CISG-online 1735	
Jurisdiction	Austria
Tribunal	Oberlandesgericht Innsbruck (Court of Appeal Innsbruck)
Date of the decision	18 December 2007
Case no./docket no.	1 R 273/07t
Case name	*Steel bars case V*

Translation[*] by Daniel Nagel[**]

Reasons for the Decision:

[Facts of the case:]

The [Buyer], a partnership under the Civil Code (GbR) consisting of the two defendants, was formed in respect to the contract section having to do with the federal highway B 178. **1**

In autumn 2004, the [Buyer] concluded a contract for the delivery and laying of steel bars with the [Seller] in respect to the aforementioned project. A fixed price was guaranteed until 30 April 2005. Subsequent to that date, a new price was to be set. In fact, on 29 March 2005 the parties agreed on a new (reduced) fixed price, which should be valid between 1 April 2005 and 31 March 2006. **2**

The wholesale price index declined considerably in the aftermath. Therefore, the [Buyer] claimed that this should entail a decline of the agreed price. The [Buyer] thus unilaterally reduced the price of the invoices issued in respect to the delivery and laying of steel bars. **3**

[Position of the Parties before the Court of First Instance:]

[Position of the Seller]:

The Plaintiff [Seller] requested that the Defendant [Buyer] be held liable to pay the differences accrued due to the unilateral reductions amounting to EUR 191,866.10 as well as to pay a further EUR 1,243.33 in respect to invoice number 80962 of 1 June 2006, which had been unduly reduced by the [Buyer]. **4**

The [Seller] alleged in respect to the amount of EUR 191,866.10 that, according to the agreement of 29 March 2005, a price of EUR 682.50 per ton would apply. This agreement had been **5**

---

[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, the Plaintiff-Appellant of Germany is referred to as [Seller] and the Defendant-Appellees of Austria are referred to as [Buyer]. Amounts in the uniform European currency (Euro) are indicated as [EUR].
Translator's note on other abbreviations: ABGB = *Allgemeines Bürgerliches Gesetzbuch* [Austrian Civil Code]; RIS-Justiz = *Rechtsinformationssystem des Bundes* [Austrian Federal Database on Law].
[**] Dr. Daniel Nagel, Stuttgart (Germany).

binding and the invoices had been based thereon. The issuing of a closing invoice had not been agreed on. In the aftermath of 29 March 2005, no new agreement in respect to the price had been reached, wherefore the reductions of the [Buyer] had not been justified. In particular, an oral negotiation between the parties on 29 November 2005 had not resulted in a new agreement. It was true that the [Buyer] had falsely claimed in a note that a new agreement had been reached; however, the [Seller] had sent a timely objection in writing. The parties had not agreed on the Austrian standard B 2110. In the alternative, the note of the [Buyer] constituted neither an effective modification of the contract nor an effective waiver on behalf of the [Seller] in respect to its claims arising out of the contract.

[Position of the Buyer:]

The [Buyer] requested the court to dismiss the claim. **6**

The [Buyer] alleged that the price reduction had been effected in accordance with the international decline of steel prices. It had successfully convinced the [Seller] on 29 November 2005 that it would be entitled to the respective reduction. In the course of these negotiations, the parties had agreed that, on the one hand, the [Buyer] had to pay EUR 40,000.00 net in respect to the reductions effected between May and 15 November 2005, but, on the other hand, a price of EUR 497.50 per ton (laying not included) should apply in respect to all deliveries subsequent to 16 November 2005. In addition, the [Buyer] had guaranteed an option contract to the [Seller] in respect to the delivery of four tons of construction steel for four years. It had been intended that the CEO of the [Seller] drafted this option contract in writing and that he further discussed it with the [Buyer]. The agreed payment of EUR 40,000.00 net had been due upon receipt of this draft. The [Buyer] had sent a note in respect to this agreement on 1 December 2005, which had not been objected to by the [Seller] until 17 January 2006. The objection had not been effected in due time according to item 5.5 of the Austrian standard B 2110, which had been included in the contract. According to the agreement of 29 November 2005, the payment of EUR 40,000.00 would not be due as the [Seller] had failed to draft the priority right and would hence be in default.

7 In addition, according to the agreed Austrian standard B 2110, the [Seller] had been obliged to issue a final invoice including all necessary proof. Due to the fact that such proof had not been brought, the [Buyer] would be entitled to the reductions calculated on the basis of its own records. Furthermore, the [Buyer] would be entitled to counterclaims which surpassed the amount claimed. The [Buyer] therefore declared a set-off *in eventu*.

[Decision of the Court of First Instance:]

The Court of First Instance dismissed the [Seller]'s claim. **8**

It established the facts as follows: **9**

On 17 May 2004, the [Seller] offered the delivery and laying of steel bars in respect to the contract section 2. The [Buyer] ordered the offered performances on 11 August 2004 in writing. It was agreed that the order, in addition to further conditions such as the building plan,

official authorizations as well as the respective technical and legal Austrian standards – in particular, A 2060 and B 2110, formed the basis of the contract. In case of objections, the aforementioned items should be applied according to this hierarchy. Hence, the order of 11 August 2005 was predominant.

