CISG-online 828	
Jurisdiction	Austria
Tribunal	Oberster Gerichtshof (Austrian Supreme Court)
Date of the decision	17 December 2003
Case no./docket no.	7 Ob 275/03x
Case name	*Tantalum powder case I*

Translation[*] *by Veit Konrad*[**]

Translation edited by Jan Henning Berg[***]

DECISION (*BESCHLUSS*)

The Appeal (Revision) is justified. The rulings of the Court of First Instance (see District Court (Landesgericht) Innsbruck, judgment GZ 12 Cg 32/02i-22 of 6 February 2003) and of 1 R 90/03z-27 of 3 June 2003) are set aside and the case is remanded to the Court of First Appeal (see Court of Appeal (Oberlandesgericht) Innsbruck, judgment GZ 1 R 90/03z-27 of 3 June 2003 for retrial.

FACTUAL BACKGROUND

Plaintiff [Seller], a registered company seated in Hong Kong, sued Defendant [Buyer], who is domiciled in Austria, for payment for delivered Tantalum powder. The transaction had been mediated by N.G. Ltd., which was represented by Chris H. [Seller]'s director, Alan C., who together with his son John C. represented [Buyer] in the transaction, is also owner and director of N. Ltd. which functions as logistics provider and also liquidates open claims for [Seller]. His son's company, P. Inc., registered in California U.S., sells metal products on the U.S. market. Both companies, N. Ltd. and P. Inc. served as trade agents in [Seller]'s transaction. 1

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff-Appellee, seated in Hong Kong, is referred to as [Seller], the Austrian Defendant-Appellant is referred to as [Buyer].

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[Buyer] produces Tantalum wire to be used in mobile phones, computers and cars. To meet the requirements of [Buyer]'s customers, the wire has to be manufactured using Tantalum powder of low oxygen content. 2

- Up to a content of 1100 µg/g, Tantalum powder can be used unmodified for its production;

- Up to 1300 µg/g, has to be blended with lower oxygenized powder;

- Tantalum powder with an oxygen content above 1300 µg/g has to go through a costly special refinement procedure to meet the standards for manufacture.

Chris H.'s N.G. Ltd. had been supplying [Buyer] with Tantalum products for years. Harald M., one of [Buyer]'s representatives, asked Chris H. for delivery of Tantalum powder, which he specified in a letter, written in English, on 19 August 1999. 3

Among other physical quality standards, the specification required a maximum oxygen content of 1100 µg/g. As Chris H. was not able to deliver this Tantalum powder himself, he contacted [Seller]'s representatives, Alan and John C., forwarding them [Buyer]'s quality requirements. In an e-mail of 15 November 1999, Chris H. informed [Buyer] that he found a Tantalum producer in China, who could provide Tantalum with an oxygen content of 1300 µg/g and asked if that was acceptable for [Buyer]. Correspondingly, [Buyer]'s representative, Harald M., asked for a sample of 1 kg Tantalum. The sample powder contained the promised oxygen content of 1300 µg/g and met [Buyer]'s other requirements. 4

On 26 January 2000, [Buyer] ordered another 41 kg sample from Chris H.'s N.G. Ltd. The order itself was written in English, but referred to [Buyer]'s standard purchase conditions which were printed in German on the backside of the document. This second sample, delivered to [Buyer] on 15 February 2000, neither met the required quality standards, nor was it identical with the first 1 kg sample. Yet, it could be used for [Buyer]'s purposes. On 19 July 2000, [Buyer] ordered directly from [Seller] 500 kg Tantalum powder , «sinter quality (Sinterqualität) for test purposes». In the English written order, [Buyer] again referred to its German standard terms on the back of the document. After the powder had been delivered, [Buyer] undertook a quality assessment, according to which the Tantalum was found to contain 1153 µg oxygen per g. For that delivery, [Buyer] received a bill from N. Ltd, [Seller]'s trade agent, on 25 October 2000. Following negotiations with Chris N. and John C. thereafter, [Buyer] on 31 August 2000 ordered from N. G. Ltd. another 3,000 kg Tantalum powder of the quality of «sample lot #0001T2-1», as referring to the 41 kg delivery. [Seller] was to deliver the goods in several installments between 5 September 2000 and 7 March 2001. Again, [Seller]'s trade agent, N. Ltd. sent the bills for the delivery to be paid to N. G. Ltd.. The oxygen content of the first installment delivered on 5 September 2000 ranged between 1276 and 1420 µg/g. 5

In a telephone conversation of 21 September 2000, John C. asked [Buyer]'s representative, Harald M., if an oxygen content of 1400 µg/g would still be acceptable for him. Harald M. confirmed that [Buyer] would insist on a maximum oxygen content of 1250 µg/g. 6

As it had been agreed between Harald M. and John C., thereafter another 150 g sample «lot 2000-3» taken from the Chinese Tantalum factory Z. was sent to [Buyer] on 28 November 2000. For this sample, an oxygen content of 1300 µg/g had been certified by Chinese authorities. 7

