

| CISG-online 1093     |                                               |
|----------------------|-----------------------------------------------|
| Jurisdiction         | Austria                                       |
| Tribunal             | Oberster Gerichtshof (Austrian Supreme Court) |
| Date of the decision | 31 August 2005                                |
| Case no./docket no.  | 7 Ob 175/05v                                  |
| Case name            | <i>Tantalum powder case II</i>                |

*Translation\* by Todd Fox\*\**  
*Edited by Jan Henning Berg\*\*\**

## Decision

The appeal is denied.

The Plaintiff-Appellant [Seller] is ordered to reimburse the Defendant-Appellee [Buyer] for the costs of defending this action in the amount of EUR 9,105.48 (which includes EUR 1,517.58 tax) within fourteen days.

## Reasons

Pursuant to § 510(3) ZPO, the denial of a proper appeal for failure to present a material issue of law (§ 502(1) ZPO) can be limited to an explanation of the grounds for denial. 1

However, in order to facilitate comprehension, we shall refer to the decision given by the lower court in this action (7 Ob 275/03x, SZ 2003/175 = IHR 2004, 148 = RdW 2004/252 = JB1 2004, 449 = ZfRV 2004/20), from which the essential facts can be gathered, and also briefly describe the further proceedings. 2

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

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***[Decision by the Trial court:]***

The trial court dismissed the [Seller]'s claim (again) in the second proceeding. In addition to the facts already recited in 7 Ob 275/03x, the court made the following determinations:

The [Buyer]'s purchase order of 26 January 2000 was signed [on behalf of Seller] by Company N[...] Ltd. on 1 February 2000, as a manifestation of [Seller]'s agreement, and faxed back to the [Buyer]. For the [Seller] and Chris H[...], a Swiss whose native language is German, it was evident from the order of 19 July 2000, as well as from the orders at the end of 1999, 26 January 2000, and 31 August 2000 (which Chris H[...] had forwarded to the [Seller]) that the [Buyer] only wished to contract pursuant to its supplied terms and conditions, even though the parties had not previously spoken about them. The front page of each written order contained a reference in English, as the language of the contract, to the [Buyer]'s general terms and conditions. German is not an important language in Hong Kong. Yet, considering the [Buyer]'s orders from the beginning of January 2001, the [Buyer] was among the [Seller]'s four or five largest customers expecting a long-lasting business relationship. Before the above-referenced deals, there was no business relationship between the parties to this action, nor between the [Buyer] and Company P[...] Inc. or Company N[...] Ltd. Hong Kong. On the other hand, the [Buyer] maintained a business relationship for many years with Chris H[...] and his Company N[...] G[...] based on [Buyer]'s purchase terms and conditions.

In legal terms, in view of the fact that all orders contained on the front page a reference in English to the general terms and conditions printed in German on the reverse, and the fact that the [Seller] never protested against this, the trial court found that the [Seller] at least impliedly accepted the unvarying conduct of the [Buyer] and thus established a practice within the meaning of Art. 9(1) CISG. Based on the formulation of the text and the position of the reference for the [Seller], the court found that the [Buyer] had made it clear that these terms and conditions were part of the orders and that, as an internationally active company, this was plainly discernable for the [Seller] as well as for its acting agents. The court further found that in view of the size of the transactions, the importance of the business relationship, and the scope of the expected business deals, it was to be expected of the [Seller] to either procure a translation of the purchase terms and conditions or request it from the [Buyer]. German, even if unimportant within the Chinese culture, should be considered a world language. Moreover, Chris H[...] speaks German and his Company N[...] G[...] also accepted these terms and conditions as agent for the [Seller].

As a consequence of the [Buyer]'s terms and conditions being part of the contract, the court found that Austrian law is applicable in this case. The Supreme Court had already held that the [Seller]'s deliveries were defective within the meaning of paragraph 1 of section V of the delivery conditions, and the [Buyer] was accordingly entitled to avoidance pursuant to paragraph 2 of that same section. Based on the content of the writings and faxes of the [Buyer], the [Seller] could not deny that the [Buyer] had complained that the oxygen content of the delivered powdered tantalum was too high, which is why [Buyer]'s avoidance was justified.

