

CISG-online 514	
Jurisdiction	Germany
Tribunal	Landgericht Regensburg (District Court Regensburg)
Date of the decision	24 September 1998
Case no./docket no.	6 O 107/98
Case name	<i>Italian cloth case I</i>

*Translation\* by Ruth M. Janal\*\**

*Translation edited by Camilla Baasch Andersen\*\*\**

### **Facts of the Case:**

The [seller] is a manufacturer of textiles, the [buyer] owns a knitwear factory with all the business that goes with it.

[Seller] has brought an action for the purchase price for a delivery of fabrics.

[Seller] submits that the [buyer] ordered fabric at a trade fair in Prato on 2 March 1996. This order was confirmed by the [seller] on 22 March 1996. The order had been based on a textile sample presented to the [buyer]. Furthermore, [seller] had sent the [buyer] a substantially larger sample on 15 April 1996. The first part of the delivery had been effected on 2 May 1996, the second part of the goods was delivered on 17 May 1996. The [buyer] refused to take possession of the goods, claiming that the cloth could not be cut in an economical manner and that the fabric was billowing out. [Seller] submits that the [buyer] was familiar with the quality of the fabric before ordering it and that the fabric was not defective. Moreover, even if the goods had been non-conforming, the [seller] would have been entitled to remedy the defect according to Art. 48 of the United Nations Convention on Contracts for the International Sale of Goods (CISG). At no point in time did the [buyer] provide the [seller] with the opportunity to make use of his right to remedy the alleged non-conformity. Therefore, the [buyer] was not entitled to declare the contract avoided and was obliged to pay the price for the textiles it ordered.

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\* 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].

\*\* Ruth M. Janal, LL.M (UNSW) is a Ph.D. candidate at Albert-Ludwigs-Universität Freiburg.

\*\*\* Camilla Baasch Andersen is a Lecturer in International Commercial Law at the Centre for Commercial Law Studies, Queen Mary, University of London, and a Fellow of the Institute of International Commercial Law of the Pace University School of Law. She is currently finishing her Ph.D. thesis on uniformity of the CISG at the University of Copenhagen.

The [seller] requests the Court to:

1. Order the [buyer] to pay the amount of *DM* [Deutsche Mark] 13,860.22 with interest of 12% on *DM* 10,483.24 from 18 May 1996 and on *DM* 3,376.98 from 1 June 1996; and to
2. Order the [buyer] to pay a further *DM* 198.05 with interest of 12% from 31 July 1996.

The [buyer] asks the Court to dismiss [seller]'s claim.

The [buyer] acknowledges that it indeed ordered the textiles at the trade fair in Prato on 2 March 1996. The [seller] presented it with two samples in the size of roughly 10 by 10 centimeters. The [buyer] required the fabric for the production of its fall collection which needed to be finished on 15 July 1996 at the latest. The cloth was delivered on 2 May and 17 May 1996, whereupon [buyer] immediately examined and washed the fabric. [Buyer] thereby discovered that the cloth could not be cut economically. Usually fabric has to be delivered by the meter in a way that both the front and the back of a dress or skirt can be cut out of the folded material at the same time. The textiles delivered by the [seller] did not allow such a customary and economical cutting. The only possibility left would have been to take a triangular piece of the cloth and cut either front or back of a dress or skirt out of it. Whereas generally a length of 1.8 meters is needed to cut a skirt out of a roll of material, four meters of the cloth delivered by the [seller] would have been required. This would have resulted in a waste of 122%, an amount that could not be considered economical. The price of a skirt manufactured out of the cloth would therefore have had to be at least twice the price of a skirt generally produced by the [buyer]. [Buyer] would have suffered damages that exceeded by far the price of the material. The [buyer] further discovered that the fabric was billowing out after being washed and did not hang as required. [Buyer] asked the [seller] to deliver non-defective fabric. Since the [seller] had not followed suit, [buyer] was entitled to refuse the payment of the purchase price.

