CISG-online 503	
Jurisdiction	Spain
Tribunal	Tribunal Supremo (Spanish Supreme Court)
Date of the decision	28 January 2000
Case no./docket no.	454/2000
Case name	*Internationale Jute Maatschappij BV v. Marin Palomares S.L.*

Translation[*] *by Alejandro Osuna*[**]

Facts and procedural history

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Legal reasoning

First. 9

The appeal in *casación* is against the judgment of the Court of First Instance of Linares, dismissing the claim by Internationale Jute Maatschappij BV [seller] against Marín Palomares SL [buyer]. The [seller] claimed US$ 122,491.20, whose equivalent in Spanish currency is 16,710,600 pesetas. The [seller] bases his claim on a sales contract entered into with the [buyer] concerning 800,000 sacks of jute. [Seller] alleges that this contract was breached by the buyer's refusal to accept delivery of 724,800 units. The judgment that is appealed declares that the existence of a contract concerning these 724,800 units was not proven.

Second. 10

Based on art. 1692(4) of the Spanish Civil Procedure Code, the first issue raised in the appeal alleges a violation of art. 1281 of the Spanish Civil Code, citing its first paragraph; an error by the Court of First Instance in interpreting the documents on which the parties support their positions; an error whose breach is claimed to be imputed to the [buyer]. This first issue has a close relationship with [seller's] second reasoning in which an infraction of art. 1262 of the Civil Code is alleged. [Seller's] third reasoning alleges an erroneous application of art. 19 of the United Nations Convention on Contracts for the International Sale of Goods [CISG] of 11 April 1980 (RCL 1991, 1229 and RCL 1996, 2896), to which Spain adhered to by an instrument dated 17 July 1990.

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[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Claimant-Appellant Internationale Jute Maatschappij BV of the Netherlands is referred to as [seller], and Respondent-Appellee Marín Palomares SL of Spain is referred to as [buyer].

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Article 19(1) [CISG] provides that:

> «A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.»

It is a doctrine reiterated by this Court that the existence or non-existence of a contract is a question of fact subject to resolution by the Court of First Instance whose results could only be upset in *casación* alleging an error in the legal interpretation of the evidence. Considering the norms that are said to be infringed, the appealed judgment arrived at the conclusion of the nonexistence of a contract based on what is said to be the [seller's] pretense through the rules of interpretation of contracts, as expressly discussed in the final paragraph of the third legal reasoning. In this sense, the doctrine contained in this Court's ruling of 20 May 1996 (RJ 1996, 3793) result is applicable. It states in that case that: 11

> «[…] what is precisely at issue is the existence of a contract by taking into account the intent as made evident by subsequent acts, and certainly, the analogous application of rules of contractual interpretation applicable to other legal acts previous or subsequent to the very contract could not be considered contrary to law; these rules should apply to the entire contractual context, including the preparatory acts, and also to acts of the execution of the contract or of its performance.»

Similar criteria support this Court's ruling of 3 February 1994 (RJ 1994, 970) that deemed a contract nonexistent based on the interpretation of the sole document contributed to the docket and alleged in the appeal infraction of arts. 1281 and 1283 of the Civil Code. 12

This Court's ruling of 26 March 1993 (RJ 1993, 2395) states that: 13

> «Contracts are perfected by the mere consent, manifested by an offer and an acceptance that marks the end of the formative «iter» of the contract, the culimination of the preliminary acts of formation, which requires that the offer contains all the decisive elements of the object and cause so that the subsequent acceptance determines the meeting of minds, without introducing a modification that would require further agreement.»
>
> «Thus the consent», as stated in this Court's ruling of 11 April 1992 (RJ 1992, 3093): «must be free and consciously granted, manifested by conclusive, expressed or tacit acts; acts that are exteriorized after a deliberate decision. A contract exists only when two minds converge or agree on the object and cause that are to comprise it (art. 1262 of the Civil Code).»

In view of this jurisprudencial doctrine, we conclude in the case at hand that a contract existed between the parties that had as its purpose the sale by the [seller] to the [buyer] of 800,000 bags of jute for the price of US$ 55.90 per hundred bags; that the contract was perfected by the buyer's unconditional acceptance of the offer made by the seller, as is evidenced by the fax remitted by [buyer] to [seller] on the 25 January 1993 (document number 1 of the complaint), which has the following text: 14

> «Reference: Order of sacks of jute. We confirm the order of 800,000 sacks, at the price offered of US$ 55.90/100 sacks. Please send the first shipment urgently and send the invoice by fax.»

15 The transcribed terms evidence in an unequivocal fashion the acceptance of the offer by the buyer, thus creating the contractually binding consent of the parties. The two faxes remitted by the [buyer] to the [seller] on that same 25th of January 1993, do not alter the conclusion that is arrived at through the literal interpretation (art. 1281(1) of the Civil Code) of the document attached to the claim. The fax submitted as document number 3 with the response to the claim reads:

> «Reference: Order of sacks of jute. With regard to today's phone conversation with Mr. L.M., confirm by fax the confirmation of the order under the agreed conditions: First delivery (the habitual amount of sacks of jute) in a truck by this week. The second delivery of the same amount next week. Please, you are hereby informed that the estimated amount for subsequent shipments of sacks of jute is approximately 800,000 sacks.»

