# *Conveyor band case*

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**CISG CASE PRESENTATION**

Austria 23 March 2005 Oberlandesgericht [Appellate Court] Linz (***Conveyor band case***) [translation available]
[Cite as: http://cisgw3.law.pace.edu/cases/050323a3.html]

Primary source(s) of information for case presentation: Case text

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**Case identification**

**DATE OF DECISION:** 20050323 (23 March 2005)

**JURISDICTION:** Austria

**TRIBUNAL:** OLG [ = Oberlandesgericht = Appellate Court] Linz

**JUDGE(S):** Dr. W. Moser (Vorsitz), Dr. Hildegard Egle, Dr. Eva-Maria Mayrbäuri

**CASE NUMBER/DOCKET NUMBER:** 6 R 200/04f

**CASE NAME:** Austrian case citations do not generally identify parties to proceedings

**CASE HISTORY:** 1st instance Landesgericht Wels (3 CG 213/03p-10) 6 July 2004 [affirmed]

**SELLER'S COUNTRY:** Germany (plaintiff)

**BUYER'S COUNTRY:** Austria (defendant)

**GOODS INVOLVED:** Conveyor bands

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**IHR headnote**

Reproduced from *Internationales Handelsrecht* (3/2007) 123

> "Art. 19 CISG does not contain a regulatory gap which would allow national law to rule the question of inclusion of general terms and conditions."

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**Classification of issues present**

**APPLICATION OF CISG:** Yes

**APPLICABLE CISG PROVISIONS AND ISSUES**

**Key CISG provisions at issue:** Articles 4 ; 8 ; 18 ; 19 [Also cited: Article 14 ]

**Classification of issues using UNCITRAL classification code numbers:**

4A ; 4B [Scope of Convention (issues covered): substantive validity of standard terms; Issues excluded: set-off];

8A ; 8B ; 8C [Interpretation of party's statement or other conduct: intent of party making statement or engaging in conduct; Interpretation based on objective standards ; Interpretation in light of surrounding circumstances];

18A1 ; 18A2 ; 18A3 [Criteria for acceptance of offer: statement of acceptance; Other conduct indicating assent; Silence or inactivity in and of itself insufficient];

19A ; 19B ; 19C ; 19D [Acceptance with modifications: reply purporting to accept but containing additions or modifications; "Acceptance" with immaterial modifications; Modifications that are material; Goods are accepted when "acceptance" differs materially from offer]

**Descriptors:** *Scope of Convention ; Standard terms and conditions ; Set-off ; Intent ; Acceptance of offer ; Counter-offer ; Battle of the forms*

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**Editorial remarks**

- Unavailable

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**Citations to case abstracts, texts, and commentaries**

**CITATIONS TO ABSTRACTS OF DECISION**

**(a) UNCITRAL abstract:** Unavailable

**(b) Other abstracts**

Unavailable

**CITATIONS TO TEXT OF DECISION**

**Original language** (German): CISG-online.ch website <http://www.cisg-online.ch/cisg/urteile/1376.pdf>; Internationales Handelsrecht (3/2007) 123-127

**Translation** (English): Text presented below

**CITATIONS TO COMMENTS ON DECISION**

Unavailable

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**Case text (English translation)** [second draft]

*Queen Mary Case Translation Programme*

**Appellate Court (*Oberlandesgericht*) Linz**

**23 March 2005 [6 R 200/04f]**

*Translation [*] by Jan Henning Berg [**]*

**AWARD**

Defendant [Buyer]'s appeal is unjustified.

[Buyer] is ordered to pay Plaintiff [Seller] the costs of appellate proceedings of EUR 1,091.27 (including EUR 150.52 as VAT) within 14 days.

Further appeal is inadmissible.

**FACTS**

The Austrian [Buyer] ordered two conveyer bands *"900/7000 mm"* at EUR 7,280 by written order of 10 April 2002. The order was based on [Buyer]'s general terms of purchase and delivery. Thereupon, [Seller] sent [Buyer] an order confirmation dated 11 April 2002 in which

it referred to [Seller]'s general terms of sale and delivery. One conveyer band was then delivered to [Buyer].

