the claim damages foreseen in case of fulfillment by the other party – sections 45 and following, and 51 EDL 1990/14101 and following, respectively, at the same time supplemented by the rules related to transfer risks system – sections 66 and

following EDL 1990/14101 – and by the provisions applied to the obligations of the seller and the buyer included in Chapter V."

Once established the legal regime of this first purchase agreement, it must be remembered that in accordance with section 217 of the Spanish Civil Law, both parties must prove the facts which constitute their expectation, i.e. the plaintiff must prove the pleadings and the defendant must prove the impediments, the obstacles or exclusive facts. Consequently, the plaintiff must prove the goods were duly delivered. On the other hand, the defendant and counterclaimed plaintiff must prove the goods delivered do not conform with the ones subject to the agreement, and, taking account the action of avoidance exercised in the counterclaimed lawsuit, such difference in the quality of the goods established a fundamental breach of the agreement by the seller.

Since the defendant acknowledged receipt of the goods and did not pay the price, the key issue for the resolution of the lawsuit is mainly determined by the possible existence of the fundamental breach attributed to the plaintiff by Metall A.G. as result of the unsuitability of the delivered good sold, matter on which shall depend the chance of the main and counterclaim lawsuit, which is considered in the following legal ground.

Third.- For the establishment of a possible existence of the breach attributed to the seller, the first matter to be considered is the exact determination of the goods subject to the sale. Considering for such purposes that the evidence proves that the goods under the sales contract are clean aluminium tins and pressed into the packages, taking the literal meaning of the word "clean", therefore understanding that such packages should lack any kind of dirt, such as organic residues, of other nature, or different metals, is the conclusion we can reach based on the following:

1.- Firstly it must be taken into consideration the agreement included in the proceedings as document number two of the lawsuit. Even if the plaintiff did not sign it, it established that the goods subject to the sale would be pressed clean aluminium tins. 2.- Secondly, the statement issued by Mr. M during the trial is especially enlightening; he affirmed that he intermediated in the commercial transaction, and that he was present in a meeting held in Barcelona where Mr. V came providing with samples and such samples conformed with aluminium tins perfectly clean, the same as the ones which appeared in the enclosed photography in page number three of the answering of the lawsuit of Metall A.G. He also added that the goods subject to the contract were similar tins as the samples and even if some amendments were included in the agreement, the goods subject to the agreement have never suffered any change. 3.- Thirdly, in the document number two of the lawsuit, which is a prospectus explanatory of the activity carried out by the plaintiff, there are some photographies of its activity, and aluminium tins entirely clean can be noticed, which are collected by means of a selective collection technique, and they are not collected from the rubbish dump.
Taking this consideration as a starting point, the goods finally delivered are clearly not equivalent to the type agreed, as just having a quick look at the photographies provided by the defendant as documents 3 and 5, it can be noticed that the tins delivered were packaged with all kind of residues and other metals, not being

reasons to doubt these photographies do not correspond to the goods delivered by the plaintiff, as on September 13, when the delivery was confirmed, the entity Metall AG sent a communication to the entity Residuos via e-mail stating the goods received were poor quality products and they can not be processed, placing them at his disposal at this moment, with similar photographies. And the Expert Report provided in writs by the entity Metall AG prepared by Mr. Detlev Th duly ratified during the oral trial, confirms that the goods are unsuitable for the corporate activity of the entity sued. Thus, Mr. Th, who started indicating that the pallets coming from Spain can be identified because they have a different measurement from the Germanies' and the labels of the tins were in Spanish, also stated that they contained aluminium tins with a lot of odd metals, such as copper, tin, zinc, rubbish or plastics, concluding that this material can not be processed with ordinary crushing machines because some of the metals contained in packages would provoked serious damages in the machines, and furthermore the products obtained will be not able to become commercialized as they can not be separated from the impurities. Such last circumstances make up undoubtedly a fundamental breach attributable to the seller Residuos, who delivered goods different from the samples presented in the meeting held in Barcelona, and they are also unsuitable for the purpose expected by the entity Metall AG, of which the plaintiff was conscious. And this failure entitles the buyer to avoid the contract, pursuant to section 49 of the Convention. No value is to be given to the statements made by the legal representative of Residuos affirming that goods were supplied by other company, as in any case he, in his position of seller, must ensure that the acquired goods were suitable for their delivery to the entity Metall AG, using for such purposes the corresponding quality controls which were totally missed, as it has been stated by Mr. V during the trial.

Consequently, this conclusion leads to the rejection of the main lawsuit, considering the counterclaim lawsuit.

