

Case 931: CISG 1; 14 (1); [18 (1); 18 (3)]; 19; [45 (1) (b); 55; 74; 79 (1)]

Switzerland: Federal Court

4C.92/2006 and 4C.474/2004

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[www.polyreg.ch/d/informationen/bgeunpubliziert/Jahr_2006/Entscheide_4C_2006/4 C.92__2006.html](http://www.polyreg.ch/d/informationen/bgeunpubliziert/Jahr_2006/Entscheide_4C_2006/4_C.92__2006.html)

http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=12.06.2006_4C.92/2006

[www.privatrecht.ch/forschung/rechtsprechung/2006/275/494 resp.](http://www.privatrecht.ch/forschung/rechtsprechung/2006/275/494_resp)

http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=05.04.2005_4C.474/2004

[www.polyreg.ch/d/informationen/bgeunpubliziert/Jahr_2004/Entscheide_4C_2004/4 C.474__2004.html](http://www.polyreg.ch/d/informationen/bgeunpubliziert/Jahr_2004/Entscheide_4C_2004/4_C.474__2004.html);

www.cisg-online.ch/cisg, No. 1012;

www.unilex.info/case.cfm?pid=1&do=case&id=1025&step=FullText;

www.privatrecht.ch/forschung/rechtsprechung/2006/275/395

English translation: <http://cisgw3.law.pace.edu/cases/050405s1.html>

Abstract in German: Swiss Review of International and European Law (SRIEL) 1/2007, pp. 148 ff., and 1/2006, pp. 203 ff.; Internationales Handelsrecht (5/2005), 204 ff.

Abstract in English: [ww.unilex.info/case.cfm?pid=1&do=case&id=1025&step=Abstract](http://www.unilex.info/case.cfm?pid=1&do=case&id=1025&step=Abstract)

<http://www.globalsaleslaw.com/content/api/cisg/urteile/1012.pdf>

<http://www.globalsaleslaw.com/content/api/cisg/urteile/1516.pdf>

Abstract prepared by Thomas M. Mayer

The Swiss company X AG informed the German company Y GmbH that an Italian firm was offering some 70 tons of triethylenetetramine (TETA) for sale. Y GmbH subsequently sent a purchase confirmation to X AG for 60 tons. X AG was unable to acquire the product. Y GmbH, who had already resold the goods, was obliged to buy goods in replacement. It invoiced X AG for the difference in price. However, X AG refused to pay, alleging that no contract had been validly concluded between it and Y GmbH. Thereupon, Y GmbH brought the case before the competent district court, which ruled in the defendant's favour, as did the appeal court subsequently.

In its first judgment, the Federal Court, allowing the application of the CISG, in accordance with its article 1 (1) (a), contradicted both the lower and appeal courts, which had ruled that no contract had been concluded between the parties. The letter of confirmation issued by the plaintiff did not in fact amount to acceptance of a corresponding offer from the defendant within the meaning of article 14 CISG, but in turn constituted a counter-offer which the defendant, through its subsequent conduct (e.g., handing over of requested documents with reference to the purchase confirmation) had ratified by decisive acts (article 19 CISG).

In its second judgement, the Federal Court considered whether the defendant should assume responsibility for non-delivery to the plaintiff. It observed that the seller must, in principle, bear the risk of its suppliers' failure to deliver. To avoid that risk, it had to free itself of responsibility by means of an appropriate contractual clause. The lower court's finding that the existence of such an agreement could not, in the present case, be inferred from the specific circumstances was admissible.