**[Decision by the Court of Appeal:]**

The Court of Appeal petitioned by the [Seller] confirmed the trial court's decision. The Court of Appeal's remarks can be summarized as finding that the Supreme Court reversed the prior decisions merely to clarify the question of whether the general terms and conditions were incorporated into the contract. If these terms were incorporated into the contract all remaining legal questions were already conclusively decided by the Supreme Court based on the then determined set of facts: namely that the [Seller] bears the language risk since Chris H[...], who speaks German, acted for the [Seller] and its agent N[...] G[...], and that with the affirmation of the choice of law avoidance of the contract was justified. For this reason, the factual contentions which do not relate to the question of whether the general terms and conditions were included in the contract were not to be considered. The remaining factual contention and the legal claim were not justified.

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Contrary to the [Seller]'s position, the Court of Appeal held that the purchase conditions are to be viewed as incorporated into the contract. In examining whether, on the basis of the demonstrated business relationships between the [Seller] (or its agents) and the [Buyer], one can speak of a practice within the meaning of Art. 9 CISG (together with Art. 8(3) CISG) to incorporate [Buyer]'s general terms and conditions into the contract, one must consider that Chris H[...] knew or should have known that the [Buyer] would only conduct business based on its own purchase conditions. On the part of the [Seller], considering that all orders from the [Buyer] contained a clear reference to its supplied terms and conditions, it is presumed that a tacit practice to incorporate the [Buyer]'s terms and conditions was established. Even if the [Seller] or its agent only signed and returned the order of 26 January 2000, in light of each of the deliveries that followed without complaint, a tacit practice must be presumed. The [Buyer] could have assumed in good faith that if the [Seller] did not accept the purchase conditions the [Seller] would protest, since Chris H[...], who was also negotiating for the [Seller], had expressly accepted the inclusion of [Buyer]'s terms and conditions for the Company N[...] G[...]. If the [Seller], despite the unambiguous and clear reference to the general terms and conditions, silently performs the contract without protest, then in the sense of Art. 8(3) CISG from the [Buyer]'s point of view such silence could only be interpreted as agreement. Accordingly, since the general terms and conditions were effectively incorporated into the contract between the parties, a valid choice of law was made for the application of Austrian law.

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Consequently, the question of the justification of avoidance is to be answered under consideration of the appropriate provision in the general terms and conditions (paragraph 5) and the referenced applicable provisions of the CISG that were not excluded. However, the Supreme Court in its Reversal Order has already conclusively answered this question in favor of the justification of the [Buyer]'s avoidance, so there is no need to further consider the [Seller]'s arguments to the contrary. Accordingly, the appeal was unjustified.

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The Court of Appeal declared a further appeal against its decision to be admissible because there is yet no Supreme Court ruling on the question of «whether the inclusion of general terms and conditions of a contracting party can be tacitly established as a practice in the sense

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of Art. 9 CISG after only two or three business transactions if their inclusion was not spoken of or negotiated either before or at the commencement of the first business transaction.» According to the Court of Appeal, the answer to this question is of an importance that goes beyond the individual case.

### Legal Reasoning

Contrary to this declaration by the Court of Appeal (which is not binding on the Supreme Court pursuant to § 508(a)(1) ZPO), the [Seller]'s appeal from the decision of the second instance fails to meet the requirements of § 502(1) ZPO and is therefore inadmissible. In its decision 7 Ob 275/03x, the Supreme Court already expressed its opinion on the central question posed in this case regarding the inclusion of [Buyer]'s purchase conditions in the contractual relationship: the Supreme Court found that the CISG does not set any special requirements for the inclusion of standardized terms and conditions such as those of the [Buyer] in this case. The Supreme Court found that the necessary rules, insofar as an object of sales law is concerned, are consequently to be developed from Art. 8 and Art. 14 *et. seq.* CISG, which govern the external formation of the contract. Accordingly, in order for the general terms and conditions to be incorporated into a contract, they must have been made part of the offer according to the discernable intent of the offeror (Art. 8(1) and (2) CISG). This can occur through a corresponding reference, or can occur tacitly or arise from the negotiations between the parties or from a practice established between them within the meaning of Art. 9(1) CISG.