Between the end of 2000 and the beginning of the year 2001, the prices for Tantalum powder rose considerably. In the beginning of 2001, [Buyer]'s representative Harald M. informed Chris H., that [Buyer] was interested in the delivery of another 10,000 kg Tantalum of the quality as analyzed in the 41 kg sample and in sample «lot 2000-3» delivered on 28 November 2000. Chris H. forwarded [Buyer]'s request to John C., who in turn made an offer in the name of P. Inc. for the delivery of 10,000 kg Tantalum at the purchase price of US $1,049.40 per kg due in monthly installments of 1,600 kg between February and July 2001. The quality was specified as follows: 8

«metallurgische Qualität -- 180 -- mesh Pulver aus Quellen wie für Musterposten Nr 0001T2-1 und ZCCW, Posten 2000-3.» [metallurgical quality -- 180 -- mesh powder from the same producers as sample #0001T2-1. and ZCCW, lot 2000-3.]

In a telephone conversation on 3 January 2001 between Harald M. and John C., the offer had been modified: Beside other modifications regarding the time of delivery and the quality documentation, the quantity to be delivered was reduced to 9,000 kg. It was also made clear that the material was to be used to produce 6,000 kg of Tantalum wire for which [Buyer] had received a fixed order from one of its customers. In a fax of 4 January 2001 which bore the letterhead of P. Inc., John C. confirmed the agreement between [Seller] and [Buyer], specifying the powder as of «metallurgical quality from the same producers as sample #0001T2-1 and ZCCW, lot 2000-3» (translation of the German original). Unlike the original order, the fax did not mention the definition «180 mesh», but contained additional provisions as regards payment and documentation of the material.

On 4 January 2001, referring to the offer in the telephone conversation two days before, [Buyer] sent an order to [Seller], in which [Buyer] confirmed the purchase of 9,000 kg Tantalum powder, sinter quality, of about 180 mesh, ex China, according to sample #0001T2-1 and ZCCW, lot 2000-3 for the price of US $1,049.40 per unit, in total US $9,444,600.00. Delivery was due until 2 August 2001. As had become established practice, [Seller] did not sign and return the order to [Buyer], but accepted it implicitly by delivering the installments. On the other hand, the order was not signed by either Alan or John C., as they were assuming that the actual contract had already been concluded in the telephone conversation of 2 January 2001. 9

The English written document referred to [Buyer]'s standard purchase conditions, which were printed in German at the backside. 10

[…] 11

[…] 12

To meet [Buyer]'s demand, [Seller] ordered 9,000 kg of raw Tantalum from two Chinese factories, ZCCW, which had already been mentioned within the negotiations with [Buyer], and CT & NS, and agreed with both factories on the refinement procedure. In a fax dated 2 March 2001, [Seller] notified [Buyer] of the exact dates in March, April and May 2001 when the installments were to be delivered, and assured [Buyer] that the Tantalum powder for the installment deliveries in June, July and August was already in stock. 13

Due to a substantial decrease of the Tantalum prices since 2001, [Buyer] notified [Seller] on 19 March 2001 that prices for [Buyer]'s Tantalum wire, which had been calculated on the basis of the costs for the raw material delivered by [Seller], could not compete on the market anymore. Therefore, while keeping to the contract as a whole, [Buyer] suggested that the time of the installment deliveries be modified: While the first three installments of 1,500 kg each should be delivered as agreed, the remaining 4,500 kg should be called up later than had been specified in the contract. 14

In a fax dated 12 April 2001, [Buyer] asked [Seller] to postpone the delivery of the first three installments as well, as the demand for Tantalum on the world market had decreased to 50%. As regards the rest, [Buyer] would not call up the installments before the beginning of the following year. In the beginning of April, the first 1,500 kg installment was delivered: 400 g of this delivery contained 1937 µg oxygen per g; 600 g contained 2248 µg oxygen per g. Submitting the results of the quality analysis that was conducted, [Buyer] asked for replacement of the defective goods. As regards the remaining 500 g as to which [Buyer]'s assessment revealed an oxygen content of 1514, respectively, 1734 µg/g, [Buyer] accepted the delivery, because blended with Tantalum power of a considerably lower oxygen content, the goods could be used for its production. [Seller] assured that it would take back the deficient goods and provide a substitute as soon as possible. [Seller] also declared its intent to ascertain the cause of the problems that had occurred and to devise an appropriate solution. In a fax dated 3 May 2001, [Seller] notified [Buyer] that 3,751.10 kg of Tantalum powder were on stock ready to be called up for delivery, which it asked for until 1 August 2001. As regards the rest of the order, [Seller] asked for call for delivery until 1 November 2001. On 2 June 2001, [Seller] delivered 1,150 kg Tantalum powder as a substitute for the defective delivery. The corresponding bill was sent by N. Ltd. The substitute goods had an oxygen content of 1405 µg/g, respectively, 1384 µg/g. 15

