CISG-online 353	
Jurisdiction	Germany
Tribunal	Bundesgerichtshof (German Supreme Court)
Date of the decision	25 November 1998
Case no./docket no.	VIII ZR 259/97
Case name	*Foil case I*

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FACTS OF THE CASE

The plaintiff [buyer] is domiciled in Vienna, Austria. [Buyer] produces stainless-steel sheet metal, which it then delivers to its customers for further processing. For protection against damage during transport and processing the metal is covered with self-adhesive foil that must be fully removed after processing. 1

The [buyer] has had a business relationship for several years with the defendant [seller], who is based in Heidelberg, Germany. The [buyer] had in the past repeatedly obtained this type of protective foil from the [seller] without complaint. In March 1995, the [buyer] again ordered 7,500 square meters of foil from the [seller], which was delivered on 28 March 1995. The [buyer] inspected the delivery for completeness and exterior imperfections but did not test it. Thereafter the [buyer] used the foil for, among other things, a section of polished stainless steel sheet metal, which it then delivered to its customer, Company B. GmbH. On 20 April 1995 Company B. informed the [buyer] that after stripping off the foil «the complete adhesive 2

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

Translator's note on other abbreviations: BGHZ = Die amtliche Sammlung der Entschiedungen des Bundesgerichtshofes in Zivilsachen [Official Reporter of Decisions of the German Federal Supreme Court in Civil Matters]; HGB = Handelgesetzbuch [German Commercial Code]; ZPO = Zivilprozessordnung [German Civil Procedure Code].

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residue stuck like an adhesive film on the polished surface.» As a result, the [buyer] notified the [seller] on 21 April 1995 of the contract non-conformity.

Company B. cleaned the stainless-steel surface at a total expense of 492,240.- sA [Austrian shillings], which the [buyer] then reimbursed. Thereafter, the [buyer] and the [seller] sought in vain to come to an agreement concerning the settlement of damages. During these negotiations, the [seller] did not complain that it was not notified of the foil defect until 21 April 1995. In the present proceedings, the [buyer] demands reimbursement from the [seller] for the 492,240.- sA [buyer] paid as compensation to Company B. The [buyer] alleges that it gave timely notice of the defect according to the United Nations Convention on International Sales of Goods of 11 April 1980 (hereafter CISG). The [buyer] claims that the [seller]'s general terms and conditions, which provide for an eight-day notification limit, were not part of the contract. [Buyer] also maintains that the defect was not manifest until the destruction of the adhesive film was ongoing. Furthermore, the [buyer] alleges that the [seller] willfully deceived the [buyer] since the [seller] used a different adhesive than the usual, faultless, rubber adhesive. 3

The [seller] alleges that the notice of defect was too late. [Seller] further alleges that it had previously used the type of acrylic adhesive that was used in this delivery. According to the [seller], it was not the type of adhesive, but rather it was the adhesive-charge that was used that was unforeseeably defective. In its partial judgment of 2 October 1996, the Landgericht [Regional Court] reasoned that the [buyer]'s claim was justified and ordered the [seller] to pay 35,160.- sA. Upon appeal by the [seller], the Oberlandesgericht [Court of Appeals] reversed the first judgment and dismissed the suit. The [buyer] appeals on points of law. 4

GROUNDS FOR THE DECISION

I. 5
The [seller] did not appear at the oral hearing. Therefore, as per the [buyer]'s petition the appeal is to be decided by default judgment. As regards content, however, the judgment is not based upon the consequences of default, but rather upon the examination of the entire still-relevant state of the dispute (BGHZ [*] 37, 79, 81 et seq.).

II. 6
The Court of Appeals explains that the CISG applies to the legal relationship between the parties since Germany and Austria are Contracting States to the this Convention. The choice of law provision in No. 13 of the [seller]'s general terms and conditions («German law applies») does not contradict this finding.

The delivered foil did not conform to the contract under Arts. 35 and 36 CISG. The [buyer], however, did not meet its duty under Art. 38 CISG to examine the goods «within as short a period as is practicable.» For the examination of the goods, it was advisable that the [buyer] undertake a trial-processing, which it should have begun within three to four days after delivery. The [buyer] would have then been able to discover the defect within a time period of at most ten to eleven days after delivery since, as noted in the expert's report from the 7

Austrian Synthetics Institute that [buyer] submitted, the build-up of adhesive residue is visible after seven days at the latest. Consequently, the notice period of Art. 39 CISG began to run ten to eleven days after the 28 March 1995 delivery-that is to say on the 7th or 8th of April 1995. For the present case concerning non-perishable goods, a notice period of approximately eight days is reasonable. The notice of defect on 21 April 1995 was therefore several days late. Art. 40 CISG does not bar the [seller] from relying on the delay of notice since the [buyer] has not produced any proof that the [seller] knew or «could not have been unaware» of the lack of conformity of the adhesive coating. Moreover, the [buyer] was not able to refute the [seller]'s assertion that [buyer] had already repeatedly used transparent acrylic adhesive on its foil without it having built any adhesive residue. This assertion of the [seller] would indicate a defective adhesive, but not the general unsuitability of the type of adhesive.