The Supreme Court further explained that under the determined facts of this case, the circumstance that the [Buyer]'s general terms and conditions were conveyed to the [Seller] in German and not in the language of the contract (English), need not prevent their incorporation into the contract. According to the Supreme Court, the criteria for whether a party can be expected to understand general terms and conditions supplied to him in a language other than his native language, the language of the contract, or an otherwise familiar language, are the duration, intensity, and importance of the business relationship and the degree of usage of the language in the relevant cultural area. The more intense and economically important a relationship, the more likely it is that one who has unmistakably demonstrated to his business partner through appropriate references and repeated forwarding of his general terms and conditions printed in a language other than that of the contract, that he only desires to contract pursuant to these terms, can expect that the business partner (if necessary) either endeavors to procure a translation himself or requests that a translation be supplied to him.

Finally, the trial court was directed to conduct an additional proceeding with reference to these governing criteria in order to reliably answer the question of incorporation of the purchase conditions into the contract in this case. After implementation of the instructed additional proceedings, and having considered all of the established facts of the case, the lower courts arrived at the conclusion that a practice within the meaning of Art. 9 CISG developed between the parties in that the [Buyer]'s purchase conditions would apply for each deal concerning the sale of powdered tantalum. As the Supreme Court has already repeatedly held in cases regarding tacit submission to the general terms and conditions of a contracting party (9 Ob 212/02w; 2 Ob 43/03t), this is a judgment of an individual case and would only be appealable if the lower courts committed a material error, which, for reasons of certainty in the

law and justice in the individual case, required correction by the Supreme Court. Such is not the case here:

It is certain that before the sales transaction in question, in each of its orders written in English in the prior four business transactions with the [Seller] or its agents the [Buyer] had expressly referenced its purchase conditions printed in German on the reverse of those orders. It is furthermore certain that on 1 February 2000 the [Seller] (or its agents, whose actions and knowledge are naturally ascribed to the [Seller]) signed the first order of 26 January 2000 as a manifestation of its agreement and faxed it back to the [Buyer], thereby clearly expressing its submission to [Buyer]'s general terms and conditions. Although the further orders of 19 July 2000, 31 August 2000, and 12 December 2000 were no longer signed and returned, they were nevertheless tacitly accepted through delivery of the quantity ordered. Under these circumstances, pursuant to the governing criteria specified by the Supreme Court in 7 Ob 275/03x, no misjudgment of the legal situation is discernible in the lower courts' presumption of an established practice to incorporate the [Buyer]'s purchase conditions in each business transaction:

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Contrary to usages, which must be observed in at least one branch of industry, practices within the meaning of Art. 9 CISG are established only between the parties. Practices are conduct that occurs with a certain frequency and during a certain period of time set by the parties, which the parties can then assume in good faith will be observed again in a similar instance. Examples are the disregard of notice deadlines, the allowance of certain cash discounts upon immediate payment, delivery tolerances, etc. (Posch in Schwimann (ed.), V *[Commentary on the Austrian Civil Code]*, 2nd ed., Art. 9 UN-Kaufrecht para. 4; see also Magnus in Staudinger *[Commentary on the German Civil Code]*, Art. 9 CISG, para. 13; Junge in Schlechtriem, *Komm. zum Einheitlichen UN-Kaufrecht [Commentary on the CISG]*, 3rd ed., Art. 9 para. 7; Melis in Honsell, *Komm. zum UN-Kaufrecht [Commentary on the CISG]*, Art. 9 para. 4, and Karollus, *UN-Kaufrecht [CISG]*, 51). In the decision 10 Ob 518/95, RdW 1996, 203, the Supreme Court stated that «practices» within the meaning of Art. 9 CISG could also be notions of one party that are not expressly agreed to and which arise from preliminary discussions. However, in such a case it must always be clear from the circumstances to the one party that the other party is in principle only prepared to conclude transactions of that kind on the basis of very particular conditions or in a particular form.