Item 12 of the order states that modifications or amendments of this order confirmation or its components need to be confirmed in written form by both parties in order to be legally effective. This requirement as to form would also apply to the agreement on a deviation in respect to this clause. **10**

However, the parties as well agreed orally on certain aspects, in particular in respect to the former construction project contract section 1, despite the agreement on written form.

Item 5.5 of the Standard Terms of Contract Works Austrian standard B 2110 stipulates that the requirement of written form is met if one party subsequently confirms an oral agreement in writing and if the other party does not raise any objections thereto. Both the confirmation and the objection have to be effected within a reasonable time. **11**

On 18 August 2004, the [Buyer] sent the order to the [Seller]; the latter signed the order and returned it to the [Buyer] attaching a hint to the amendments as set out in its letter of 1 September 2004. This amended document was in turn revised by the [Buyer] and sent to the [Seller] on 6 October 2004. **12**

It was agreed that the delivery and laying of the reinforcement bars would be effected at a price of EUR 770 per ton as a fixed price until 30 April 2005. The parties defined a fixed price as a price which would not even change if the market prices for steel varied. Furthermore, an agreement on the basis of EUR 320 per ton should be reached, which should depend on the steel prices, namely, that a decrease in steel prices should lead to a reduction of the price. The [Buyer] interpreted this as an option to renegotiate prices as soon as the steel prices changed. The order amounted to 5,500 tons in total. **13**

The invoices should be issued separately after the delivery and laying; the payment should be effected in full after thirty days. A retention has not been agreed on and the [Buyer] has never claimed to be entitled to it. **14**

The steel prices varied during the period of time for which the parties had agreed on a fixed price of EUR 770 per ton. Therefore, the parties reinitiated negotiations upon request of the [Buyer] on 29 March 2005 in the office of the second defendant in Innsbruck. Daniel R[…] and Erwin W[…] took part on behalf of the [Seller], Wolfram W[…] and Hansjörg D[…] on behalf of the [Buyer]. The negotiations resulted in an agreement that EUR 497.50 should be paid per ton for the delivery of steel bars TC 55 and a further EUR 185 per ton for the laying, amounting to EUR 682.50 per ton in total. This price should be set as a fixed price from 1 April 2005 until 31 March 2006. The result was written down and signed by both parties. **15**

The price index for steel bars TC 55 decreased again in the aftermath of these negotiations, whereupon the [Buyer] intended to further reduce the price. A conversation was held in this respect on 13 June 2005, however, the parties did not reach an agreement. The [Buyer] sent **16**

a letter on 11 July 2005 referring to item 2.1 of the order of 11 August 2004 *[translator's note: typing error in original judgment]* and claimed that «a decrease in the market price would lead to a decrease in the agreed price.» [Buyer] furthermore alleged that this agreement in respect to price had been effective and mutual and that the [Seller] had not objected to it. The agreement of 29 March 2005 would only represent the execution of the contractual agreement to find a new regulation after the first price-period had elapsed. Following this agreement, the price of steel fell considerably, wherefore the agreed price had to be assimilated to the market price. [Buyer] reduced the invoiced prices on the basis of the respective market price as the negotiations in this respect had failed.

17 On 18 July 2005, the [Seller] objected to this unilateral reduction and requested the [Buyer] to pay for the remainder. However, [Seller] additionally offered to accommodate the [Buyer] with the price and sent a fax on 7 October 2005 containing a proposal for the solution of the dispute. The proposal showed a price of EUR 28,308.16 for the delivered tonnages between May and August 2005. However, the [Buyer] did not accept this proposal.

18 On 29 November 2005, the parties once again initiated negotiations. These negotiations were carried out at the seat of the [Buyer] in Kematen, Austria, by Daniel R[…] and Erwin W[…] on behalf of the [Seller] and by Christian M[…], Wolfram W[…], Helmut F[…], Hermann P[…], Hansjörg D[…] and Günther H[…] on behalf of the [Buyer].

Both the representatives of the [Seller] and the representatives of the [Buyer] explained their respective points of view at the beginning of the negotiations. In respect to the invoices of the [Seller], an amount of circa EUR 170,000 had remained unsettled at that point in time. The representatives of the [Buyer] offered to pay EUR 40,000.00 as a supplementary payment. This offer was rejected by the representatives of the [Seller] at first. The outstanding delivery of 600 tons of steel has as well been discussed in the course of these negotiations upon request of Daniel R[…] and Wolfram W[…].

19–20 Hermann P[…] asked Daniel R[…] and Christian M[…] to join him in order to discuss a solution in a small group as no agreement could be reached. In the course of this discussion, Hermann P[…] once again offered the payment of EUR 40,000.00 and to pay EUR 497.50 per ton from 16 November 2005 until the completion of contract section 2. Furthermore, he offered that Daniel R[…] would receive the option to contract for a further 2,000 tons. In the aftermath, this amount was increased to 3,000 tons. When Daniel R[…] once again mentioned the shortage of 600 tons, Hermann D[…] was invited to join the small group, and he confirmed this amount.

21 Finally, the parties agreed on an option contract for the [Seller] in the amount of 4,000 tons. Daniel R[…] was concerned about the wording of this option contract and in particular in respect to the case that the [Seller] submitted the best tender anyway, whereupon Hermann P[…] promised that the latter case would not have any effect upon the option contract.

