

Case 270: CISG 1(1); 8(2); 8(3); 38; 39

Germany: Bundesgerichtshof; VIII ZR 259/97

25 November 1998

Original in German

Published in German: [1999] Monatsschrift für Deutsches Recht 408; [1999] Neue Juristische Wochenschrift 1259; [1999] Der Betrieb 687; [1999] Wertpapier-Mitteilungen 868; [1999] Recht der Internationalen Wirtschaft 385; [1999] Aussenwirtschaftliche Praxis 176; [1999] Lindenmaier-Möhring: Nachschlagewerk des Bundesgerichtshofs in Zivilsachen CISG No. 5; [1999] Praxis des Internationalen Privat- und Verfahrensrechts 377; <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/353.htm>

Head Note published in German: [1999] Eildienst: Bundesgerichtliche Entscheidungen 105; [1999] Entscheidungen zum Wirtschaftsrecht 257

Commented on in German: Schlechtriem, [1999] Entscheidungen zum Wirtschaftsrecht 257; Magnus, Lindenmaier-Möhring: Nachschlagewerk des Bundesgerichtshofs in Zivilsachen CISG No. 5; Otte, [1999] Praxis des Internationalen Privat- und Verfahrensrechts 352; Escher, [1999] Recht der Internationalen Wirtschaft 495

A German seller, defendant, delivered surface-protective film to an Austrian buyer, plaintiff, for use by the buyer's business partner. The buyer did not test the film, which had to be self-adhesive and removable. When the film was removed from polished high-grade steel products by the buyer's business partner, it left residues of glue on the surface. Upon being so advised, the buyer notified the seller the next day. However, this notice was given 24 days after the film had been delivered. The buyer paid the expenses of removing the glue residue and brought a claim for reimbursement of these expenses against the seller. The appellate court had dismissed the buyer's claim (see Case No. 230) and the buyer appealed further.

The Supreme Court reversed the appellate court's decision and allowed the buyer's claim. It confirmed that the CISG is applicable if the parties have chosen, even by means of standard contractual provisions, the law of a Contracting State to govern their contract (article 1(1)).

The court found that the seller had waived its right to rely on articles 38 and 39 of the CISG. It stated that a seller can waive its rights not only expressly but also in an implied manner. The preconditions for an implied waiver are specific indications that would cause the buyer to understand the seller's action as a waiver. The fact that a seller enters into negotiations over the lack of conformity of the goods need not necessarily be regarded as a waiver, but should be considered in conjunction with the circumstances of each case. In this case, negotiations as to the amount of damages and the manner in which damages should be paid had taken place between the parties over a period of 15 months, during which time period the seller had not reserved the right to rely on articles 38 and 39 of the CISG. Furthermore, at the buyer's request, the seller had paid the expenses of an expert. Moreover, the seller had offered damages amounting to seven times the price which the seller had received for the surface-protective film. The court held that, from the buyer's point of view (article 8(2) and (3) CISG), it could only be understood that the seller would not, at a later point of time, rely on articles 38 and 39 of the CISG.

The court left open the issues of whether examination under article 38 of the CISG should have included a test treatment by the buyer and whether the buyer had had a reasonable excuse for failure to give notice within the required period of time (article 44 CISG). It also left open the issue of whether the seller had lost the right to rely on the provisions of articles 38 and 39 by means of article 40 of the CISG.

*Addenda/Corrigendum*

Document A/CN.9/SER.C/ABSTRACTS/26 (Arabic, Chinese, English, French, Russian, Spanish)

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Commented on in French: Witz [1999] Recueil Dalloz, No. 40, 356