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The lower courts' finding of a practice is in accord with these fundamental considerations. Since the existence of a practice in the described sense can typically only be judged according to the criteria of the individual case (see 2 Ob 43/03t), and thus depends heavily upon the individual facts, the question viewed by the Court of Appeal as appealable cannot be answered generally. The petitioner's objection that the Court of Appeal departed from the jurisprudence of the Supreme Court in its consideration of the legal significance attached to silence on the part of the other contracting party overlooks the fact that the lower courts did not construe the [Seller]'s mere silence as consent, but rather found the [Seller]'s consent to the incorporation of [Buyer]'s purchase conditions from the [Seller]'s performance of delivery in conformity to each order. In this context, the [Buyer] rightfully claims in its answer that the deliveries represented «assertive conduct».

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The [Seller] also wrongfully considered its appeal permissible because it claimed the Court of Appeal made a gross error when it presumed itself not required to consider the majority of [Seller]’s factual contentions. The petitioner overlooks that the Supreme Court’s reversal of the lower courts’ decisions, as already mentioned, was for purposes of conducting a supplementary proceeding in order to reliably answer the question of the incorporation of the [Buyer]’s purchase conditions into the contractual relationship. In its Reversal Order the Supreme Court expressly stated that if the delivery conditions of the [Buyer] had become part of the contract, then the [Buyer]’s avoidance of the contract would be justified. Since the decisions of the lower courts were therefore reversed due to an error (*Mangel*) pursuant to § 496(1)(2) ZPO, as the lower courts correctly recognized, pursuant to § 496(2) ZPO the scope of the supplemental proceeding was to be limited to those parts of the trial court’s decision and procedure affected by the error. (See Fasching, *LB [Textbook on the Austrian law of civil procedure]*, 2nd ed., para. 1819).

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The Court of Appeal therefore did not commit a procedural error in its failure to consider petitioner’s factual contentions. In this context, the petitioner’s further assertion that the second court proceeding was in order to supplement the facts misses the mark, since the only issue in question there was that of the incorporation of the purchase conditions.

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As was already emphasized, the supplemental proceedings were not to consider circumstances regarding issues of non-conformity of the delivered goods or notification of defects by the [Buyer].

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Finally, the petitioner also fails to raise a material issue of law within the meaning of § 502(1) ZPO in its appeal. Insofar as the [Seller] insinuates in its appeal that (also) in the four business transactions prior to the sale in question the [Buyer]’s purchase orders (complete with terms and conditions) were only sent to the [Seller] after contract formation, and therefore the purchase conditions could never have been part of an offer from the [Buyer], this deviates from the ascertained facts. In this respect the petitioner’s appeal was not properly carried out.

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The appeal must be denied for failure to comply with the requirements of § 502(1) ZPO.

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The decision regarding costs is based on §§ 41 and 50 ZPO. In its answer in this appeal the [Buyer] had expressly noted the inadmissibility of the [Seller]’s claims. Since pursuant to § 6 RATG the legal fees with claims in foreign currencies are determined according to the currency exchange rate at the time of the decision regarding the obligation to reimburse costs, and not on the basis of the value of the claim (which is calculated from the currency rate of the day the complaint is filed with the court [Gitschthaler in Fasching (ed.), *Kommentar zu den Zivilprozessgesetzen [Commentary on the Austrian laws of civil procedure]*, 2<sup>nd</sup> ed., Vol. I, § 54 JN para. 21]), the costs to be reimbursed to the [Buyer] for answering the appeal are to be fixed based on the dollar exchange rate from August 31, 2005 recognized by the court (1 Euro = 1,2181 US dollars).

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