Fourth.- Once the issue related to the first contract is resolved, it is time to consider the second one, which resulted in the accumulated lawsuit, which started at the Court of First Division number one of this town. By virtue of this contract entered into verbally, the entity Recuperaciones sold to the entity Residuos 21 tons of aluminium tins for an amount of 18,900 euros.

The lawsuit opposes to the payment of those goods, stating that they were acquired for their delivery to the German entity Metall AG, which rejected the delivery due to the poor quality. Therefore, the avoidance of the contract is sought. The buyer understands that the seller has not complied with the delivery obligation agreed under the contract. He subsidiary alleges that the price agreed was not 900, but 400 euros per ton. This purchase agreement was entered into two Spanish entities, being the buyer Residuos, who sold the goods later to the German entity Metall AG, reason for which all the requirements set forth in sections 325 and followings of the Commercial Code governing the legal regime of the commercial contract were fulfilled. And here it must be considered again section 217 of the Spanish Law of Civil Procedure, in accordance of which the plaintiff must prove the delivery of goods, assuming the counterclaimed defendant the burden of proving that the plaintiff delivered something different from the agreed "aliud pro alio" as a premise of the avoidance claim, having to prove also

such failure has provoked the damages subject to the claim. Regarding the main lawsuit, it is incumbent to him to prove that the price reflected in the invoice is excessive (Court ruling of the Provincial Audience of Huelva dated on June 24, 2002 and Court ruling of Provincial Audience of Asturias dated on December 21, 2003).

It has been put on record that the plaintiff of this accumulated proceeding has proved the delivery of goods (document 3 of the lawsuit and acknowledgement of party). It should be also analyzed if the circumstances for the avoidance of the contract of sale are met and the excessive price in the invoice and the poor quality of the goods.

1.- Regarding the price in the invoice, the entity Residuos has not proved the price of 900 euros per ton can be considered as excessive; the invoices provided as document 5 and 8 of the answer of the lawsuit are not enough for proving such issues, as they are documents which have been prepared by the party who is interested in their validity, and are not based on the expert reports or external testimonies which can confirm their meaning. On the other hand, it is astonished the substantial difference between the price it tried to pay to Recuperaciones (400 euros per ton), and the one which Metall AG tried to collect (more than 1,300 euros per ton). Therefore this allegation can not be considered.

2.- The second opposition reason made by Residuos, S.L. is focused on the poor quality of the goods supplied, reason on wich he bases his counterclaim lawuit demanding the avoidance of the sale with the corresponding damages.

Considering that the entity Residuos S.L. has not managed to prove the existence of a connection between this purchase and the one considered previously, making its effectiveness and its termination conditional on the success of the business between Residuos and Metall AG. It is also to be considered that the plaintiff Recuperaciones was conscious of the terms agreed between the latters regarding the good subject to the sale, as does not exist a written agreement and the legal representative of the entity Recuperaciones denies convincingly such circumstance.

Therefore this sale contract must be considered separated from the one analyzed in previous legal grounds.

Fifth.- Nevertheless, before going into the heart of this matter, it is necessary to analyze the limitation exception alleged by the entity Recuperaciones in the answering written face to the resolution claim ex. Section 336 and 342 of the Commercial Code, as well as section 1490 of the Civil Code.

Section 336 of the Commercial Code establishes “The buyer who examines the content of the goods at the time of receipt shall not be entitled to take action against the seller alleging flaw or defect in the quantity or quality of the goods.

The buyer shall be entitled to repeat action against the seller due to defect in quantity or quality of the merchandise received in packaging or wrapped,

provided he takes that action within four days following receipt and the breakage is not due to a fortuitous event, flaw inherent to the item or malicious intent."

Section 342 establishes "The buyer who has not made any complaint whatsoever based on internal flaws of the item sold, within the thirty days following its delivery, shall lose all entitlement to action and right of repetition against the seller for the cause".

Section 1490 of the Civil Code establishes that "Actions resulting from the provisions of the five preceding articles shall be extinguished after six months, counting from delivery of thing sold".

Such sections are developed, among others, by the court ruling of the Provincial Court of Barcelona dated on July 30, 2009, where it is established that "This Court has been remembering that in cases of faulty or incomplete compliance by the seller of his obligation consisting of delivering the good sold to the buyer, within the contractual relation which defines the purchase agreement, the Case Law has been making the difference between a real and entire agreement breach or "aliud pro alio", for having delivered a good different from the agreed and for absolute unsuitability of the good sold, which makes it inappropiate for the purpose for it has been used and provokes the totally dissatisfaction of the buyer, existing a substantial or functional diversity, which allows to use the general protection provided by sections 1101 and 1123 of the Civil Code EDL 1889/1 q EDL 1889/1 q EDL 1889/1, from other cases where the goods subject to the purchase suffer hidden flaws or defects in their quality or suitability, making difficult the usefulness persecuted, in short the buyer can use and take an advantage of the good sold.

