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Translation by Juan Pascual

MADRID COURT OF APPEALS, 18TH OCTOBER 2007
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Jurisdiction: Civil
Appeal number 96/2007
Reporting Justice: Honourable Jesús Gavilán Lopez

COURT OF APPEAL SECTION 11
MADRID
JUDGMENT: 00865/2007
MADRID COURT OF APPEALS
ELEVENTH SECTION
JUDGMENT 865/7
Docket: Appeal 96 /2007
Honourable justices: LOURDES RUIZ GORDEJUELA LOPEZ D. JESUS GAVILAN LOPEZ D. SAGRARIO ARROYO GARCIA
In MADRID on the 18th of October 2007

Section 11 of the Honourable Madrid Court of Appeals, has viewed on appeal, the Ordinary Proceedings briefs numbered 327 /2005 of Madrid's 49th First Instance Court, on the subject of a compensation claim between the parties, appealing OXYGENE, represented by court liaison Cuadrado Ruescas, and opposing TEJIDOS BURGUES ltd., represented by court liaison Sandin Fernández.

BACKGROUND

FIRST: The preceding facts of the appealed judgment are accepted.

SECOND: The suit, having followed its legal proceedings before MADRID'S 49TH COURT OF FIRST INSTANCE, judgment having been passed on the 17th of November 2005 whose ruling established "I HEREBY DENY the suit presented by Mr IGNACIO CUADRADO RUESCAS as representative of OXYGENE against TEJIDOS BURGUES LTD. and in doing so deny the plaintiff's claim although condemn him to pay court costs." Once the ruling had been notified to all parties, OXYGENE filed an appeal, claiming what grounds were found to be pertinent, which was admitted with both procedural effects. After being notified, the opposing party filed their rebuttal. Once the court received and examined the judgment briefs the 11th of October was set as the date for debating, voting and passing a ruling on the case.

THIRD: In the handling of this proceeding, the relevant legal mandates have been followed.. The case was viewed under the Honourable Jesús Gavilán Lopez as reporting justice.

LEGAL REASONING The First Instance ruling arguments are hereby rejected.

FIRST: Procedural background of the appeal.-

The First Instance Court in the its ruling, after taking into consideration that the penalty clause established by the parties for the event of delay was applicable, denied the payment claim of all unpaid invoices, all this in the specific terms that are outlined in the second section of the background of this decision, and which corresponds to the First Instance Court's ruling. The plaintiff's legal representative bases the claim, summarizing the grounds found in the written appeal, on the wrongful consideration of documentary evidence; specifically the contract on record as document 7 of the original lawsuit which was modified afterwards by the contracting parties. The original shipping from India was altered to transport by plane, to avoid further delays, the costs of which were taken on by the plaintiff, having offered the defendant the opportunity to avoid the contract, which he rejected thus conceding to the changes. Furthermore the defendant sustained no damages due to the delay, and the goods were delivered in full, as expressed in articles 47 and 74 of the Vienna Convention. This is also evidenced by the nonexistence of any delay on delivery, and the unpaid invoices. The plaintiff demands the reversal of the First Instance Ruling, and another be passed awarding the plaintiff's claim, obliging the defendant to pay the principal sum as well as the legal interest of said amount and the court costs of both instances. The defendant, agreeing with the base arguments of the original Judgment, requests the ruling be confirmed due to the existence of a delay, and that the plaintiff be forced to pay the court costs.

SECOND: Base for appeal: Mistaken value attributed to evidence and enforcement of the penalty clause.-

The starting point of the re-evaluation of previous evidence is the existence of a contract for the supply of textile goods of the 24th of December 2003, filed as document 7 with the original suit, payable by means of letter of credit, through which the date of delivery was established as being the 30th of January 2004, also containing an automatic penalty clause in the event of delivery delayed, of 1% discount for each day delayed. The first air shipment, with invoice number 1.542/03-04 and worth 14.756,35$US, arrived on the 25th of February 2004. The second on the 5th of March 2004, worth 6.698,00$US, invoice 1.548/03-04. The third on the 12 of April 2004, worth 25.754,90$US, invoice 1.562//03-04. There was a delay of 31, 44 and 82 days respectively for each shipment, including the handover of documents. The remaining invoices that relevant to the case stem from previous orders, delivered without any objection, with a total value of 3.035,95$US; the plaintiff having admitted to receiving payment of 18.097,89$US it leaves the rest of the claim at 31.947,31$US. The plaintiff's assuming the cost of shipping the merchandise by plane, was due to the delay of the ship which was to transfer the goods to Spain. Notice is taken of the plaintiff's initiative towards the mode of transport finally used, without the buyer's opposition or acceptance to the avoidance of contract offered to him.