By letter of 28 August 2002, [Buyer] asked [Seller] concerning the price of another conveyer band. This inquiry lacked reference to any standard terms. With this letter, [Buyer] also requested cancellation of its previous order of the two conveyer bands and the corresponding invoices 126 and 149/02. In a telephone call on 3 September 2002, [Seller] proposed to [Buyer] that it would adapt the remaining conveyer band at a price of EUR 384 and further stated that "in other respects, the former conditions of offer and order confirmation applied." By further order confirmation of 5 September 2002, [Seller] invoiced to [Buyer] these adaptation costs of EUR 384, constituting a total price for the conveyer band of EUR 4,024 with reference to [Seller]'s standard terms. On 7 June 2002 and 1 October 2002, [Seller] issued invoices to [Buyer] in the amount of EUR 3,640 and EUR 4,024. Following an order placed by [Buyer] via telefax on 1 October 2002, [Seller] sent to [Buyer] another order confirmation that also referred to its standard terms. This order was invoiced on 11 November 2002 at EUR 12,080. All three invoices contained the phrase: "You receive in accordance with our standard terms ...".

Within only a few days, [Buyer] notified [Seller] that two of the three conveyer bands were defective. Neither these notices of non-conformity nor any further correspondence by either party ever again referred to standard terms.

In its order confirmation of 11 April 2002, [Seller] had offered a translation of the instruction manual into Spanish as an extra service which was to be charged depending on the effort required. [Seller] requested payment of EUR 468 for this in its invoice of 2 July 2002.

On 12 December 2002, [Buyer] issued its invoice to [Seller] in the amount of EUR 12,829.22 for necessary operations with the conveyer bands and for the costs of an allegedly frustrated trip by two employees to Yugoslavia, where an angled conveyer band should have been received. [Buyer] did not refer to standard terms in this invoice. On 27 January 2003, [Buyer]'s attorney informed [Seller] that [Buyer] had declared a set-off of EUR 12,829.22 through its invoice of 12 December 2002 and that it would refrain from paying any of [Seller]'s invoices.

On 5 March 2003, [Buyer] submitted another invoice to [Seller] -- an invoice in the amount of EUR 1,094.40 -- for the rectification of a defective engine of one of [Seller]'s conveyer bands. This invoice, as well, did not refer to standard terms.

[Seller]'s standard terms contain the following provisions (excerpt):

> *1.3. Any uncontested receipt of our order confirmation means that a contract has been concluded governed by these provisions.*
>
> *1.4.* [...] *An order is only accepted if we have confirmed it in writing.*
>
> *4.5. The orderer is entitled to retain the goods or may rely on a set-off only if the counterclaim is undisputed or effectively determined in court.*

*11.1. The interpretation of this contract is exclusively governed by German law. German law is applicable without restrictions, even for deliveries to foreign customers.*

*11.2. Any purchase conditions of the orderer that contradict these terms are not legally binding. This applies even where the orderer attempts to include his purchase terms in the contract and also in cases where we have not expressly contested them.*

*11.4. Should any of the above provisions appear as entirely or partially invalid, it does not affect the validity of any other provision.*

By way of contract, the standard terms of [Buyer] provide that:

*Any orders will be placed only under its purchase conditions. A seller's conditions for delivery are not in effect, even if they are attached to or referred to by an order confirmation. Instead, Austrian law applies.*

And [Buyer]'s standard terms do not contain relevant provisions for a set-off.

It is undisputed that each party merely made references to its own set of standard terms and that there had not been any oral agreement or negotiation about their validity.

**[POSITION OF THE PARTIES]**

**The [Seller]**

**[*Seller*]*'s statement of the facts***

[Seller] requested payment by [Buyer] in the amount of EUR 13,297.22. [Seller] alleged that:

- In conformity with the contract, one angled conveyer band and a Spanish translation of the instruction manual had been delivered without any defects. In that respect, four invoices were issued in the total amount of EUR 20,212.

- The first of two horizontal conveyer bands was delivered on 11 June 2002. The translation was finished about one week afterwards. As [Buyer] did not settle the invoices but unjustifiably attempted to rely on defects, [Seller] was not willing to deliver the second identical conveyer band to [Buyer]'s place of business in Austria.

- The first conveyer band was retrieved from Austria and taken back to Germany for a technical inspection. As had been expected, the inspection determined that there had not been any defects at all.

- [Buyer] issued a request for another large angled conveyer band at the time that the other two bands were still at the [Seller]'s place of business. [Seller] responded that, despite its proper delivery, [Buyer] had not yet paid the price for the first two conveyer bands. Thereupon, [Buyer] indicated to [Seller] that, contrary to its former expectation, it had no use for the two horizontal conveyer bands. That must have been the reason for [Buyer]'s assertions of defects for which [Seller] was not responsible.