22 Afterwards, Hermann P[…] and Daniel R[…] agreed by handshake on a supplementary payment of EUR 40,000.00 and a forfeiture of any additional rights of both parties. In addition, they agreed that a fixed price of EUR 497.50 per ton (laying not included) was to be paid between 16 November 2005 and the completion of contract section 2 as well as on an option to

contract for a further 4,000 tons of construction steel for a period of four years. Daniel R[…] reserved the right to transform this agreement in respect to the option contract into a written document. It was agreed that he would discuss the wording with Hermann P[…] and Christian M[…]. Upon the compilation of this document, the supplementary payment should be effected. This agreement was witnessed by Hermann D[…] and Christian M[…].

23 When the «small» group returned to the initial room, Hermann P[…] repeated the aforementioned result. He asked Daniel R[…] to prepare the written document as fast as possible. The latter agreed to do so. The result of these negotiations has not been documented in written form. Nevertheless, Hermann P[…] compiled a note for the file without being requested to do so. On 1 December 2005, he sent a copy of this note to every participant of the negotiations of 29 November 2005.

24 The note read as follows:

> «Re dispute in respect to the delivery of construction steel:
>
> The ARGE modified invoices on 15 November 2005 in respect to the delivery of construction steel for the period between May and 15 November 2005 in the amount of EUR 169,393.38.
>
> Today, the following has been agreed on:
>
> Deliveries after the 16 November 2005 will be effected at a fixed price of 497.50 per ton (laying not included). The remaining amount of steel amounts to 600 tons approx.
>
> Company R [Seller] receives an option to contract for the delivery of a further 4,000 tons of construction steel for the period of four years. Daniel R[…] will compile a respective contract in close collaboration with Hermann P[…] and Christian M[…].
>
> In return, ARGE will pay EUR 40,000.00 net after the compilation of the aforementioned contract.
>
> Following this, Company R [Seller] will accept the modifications of the invoices. Both parties waive any further claims in this respect.

25 The [Seller] received this note on 6 December 2005. Daniel R[…] saw this note for the first time in mid-December. However, he did not answer until 17 January 2006. The letter he wrote in reply stated that the [Seller] would under no circumstances accept the note in respect to the negotiations of 29 November 2005. No agreement had been reached; only possible solutions had been discussed. In particular, the [Seller] would not accept a «double-disadvantage.»

26 The [Buyer] answered this letter via letter – the date of which could not be established – stating that the agreement which had been reached in the course of the negotiations on 29 November 2005 would be binding and final. In addition, the [Buyer] alleged that the note exactly mirrored the outcome of the negotiations. Hence, the [Seller] was asked to reconsider its letter of 17 January 2006.

27 The parties did not communicate further until August 2006 when new negotiations were scheduled. Both Daniel R[…] and Wolfram W[…] were invited to this meeting. However, only

Wolfram W[…] took part on behalf of the [Seller], and he refused to negotiate due to a lack of authority.

Finally, the [Seller] requested payment of EUR 266,794.49 via letter of 28 August 2006. Thereupon the [Buyer] promised to pay EUR 73,189.37 in respect to reinforcement works on 12 September 2006; the [Buyer] referred to the negotiations of 29 November 2005 in respect to further payments. [Buyer] additionally pointed out that the amount of EUR 40,000.00 would be paid upon transmission of the draft contract in respect to the option which had been agreed on. **28**

The [Seller] issued the invoices in dispute until 15 November 2005. **29**

The Court of First Instance held that the parties had agreed on the Austrian standard B 2110. This would not constitute a contradiction of the basis of the order but solely an amendment. The negotiations of 29 November had led to the results as established. The [Seller] had failed to object to the note within due time in the sense of Austrian standard B 2110. Therefore, the [Seller] would not be entitled to the claim. **30**

[Position of the Parties before the Court of Appeal:]

The [Seller] appealed against this judgment and requested the Court to revoke the judgment of the Court of First Instance and to allow its claim. In eventu, the [Seller] requested that the judgment of the Court of First Instance be revoked and the case referred back to the Court of First Instance. **31**

The [Buyer], in turn, requested the dismissal of the appeal. **32**

[Decision and reasoning of the Court of Appeal:]

The [Seller]'s appeal is not justified. **33**

1. In respect to the evidence

The [Seller] contests the findings in respect to the negotiations of 29 November 2005. It requests that the findings be changed to: **34**

> *«The parties have not been able to reach an agreement in respect to the modifications of the invoices on 29 November 2005.*
>
> *Daniel R[…] was asked to prepare an amicable solution in respect to the modifications of the invoices. An agreement of the participants cannot be inferred from the note which has been compiled on 1 December 2005 and transmitted to the [Seller] via fax on 6 December 2005.»*

The [Seller] alleges that the Court of First Instance had exclusively based its assumptions on the reports of witnesses that have been named by the [Buyer] and only compared these statements with the submissions of the [Buyer]. The Court of First Instance had failed to consider whether these statements would be in accord with the documents and the remaining facts. **35**

The consideration of evidence of the Court of First Instance could be challenged in many ways. First of all, it had to be taken into account that the [Buyer] had deliberately breached the agreement of 29 March 2005 starting in July 2005 (with retroactive effect as of 29 March 2005). Somebody who deliberately committed a breach of contract would be likely to lie in court as well.