The first matter up for debate, must be centred on the modification of the contract, through which delivery of the merchandise was undertaken by plane instead of by boat, outside of the agreed deadline. Contrary to what the plaintiff purports, when the amendment of the letter of credit is argued through the establishing of a new deadline and mode of transport; no novation of the contract may be observed. Quite the contrary, nearing the deadline of delivery, and faced with the buyer's necessity to sell on the goods before the end of the season for which they were bought, as can be determined from the communications between the parties, the plaintiff chose, without any opposition from the buyer, to send the goods by plane, not forgetting that the delivery was made by three different flights on different days up until the month of April 2004, when the deadline had been the previous

30th of January as mentioned above; because for one duty to be extinguished by another substitute obligation this fact must be definitively stated, or the previous and latter duties must be completely incompatible as established by article 1.204 of the Spanish Civil Code (*Código Civil*) situation which may not be presumed and which requires a clear establishment of the will to extinguish the primitive duty, even though said will may be inferred from the obligations being non-compatible [Supreme Court Judgments (*Sentencias del Tribunal Supremo*) of the 31st of May 1997 and 23rd of March 2001 among others]; also there is no possibility of applying the so called mere amendment novation as the background facts show an absence of prior accord or agreement to its effects, and a mere absence of opposition, fact which by itself is insufficient to determine any amending effects [Supreme Court Judgment (*Sentencia del Tribunal Supremo*) of the 2nd of October 1998] which would have meant the inexistence of the argued delay. This makes the nature of the FOB clause irrelevant since the place of delivery is not in question.

Consequently, the objective delay due to the above mentioned causes, implies and irregular or partial breach of contract and so the application of the penalty clause freely agreed between the contracting parties with the moderating function recognised in article 1.154 of the Spanish Civil Code (*Código Civil*) in accordance with the long standing Supreme Court (*Tribunal Supremo*) case law [Judgment (*Sentencia*) of 7th November 2000, 29th March and 22nd December 2004 among others].

THIRD: Applicability and breach of articles 48 and 74 of the Vienna Convention.-

The Vienna Convention of the 18th of April 1980 establishes in its article 48 "[…] the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer […]". Moreover article 74 establishes "Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach […]". In any case, neither of the aforementioned articles is applicable to the present case. The first, because it is a general rule with regards to standard situations of breach of contract; meanwhile the penalty clause is based on its own differentiated and autonomous nature and specifically covers certain kinds of breach, having the parties freely established the penalty even for the first day of delay. The second article is also inapplicable, because the above mentioned clause substitutes any damages as an exception to the general rule of contracts, and because of it having a restrictive interpretation [Supreme Court Judgments (*Sentencias del Tribunal Supremo*) 27th of March 1982 and 10th of November 1983 among others].

FOURTH: Moderation of the penalty clause in briefs.- The effective delivery of the goods is noted, without there being any proof of specific damages derived from the late delivery, or worse sale of the textile goods thereafter with the seller's expressed will to carry out the contract, choosing the aeroplane alternative and covering its costs when faced with no possible solution given the frustrated shipment by boat. Consequentially and in line with the above mentioned legal reasoning, doctrine and case law, surpassing its strict and equal application, this Chamber considers more appropriate a reduction of 50% of the compensation claim establishing a final lump sum of 15.973,65 Euros plus the legal interest since the date the suit was filed – article 1.108 of the Spanish Civil Code (*Código Civil*). - All of the aforementioned arguments lead the Court to modify the given Ruling, reversing the Court of First Instance Judgment and passing another in its stead, partially awarding the plaintiff's claim, condemning the defendant to pay the above mentioned sum, without any

specific ruling on court costs due to the partial recognition of the plaintiff's claim, in accordance with article 394 of the Civil Procedure Law (*Ley de Enjuiciamiento Civil).*

FIFTH: Court costs of the appeal.- The award of a claim carries with it the impossibility of imposing court costs on any of the parties, in accordance with article 398 of the Civil Procedure Law (*Ley de Enjuiciamiento Civil).* The above mentioned legal arguments being viewed and all others pertinent to the case considered, we must rule as follows.

RULING: We must award and do so award Oxygene's appeal against the ruling of Madrid's 49th First Instance Court, dated 17th of November 2005, reversing it judgment and passing a new ruling in its stead, partially admitting Oxygene's claim against Tejidos Burgues ltd. condemning the latter to pay a total of 15.973,65 Euros as well as its legal interest since the day the suit was originally filed, with no specific ruling on the subject of court costs of any level. This ruling is not susceptible of appeal before a higher Court, we therefore rule, order and sign.

PUBLISHING: Once signed the above ruling is handed to this Secretariat for its due notification, publishing it as legally established, and a certified copy of the ruling shall be handed out to be adjoined to the docket. I hereby certify.