[Buyer] asked [Seller] for the details of its suppliers, in order to conduct an inspection himself. After an agreement to prevent direct business relation between [Buyer] and [Seller]'s suppliers under circumvention of [Seller] (Nichtumgehungsvereinbarung) had been concluded, on 7 May 2001 [Seller] faxed the details of its suppliers, ZCCW and CT & NS. Between 10 and 12 June 2001, representatives of [Buyer], together with Alan and John C., inspected [Seller]'s supplying factories to discuss the problems that had occurred with those in charge of the production of the raw material. During this visit, [Buyer] noted that [Seller]'s supplying factories were at the technical standards of 1970: the building and the machines were in a very poor state of condition, the working conditions suffered from very low security standards, the equipment was deficient. [Buyer]'s representatives submitted their quality specifications directly to those responsible for the production in the Chinese factories, and made clear that they expected these quality standards to be met in the future. Yet, after they returned from their visit and after they received the result of the quality assessment conducted with the substitute material, they decided that it would not be possible for the suppliers in China to deliver material that would meet [Buyer]'s required standards. **16**

In a letter dated 26 June 2001, [Buyer] again mentioned the reduced demand for Tantalum powder. [Buyer] also made clear that it would only accept material that would meet the quality standards as agreed on 4 January 2001, as only this -- blended with powder of European provenance -- could be used as a reference. It was a mere gesture of good will to accept [Seller]'s substitute delivery of 1,150 kg in replacement for its defective delivery, despite the fact that the quality was not comparable to the reference samples. Given the low demand for Tantalum wire on the world market, an amount of 3,000 kg, complying with the quality standards of the samples, would meet the demand for [Buyer]'s production until April 2002. [Seller] had to understand that [Buyer] could not possibly call for more than these 3,000 kg for the price of US $1,049.40. Of this amount 1,650 kg had already been delivered. On 4 July 2001, [Seller] delivered another 1,367.10 kg of Tantalum powder. A corresponding bill had been sent to [Buyer] by N. Ltd. on 30 June 2001. Tests conducted by [Seller] revealed that 717.1 kg of this delivery contained 1300 µg oxygen per g; 650 kg had an oxygen content of 1400 µg/g. However, [Buyer]'s quality analysis revealed an oxygen content of 1474 µg/g, respectively, 1296 µg/g. **17**

In a letter dated 12 July 2001, [Buyer] notified [Seller] that it would accept the delivery as a mere gesture of its good will, although it did not meet the required standards. Yet, [Buyer]'s acceptance was not to be interpreted as declaring that the goods that were delivered complied with the contractual standards. On 30 July 2001, John C. and Chris H. visited [Buyer] at its domicile in R. As regards the poor quality of the goods, they made several suggestions, including substitute delivery. However, [Buyer] did not find any of their propositions suitable for its demands and again declared that it considered the contract terminated after the last delivery. In a letter dated 3 August 2001, [Seller] notified [Buyer] that it would not regard [Buyer]'s declaration to terminate the contract as binding. **18**

In its response of 16 August 2001, [Buyer] pointed out that it was not only due to the decreased demand on the market, but also due to the poor quality of [Seller]'s delivered Tantalum powder, which could only be used in low doses blended in higher quality material, that [Buyer] had no use for more of [Seller]'s goods. Moreover, due to the non-complying deliveries it lost confidence in [Seller]'s ability to provide Tantalum powder of the requested quality. 19

On 30 October 2001, [Seller] delivered another installment of 1,500 kg Tantalum powder. The goods were certified to contain 968 µg oxygen per g. In a letter of 30 October 2001, [Buyer] refused to accept delivery. As after delivery and payment for a total amount of 3,017.10 kg Tantalum, [Buyer] had declared the contract terminated, it asked [Seller] to take back this further delivery. [Seller] did not comply. [Buyer] did not pay the purchase price of US $1,574,100.00 for this further delivery. 20

[Buyer]'s standard terms contained the following provisions: 21

«For all orders given by the [Buyer] the following conditions apply if not agreed otherwise. These provisions apply irrespective of whether the supplier in its confirmation of an offer explicitly diverges from them. In accepting the order the supplier impliedly agrees to these standard terms. As regards diverging standards terms of the supplier, remaining silent on side of the [Buyer] does not imply their agreement. Each of the following provisions applies irrespective of the applicability of the others.

1) 22
Offers / Orders:

[...] Orders are considered binding only when given in writing and signed by two representatives of the [Buyer]. Orally given orders need to be confirmed in writing. An order given by the [Buyer] is considered to be accepted if the supplier does not object in writing within fourteen days after it had become known to him. Orders concerning installment deliveries on call, are binding only after the call for delivery has been given. Hereby the supplier accepts the modification of delivery dates at any time.

[...]

5) 23
Liability:

The supplier attains liability for the contractually stipulated quality, and guarantees that the delivered good meets current technical standards, fits the purposes for which goods of that kind are commonly used. He is liable for any defect which would diminish the value and / or the ordinary or contractually presupposed usage of the good. Moreover the supplier guarantees that the good is not the property of third persons and that the sale of the goods does not contravene statutory interdicts.

