

**Case 1961: CISG 39; 50**

Switzerland: Bundesgericht/Tribunal fédéral (Federal Supreme Court)

No. 4A 493/2020

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The Swiss Respondent (buyer) is operating a mountain lodge in Switzerland, which it renovated in 2014. For this purpose, the buyer purchased façade panels from two German manufacturers (sellers). After a dispute about both the delay of the delivery and the quality of the panels had arisen, the buyer refused to pay part of the contract price. The sellers in turn assigned their payment claim to a German factoring company (Claimant), which eventually sued the buyer for payment in a Swiss court. After the Claimant had prevailed in both the Court of First Instance and the Court of Appeal, the Respondent appealed to the Federal Supreme Court.

Two of the points of law raised upon appeal concerned the CISG.

The first point concerned the Respondent's allegation that the sellers had tacitly waived any right to rely on the buyer's late notice of non-conformity (article 39(1) CISG) by investigating the source of the alleged quality deficiency and negotiating with the buyer. The Federal Supreme Court pointed out that article 39(1) CISG is a non-mandatory provision, so that a seller can waive his right to rely on it. A waiver can occur even tacitly, if clear indications ("eindeutige Anhaltspunkte") for such a step exist. Such a tacit waiver may occur if a seller unconditionally ("vorbehaltslos") acknowledges the non-conformity, if it unconditionally takes the goods back, if it declares his willingness to repair the goods or to deliver substitute goods, or if it unconditionally promises to investigate the alleged defects. By contrast, no waiver can be seen in the mere commencement of negotiations about the alleged defects, in a promise of repair that is combined with a request of full payment of the contract price, or in the fact that the lateness of a notice of non-conformity is for the first time raised during court proceedings. In light of this standard, the Supreme Court affirmed the lower courts' ruling that the sellers in the present case had not tacitly waived their right to rely on article 39(1) CISG, because they had never unconditionally acknowledged the defects.

The second point concerned the buyer's earlier refusal to pay a part of the outstanding contract price, and whether this refusal had constituted a reduction of the contract price (article 50 CISG) or merely a temporary retention of the payment. The Supreme Court affirmed the Court of Appeal's position that the buyer's right to reduce the price under article 50 CISG has to be exercised through an express declaration (although free of form), and that a mere notice of non-conformity combined with a partial payment of the price is insufficient. Although the remedy of price reduction (article 50 CISG) is not subject to a specific time frame, it presupposes that a notice of non-conformity has been timely given (article 39(1) CISG). In the present case, the buyer had refused to pay in order to compensate for the late delivery, and no defect had been timely notified in accordance with article 39(1) CISG. Accordingly, no reduction of the price had occurred.