36 Furthermore, it had to be scrutinized why six people had been present on behalf of the [Buyer] on 29 November 2005. Such an amount of participants would not have been necessary from a commercial point of view. This suggested that the [Buyer] had intended to have an advantage as to numbers in order to be able to offer proof in respect to certain (possibly incorrect or modified) circumstances. In addition, it had to be considered that the alleged agreement of 29 November has not been documented in writing. The witnesses of the [Buyer] had not been able to explain why this had not been done. It had, in particular, to be considered in this respect that all previous agreements had been documented in writing and signed by both parties. It would be implausible that this form would be neglected in respect to such an important agreement.

37 Moreover, the Court of First Instance had failed to explain why the [Seller] should have been willing to accept such an agreement. Due to the fact that a fixed price had been agreed upon on 29 March 2005 which had been valid until 31 March 2006, it would not have been necessary to once again agree on a fixed price. In particular, against the background of the fact that the [Seller] would have waived the right to claim a further EUR 130,000 according to the alleged agreement and thus accepted the modifications of the invoices without any objections. The alleged agreement would in the end result in the fact that the [Seller] would be bound to deliver 261 tons of steel for free in addition to the obligation to effect an advance performance, namely, the drafting of the contract in respect to the option. It would be economically absurd to assume that even the payment of EUR 40,000.00 should be dependent upon the drafting of the option contract as the latter would have been beneficial to the [Seller] anyway. In addition, it had to be considered that the [Seller] had only been willing to accept a small discount or a minor derivation from the agreed price respectively. The assumption that the [Seller] had been willing to accept such an – oral – solution – which would be very generous from the [Buyer]'s point of view – would not only contradict any experience of life but also any business acumen.

38 Even the [Buyer] had assumed in the aftermath of the transmission of the note and the respective reaction of the [Seller] that no conclusive agreement had been reached. This could be seen from the fact that the [Buyer] had asked the [Seller] via letter of 31 July 2006 to meet in order to «discuss the outstanding items.» Finally, the statements of witnesses Daniel R[…] and Wolfram W[…] would be more trustworthy than those of the witnesses of the [Buyer], as not even the amount of the shortage would have been sufficiently assessed. The option contract offered by the [Buyer] would not constitute an adequate equivalent to the loss incurred due to the arbitrary reduction of the price and the shortage – which had been proven in the aftermath. Only additional orders, where the price would not have been set by third parties, would have constituted a sufficient equivalent to the loss. Therefore, it would be obvious that Wolfram W[…] and Daniel R[…] had not been able to accept the proposal of the [Buyer] of 29 November 2005, wherefore no agreement had been reached.

The incorrectness of the challenged findings could already be derived from the wording of the note «Following this, Company R [Seller] will accept the modifications of the invoices.» According to the clear wording of the note, the modifications of the invoices should only be accepted subsequent to the compilation of a draft contract in respect to the option and the payment of EUR 40,000.00. A different interpretation of the note would not be possible from an objective point of view. At the least, the witness report of the employees of the [Buyer] would contradict all submitted documents and any rule of logical thinking or of general experience, respectively. It can be seen from the fact that the [Buyer] had shown its willingness to pay the claimed amount except for EUR 20,000 during the oral proceedings on 27 February 2007 that it had been aware of its weak arguments. **39**

These allegations of the [Seller] are not justified. **40**

First of all, it has to be objected to the allegation that the employees of the [Buyer] would be likely to lie due to the fact that the [Buyer] had breached the contract. On the one hand, particularly the employees W[…], F[…], H[…] and D[…] have not personally breached the contract, as they do not have the authority to such a decision. A site manager (W[…]) or an accountant (F[…]) are obviously not authorized to decide whether the invoice of a contractual partner of the [Buyer] has to be met in full or only partially. Such an important and momentous decision can supposedly only be made by the director of the [Buyer]. **41**

On the other hand, the fact that the employees of the [Buyer] have been heard as witnesses and have thus been obliged to tell the truth should not be neglected. Hence, it is not possible to qualify their statements as unreliable simply because they are employees of the [Buyer]. In addition, it has to be taken into account that the [Buyer] is convinced that there has not been a fundamental breach of contract as – according to the established facts – the [Buyer] has been of the opinion that the steel price it had to pay had to be assessed according to the wholesale price index as agreed on, wherefore a reduced price had to be paid in case the whole sale price index fell. This assumption cannot be seen as untenable due to the fact that it has been agreed on that a reduction of the steel price would lead to a reduction of the standard price. Therefore, a deliberate breach of contract by the [Buyer] cannot be assumed. **42**

It cannot be excluded that the [Buyer] might have asked four employees to join the meeting on 29 November 2005 in order to have many witnesses for the content of the negotiations subsequently. However, this can be qualified as legitimate in the business world and cannot lead to the assumption that, due to this fact, the statements of the witnesses have to be questioned. Furthermore, it has to be assumed that the persons who acted for the [Seller] in this respect are experienced businessmen and had thus been able to notice the intention of the [Buyer]. Thus, they have been able to face the imbalance as regards numbers by compiling written minutes and having them signed by all attendants. **43**

In general, the allegations of the [Seller] have to be countered by the fact that witness reports cannot be qualified as unreliable solely because they correspond in respect to the content. **44**

The allegation of the [Seller] that the fact that the agreement had not been put in writing immediately would militate against the assumption that an agreement had been reached, cannot be denied. Nevertheless, if one takes the statements of the director of the [Buyer] and **45**

the witnesses into account, namely, that an agreement had been reached following long and laborious negotiations, which had been sealed by handshake of the participants and then shared with the plenum, it can be understood that an immediate written confirmation has not been deemed necessary. This has been conclusively stated by the director of the [Buyer] and by witness D[…].