In case of the commercial purchase, the lack of conformity of the goods system for defects of the good sold is governed by the specific rules of section 336 and 342 of the Commercial Code EDL 1885/1 q EDL 1885/1, the first one referres to the evident defects and the second one to hidden defects, being these rules applicable before the ones of the Civil Code EDL 1889/1 EDL 1889/1 EDL 1889/1, as long as it was about a faulty consideration for a defect of the product, and not the delivery of something different, in which case it shall be used the general actions of agreement breach (court rulings of the Supreme Court dated March 12, 1982 EDJ 1982/1435, November 23, 1984 EDJ 1984/7501 EDJ 1984/7501, March 8, 1989 EDJ 1989/2596 EDJ 1989/2596 and March 10, 1994 EDJ 1994/2181).

This regulatory scheme presents some peculiarities related to the lack of conformity of the goods system provided in the Civil Code EDL 1889/1 EDL 1889/1 EDL 1889/1, which are imposed by the security and fluency requirements of the commercial transactions, among of which we find the legitime interest of the seller in knowing, certainty and as soon as possible, that the buyer accepts without claiming the goods. In the commercial framework, it also makes no sense to use the protectionist criteria, which prevail in other legal relations in favor of buyer-consumer, since it is usually about business entered into dealers, where both parties hold the same position, as a result of their common dedication and professional experience, which led them to a comparable diligence duty and contractual good faith.

Pursuant to sections 336 and 342 of the Commercial Code EDL 1885/1 q EDL 1885/1, the buyer assumes the obligation of making a detailed examination of the goods collected and claiming their defects within a brief deadline, as previous and unavoidable condition for the exercise of the corresponding actions, which is subject, in the present case, to an expiration deadline of 6 months. The actions related to the lack of conformity of the goods system for hidden defects, are characterized by the brief deadline for its exercise compared to the general actions resulting of the failure of the obligations:

A) Regarding the civil purchase:

a) Section 1490 of the Civil Code EDL 1889/1 EDL 1889/1 (redhibitories actions and quanti minoris) indicates that they shall be extinguished (expiration) at the six months since the delivery, as long as it exists a flaw or defect (section 1484 of Civil Code EDL 1889/1 EDL 1889/1) which implies the total or partial uselessness ("deteriorations, damages or irregularities in quality or suitability of the goods supplied which make difficult their useless", court tuling 17.02.1994 EDJ 1994/1420 EDJ 1994/1420), which must be serious (it makes the good unsuitable for its useless or decrease such useless, that in case the buyer would be conscious, he did not acquire it or he had offered a minor price), which must be hidden (as the seller is not liable for evident defects, being the buyer aware of them at the moment of the acquisition, or of the visible defects or of the ones which are not visible when the buyer is an expert and he must be easily aware of them due to his profession or his business, Court ruling dated 15.3.1989 EDJ 1985/2985 EDJ 1985/2985, 8.7.1994…) and which must be previous to the formalization of the agreement, even if its development is subsequent, which must be proved by the buyer (Court ruling 23.9.1989).

b) A different thing is the aliud pro alio (the delivery of a different good or a good of different quality from the agreed) which implies the failure of the seller's obligation and the subject to the general term of prescription of 15 years set forth in section 1964 of Civil Code EDL 1889/1 EDL 1889/1.

B) Regarding the commercial purchase (unequivocally our case):

a) When the buyer, at the moment of the reception of the goods, examines them without making any complaint, shall not be entitled to take action against the seller alleging flaw or quantity or quality defect apparent or evident (section 336.1 of the Commercial Code). b) When he receives the goods packaged or wrapped, he is entitled to take actions (for the resolution or the compliance, with damages in both cases) alleging quantity or quality defects apparent or evident, if he exercise it within four days following to the reception (section 336.2 of the Commercial Code).

c) When defects are internal (hidden, with requirements of the case A.a), he must claim within 30 days following to the delivery (section 342 of Commercial Code). They are complaint or objection terms (it does not mean that the action must be exercised within these brief terms, but the seller must be informed of the disconformity of the consideration, and complaining about it the action is

preserved, and must be exercised within six months set forth in section 943 of the Commercial Code which refers to section 1490 of the Civil Code EDL 1889/1 EDL 1889/1, being actions of identical nature), equivalent to prescription terms, as they do not admit interruption, which complaint – in accordance with the clearly majority of the Case Law – would be applicable 2127 of Spanish Law of Civil Procedure 2000/77463 1881, applicable for being currently in force.

d) Furthermore, the assumption of the aliud pro alio, subject to the general prescription term.