16 The meaning of this fax, if it is to be given any meaning, is that it confirmed the acceptance previously given. The fax submitted as document number 4 with the response to the claim states:

> «Reference: Order of sacks of jute. Thank you for today's fax. We confirm the order of a truck today and of a truck for next week with the conditions established in your fax. With regard to the bill of 730,000 sacks, in case you cannot adjust the price in pesetas, we will have to renegotiate the price of US$ 55.90 dollars per 100 sacks. Markings: The same as previously indicated, unless there is another instruction from us.»

17 This second communication only evidences the buyer's intent to renegotiate the accepted price in connection with subsequent shipments. As this Court's award of 7 June 1986 (RJ 1986, 3296), reads, quoting several other judgments of this Chamber:

> «An offer can be revoked provided the contract has not been perfected, unmistakably and clearly stating the coincidence of offer and acceptance, the first of which is insufficient until the [offeree] fully accepts it. It is not possible to appreciate the existence of an acceptance when a submission for modifications, alterations or conditions to the offer are made.»

18 In the instant case, there is no lack of acceptance; the offer to «renegotiate» the price of the 73,000 remaining bags was made subsequent to a pure and unconditional acceptance contained in the first of the cited faxes, and thus should be considered as a proposal for a modifying novation of the contract with regard to the price, which was not accepted by the seller. This is not consistent with the position maintained by the [buyer] concerning the non-existance of the sales contract regarding the 730,000 sacks of jute. The fact is that on 14 September 1993, [buyer] showed that she was willing to take the 724,800 sacks at the current market price, 70 pesetas, «with a view towards giving once and for all a solution to this regretable matter.» It is stated in [buyer's] fax of 14 September, that is to say, that [buyer] was

willing to acquire the merchandise for the price of 50,736,000 pesetas although, according to her, there was no existing contract that would bind her to make that acquisition. By applying the rule of contractual interpretation invoked in the first reasoning of the appeal, it must be concluded that there was a binding sales contract that had as its purpose the sale by the [seller] to the [buyer] of 800,000 sacks of jute at US$ 55.90 per hundred units. Because the appealed judgment failed to reach this conclusion, the legal provisions mentioned in the first, second and third legal reasonings, are infringed. In consequence, we find the appeal well grounded; we vacate and annul the appealed sentence.

Third. 19

Having found the procedure of *casación* well grounded, this Chamber takes full jurisdiction, and now turns to the other issues raised in this dispute (art. 1715.3 of the Civil Procedures Code). It is claimed that there exists a difference between the contract price and the price at which the seller had to sell the goods to a third party, a difference valued at, according to [seller], US$ 122,491.20, whose value in pesetas is 16,070,600. This claim is based on [CISG] article 75, according to which:

> «If the contract is avoided and if, in reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.»

There is evidence on file proving that the seller made the sale of the sacks of jute on 6 October 1993 which, according to article 75, gave [seller] the legitimate right to demand the difference between the price of the substitute transaction and the agreed price in the avoided contract. However, under article 77 of the [CISG]: 20

> «A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.»

It was proved that [buyer] offered to purchase the 724,800 sacks of jute at a price of 70 pesetas per unit, a price which included the stamping of the [buyer's] anagram. Upon being informed by the seller of the existence of a substitute buyer who would pay US$ 0.30 per new and printed unit, the rejection by the seller of [buyer's] offer to purchase the jute at 70 pesetas per unit is not justified based on [seller's] attempt to condition [buyer's] payment on the issuance of a letter of credit drawn on a prestigious Dutch bank to cover the purchase price that [buyer] offered. This is so considering the fact that the commercial relationship that had existed between the parties since 1988 was without incidents concerning the payment of the supplied merchandise. We further observe that in the substitute sale no special guarantees of the payment of the price were demanded; [seller] simply made payment conditional «after receipt of the invoice.» Consequently, we cannot affirm that in rejecting [buyer's] offer to acquire the 724,800 sacks of jute at a price of 70 pesetas per unit, the [seller] had adopted «measures that are reasonable under the circumstances, in order to reduce the loss.» Instead, 21

the [seller] resold the sacks to a third party for a very inferior price after only a few days. The damages [seller] has requested should therefore be reduced to US$ 17,865.48 whose value in Spanish currency is 2,340,379 pesetas. We direct the [buyer] to pay this amount plus the legal interest under art. 921 of the Civil Procedures Code from the date of this award.

Fourth. 22
As for the legal expenses, we see no merit to make a special judgment for expenses incurred in the Court of First Instance, because of the partial estimate of the claim, nor for the expenses incurred in the appeal and *casación* recourses. Pursuant to arts. 523.2, 710.2, 1715.3 of the Civil Procedures Code and, in accordance with this last precept, we return to the appellant the deposit made.

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