46 In this context, it has furthermore to be taken into account that it is true that prior modifications to the contract have been partially documented in writing, however, not all oral agreements have been confirmed in writing. This can be seen from the document (appendix 19) and in respect to this letter from the statement of witness R[…]. Moreover, the Court of First Instance has undisputedly held that the parties have reached oral agreements despite the fact that they have agreed on written form.

47 The allegation of the [Seller] that, from a commercial point of view and based on the experience of life, there had been no reason to accept such a generous agreement and to accept the duty to perform in advance, namely, the drafting of a contract in respect to the option, as has been established by the Court of First Instance, cannot be followed. It is true that the [Seller] disposed of the agreement of 29 March 2005. However, it should not be neglected that the [Buyer] has continuously claimed that the purchase price had to be adapted to the fallen wholesale price index. It is true that this view has obviously not been supported by the [Seller], however, it is not fully made up out of thin air. The parties thus had a diametrically different opinion in respect to the question on how the price had to be calculated. A solution to this difference would have required court proceedings due to the lack of an agreement. As the parties had a good business relationship – as witness Daniel R[…] emphasized himself – it is comprehensible from a practical point of view that the [Seller] had been interested to reach an amicable settlement with the [Buyer] and been willing to make extensive concessions.

48 In addition, the [Seller] has not unilaterally and without any consideration agreed to a reduction of the claim by approx. EUR 130,000 as it now alleges; the [Buyer] also made concessions by promising the option contract. The allegation that this option contract has been of no relevance to the [Seller] as purported by witness R[…], cannot be followed. After all, such an agreement constitutes a secure option to contract, which offers the possibility to deliver 4,000 tons of steel to the [Buyer] over a period of four years. It is true that these deliveries could only be effected on the basis of the best price, however, the [Seller] would have had the advantage not to be obliged to underbid the best price in order to be chosen. Moreover, it has been agreed that the respective contingent of steel will not be deducted from the 4,000 tons if the [Seller] offers the best price anyway. Therefore, this option contract cannot be seen as uninteresting from a commercial point of view and explains why the [Seller] was willing to reduce the price.

Moreover, the [Seller] was not forced to accept the advance performance. According to the factual findings of the Court of First Instance, it was witness Daniel R[…], who demurred to the wording of the option contract. On the basis of this, the fact that the director of the [Buyer] offered that witness R[…] might compile the written document in respect to the option contract can be qualified as a concession.

The fact that, in its letter of 31 July 2006, the [Buyer] asked for a meeting in order to «finally discuss the outstanding items» does not contradict the position of the [Buyer], as at that point in time the parties had been in dispute over whether an agreement had actually been reached on 29 November 2005. The [Buyer] obviously intended to express that these differences should be settled in the course of a personal meeting. **49**

The argument of the [Seller] that the fact that it had not been possible to calculate the shortage on 29 November 2005 would contradict the assumption that an agreement had been reached on that very day cannot be followed. [Seller] further alleged that the option contract had not been sufficient to counterbalance the arbitrary price reduction and the shortage. The allegations in this respect neglect the fact that the outstanding amount of steel of about 600 tons has been relativized by the representatives of the [Seller] and that this very objection had lead to an increase of the option from 2,000 tons to 4,000 tons. **50**

The interpretation of the note of 1 December 2005 of the [Seller] cannot be affirmed. The wording «Following this, Company R [Seller] will accept the modifications of the invoices» cannot be interpreted as a postponement of the acceptance until a payment of EUR 40,000.00 has been effected and the option contract been formulated. The word «following» does not constitute a reference as to time as can be seen from the whole context of the note, but expresses that the [Seller] would accept the price reductions of the [Buyer] «in accordance» with the agreement. **51**

Finally, the allegations in respect to the credibility of witnesses R[…] and W[…] cannot be followed, as these statements contain less internal probability than the statements of the witnesses of the [Buyer] and the director of the [Buyer]. **52**

According to the statements of witness W[…] and R[…], no agreement had been reached on 29 November 2005; it had, however, been agreed that Daniel R[…] would compile a solution. If one takes into account that these negotiations have been preceded by several months of differences between the parties and that the negotiation itself took several hours, it is not very realistic that the directors of the [Buyer] would have accepted that Daniel R[…] would draft a unilateral suggestion some time in the future, which beyond doubt would have lead to the re-initiation of the whole discussion. The effort that has been necessary in respect to the meeting on 29 November 2005 already suggests that all of the participants wanted to find a common solution. The assumption that the directors of the [Buyer] had agreed that witness R[…] would draft a solution as a result of these discussions would contradict any realistic view. Furthermore, the dispute which had lasted for months called for a fast solution. According to the statements of witnesses R[…] and W[…], not even a period of time had been agreed on in respect to the submission of the draft by Daniel R[…]. This additionally contradicts the statements of these witnesses. **53**