### **Reasoning of the Court:**

[Seller]'s claim is allowed with respect to an amount of *DM* 13,860.22 and dismissed with respect to any further claims.

It is undisputed that the [seller] was originally entitled to a purchase price in the amount of *DM* 13,860.22. The [buyer] is not entitled to refuse payment of that price.

On 2 March 1996, the [buyer] ordered the goods based on a sample presented to it by the [seller]. The fabric was also delivered in the quantity, quality and description required by the contract. Unless the parties have agreed otherwise, under Art. 35(2)(a) CISG, goods only conform with the contract if they are fit for the purposes for which goods of the same description would ordinarily be used. Undisputedly, the fabric delivered by the [seller] is fit to be used for the production of skirts and dresses. Art. 35(2)(b) CISG further requires that the goods be fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract. However, the [buyer] does not submit that it in any way indicated when it ordered the cloth that the fabric had to be cut in a certain way in order

to be used economically. The [seller] was unable to infer from the circumstances that the [buyer] meant to cut the material in any particular way. The cloth is furthermore non-defective under Art. 35(2)(c) CISG because [buyer] itself admitted that the fabric possessed the qualities of the sample presented to it by the [seller]. Therefore, the [buyer]'s defense that the cloth could not be cut in an economical manner cannot be heard. Even if this submission were correct, this would also not constitute a defect under § 459 BGB, unless the parties had stipulated the possibility of an economical processing of the goods in their contract.

[Buyer]'s other submission that the fabric was billowing out after washing and did no longer hang properly is also not convincing, because it did not specify the nature of the alleged defect. And even if the alleged defect had existed, the [buyer] failed to notify the [seller] of the defect within a reasonable time as required under Art. 39(1) CISG. The faxes of 15 May and 29 May 1996 presented by the [buyer] do not give conclusive evidence whether the [buyer] complained about any non-conformities and to which defects those notices would have referred.

Finally, even if the Court assumed a non-conformity of the goods and a notice within a reasonable time under Art. 39(1) CISG, the [buyer] would still not be entitled to declare the contract avoided. According to Art. 49(2)(b)(ii) CISG, the buyer loses the right to declare the contract avoided if the buyer fails to do so within reasonable time after the expiration of an additional period of time fixed by the buyer under Art. 47 CISG, or after the seller has declared that it will not perform his obligations within such an additional period. As a consequence, the [buyer] would only have been entitled to declare the contract avoided if it had provided the [seller] with an opportunity to remedy the alleged breach of contract. The [seller] tried to help the [buyer] with the difficulties it was obviously experiencing in processing the cloth and asked [buyer] for more information with respect to the nature of those difficulties. [Seller] also sent the [buyer] a different kind of the fabric ordered, that is, *Lolita* instead of *Lolita-Airo*, so that [buyer] could try processing this material. However, the [buyer] refused to take delivery of this fabric. Instead, the [buyer] fixed an additional period of fourteen days for the delivery of «non-defective goods», without specifying what [buyer] considered to be non-defective. [Buyer] therefore thwarted [seller]'s right to remedy a non-conformity under Art. 48 CISG. Since the [seller] could not know which type of fabric the [buyer] would accept, it was not obliged to send more than a sample of the replacement cloth. The delivery of the sample was also timely because the parties had not agreed on a specific period of delivery. The [buyer] was therefore held to agree to the solution suggested by the [seller]. Because [buyer]'s request to deliver «non-defective» goods within fourteen days was insufficient, it was not entitled to declare the contract avoided under Art. 49 CISG and remains obliged to pay the purchase price for the textiles.

The claim is therefore allowed in the amount of *DM* 13,860.22.

The Court will only allow interest in the amount of 5% under § 352(1) HGB from the time the action was brought, because the [seller] has neither shown that it suffered a higher damage nor proven an earlier culpable delay by the [buyer].