- [Seller] was not willing to cancel both orders. In order to receive the angled conveyer band, [Buyer] had issued to [Seller] a further order to adapt the former conveyer bands according to the present needs of [Buyer]. [Seller] had undertaken the adaptation works. However, the adaptation was effected only because [Buyer] had promised to pay for the bands and the translation. Thereupon, the first of the two adapted horizontal conveyer bands was delivered without final inspection and the second one was delivered after a final inspection. The corresponding invoices were not paid.

- The angled conveyer band was inspected by [Buyer] at the Yugoslavian subsidiary of [Seller]. On 19 November 2002, it was delivered to Austria and an invoice was issued to [Buyer] for EUR 12,080. [Buyer] also alleged purported defects of this conveyer band although none actually existed. Therefore, [Seller] unmistakably indicated to [Buyer] that all invoices were to be paid in full. Otherwise, legal action would be initiated. By the end of 2002, [Buyer] suddenly made an irreproducible invoice concerning various expenses (damages).

- By way of a set-off, [Buyer] alleged that any purchase price claims by [Seller] were settled in the amount of EUR 6,914.78. Subsequently, another invoice was issued by [Buyer].

**[*Seller*]*'s position on the applicable terms and conditions***

The parties had agreed that all contracts between them were based on [Seller]'s standard terms. [Seller] immediately contested [Buyer]'s standard terms, which furthermore were submitted only after [Seller]'s standard terms had been communicated. Additionally, [Buyer] gave its consent. Consequently, the standard terms of [Seller] were effectively introduced into the contract. [Seller]'s standard terms provided for German law to apply. This was also applicable under Art. 4(2) of the Convention on the Law Applicable to contractual Obligations (Rome Convention). According to [Seller]'s standard terms, the claims purported by [Buyer] had not been in existence. They were contested on their merits and on their amouints.

**[*Seller*]*'s claim***

[Seller] alleges that its claim was properly founded on the contract concluded between the parties. Additionally, [Seller] could rely on damages. In case of a possible invalidity of contracts, [Seller] had claims from rescission of contract (unjustified enrichment).

**[Buyer]'s response**

[Buyer] contested these allegations by [Seller] and requested dismissal of the action. [Buyer] argued that:

It had ordered two conveyer bands on 10 April 2002. This order was later amended to include an order for a translation of the instruction manual into English and Spanish (total value: EUR 7,280). Defects affecting the first delivered conveyer band were rectified by [Seller], the band was then returned to [Buyer] on 3 October 2002. It was defective once again. [Seller] refused to rectify the defects meaning that [Buyer] itself was forced to cure the

defects. The second conveyer band which was accepted in October 2002 was free of defects. The sum charged by [Seller] for the translation of the technical documentation was excessively high (it had been agreed that [Seller] would arrange for an inexpensive translation in Serbia). On 1 October 2002, [Buyer] accepted [Seller]'s offer for the sale of the angled conveyer band at a price of EUR 10,900. However, this band, delivered on 19 November 2002, had severe defects and [Seller] refused to rectify them.

[Seller] also refused [Buyer]'s request dated 16 January 2003 for the delivery of a more powerful engine because one engine had burned down. As a result, [Buyer] acquired the replacement engine on its own. This engine finally burned down as well so that a third even more powerful engine had to be bought. [Seller] alleged that the initial engine power was sufficient. [Buyer], however, relied on a set-off of its additional expenses as a consequence of [Seller]'s culpable, non-conforming delivery. [Buyer] has properly paid the difference between the four unsettled invoices of [Seller] and the counter-invoice issued by [Buyer].

Austrian law applies to the present case. [Buyer] had ordered both conveyer bands *"900/7000"* and the angled conveyer band according to its own general terms for purchase and delivery. Any purported agreement by the parties on [Seller]'s standard terms was challenged. [Buyer]'s terms of delivery provided that all orders were exclusively placed under these conditions. Therefore, [Seller]'s terms of delivery would be ineffective even in case of submission or through reference by way of [Seller]'s order confirmations. [Seller] had been aware from previous orders that [Buyer] would only enter into a contract if its purchase terms applied. [Seller] could not rely on the assumption based on its own standard terms that [Buyer] was willing to conclude a contract under the [Seller]'s standard terms and especially that [Buyer] would agree to the exclusion of its own standard terms. By no means, had [Seller]'s standard terms become part of the contract. In the light of the conflicting contents of both sets of standard terms and the conflicting contractual references to them, these particular terms had not at all become part of the contract. There was a dissent concerning fundamental terms of the contract for all orders in question. [Seller] was not entitled to its asserted claims, failing their legal basis. In the alternative, it is submitted that at least a partial dissent existed which embodied terms other than the agreement on the goods and their price. Consequently, the parties had, in any case, not effectively agreed on a preclusion of set-offs as provided in [Seller]'s standard terms.