If defects of the kind mentioned above occur, the [Buyer] may chose to proportionately reduce the purchase price, may insist that the supplier make up the defect, or may claim damages for breach of contract. The [Buyer] is also free to rescind the contract as a whole. [...] Hereby, the supplier declares to accept complaints even if given delayed. In any event, notification as regards defective delivery is considered as given within reasonable time if made within two months after acceptance of the delivery. [...] The time limitation begins with the passing of the risk at the place of delivery. In case of made up or replacement deliveries, the time limit starts to run again.

[...]

12) **24**
Jurisdiction:

The [Buyer] and its suppliers hereby agree their contracts are to be governed by Austrian law. [....]»

(Abridged translation of the German written standard terms)

POSITIONS OF THE PARTIES IN FIRST INSTANCE

[Seller]'s claim for the purchase price

[Seller] filed for payment of US $1,574,100.00 as the purchase price of delivered Tantalum powder and for the amount of US $4,704,355.03 in exchange for the due delivery of another 4,482.09 kg Tantalum powder, according to the 180 mesh quality stemming from the same production as sample #0001T2-1 and sample ZCCW lot 2000-3. **25**

To support its claim, [Seller] submitted that the replacement of the delivered high oxygen Tantalum powder was a mere act of good will on its side. As an exact maximum oxygen content had never been stipulated, the high oxygenized powder was not defective, but complied with the contract. As regards the quality standard, it has only been agreed that the goods should stem from the same factory as one of the given samples. As there were only few Tantalum manufacturers, the name of the supplier would suffice to indicate the required quality standard. Despite the claimed defects, [Buyer] did not even ask [Seller] for replacement of the goods. [Seller] further argued that [Buyer]'s standard terms, printed in German at the backside of its order, have not been validly incorporated in the English written contract between the parties. **26**

[Buyer]'s response

In its response, [Buyer] sought to have the case dismissed. As the parties had business relations with one another since 1999 -- including relations with Chris H.'s N.G. Ltd. which functioned as a mediator for [Seller]'s N. Ltd., and thus must be seen as [Seller]'s representative -- [Seller] knew exactly about the quality standard required for [Buyer]'s purposes. In particular, [Seller] knew that a low oxygen content was essential for [Buyer]'s

production and that [Buyer] could only use Tantalum powder up to a certain maximum oxygen content according to the given samples. [Buyer]'s order given on 2 January 2001 entailed an exact specification of the required quality. The mentioning of the produced samples only served as a reference for the required quality. It was not meant as a quality standard itself in a way that, irrespective of its metallurgic quality and its oxygen content, the goods would have merely had to be taken from the same suppliers as the samples to meet [Buyer]'s demand. An agreement as presumed in [Seller]'s version of the facts would be highly obscure and extremely uncommon in the parties' field of business. Moreover, [Buyer]'s standard terms had been validly incorporated in the contract. As the delivered goods did not comply with [Buyer]'s quality standards according to the given samples, [Buyer] eventually revoked the contract orally and in writing. Consequently, [Buyer] did not accept [Seller]'s delivery of 30 October 2001.

REASONING OF THE DISTRICT COURT

The Court of First Instance (see District Court (Landesgericht) Innsbruck, judgment GZ 12 Cg 32/02i-22 of 6 February 2003) found that as [Buyer] of Austria and [Seller] of Hong Kong, China, were domiciled in Member States of the Convention, the contract is governed by the CISG. As the CISG was adopted into Austrian law, the Convention would also govern the contract, if [Buyer]'s standard terms had been validly incorporated. Further, the provisions of the CISG have not been excluded as possible under in Art. 6 CISG. Yet, as the People's Republic of China had refused to adopt Art. 12 CISG, this provision, ensuring that a contract governed by the CISG may be concluded, modified or terminated in any form, would not apply to the contract. Instead, the Court of First Instance contended that Chinese law should apply as to questions of form. Under Chinese law, contracts have to be concluded in writing. According to § 11 of the newly revised Chinese Contract Law, declarations in faxes and e-mails would be considered as given in writing. Moreover, according to § 36 of that Law, a contract is considered bindingly concluded irrespective of any non-compliance with formal requirements, if the agreement has been properly executed. The Court of First Instance found that under Art. 14 CISG, [Seller]'s fax of 2 January 2001 constituted a binding offer. On the other hand, the subsequent negotiations in telephone conferences could not be considered as a binding agreement: They failed to comply with the Chinese form requirement. Further, they did not cover all essential points of the planned transaction. The Court held that, under Art. 19(1) CISG, [Buyer]'s reply given on 4 January 2001, including quality specifications which diverged substantially from [Seller]'s original offer, is to be seen as a rejection and counter-offer to [Seller]'s original proposal. According to Art. 9 CISG, this counter-offer, although [Seller] did not explicitly respond to it, was impliedly accepted by delivering the requested goods in accordance with the established practice between the parties. Hence, [Seller] also consented to the quality specifications provided in [Buyer]'s counter-offer of 4 January 2001. As regards [Buyer]'s referred standard conditions, the Court of First Instance contended that being printed in German language would not per se prevent them from being validly incorporated in the contract. The samples that were provided served as a reference for the quality of the goods, namely for the required oxygen content. As the delivered Tantalum

27

powder did not meet these requirements, [Buyer] had good reason to notify [Seller] of the lack of conformity.

