

37. Tribunal Supremo [Supreme Court], 7 July 1998, exequatur proceedings no. 1678/1997

Parties: Claimant: Unión de Cooperativas Agrícolas Epis-Centre (France)  
Defendant: Agucersa, SL (Spain)

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Articles: I; IV(1) (a); IV(1) (b); V(2); VII(1)

Subject matter: - "in writing"

Commentary Cases: ¶401; ¶504; [3] - ¶101, ¶703

### Facts

In August 1993, Unión de Cooperativas Agrícolas Epis-Centre (Epis-Centre) sold certain goods to Agucersa, SL (Agucersa) through a broker, Calamand & Co. (Calamand). On 17 and 18 August 1993, the broker sent two confirmations to Epis-Centre, which referred to Standard Contract no. 19 Paris, which contains a clause for arbitration of disputes at the *Chambre Arbitrale de Paris* (Paris Chamber of Arbitration). On 31 August and 1 September 1993, Epis-Centre sent two sale confirmations to Agucersa, which also referred to Standard Contract no. 19, requesting that Agucersa sign and return them for acceptance. Agucersa did not comply. Subsequently, Agucersa sent a fax and a telex to Calamand complaining about the quality of the goods received.

A dispute ensued and on 23 December 1994 the Paris Chamber of Arbitration rendered an award directing Agucersa to pay FF 900,025 to Epis-Centre for breach of contract.

Epis-Centre sought enforcement of the award in Spain. The Supreme Court denied enforcement, holding that the documents in the file did not prove that Agucersa intended to agree to the arbitral clause, since Agucersa had signed neither the confirmations sent by Calamand to Epis-Centre nor the confirmations of sale it received from Epis-Centre.

### Excerpt

[1] "The following documents have been supplied: the authenticated and certified award for which enforcement is sought, accompanied by a translation and by a declaration that it is final; authenticated and certified copies of two confirmations sent by Calamand, the broker, to seller Epis-Centre on 17 and 18 August 1993, nos. 44788 and 44829, respectively, with a translation; two original confirmations of sale, nos. B 93110 and B 93127, which Epis-Centre sent to Agucersa on 31 August and 1 September 1993, with a translation. There is also a simple copy of a fax and a telex sent by Agucersa to broker Calamand, by which Agucersa expressed its dissatisfaction with the quality of the goods it had bought. Lastly, [Epis-Centre] has supplied documents from various companies, aiming at proving that [Agucersa] was well-experienced in the international business [at issue], and that referring to Standard Contract no. 19 was usual [in that business].

[2] "Epis-Centre [rectius: Agucersa] resists enforcement on the following grounds: (1) the requirement of Art. IV(1)(b) of the [New York Convention], that the original or a certified copy of the written arbitration agreement, signed by the parties, be supplied together with the request for enforcement, is not met; (2) there is no arbitration agreement, notwithstanding later acts of performance of the contract; and (3) there has been violation of due process because of the failure to give notice of the appointment of an arbitrator and of the right to appoint an arbitrator under the [applicable] arbitration rules. (...)

[3] "We must apply the provisions of the [1958 New York Convention] when deciding on this enforcement. The Convention applies on the basis of both the subject matter and the time of rendition [of the award]. The Convention applies universally in Spain as Spain made no reservation to Art. I at the time of accession on 12 May 1977. ... The Convention applies rather than the Treaty between France and Spain on the Recognition and Enforcement of Arbitral Awards and Judgments in Civil and Commercial Matters of 28 May 1969 ..., which is also applicable according to its Arts. I, II and XVII. Although the treaty was concluded later than the Convention, its Art. XIX provides that it shall not affect other specific conventions which have been or shall be signed by the parties concerning the recognition and enforcement of decisions. This provision [of Art. XIX] must be complemented with the principle of maximum efficiency that is inherent to this type of treaty. In cases like the present one, this principle leads to preferring the New York Convention, as already held by this Court on earlier occasions (see Supreme Court, 16 April 1996 [1998/2919] in exequatur proceedings no. 3868/1992 ... and 17 February 1998 in exequatur proceedings no. 3587/1996...).<sup>1</sup>

[4] "The subject matter of the arbitration is arbitrable in Spain and the arbitral award at issue does not violate Spanish public policy (Art. V(2)).

[5] "Agucersa's opposition to recognition and enforcement focuses

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<sup>1</sup>Reported in this Yearbook at pp..... (Spain no. 34) and pp.... (Spain no. 33), respectively.

first on whether the requirement of Art. IV(1)(b) of the Convention is met. [Aguicersa] maintains that there is no arbitration agreement and that, therefore, Epis-Centre has not complied with the requirement that the petitioner supply, together with the request for enforcement, the original agreement referred to in Art. II of the Convention or a duly certified copy thereof. It argues that Epis-Centre only supplies confirmations of sale nos. 44788 and 44829, which Calamand sent to seller Epis-Centre on 17 and 18 August 1993 and which are not signed by Aguicersa. It further maintains that such confirmations, sent by the broker to the seller, may not bind the buyer, since the broker did not act in the name and on behalf of the buyer but merely put the interested parties in contact, and thus it could not bind the buyer in the present case. The buyer is not bound by the confirmations sent by the broker to the seller, which contain, as a contractual condition, a reference to Standard Contract no. 19.

