CISG-online 310	
Jurisdiction	Germany
Tribunal	Oberlandesgericht München (Court of Appeal Munich)
Date of the decision	11 March 1998
Case no./docket no.	7 U 4427/97
Case name	*Cashmere clothing case*

Translation[*] *by Ruth M. Janal*[**]

Facts of the case:

1. 1
[Seller], an Italian firm that manufactures and sells high-quality clothes, started delivering cashmere clothing to the [buyer] in 1992, which [buyer] then sold in its various stores.

[Buyer]'s orders contained the clause «The Standard Conditions of the German Textile and Clothing Industry are part of the order». After respective orders, [seller] made the following deliveries of cashmere clothing (the deliveries were effected on the dates of the respective invoices): 2

[...]

Of the overall amount of DM [Deutsche Mark] 238,784.--, [seller] is crediting [buyer] DM 4,066.--. This credit relates to other invoices that [buyer] has paid. [Buyer] received 2,784 pieces of cashmere clothing for the entire season in the amount of DM 467,158.-- and paid the price for those goods apart from the invoices that are the issue of the claim. 3

[Seller] enclosed its «General Sale and Delivery Conditions in the Contractual Relationship with Foreign Customers» in all its confirmations of [buyer]'s orders. Inter alia, these conditions read: 4

> «1. [...] Object of the contract are also [...] the payment and delivery unitary conditions of the German textile industry [...]

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff of Italy is referred to as [seller]; the Defendant of Germany is referred to as [buyer]. Amounts in German currency (*Deutsche Mark*) are indicated as [*DM*].

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3. [...] Should the customer be cited in the country competent for its office, the rights of that country will be valid.

8. [...] Complaints must be made in writing within fourteen days from receipt of the goods.»

[Seller] submits that [seller]'s goods conformed to the contract. Furthermore, [buyer] neither examined the merchandise within a reasonable period of time, nor did [buyer] give notice specifying the asserted non-conformity. A set-off is not admissible according to Italian law, which finds supplementary application to the contract. Moreover, the parties had agreed on a period allowed for payment of sixty days from the date of the invoice. 5

[Seller] asks the Court to order [buyer] to pay the price of DM 234,718.-- with 10% interest on DM 208,579.-- from 27 September 1996, 10% interest on DM 2,062.-- from 18 December 1996, and 10% interest on DM 1,512.-- from 6 January 1997. 6

[Buyer] asks the Court to dismiss the claim. 7

[Buyer] claims that the merchandise delivered by [seller] did not conform to the contract. The examination of two sweaters delivered in the fall/winter season of 1996 revealed that only two-thirds of the material contained delicate cashmere fibre. With respect to the deliveries in question, [buyer]'s stores noticed for the first time that the goods had a rougher feel to them. Customers of these stores also noticed that the cashmere sweaters were not as soft as they had previously been. In the fourth quarter of 1996, [buyer] discussed these customer complaints with the [seller]'s representatives at the [buyer]'s headquarters in Munich [Germany]. During the course of this meeting, the [seller]'s agent admitted that it had heard complaints about the inferior quality of the material before. Already on 22 November 1996 the expert report referred to had been commissioned. After receipt of the report on 18 December 1996, [buyer] informed [seller] about the result. 8

[Buyer] seeks to set-off with a claim of damages against the purchase price: 9

For the 326 sweaters still in stock, [buyer] is asking for the average purchasing price. This is an amount of DM 54,704.20. [Buyer]'s loss of profit for being unable to sell the 326 pieces amounts to DM 79,544.--.

As far as [buyer] had been able to sell the goods, [buyer] was only able to obtain a lower price. [Buyer] therefore suffered an additional loss of profit of DM 123,755.--.

Finally, [buyer] seeks a set-off for the cost of the expert report in the amount of DM 1,748.--.

2. 10
The Court of First Instance granted [seller]'s claim and declared that the [buyer] could not set off its alleged damages against the undisputed purchase price.

The Court held that [buyer] had not been able to explain to the Court's satisfaction that the sweaters in dispute had not consisted of 100% of delicate cashmere fibbers. According to the 11

[buyer]'s own concession, neither of the pieces presented by it had been a part of the deliveries in dispute. [Buyer] was unable to give any further evidence because only 326 of the 2,784 sweaters delivered remained in its storage, and those pieces were supplied with the deliveries in dispute as well as with other deliveries. Furthermore, [buyer] was unable to rely on the asserted non-conformity of the goods as its notices of 5 and 19 December 1996 were not given within a reasonable time. [Buyer] itself pointed out that all of the sweaters in dispute had a rougher feel to them than previous deliveries. If [buyer]'s customers had «frequently» noticed this and complained about the material, then an expert trader obliged to examine the goods should have noticed the lower quality even more so. That [seller] knew or could not have been unaware of the lack of conformity is neither apparent, nor has it been put forward by the [buyer].