Doing so, [Buyer] clearly specified the claimed defect within reasonable time, as required by Art. 38 and Art. 39 CISG. The fact that [Buyer] anyhow accepted the deficient powder for whatever reason, could not be interpreted as a waiver of the originally required quality standard and thus would not amount to an implicit subsequent modification of the contract. Given that two-thirds of [Seller]'s delivery had been absolute waste, while the other third could be used in [Buyer]'s production though still not meeting the agreed standards, and further given that [Seller]'s replacement delivery still did not comply with the contract, [Buyer] after its visit to [Seller]'s supplying factories in China was entitled to revoke for fundamental breach of contract. Hence, the Court of First Instance concluded that [Buyer] was not obliged to accept and pay for [Seller]'s delivery in October 2001, nor was [Buyer] bound to accept further deliveries. [Seller]'s claim was unjustified. **28**

REASONING OF THE APPELLATE COURT

On [Seller]'s appeal (Berufung) the Appellate Court (see Court of Appeal (Oberlandesgericht) Innsbruck, judgment GZ 1 R 90/03z-27 of 3 June 2003) reversed the ruling of the Court of First Instance, holding [Seller]'s claim justified **29**

1. In the amount of US $1,574,100.00 plus interest, and
2. A further US $4,704,355.30 in exchange for the due delivery of another 4,482.20 kg Tantalum powder of quality 180 mesh produced by [Seller]'s Chinese suppliers, as per the given samples #0001T2-1 and ZCCW lot 2000-3; and containing oxygen of 1299 µg/g at maximum.

The Court of First Appeal contented that as Hong Kong was bound by international conventions concluded and ratified by the People's Republic of China, the CISG also applied to contracts for the sale of goods concluded by parties who are registered and domiciled in Hong Kong. **30**

As regards the incorporation of [Buyer]'s standard terms, the Court found that it fell within the responsibility of the party who provided the standard terms to ensure that these became known to the other party. In principle, this implied that the standard terms had to be formulated in the language in which the negotiations had been conducted and in which the contract was concluded. As here the parties negotiated and contracted in English, [Buyer] could not rely upon its German written standard terms. Although the Austrian Supreme Court (Oberster Gerichtshof; OGH) in an obiter dictum to its ruling 7 Ob 176/98b, resorting to the jurisprudence of the German Federal Supreme Court (Bundesgerichtshof; BGH), found that standard terms written in foreign language unfamiliar to the other part may nevertheless be validly incorporated if they were referred to in the contract in the language the negotiations had been conducted and in which the contract had been concluded. **31**

Yet, in that cited case the standard terms had actually been written in the language of the contract so that the Supreme Court's decision was not based upon this point, the Appellate Court did not feel bound by the cited ruling and concluded that [Buyer]'s standard terms had not been validly incorporated. 32

Relying on the Court of First Instance, the Appellate Court presupposed that according to the contract [Seller] had to deliver Tantalum powder that complied with the samples #0001T2-1 and ZCCW 2000-3 in terms of quality -- in particular, as concerns a maximum oxygen content of 1299 µg/g. Yet the first 1,500 kg installment of April 2001 with an oxygen content of 1500 µg/g missed the agreed requirements by far. The 1,150 kg Tantalum powder delivered in replacement still did not comply with the required oxygen standard. Of the second installment delivered in June 2001, only 24% met the stipulated quality, while the other 76% again missed the mark. 33

However, despite the fact that the deliveries were not of the required quality, [Buyer] accepted the installments, respectively, the deficient replacement delivery and paid for them. In doing so, [Buyer] failed to give specified notification of the claimed defect, as required by Art. 39(1): The results of [Buyer]'s conducted quality assessment, which [Buyer] had communicated to [Seller], would not suffice for this purpose because these charts only listed the discovered quality deviances from the samples, but did not specify the particular defect, i.e., the high oxygen content, a complaint in the sense of Art. 39(1) CISG might have relied upon. Hence, [Buyer] forfeited its right to rely on the claimed lack of conformity under Art 39(1) CISG. Under Art. 73(2) CISG, a party to a contract for the delivery of goods by installments might declare the contract avoided for the future if the other party's failure to perform any of its obligations in respect of any installment gave good grounds to conclude that a fundamental breach of contract will occur with respect to future installments, and if it did so within reasonable time. [Buyer] had accepted the deliveries of the defective, high oxygenized Tantalum powder and paid for the installments. Thus, according to the Court of First Appeal, [Seller] could reasonably assume that the transgression of its oxygen standard would not amount to a fundamental breach of contract in the sense of Art. 25 CISG for [Buyer]. Consequently, a fundamental breach of contract could not be reasonably concluded in respect of future installments. Hence, [Buyer] was not entitled to avoid the contract for the future under Art. 73(2) CISG. Therefore, [Seller] relying on the contract was entitled to US $1,574,100.00 as purchase price for the third installment delivered on 30 October 2001. 34