The hint of the [Seller] that negotiation on an amicable settlement during the court proceedings is unfair and not justified: An amicable settlement always includes giving way and disassociating oneself from the initial position. Hence, the fact that a party shows the willingness to reach an amicable agreement cannot be used as a basis for negative findings. Furthermore, the negotiations in respect to an amicable settlement have been effected prior to the hearing **54**

of the witnesses and the directors of the [Buyer] in the present case. Hence, there had been no proof for the position of the [Buyer] at the time of these negotiations. Therefore, any offers made by the [Buyer] in the course of these negotiations cannot be seen as a concession in respect to the correctness of the position of the [Seller].

55 Finally, there is one crucial circumstance which contradicts the position of the [Seller]. According to the facts, the note of 1 December 2005 reached the [Seller] on 6 December 2005 and Daniel R[…] saw it for the first time in mid-December 2005. Daniel R[…] did not react to this note until 17 January 2006. If the note had in fact been contradictory to the negotiations of 29 November 2005 and if it had untruthfully stated that an agreement had been reached, it cannot be understood why the representative of the [Seller] did not reply earlier.

If the note had been in contrast to the truth, it would have been obvious to immediately object to it – at least via e-mail. The argument of witness R[…] in respect to the fact why he had not responded earlier is not comprehensible. A prior discussion with witness W cannot be seen as necessary in order to object to the note. If there had actually been no agreement on 29 November 2005, Daniel R[…] would not have had to verify that by asking witness W[…] and there would not have been any reason to discuss further steps. The hint about a busy Christmas time cannot be accepted as well. This is due to the fact that an objection via e-mail would not have required a lot of spare time.

56 As a conclusion to this, it has to be noted that the [Seller] – despite its extensive allegations – is not able to contest the correctness of the factual findings, wherefore the very part of the appeal based on this fact cannot be seen as justified.

2. In respect to the legal assessment

57 The [Seller] asserts for the first time in the appellate proceedings that the CISG would have to be applied to the present case – in particular on the basis of Art. 3 of the 1980 Rome Convention on the law applicable to contractual obligations. [Seller] alleges that, in consideration of Art. 29(2) CISG, the agreement had not been reached in compliance with the requirements as to form, wherefore it could already be seen as ineffective due to this fact. Even if the United Nations Convention on Contracts for the International Sale of Goods could not be applied, the agreement would be ineffective due to the mutually agreed written form. The Austrian standard B 2110 (item 5.5) would not be decisive in this respect as it would be subsidiary. Furthermore, an agreement had not even been reached on the basis of the facts as established by the Court of First Instance as it was true that there had been negotiations in respect to the option to contract, however, there had not been a conclusive agreement. Therefore, the parties had failed to agree in respect to a major part of the contract or at least in respect to a relevant subsidiary agreement, wherefore there had altogether not been a valid agreement. This was due to the fact that the option to contract would have had to be put in writing and the [Buyer] would have had to pay EUR 40,000.00 in order to render the agreement effective. These requirements had not been fulfilled. Therefore, the [Seller] would be entitled to claim the purchase price in full. It at least would be entitled to claim payment of EUR 40,000.00 net.

58 First of all, it has to be noted in respect to these allegations that the United Nations Convention on Contracts for the International Sale of Goods is generally embraced by the choice of

law as it forms part of the Austrian legal system. Parties have to explicitly or tacitly agree on an exclusion if they do not want the CISG to apply (RIS-Justiz RS0115967).

59 It is undisputed that the order of the [Buyer] of 11 August 2004 contains the clause «Austrian law applies.» As this order constitutes the basis for the contract – as has been established – the parties have effectively made a choice of law in the sense of Art. 3(1) of the 1980 Rome Convention on the law applicable to contractual obligations. As the parties have not even alleged that the CISG has been excluded, it is generally relevant to the present dispute.

60 However, it cannot be decided conclusively on the basis of the current state of the procedure whether the CISG actually can be applied to the present case. The parties have at least not concluded a pure contract of sale. It is true that according to Art. 3(1) CISG contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production. Mixed-type contracts are not governed by the United Nations Convention on Contracts for the International Sale of Goods, if the part which does not relate to the sale is crucially predominant. The individual circumstances of the relation between the part which relates to the sale and the part which does not relate to the sale are decisive (Austrian Supreme Court, 8 November 2005 – 4 Ob 179/05k). The quantitative balance does not constitute the sole requirement in respect to the question whether the supply of services is predominant. In addition, further components have to be taken into account in each case such as in particular the interest of the parties as regards the remaining performances. (Posch, in Schwimann (ed.), *ABGB* [Commentary on the Austrian Civil Code], 3rd ed., Art. 3 CISG para. 4).

61 It is true that it has been established in the present case that the price for the delivery of the steel is considerably higher than the price for the laying. This, however, does not suffice to decide whether the element relating to the sale was predominant in the present case – as can be seen from the aforementioned legal position.