The [buyer] was not able to produce a «reasonable excuse,» as available under Art. 44 CISG for failing to give timely notice. Article 44 CISG only concerns the notice period of Art. 39(1) CISG, thus it does not apply when, as here, the notice is late solely because the buyer did not conduct an orderly examination the goods as provided in Art. 38 CISG. Finally, the [seller] did not forfeit its right to object to the lateness of the notice. Even though according to Arts. 7(1) and 80 CISG, the principles of good faith apply, in this perspective it is not an impermissible exercise of rights for the [seller] to presently object to the untimely notice. This is so, notwithstanding the fact that the [seller] did not object before these proceedings, but merely negotiated over the alleged defect and settlement of damages. It is accepted under § 377 HGB [*] that holding negotiations over an alleged defect does not mean that the seller waives the objection to delay. Any other decision would mean that any willingness to negotiate, even to oblige the buyer, would put the seller in danger of losing its right to object to the delay; this would not be appropriate. Here the [buyer] did not present special circumstances, which (exceptionally) would show a clear waiver by the [seller]. Such circumstances are also not to be found in the submitted written exchanges of the parties. **8**

III. **9**
These elaborations do not withstand legal scrutiny.

1. **10**
The Court of Appeals was correct to apply the CISG and also to affirm the Convention's application in case the [seller]'s general terms and conditions had become part of the contract. As the Court of Appeals properly explained, the referral to German law (here through No. 13 of [seller]'s general terms and conditions) in principle leads to the authority of the CISG. This law of sales, as part of German law and as special law for the international sale of goods, has priority over non-uniform German sales law. The parties do not assert that in this case something else should apply as an exception.

2. 11
It may remain undecided whether the Court of Appeals was correct that the [buyer] in this case should have undertaken a trial-processing of the foil (Art. 38 CISG) and that, as a result of its omission to undertake such an examination, the [buyer] passed the notice period of Art. 39(1) CISG. This applies equally with regard to the Court's findings that the [seller] was not denied its right to object to the delay because of bad faith (Art. 40 CISG), and that the [buyer] had no reasonable excuse for the delay in giving notice (Art. 44 CISG). All of this requires no final decision. The [seller] may at any rate no longer rely on the claimed delay because it impliedly waived this objection during the negotiations over the settlement of damages.

The interpretation of individual legal declarations is generally the task of the Court of First Instance and is only limitedly verifiable at the appellate level. However, the finding of the Court of Appeals that the [seller] did not lose its right to rely on the untimely notice is, as the appeal correctly notes, based upon a violation of accepted rules of interpretation - especially of the principle that an interpretation be just as to each party's interests. Furthermore, it ignores essential procedural material (§ 286 ZPO).[*] 12

a) 13
The records of the Court of Appeals do not sufficiently indicate whether the Court wanted to consider the [seller]'s conduct before these proceedings with regard to the objection on the grounds of forfeiture of the delay, or on the grounds of an implied waiver - which differs from forfeiture. The question of forfeiture can remain open, however, since in any case according to the findings of the Court of Appeals it is presumed that the [seller] impliedly waived its right to object to the delay.

It is recognized in the judgments of the Federal Supreme Court that a seller can also impliedly waive the right to object to an untimely notice of defect. The possibility of this type of waiver is especially fitting within the scope of § 377 HGB when the seller unconditionally takes back the complained-about goods, or without reservation promises to remedy the goods, or does not raise objection to the delay. Nonetheless, the mere entering into negotiations over defects asserted by the buyer is usually not to be seen as this type of waiver since the seller may thereby wish first of all to attempt to arrive at an amicable settlement of the dispute. Even the fact that the seller does not raise the objection to the delay until trial, or under circumstances not even until appeal, does not alone establish an implied waiver (see generally panel [Senat = panel of the Federal Supreme Court] judgment of 19 June 1991, VIII ZR 149/90 = BGHR HGB § 377, objection to delay 1 m.w.Nachw.). 14

Since a general waiver of rights is not to be presumed, clear supporting facts must be presented which the buyer could understand as a waiver of rights; here the right in question is the objection to the delay by the contract partner. Accordingly, the acceptance of an implied waiver is ruled out when dealing with rights of which the other party is unaware and with which it has not reckoned (BGH [Bundesgerichtshof (Federal Supreme Court)], judgment of 16 November 1993, XI ZR 70/93 = BGHR BGB § 397, Disagio 1; judgment of 21 November 1996, IX ZR 159/95 = WM 1997, 330 under III). 15

b) 16
There are no reservations against applying these principles, developed for German national law, within the scope of the CISG (see panel judgment of 25 June 25, VIII ZR 300/96 = WM 1997, 2313 under II 1 b). The Court of Appeals correctly proceeded from this assumption. As the appeal correctly points out however, the Court of Appeals did not sufficiently consider important circumstances in the facts of this case when it judged the [seller]'s conduct to be merely an expression of willingness to negotiate and generosity due to the rather long lasting business relationship between the parties.