[6] "Further, Aguicersa has supplied, together with its statement in opposition, confirmations of sale nos. B 93110 and B 93127, sent by Epis-Centre on 31 August and 1 September 1993, in which Epis-Centre requested Aguicersa to sign and return the second copy [of the confirmations]. Aguicersa did not comply with this request as it disagreed with several conditions in the confirmations of sale, that is, with a reservation of property rights, the identity of the laboratory appointed to settle possible disputes concerning the quality of the goods and the incorporation of Standard Contract no. 19, which Aguicersa maintains it was not aware of and which it allegedly did not receive either from the seller or from the carrier. Aguicersa therefore maintains that the failure to return the duly signed copies [of the confirmations] means that it did not accept the referral to arbitration. Further, [Aguicersa's] silence following reception of the confirmations of sale may not be deemed to equal cognizance and acceptance of the arbitral clause.

[7] "We must remark, on this issue, that this Court is aware that there is a doctrinal debate on the scope of the requirement in Art. IV together with Art. II. This Court has endeavoured to extract from these provisions, in necessary agreement with the provisions of the [European Convention of 1961], a criterion to ascertain when there is an agreement in writing as required in these provisions. While the silence or inactivity of a party with respect to an offer which directly or indirectly contains an arbitral clause has no effect whatsoever, the Court's interpretation aims at ascertaining, from the communications and acts of the parties, whether they wished to include the arbitral clause in their contract or, in general, to submit their dispute to arbitration (see Supreme Court, 17 February 1998 in exequatur proceedings nos. 3587/1996 and 2377/1996...).

[8] "If we apply this criterion to the case at issue and we analyze the documents filed by the claimant - who has the burden to supply the documents indicated in Art. IV - we certainly cannot deem beyond any doubt that the parties had the clear and unambiguous intention to include in their contract the arbitral clause in Standard Contract no. 19 Paris, to which the offers signed by the claimant refer, even if we start from the doubtful assumption that Aguicersa knew the meaning of the reference to

Standard Contract no. 19 Paris. Agucersa maintains that it was not aware of what this reference meant; this is in any case irrelevant, since even if Agucersa knew, we cannot infer from its knowledge that it accepted the submission to arbitration.

[9] "Hence, as far as the existence of such intention - and thus the compliance with the requirement in Art. IV - is concerned, we cannot hold that Epis-Centre supplied the document(s) containing the arbitration agreement according to the formal requirements in Art. II(2) of the New York Convention. There is no signature or declaration by Agucersa, expressing its intention to submit to arbitration, in the documentation supplied by Epis-Centre, [that is, in] the confirmations sent by broker Calamand to Epis-Centre, which refer to Standard Contract no. 19 Paris.

[10] "Nor can we reach a different conclusion based on the documents supplied by Agucersa. As to the confirmations sent directly by the seller, which also refer to Standard Contract no. 19 Paris, the fact that Agucersa has filed, together with the original confirmation, the copy which had to be returned, duly signed, in case of acceptance, shows that Agucersa did not sign it and clearly did not return it to Epis-Centre. This does not affect the existence of a commercial relation between the parties which led to typical acts of contractual performance, a circumstance which is recognized by Agucersa. These acts do not necessarily presuppose that Agucersa accepted the submission to arbitration, since none of them refers directly to the arbitration agreement or allows us to infer beyond any doubt that Agucersa wished to accept it. The fax and telefax also supplied by Agucersa, which are the only communications [between the parties] filed in this proceedings that are of a later date than the confirmations of sale, only prove that Agucersa disagreed with the quality of the goods received (fax of 1 December 1993 and telex of 20 December 1993), with no reference to the arbitration agreement.

[11] "We agree with Agucersa that we cannot deem that Agucersa's silence or inactivity vis-à-vis the sale confirmation[s] meant that it accepted the conditions therein, including the arbitration agreement. The more so as it appears, as mentioned above, that returning the [confirmations] to seller Epis-Centre was a prerequisite for the contract's coming into existence in the form suggested by the seller [in the confirmation]. Returning the contract would have been the expression of the contractual intention of buyer Agucersa.

[12] "Hence, we must conclude that Epis-Centre has not met the requirement in Art. IV(1)(b) of the Convention. It is thus unnecessary to examine the further grounds for opposition raised by Agucersa. The costs of this proceedings shall be borne by the party seeking enforcement, since enforcement is denied...."