Nevertheless, it does not have to be decided whether the United Nations Convention on Contracts for the International Sale of Goods is applicable to the present case as – as can be seen from the following assessment – the legal outcome is similar irrespective whether the United Nations Convention on Contracts for the International Sale of Goods or other Austrian law is applied.

62 According to Art. 29(2) CISG, a contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. An oral modification or termination does not have any legal effect if a written contract or a contract which falls under Art. 3(1) CISG stipulates, that it may only be altered by written agreement.

63 However, Art. 29(2) does not define the term written agreement on a modification or termination of the contract. The provision does not provide for a specific type of written form. Art. 29(2) CISG is supplemented by Art. 13 CISG in this respect as it states that writing includes telegram and telex for the purpose of the Convention. Therefore, a unilateral confirmation of

a modification or termination by agreement (e.g., via telegram or telex) meets the requirements of Art. 29(2) CISG.

It is in any case decisive what the parties themselves determined as written form and how this agreement has to be interpreted by applying Art. 8 CISG (Schlechtriem/Schwenzer (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht* [Commentary on the CISG], 4th ed., Art. 13 para. 2; Schlechtriem, *Internationales UN-Kaufrecht* [Textbook on the CISG], 3rd ed., para. 67). **64**

In the present case, the clause in respect to written form provides for the requirement that modifications or amendments to the contract need to be confirmed in writing by both parties. According to this clause, a unilateral written confirmation of a modification or termination by agreement in the sense of Art. 13 CISG would not suffice to meet the requirement of a written form. **65**

Nevertheless, not only the order of the [Buyer] but also the Austrian standard B 2110 forms part of the contract. The latter provides in item 5.5 that the requirement in respect to written form is met if an oral agreement is confirmed in writing by one contractual partner within a reasonable period of time if the other contractual partner does not object thereto within a reasonable period of time. It is true that the order prevails over the Austrian standard B 2110 as regards contradictions. However, item 5.5 of the Austrian standard B2110 does not contradict the clause in respect to written form of the order but only amends it. Hence, the clause has to be interpreted as follows: **66**

In general, a modification or an amendment of the contract needs to be confirmed in writing by both parties; nevertheless, it suffices if one contractual partner confirms an oral agreement in writing if the other contractual partner does not object to this. Thus, these two provisions can be applied simultaneously and do not contradict each other. It is true that Item 5.5 of the Austrian standard B 2110 weakens the requirement as to form as contained in item 12 of the order, however, it does not deviate from the requirement of a bilateral agreement as a sole unilateral written confirmation of an agreement – as provided for by Art. 13 CISG – does not suffice. The requirement as to form is only met if the other contractual partner does not object to the written confirmation within a reasonable period of time.

Therefore, according to this interpretation, the requirement in respect to written form according to Art. 29(2) CISG is met in the present case if an oral modification of the contract is confirmed in writing by one contractual partner and not contested by the other party. **67**

The [Buyer] has compiled the note of 1 December 2005 in respect to the agreement of 29 November 2005. This note reached the [Seller] on 6 December 2005. The [Seller], however, failed to object until 17 January 2006. This objection has not been effected within due time, as a period of six weeks cannot be considered as reasonable in respect to the fast-moving building industry, where a fast decision is necessary and usual. **68**

As a consequence to the late objection against the written note of the [Buyer] of 1 December 2005, the requirements as regards the written form in the sense of the contractual agreement of the parties and according to Art. 29(2) CISG have been met according to item 5.5 of the Austrian standard B 2110.

This result can also be reached if other Austrian provisions are applied instead of the United Nation Convention on Contracts for the International Sale of Goods. **69**

If the parties have agreed on written form, a contract comes into existence according to § 886 ABGB by the signature of both parties. Written form in the sense of § 886 ABGB thus means a handwritten signature (RIS-Justiz RS0017232, RS0078934). However, § 886 ABGB is only to be applied in cases of doubt in respect to agreements on a written form (Rummel in: Rummel (ed.), *ABGB* [Commentary on the Austrian Civil Code], 3rd ed., § 886 para. 1). The parties are free to choose a different form at any time according to the principles of private autonomy. This has been the case. It is true that the parties have generally agreed that a modification or termination by agreement requires the written confirmation of both contractual partners. Nevertheless, the parties additionally agreed according to the Austrian standard B 2110 which forms part of the contract, that the requirement as regards written form is also met in case that one contractual partner confirms an oral agreement in writing and that the other contractual partner does not object to it within a reasonable period of time. **70**

Furthermore, it is possible to deviate from an agreed written form at any time by mutual explicit or tacit consent (RIS-Justiz RS0014378, RS0038673). This does also apply to the present case where the parties have agreed that written form is required in order to deviate from the agreement on written form (Austrian Supreme Court – 5 Ob 37/06m with further references). **71**

The agreement of 29 November 2005 can be seen as such a mutual tacit consent to deviate from the agreement on written form if the circumstances are taken into account (§ 863 ABGB). This is due to the fact that the representatives of the parties have sealed the agreement by handshake as well as informed the participants of the meeting about it. It can be assumed on the basis of such a conduct that the parties intended that this oral agreement should be binding notwithstanding their prior agreement on written form. **72**

Hence, the requirement as to form does not prevent the legal effectiveness of the agreement of 29 November 2005.

