

Case 359: CISG 35; 38; 39; 45; 78

Germany: Oberlandesgericht Koblenz; 2 U 1556/98

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A French seller, the plaintiff, sold fibreglass fabrics for filters to a German buyer, the defendant. One week after delivery the buyer handed the fabrics over to a third party for further treatment. Eighteen days later the buyer complained about the anomalous structure of the fabrics and refused to pay. The seller sued the buyer for the purchase price. The buyer claimed set-off because of the damage caused by the defective goods. The court of first instance applied German law and allowed the claim. The buyer appealed.

The appeal Court confirmed the judgement holding the CISG to be applicable.

It found that the buyer had lost its right to rely on a lack of conformity (article 35 CISG) by virtue of article 39 CISG. According to article 39 CISG the buyer loses the right to rely on a lack of conformity if he does not give notice within a reasonable period of time. According to article 38 CISG the buyer must examine the goods within as short a period as is practicable in the circumstances. After expiration of this period, the buyer loses the right to rely on a lack of conformity. The Court referred to its own decision of 11 September 1998 (see Case No. 285) to conclude that where defects are easy to discover, as in the case at hand, the examination period should not exceed a period of one week. Following this examination period, the buyer then normally has to give notice within a further two weeks. In this case, the buyer had to pass the fabrics to a third party for further treatment. This should have enabled the third party to examine the goods within the one week period. The buyer delayed however in handing the goods over to the third party without giving reasonable causes for the delay. Thus, giving notice on July 15, when the defendant had received the goods on June 20, was held to be too late.

As a result of the buyer's loss of right to rely on a lack of conformity, the buyer was unable to claim the remedies provided in article 45 CISG. Consequently, the Court dismissed the claim for set-off.

The Court granted interest under article 78 CISG and established the interest rate according to French law applicable pursuant to the rules of German private international law.