Furthermore, [Seller] was entitled for the amount of US $4,704,355.30 in exchange for the due delivery of another 4,482.90 kg Tantalum powder complying with the stipulated maximum oxygen content of 1299 µg/g. The Court of First Appeal allowed further appeal (Revision) to the Supreme Court, because with regard to the applicable law, the incorporation of [Buyer]'s standard terms, and the claim of fundamental breach of contract under Art. 73 CISG despite acceptance of delivery, the case would touch upon relevant legal issues which had not yet been subject to Supreme Court jurisprudence. 35

[Buyer]'s appeal (Revision) against the Appellate Court's decision focuses on claimed irregularities within the appellate proceedings, as well as a presupposed misinterpretation of substantive law by the Appellate Court. In its appeal, [Buyer] seeks to change the Appellate Court's ruling as far as it diverged from the judgment of the Court of First Instance. In eventu, [Buyer] wants that decision set aside and the case remanded to the Court of First Instance for retrial. 36

[Seller] seeks the dismissal of [Buyer]'s appeal.The appeal (Revision) is admissible and justified as far is it seeks the Appellate Court's decision to be quashed. The case is remanded to the Court of First Instance for retrial.

REASONING OF THE FEDERAL SUPREME COURT OF AUSTRIA

In the beginning of January 2001, the parties entered into a sales contract for the delivery of 9,000 kg Tantalum powder, due in several installments. After the delivery of 3,017.10 kg in three installments (including a replacement delivery of 1,150 kg for deficient Tantalum powder), [Buyer] in July 2001 declared the contract avoided with respect to future deliveries, arguing that it had good grounds to assume that [Seller] would not be able to deliver goods of the required quality in the future as it has not in the past. It must be assumed that a considerable part of the deliveries that [Seller] made had actually missed the required quality standard by far. Therefore, the vital question as regards this appeal is whether [Buyer] was entitled to avoid the contract for the future. 37

[…] 38

This depends on whether [Buyer]'s standard terms have been validly incorporated in the contract. In this respect, [Buyer] correctly argued that the incorporation of standard terms as regards this contract is provided for in Art. 8 of the Rome Convention on the Law applicable to Contractual Obligations of 19 June 1980 (Übereinkommen über das auf vertragliche Schuldverhältnisse anzuwendende Recht; hereafter referred to as EVÜ) which has been valid in Austria since 1 December 1998 (see Offner, Neuregelung des Internationalen Vertragsrechts, Römisches Schuldvertragsübereinkommen, in RdW 1999, page 2). According to Art. 1(1) EVÜ, this Convention applies to contractual obligations in any situation involving a choice between laws of different countries. According to Art. 2 EVÜ, any law specified by the Rome Convention applies irrespective of whether it is the law of a Contracting State. As [Buyer]'s standard terms point to Austrian law as the law to govern the contract, their incorporation, following Art. 8(1) EVÜ is provided for by the CISG being part of Austrian law (see: Supreme Court (Oberster Gerichtshof; OGH) 1 Ob 77/01g). According to Art. 6 CISG, the parties to a contract may expressly or implicitly exclude the application of this Convention (see Posch, in: Schwimann2 Art. 6 UN-K note 3). However, such an exclusion has not been claimed by either party. Moreover, an exclusion of the CISG would require the Convention to be expressly referred to. The mere resort to national law (here: Austrian law) as in [Buyer]'s standard terms therefore cannot exclude the CISG, where both parties have their places of business in Member States of the Convention (see Supreme Court (Oberster Gerichtshof; OGH) 1 Ob 77/01g; Lurger, Die neuere Rechtsprechungsentwicklung zum UN- 39

Kaufrechtsübereinkommen, in JBl 2002, page 750; Posch commenting on the ruling 2 Ob 328/97t, in ZfRV 1999, page 65; against this interpretation: Wilhelm ecolex, 1998 page 693).

In its appeal, [Buyer] argues that, as all of its English written orders refer to its standard terms printed in German on the backside of the document, [Seller], by impliedly accepting this routine, established a practice in the sense of Art. 9(1) CISG according to which it is bound to the thus incorporated standard terms. The fact that the conditions were formulated in a foreign language would not hinder their applicability to the contract, because they had been expressly referred to in English on the order document. **40**

Although the CISG does not specifically provide for standard terms (see: Supreme Court (Oberster Gerichtshof; OGH) 10 Ob 518/95; Schlechtriem, Art.14 note 16), their incorporation is governed by Art. 8 CISG (see Schlechtriem, ibidem) and Art. 14 CISG et seq., which provide for the formation of a contract under the Convention in general (see Supreme Court (Oberster Gerichtshof; OGH) 10 Ob 518/95; ZfRV 1996, page 248, referring to Pitz, Internationales Kaufrecht, § 5 note 75). Following Art. 8(1) and (2) CISG, standard terms, in order to be applicable to a contract, must be included in the proposal of the party relying on them as intended to govern the contract in a way that the other party under the given circumstances knew or could not have been reasonably unaware of this intent. This might be done through express or implied reference to them in the statement (see: Supreme Court 7 Ob 2707/96p). This intent might also be expressed within the negotiations to the contract, or through an established practice as provided for in Art. 9(1) CISG (see Supreme Court 10 Ob 518/95). **41**