Finally, the Court held that it was incomprehensible how [buyer] was supposed to have suffered the damages claimed. It was undisputed that at least 88.29% of the goods in question had been sold. Since [buyer] claims that it was unaware of the non-conformity of the goods, the alleged price reductions could not have been the result of such a non-conformity. 12

3. 13
[Buyer] has lodged an appeal against the decision.

[Buyer] submits that in the meantime two other sweaters – this time taken out of the deliveries in dispute – have been examined. The test has shown a percentage of delicate cashmere fibre of 77 to 78%. An examination of the entire remaining stock would prove that all of the cashmere merchandise delivered since July 1996 were lacking in conformity. [Buyer] claims that it gave notice of the defect within reasonable time, as it had to be taken into account that the last three invoices were dated October and November 1996. The non-conformity was not a visible or obvious one. The only way to discern the flaw was through a microscopic examination at one singular institute in Germany. Furthermore, the [seller]'s representative had admitted on 5 December 1996 that this was not the first time [seller] heard complaints about the inferior quality of the goods. Finally, the non-conformity was such that [seller] ought to have been aware of the defect during the course of manufacture. Furthermore, [buyer] states that it must be taken into account that in a meeting on 7 February 1997 Mr. A of [seller]'s company had admitted that it would constitute a non-conformity if the sweaters contained less than 95% of delicate fibre. The parties had agreed on a joint examination of the merchandise. 14

[Buyer] is asking the Court to reverse the decision of the Court of First Instance. 15

[Seller] is asking the Court to dismiss the appeal. 16

[Seller] is defending the decision made by the Court of First Instance and argues that [buyer] is now presenting new and scarcely credible facts. Suddenly the delivered goods supposedly did not possess a «rougher feel» to them throughout, but partly a «somewhat softer feel». In case [buyer] was trying to claim that the asserted non-conformity was not discernible to the touch, [buyer] would destroy its own case as presented before the Court of First Instance. It is especially curious why [buyer]'s customers would have complained about the sweaters and why the sale of the goods «slowed a considerable degree». Even an examination of all the 17

material still in [buyer]'s stock would not clarify the situation. In this regard, it had to be considered that after the last delivery in dispute (effected on 6 November 1996) [seller] had delivered thirteen additional pieces in the beginning of December which had not been questioned and had been paid for according to the agreement. The topic for the meeting of 5 December 1996 had not been the quality of the material, but rather the delivery conditions for the year 1997.

Furthermore, [seller] submits that the Court of First Instance held correctly with respect to Art. 40 CISG that the examination of the goods is an obligation put upon the buyer, not on the seller. [Seller] obtains the raw cashmere from Asian markets. The following manufacturing process takes place outside of [seller]'s business entity. After a short period of intermediate storage, the goods are delivered to various businesses carrying out the washing, spinning, dyeing and knitting. Those businesses again distribute the goods to various subcontractors, so that only the finished product reaches the storage rooms of the [seller]. The manufacturing process takes place in various Italian regions (Umbria, Piemont and Emilia-Romagna). 18

[Seller maintains that] the parties did not agree on 7 February 1997 that ten further sweaters still in stock be examined. This had only been a non-binding suggestion which [seller] had not committed to because [buyer] had simultaneously demanded that [seller] agree to an extensive waiver of rights. 19

[...]

Grounds for the Decision:

The admissible appeal is successful only with respect to a part of [seller]'s claim for interest. 20

1. 21
[Seller]'s right to claim the purchase price is undisputed with respect to the amount claimed and results out of Art. 53 CISG. The United Nations Convention on Contracts for the International Sale of Goods applies to the contract between the parties according to Art. 1(1)(a) CISG.

The liability of buyer's owner for the claim against [buyer] follows from §§ 161(2), 128 HGB [*Handelsgesetzbuch* – German Commercial Code]. 22

2. 23
[Buyer] is unable to set off its alleged claims against the purchase price because set-off claims are prohibited under § 10(2) of the Standard Conditions of the German Textile and Clothing Industry. The parties mutually agreed on those Standard Conditions (Art. 18 CISG) as both [buyer] in its orders and [seller] in its confirmation of the orders referred to them.

