

Case 750: CISG 9 (1)

Austria: Oberster Gerichtshof

7 Ob 175/05v

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Original in German

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Abstract prepared by Maria Kaller.

The Austrian buyer ordered metal powder from a seller, a private limited company with its place of business in Hong Kong. English order forms were used with an English reference on the front page to the general terms and conditions on the backside. The general terms and conditions were in German, a language not spoken in Hong Kong. The forms had been used several times before. The seller could not detect that the buyer wanted only to conclude the contract under its general terms and conditions. Since the metal powder did not have the necessary quality, the buyer on the basis of the general terms and conditions avoided the contract. The seller claimed the price.

The Supreme Court decided that the German general terms and conditions were part of the contract, because the use of these terms and conditions had been a practice which the parties had established between themselves, according to Art. 9 (1) CISG. While usages have to be followed at least in certain trade sectors, practices are established between parties. Such practices could be behaviour patterns frequently upheld during a certain period and in a way that parties in good faith can rely on the fact that the practices will be followed in future occasions again. Implied perceptions of a party may also form such practices if, from the circumstances, it is clear to the other party that the party is ready to conclude the contracts under certain conditions and in a certain form. In this case, the seller had signed the order form for its first purchase and resent it to the buyer, thus accepting the general terms and conditions. In the subsequent purchases, the seller had not returned the forms, but accepted the buyer's offer and thus general terms and conditions by performing the contract.