As herein the only existence of defects is not denounced in the counterclaim, but the delivery of a different good, useless for the use which is going to be use the marble, we would face the prescription term of 15 years, obviously not passed, and not those terms of extreme brevity. Therefore the first reason must be rejected, taking into account that in accordance with dates provided by the plaintiff and the documentation, the denounce was made within the month corresponding to the delivery."

And applying the doctrine used for the present case, the result of the resolution of the expiration exception must be identical to the one expressed herein, as the counterclaimed party refers to the "aliud pro alio", i.e., the delivery of a different good, useless for the use which is going to be use the scrap of aluminium tins (i.e., its suppliance to the German entity Metall AG). Consequently, we would be at the prescription term of 15 years, which have not passed since the facts hereby judged until the filing of the counterclaimed lawsuit.

Sixth.- Once the prescription exception has been rejected, it is the moment to analyze the possible existence of the failure attributed by Residuos G-2002 to Recuperaciones, consisting on, basically, he supplied goods which failed the expectations of the entity Metall AG, causing his rejection of the same.

It has been proved by express acknowledgment of the party, that on September 7, 2006 21 tons of aluminium scrap were loaded in the facilities of Recuperaciones for its direct delivery to Metall AG, and Mr. V, the legal representative of the entity, approved the goods, insisting during the hearing that in his oppinion, the load was correct, signing the corresponding delivery note, having a quick look at the palets and without carrying out a quality monitoring, in spite of the said above that he was committed to supply to the Gemany entity aluminium tins clean of any impurity, and the legal representative of the entity Recuperaciones stated that aluminium uses to have some percentage of dirt, and since it comes from dumps, the press packages could be contained the same.

It has also been proved that until September 13, 2006 Residuos G-2006 has not notifyied Recuperaciones of the faulty quality of the scrap loaded, when he received the notification of the German entity rejecting the good transported.

On the other hand, it does not exist documentation trace of the connection or conditioning of the sale hereby analyzed with the success of the first commercial transaction, and in short it does not exist any evidence which prooves the assertion that the good subject to the sale entered into Recuperaciones and

Residuos does not conform with the scrap of aluminum tins that Mr. V. loaded with his satisfaction.

Therefore, it is not considered proved that the entity Recuperaciones has breached the purchase agreement, reason of which it does not exist a cause for which the entity Residuos denies the payment of the price, obtaining the resolution of the agreement and the damages required.

In short, the main lawsuit must be considered entirely, rejecting the counterclaim lawsuit.

Seventh.- Regarding the interests, section 341 of the Commercial Code shall be applicable, where it is established that "Delay in paying the price of the item purchased shall imply the buyer has the obligation to pay the legal interest on the moneys owed to the seller".

Eighth.- Section 394.1 of the Spanish Law of Civil Procedure establishs that the party whose claims were enterely rejected, shall be condemned to pay procedural costs. Once analyzed the referred legal sections and others wich result to be general and pertinent applicable.

RULING

1.- That rejecting the lawsuit filed by the entity Residuos, represented by the Trial Attorney Mr. Lopez, against the entity Metall AG, I have to resolve and resolve to absolve the defendant of the pleadings addressed against him, ordering the plaintiff to pay procedural costs.

2.- That considering the counterclaim lawsuit filed by the entity METAL AG, represented by the Trial Attorney Ms. T, against the entity S.L., I have to declare and I declare the resolution of the purchase agreement referred by the present writs, ordering the counterclaimed party to pay procedural costs.

3.- That considering the lawsuit filed by the entity Recuperaciones, S.A., represented by the Trial Attorney Mr. T, against the entity Residuos, S.L. I have to resolve and I resolve to order the defendant to pay to the plaintiff the amount of 18,900 euros, plus the legal interest of the money since the moment of the unpayment.

4.- That rejecting the counterclaim lawsuit filed by the entity Residuos against Recuperaciones y Desguaces Tolon, S.A. I have to resolbe and I resolve to absolve the counterclaimed party of the pleadings addressed against him, ordering the counterclaimed party to pay the procedural costs. Notify this Court Ruling to the parties, informing them that it is not definitive, and against it it can be prepared an appeal begore this Court, the Provincial Court of Alicante (section ninth, situated at Elche), within the term of five days following to its notification. Include the hard copy in the Court Rulings Book. By means of my court ruling I pronounce, I order and I firm.

PUBLICATION.- The above Court Ruling has been read and published by the Judge who subscribes it, holding a public audience, with my attendance, on the same day of its date, which I, the Secretary, give faith.

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