There is no reason to doubt the validity of an agreement to prohibit a set-off (the validity would be a matter of German law according to Art. 4(a) CISG). The application of German law (which is also the law the [buyer] refers to in its arguments) is a result of a corresponding stipulation in [seller]'s General Conditions, which supplement the Standard Conditions of the German Textile and Clothing Industry. [Buyer] accepted those additional General Conditions (which modified its offer) by carrying through with the contract (*cf.* Herber/Czerwenka, *CISG*, 24

Art. 19 n. 18). According to German law, the clause in question would be admissible even in consumer transactions (*cf*. § 11 No. 3 AGBG [*Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* – German Act for the Regulation of the Law of Standard Terms]).

3. **25**
[Buyer] is neither entitled to reduce the price according to Art. 50 CISG, nor may [buyer] declare the contract avoided with respect to the goods that are still in stock.

According to Art. 39(1) CISG, [buyer] lost the right to rely on the asserted non-conformity of the cashmere sweaters. Whether the sweaters were in fact defective is therefore irrelevant. **26**

The earliest notice specifying the lack of conformity that [buyer] brings forward is an oral complaint in Munich [Germany] on 5 December 1996. This notice was not given within a reasonable time after [buyer] ought to have discovered the lack of conformity. It has to be taken into account that the sweaters in dispute had predominantly been delivered in the last days of July 1996. Apart from a substitute delivery in the beginning of September 1996, only three deliveries were made in October and November 1996; they constituted roughly 2% of the goods in question. **27**

According to Art. 38(1) CISG [buyer] is required to examine the goods within as short a period of time as was practicable in the circumstances. A thorough and expert examination of the goods can be expected from a business of [buyer]'s size, which owns various retail stores. Such a sample examination would have revealed the asserted non-conformity within a short period of time, as [buyer] claims that none of the sweaters conformed with the contract. A trader selling high-quality clothing should have noticed that the merchandise had a «rougher feel» to them. If the quality of the goods was in fact so inferior that (as [buyer] has maintained) customers frequently complained about the lack of softness in the material, then a trader who sells such high-quality clothing in a number of retail stores had to notice the defect. The lack of a detailed scientific analysis is irrelevant in these circumstances. According to [buyer]'s own argument, [seller] was giving a notice of lack of conformity on 5 December 1996 following customer complaints – even though at that point in time the commissioned expert had not yet issued its report. **28**

In view of these facts, the Court is of the opinion that the reasonable time to give notice under Art. 39 CISG (including the period for examination) expired after one month – at the latest. **29**

Furthermore, the parties contractually agreed on a shorter period of time – according to § 7(1) of the Standard Conditions of the German Textile and Clothing Industry, notice is to be given within two weeks after delivery of the goods. Such a contractual derogation from the CISG is possible (*cf.* Herber/Czerwenka, *CISG,* Art. 39 n. 18; Magnus in *Staudinger, BGB*, Art. 39 CISG n. 65). [...] **30**

[Seller] may rely on Art. 39 CISG because [buyer] has not proven that [seller] could not have been unaware of the lack of conformity. Since [seller] lets other companies manufacture the goods, the requirements of Art. 40 would only have been met had [seller] failed to notice grave and obvious defects in the merchandise (*cf.* Magnus in *Staudinger,* Art. 40 CISG n. 5). Under the undisputed course of events, such circumstances are not given. The Court cannot **31**

take the view that the merchandise was unfit to be worn or sold, as [buyer], as a retailer for high-quality goods, sold the majority of the sweaters to its customers. Even if it were true that [seller]'s representative told [buyer] in the meeting of 5 December 1996 that [seller] had already received complaints about the quality from third parties, this would not alter the result. First of all, the opinions of other customers cannot be taken as a proof of a non-conformity in business transactions. Secondly, there is nothing to indicate that [seller] was aware of such complaints before delivering the goods, or before the period granted to the [buyer] to give notice of a lack of conformity had run out.

[...]

A reasonable excuse within the meaning of Art. 44 CISG has neither been presented by the [buyer], nor is one apparent. **32**

[Seller] has not waived its right to rely on [buyer]'s failure to give notice of the defect within a reasonable time. This is especially true for the meeting on 7 February 1997. With respect to this meeting, [buyer] conceded in its memoranda of 20 February 1998 that «[seller] did not renounce a right to rely on a belated notice of non-conformity». A waiver cannot be inferred from the agreement (alleged by the [buyer]) to jointly examine the material, as such an examination could also have formed the basis for a settlement out of generosity. **33**

4. **34**
The claim for interest is justified only for a rate of 5% according to §§ 352, 353 HGB [*Handelsgesetzbuch* – German Commercial Code], because German law is the applicable law supplementing the CISG (see above at 2.). After [buyer] substantiated its arguments with respect to the settlement date with documents, [seller] is no longer disputing the date.

5. **35**
[...]