The [seller], after inspecting the defect for itself, agreed without reservation with the [buyer]'s notice of defect. Thereafter, the [seller] negotiated exclusively over the manner of settlement and the amount claimed by the [buyer] as reimbursement for the sum of 492,240.- sA that it had paid to its customer, which the [seller] rejected as excessive. The [seller] never cast a doubt concerning the contract non-conformity as such. Moreover, the appeal correctly points out that the [buyer] already indisputably stated in its action that the [seller] had reimbursed [buyer] for the costs of the expert opinion by the Austrian Synthetics Institute in the amount of 11,300.- sA. Furthermore, the [seller], according to its letter of 31 July 1995, offered to reimburse the [buyer]'s cleaning costs of 16,500.- DM [Deutsche Mark] through the free delivery of 30,000 square meters of protective foil with rubber adhesive. Finally, by letter from its legal counsel dated 18 January 1996, the [seller] proposed the amount of 200,000.- sA, one half in cash payment, the other half in performance of deliveries. This is a considerable sum in view of the sale price for the disputed delivery of 4, 275.- DM. 17

When, after [seller]'s own inspection of the claimed defect, the [seller] subsequently negotiated over the amount and manner of a settlement of damages for practically 15 months - until its answer of 9 July 1996 - without expressly or at least discernibly reserving the objection to the delay, and when the [seller] thereby not only reimbursed the costs for the expert opinion, but also offered through legal counsel to pay compensatory damages that amount to practically seven times the value of the goods, the [buyer] could then only reasonably understand (see Art. 8(2), (3)) that the [seller] was seeking a settlement of the affair and would not later refer to the allegedly passed deadline as a defense to the [buyer]'s reimbursement claim. Considering all these circumstances, the idea of a mere obliging arrangement by the [seller] must have been far from the [buyer]'s thoughts. The argument that the [seller] was not aware of the meaning of its conduct because [seller], even though advised by legal counsel, did not recognize the legal significance of the objection to the delay is rejected. The incumbency to inspect the goods and to give notice of possible defects within a reasonable time - regardless of the allotment of this notice period in the individual case - are part of the basic rules of commerce. Moreover, the [seller] expressly provided for a notice period of eight days in its general terms and conditions, which it also never relied upon before these proceedings. 18

c) 19
Under these conditions, the concerns of the Court of Appeals that the acceptance of an implied waiver would have the effect that all willingness to negotiate, including merely to oblige, would put the seller in danger of losing its objection to the delay, are not justified in the present case. The [seller] was not impeded from suitably pointing out the alleged delay of notice and from reserving its rights. The [seller] would have thereby clarified vis-à-vis the [buyer] that [seller]'s compensation offer and reimbursement of the expert opinion costs were of an obliging character. Without this type of reservation, the [seller] had to expect that the [buyer] would interpret [seller]'s willingness to pay as a waiver of such objections.

Further determinations in this context are not to be expected. Therefore the panel itself can 20
interpret the [seller]'s conduct to find that in the [seller]'s unreserved settlement negotiations it impliedly waived the objection to the delay of notice, which the [buyer] gave on 21 April 1995.

[…] 21

IV. 22
Therefore, the Regional Court correctly held the claim for relief as justified. The [seller]'s liability includes the consequential damages that the [buyer] suffered through reimbursement to its customer for the damages caused by the foil non-conformity (Art. 74(1) CISG; Schlechtriem/Stoll [Kommentar zum einheitlichen UN-Kaufrecht (Commentary on the UN Uniform Sales Law)] Art. 74, nn. 20, 47). Since even after consideration of the [seller]'s pleadings the [buyer]'s claim is in any case justified for the amount of 35,160.- sA, the [seller]'s appeal against the Regional Court's partial judgment is groundless.

V. 23
To the extent that the case has reached the appellate level, it is ripe for a final decision. The panel has therefore itself pronounced that the [seller]'s appeal against the 2 October 1996 judgment of the Heidelberg Regional Court will be refused (§ 565 section 3 n. 1 ZPO).