The Court of First Appeal did not investigate further as to whether [Buyer]'s standard terms could have been validly incorporated through established practice in the sense of Art. 9(1) CISG, as it held that (following Ventsch / Kluth, Die Einbeziehung der Allgemeinen Geschäftsbedingungen im UN-Kaufrecht, in IHR 2003, page 61), in any event, standard terms written in German language were not applicable to a contract written in English. **42**

This undifferentiated view cannot be upheld by the Supreme Court. The incorporation of standard terms depends on whether the intent to apply the standard conditions to the contract is known or ought to have been known to the other party. Whether this is the case depends on the circumstances of the particular case. It requires an unambiguous declaration of the provider's intent. Hence, a reference to standard terms given in the actual proposal must be specified and clear enough so that a reasonable person «standing in the shoes of the other party» (Schlechtriem, ibidem, referring to Art. 8(2) CISG) would understand it. In determining the intent of a party, or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case, including negotiations and practices established between the parties (Art. 8(3) CISG). In any event, the addressee must be referred to the standard terms in a way that it could not be reasonably unaware of them: He must have knowledge to be able to understand them (Schlechtriem, ibidem). This also depends on the language the conditions are formulated in, and on the language they are referred to in the contract (Schlechtriem, ibidem; Melis in Honsell, Commentary on the CISG (Kommentar zum UN-Kaufrecht), Art 8, note 7): **43**

According to German doctrine, standard terms written in a foreign language might still be validly incorporated in a contract if they are referred to in the language the negotiations have been conducted and in which the contract has been concluded (Kropholler, Europäisches Zivilprozessrecht6 Art.17 note 34 with references to German jurisdiction). In an obiter dictum to the ruling of 7 Ob176/98b (in: JBl 2000 page 121 = RdW 1999 page 723 = ecolex 1999/329 = ÖJZ-LSK 1999 page 266), the Austrian Supreme Court joined this opinion. 44

Criteria for cases in which the addressee might be expected to have knowledge and understanding of standard terms written in a foreign language are: length, intensity and economic importance of the business relations between the parties, as well as the spreading and use of the language within their society: The more intense and economically important the business relation becomes, the more can it be expected that the addressee of long and frequently referenced standard terms written in a foreign language will take measures to understand them, i.e., will ask for a translation to be provided by the other party or will attend to such a translation himself. 45

According to widespread opinion among German and Austrian scholars (see: Stadler Allgemeine Geschäftsbedingungen im Internationalen Handel, page 86), it suffices that standard terms were formulated in a language the addressee is familiar with, respectively, in one of the few internationally common languages, such as English, French and German. In case an international enterprise thus provides standard terms in one internationally common language, it is for the addressee to notify the other party of its lack of understanding, otherwise its knowledge can be reasonably presumed. 46

During the business relationship with [Seller], [Buyer] on several occasions referred in English to its German written standard terms printed on the backside of its documents. As the parties entered into a deal of roughly about 7 million Euro, an economic importance in the sense mentioned above can be concluded. Further, it must be taken into account that Chris H., who mediated the deal between the parties and functioned as a representative of N. G. Ltd., a sales agent of [Seller], had a good command of the German language -- a fact that due to their long term business relations must have been known to [Seller]'s representatives John and Alan C. 47

As concerns length and intensity of the business relations and the claimed established practices, it appears necessary to check on [Buyer]'s submission that it had entered into business relations underlying its standard purchase conditions with [Seller], respectively, with its agent companies, several times before. In particular, it needs to be clarified whether it had become an established practice of [Seller] to implicitly accept [Buyer]'s orders through delivery -- without signing and returning them. Failing to investigate into these relevant questions, the trial before the Court of First Appeal suffers from a secondary procedural error as concerns the taking of evidence (sekundärer Feststellungsmangel), that demands a retrial of the case taking account of these circumstances. 48

If it turns out that [Buyer]'s standard terms are thus applicable to the contract, it has to be decided whether the delivered goods had been defective as required by section 5) subsection 1 of [Buyer]'s standard terms, so that [Buyer] was entitled to rescind the contract in respect of future installments as provided in section 5) subsection 2 of its conditions. As the contract between the parties constituted an agreement for the delivery of goods by installments, the presumably applicable provisions of [Buyer]'s standard terms must be interpreted according to Art. 73 CISG. 49

The Court of First Appeal contended that [Buyer] in accepting the defective deliveries impliedly waived its quality requirements so that the admittedly high oxygen content would not constitute a fundamental breach of contract as required by Art. 73(1) CISG. 50

This cannot be upheld by the Supreme Court. As the Court of First Instance found, [Buyer] had repeatedly resorted to its quality specifications thus impliedly declaring its intent to maintain them. [Buyer] also expressly objected in response to [Seller]'s query, whether an oxygen content of 1400 µg/g was acceptable for [Buyer]. [Buyer] further visited [Seller]'s Chinese supplying factories in order to make sure that the quality standards could be achieved. [Buyer] repeatedly explained its acceptance of the deliveries as a mere gesture of good will towards [Seller]. By its acceptance, it did not mean to confirm that the delivery was complying to the contract. Underlying these facts, it cannot be concluded that [Buyer] accepted the delivered Tantalum powder as complying with the contract -- as had been assumed by the Appellate Court. 51