Thus, the question of the [Seller], namely, whether the agreement of 29 November 2005 can be seen as a valid contract (or modification of a contract, respectively), has to be considered. **73**

The conclusion of a contract requires the agreement of the contractual partners in respect to both the subject matter of the contract and subsidiary agreements (RIS-Justiz RS0013984). A contract does not come into existence if individual issues have not been addressed within the agreement. It is irrelevant in this respect whether these issues are of fundamental importance. The contract cannot be seen as concluded until a conclusive agreement has been reached in this respect (RIS-Justiz RS0013972). Therefore, an agreement has to be reached in respect to every aspect of the contract which has formed part of the pre-contractual negotiations. An exception to this is only possible in case the parties intended to be contractually bound despite the fact that they have not reached a conclusive agreement (RIS-Justiz RS0013972 T2). **74**

However, if the parties have reached an oral agreement in respect to every aspect of the contract and solely state that the written compilation of the contract should be effected later on, **75**

a perfect contract is already present (cf. RIS-Justiz RS0017217). This solely does not apply if the circumstances of the case clearly show that the parties intended that the conclusion of the contract be dependent on the signing of a written document (cf. Austrian Supreme Court – 2 Ob 33/05z).

76 On 29 November 2005, the parties have reached an agreement in respect to every aspect of the modification, namely, the supplementary payment of the [Buyer], the future steel price and the option to contract. There has in particular not been any lack of agreement in respect to the option contract: Both contractual partners knew the details of the option, its scope and its applicability as regards time, and the parties agreed that this will not be considered in the calculation of the agreed amount if the [Seller] offers the lowest tender anyway. Thus, an agreement has been reached in respect to the esentialia negotii and due to the fact that the representatives of the parties sealed it via handshake it has to be assumed that the parties clearly intended to be bound at this point in time.

The [Seller] fails to show any fundamental point which had not been regulated in respect to the option and would therefore counter the assumption of an agreement. According to the established facts, solely the wording of a written document in respect to the agreed option has been left open. This does not alter the assumption that an oral agreement has been reached according to the aforementioned jurisprudence.

77 Therefore, the agreement of 29 November is legally effective. Thus, the [Buyer] does not have to pay the outstanding amounts as regards the invoices of the [Seller].

78 According to the agreement of the parties, the payment of the amount of EUR 40,000.00 net should not be due until the option contract has been put in writing. The [Seller] would have been obliged to compile the document in this respect. The [Seller] undisputedly failed to do so, wherefore it failed to meet the requirement in respect to the maturity of the claim. Due to this fact, not even the agreed sum of EUR 40,000.00 net is due.

79 As a conclusion to this, it is obvious that the Court of First Instance has rightfully dismissed the claim of EUR 191,866.10 on the basis of the legally effective agreement of 29 November 2005.

80 In addition, it has to be stated that the appeal fails to substantiate the claim of EUR 1,243.33 in respect to invoice no 80962. This separate claim, which has been based on separate facts, has thus to be excluded from the appellate judgment as the Court is bound by the statements of claim (RIS-Justiz RS0041570).

3. In respect to costs

81 The [Seller] alleges that the submission of documents by the [Buyer] of 1 December 2006 could not be reimbursed as these documents could have been submitted in conjunction with the written submission of 6 December 2006.

82 This is incorrect. The Court of First Instance requested the [Buyer] via decision of 8 November 2006 (ON3) to submit all offered and yet to be offered documents ten days prior to the oral proceedings at the latest. The [Buyer] had to follow this order and did in fact do so. In contrast,

the written submission of 6 December 2006 only had to be served seven days prior to the agenda (of 13 December 2006) according to § 257(3) Austrian Code of Civil Procedure. Thus the period for the service of the written submission was longer than the period for the submission of the documents as requested by the Court of First Instance. This period cannot be reduced by the fact that the party is obliged to serve a written submission earlier on the basis of costs, as the Court has set a shorter period for the submission of the documents than granted by § 257(3) Austrian Code of Civil Procedure. Therefore, both the submission of documents according to the order of the court and the service of a written submission according to § 257(3) Austrian Code of Civil Procedure have been necessary in order to establish an effective defense. Hence, both submissions have to be reimbursed.

83 Thus, the [Seller]'s appeal had to be dismissed in its entirety.

84 The decision on costs is based on §§ 41 and 50 Austrian Code of Civil Procedure. The [Buyer] is not entitled to claim the costs requested in respect to the appellate defense as regards the costs. The costs for an appeal in respect to costs or for the appellate defense in respect to costs cannot be reimbursed separately, as this forms part of the appeal or the appellate defense, respectively. It is therefore included in the costs granted for the written submissions (RIS-Justiz RS0119892).

85 The Court of Appeal was able to take the preceding jurisprudence of the Austrian Supreme Court into account. Furthermore, the crucial dispute in the present case dealt with the interpretation of the individual circumstances of a contract, which does not constitute a legal question of fundamental importance according to § 502 Austrian Code of Civil Procedure. Hence, the requirements to admit further appeal (Revision) are not met in the present case.