Nor can this Court follow the Appellate Court's further conclusion that, as [Buyer] in accepting the first three deliveries had impliedly had given up its quality standards, the remainder of 5,982.09 kg of Tantalum powder would not have to comply with the specifications. To the contrary, [Buyer], who in its letters and faxes repeatedly notified [Seller] of the non-compliance of its deliveries, could reasonably presume that the remaining 5,982.09 kg would also not meet the agreed quality standard. 52

[…] 53

Therefore, if [Buyer]'s standard terms were applicable, [Buyer] was entitled to declare the contract avoided with respect to future deliveries. The presumption that [Buyer]'s decision to revoke the contract might have been motivated by the massive price dump for Tantalum powder at the time, as hinted on in its letters dated 19 March 2001, 12 April 2001 and 12 June 2001, has no effect on this conclusion. 54

[Buyer] correctly argued that in granting [Seller]'s claim for US $4,704,355.30 in exchange for another 4,482.90 kg Tantalum powder that, according to the Appellate Court, did not need to comply with [Buyer]'s specifications but with lower -- and indeed other -- standards than mentioned in [Seller]'s claim, the Court of First Appeal exceeded its competences violating the principle of ne ultra petitur as stated in § 405 of the Austrian Code of Civil Procedure (Zivilprozeßordnung; ZPO) (see Aicher in Rummel3 § 1052 note 16). 55

[…] 56

Yet, this transgression does not necessarily lead to a dismissal of the claim. The claim for performance in exchange for a counter performance can only be dismissed in case the claimant who owes the counter performance definitely refuses to perform (Aicher, ibidem, § 1052 note 17). The mere denial of the existence of such a counter-obligation cannot be interpreted as a definite refusal to perform in the sense mentioned above (see: HS 7287; Supreme Court 8 Ob 55/02z, RIS-Justiz RS0020987 [T 3]; Aicher ibidem, § 1052 note 17). In the later case, the party, that presumably owes counter performance must be heard by the court as to whether its refusal to perform will be kept up even in case it turns out within the proceedings, that the counter obligation did actually exist. As the Court of First Appeal failed to hear [Seller] on whether it will perform its obligation to deliver goods according to [Buyer]'s agreed quality specifications, this point must be clarified in future proceedings. If, however, [Seller] definitely keeps to its refusal to perform in the required quality, its claim for US $4,704,355.30 will have to be dismissed. 57

Finally, [Buyer] claims the appellate proceeding suffered from a secondary procedural error concerning the taking of evidence (sekundärer Feststellungsfehler) as far as it had been neglected to define the applicable substantive law to govern the contract, in case [Buyer]'s standard terms were not applicable: [Buyer] questions the Appellate Court's contention that in this event, due to the restricted autonomy of Hong Kong in international and foreign affairs the CISG adopted by the Chinese Republic was to govern the contract between the parties. In this respect, [Buyer] submits a letter of a high official of the UN, according to which China on 20 June 1997 had notified the Secretariat of the UN about any international convention that was meant to be adopted for Hong Kong. However, the CISG was not among the cited declarations, and consequently has not been applied to Hong Kong. [Buyer] further submits several other pieces of evidence supporting its view that the CISG was not applicable to Hong Kong related issues. 58

Therefore, given the Court of First Appeal's contention that [Buyer]'s standard terms would not apply, the court failed to clarify what substantive law is to govern the contract at issue. Provided that [Buyer]'s submitted evidence supports its claim, [Seller] must be given the chance to respond to it in future proceedings. In any event, § 4(1) of the Austrian Statute regulating the Conflict of Laws (Gesetz über das internationale Privatrecht; IPRG) demands further investigation as to the question of the applicable substantive law. If the parties have not chosen otherwise, the contract is governed by the law of the country with which it is most closely connected (Art. 4(1) EVÜ). Undoubtedly the connecting factors mentioned in Art. 4(2) EVÜ point to Hong Kong as the State in the sense of Art. 19(1) EVÜ which has the closest relation to the case. Hence, the contract would be governed by particular Hong Kong law. Given [Buyer]'s submission that the CISG has not been made applicable for Hong Kong, the case would be governed by the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Bergmann/Ferid/Henrich, Internationales Ehe- und Kindschaftsrecht, 131. Lieferung, Hong Kong, page 3), by previous law which had been adopted after 1 July 1997, by Provisions newly released by the national authorities, or by 59

statues released by the National Committee of the Republic of China (see Bergmann/Ferid/Henrich, ibidem, page 7).

As the trial of the case demands further investigations and clarifications to an extent that cannot be overseen by the Supreme Court at that stage of the proceedings, a remanding to the Court of First Instance appears appropriate.

The decision on the costs relies on § 52(1) of the Austrian Code of Civil Procedure (Zivilprozeßordnung; ZPO).

[...]