**RULING OF THE COURT OF FIRST INSTANCE**

The Court of First Instance ordered [Buyer] to pay to [Seller] the sum of EUR 13,229.22 and dismissed [Seller]'s further request for EUR 68. The Court made the factual findings as set out above. Concerning the legal assessment, the Court held that basically the CISG applied as an element of both jurisdictions in question. Failing any choice of law by the parties, German law applied under Art. 4(2) Rome Convention. German law allowed a set-off ban as stated in [Seller]'s standard terms. Therefore, the case would be ripe for decision if [Seller]'s standard terms were effectively incorporated into the contract. It must be determined whether [Buyer]'s silence following [Seller]'s submission of order confirmations formed a **tacit submission to [Seller]'s standard terms.** The question of an implied submission under standard terms is not solely governed by the law which applies to the contract itself. It must also be geared to the law that applies to usual activities of the person whose silence should bear legal relevance. A particular act could not be attributed to a person as a legal declaration of intent if this person did not have to reckon with such qualification according to its "surrounding law".

According to prevailing jurisprudence, conflicting standard terms only form a partial dissent. Terms not regulated by the contract are to be determined by statutory law and supplementing interpretation.

If an order confirmation is not fully congruent to the corresponding offer ("modified order confirmation"), *e.g.*, if it contains standard terms to which the offeror has not expressed its consent, there is no conclusion of contract as provided by § 869 ABGB [*]. Generally, such an order confirmation is considered as a new offer that might have been accepted by the silence of the recipient.

The case at hand is characteristic because:

- First, [Seller] had made an offer under its standard terms;

- Thereupon, [Buyer] had placed an order under its partially conflicting standard terms; and,
- Finally, [Seller] had confirmed the order once again under its standard terms.

This is a situation in which [Buyer] had accepted the deliveries and the [Seller]'s invoices (which again made reference to [Seller]'s standard terms) without further contesting or negotiating the validity of [Seller]'s standard terms.

It had been repeatedly adjudicated that an implied submission under standard terms of the contracting partner is assumed if the addressee can clearly identify that the contracting partner would only want to conclude the contract under its own standard terms. With regard to a set-off ban, [Seller]'s standard terms would not even conflict with the standard terms of [Buyer] which do not at all refer to this issue. At hand, an implied submission by [Buyer] to [Seller]'s standard terms is to be assumed. [Seller] has repeatedly indicated to [Buyer] that it would conclude the contract only under its own standard terms.

Failing any admissible set-off by [Buyer], [Seller]'s action is mainly justified; claims for a price reduction had not been made a subject of the present proceedings. The costs for translation services could be estimated at EUR 400 in accordance with § 243 ZPO [*].

**POSITION OF THE PARTIES ON APPEAL**

[Buyer]'s appeal is aimed against this judgment. [Buyer] relies on an incorrect legal assessment "including factual failures due to incorrect legal assessment" and requests amendment of the judgment of the Court of First Instance so that [Seller]'s action is dismissed in full. Alternatively, [Buyer] requests repeal of the judgment and that the case be remanded to the Court of First Instance.

[Seller] furnished an appellate response requesting the Court to dismiss [Buyer]'s appeal.

**REASONING OF THE COURT**

The [Buyer]'s appeal is not justified.

**1. [Whether there was a procedural failure to take sufficient evidence]**

**1.1.** [Buyer] argues that the Court of First Instance overlooked the fact that it contested [Seller]'s claim on the grounds of not only a set-off, but also on the grounds of claims from contractual warranty and damages claims. [Buyer] alleged that, due to the Court's erroneous legal assessment, it failed to make factual findings which would have led to the dismissal of the [Seller]'s claim. Therefore, a secondary failure of taking evidence existed.

**1.2.** [Buyer] has contested [Seller]'s claim in the First Instance by asserting that it had paid the difference between the unsettled invoices and its "counter-invoice" (concerning expenses following non-performance by [Seller]). However, [Buyer] did not rely on any warranty or damages claims. Furthermore, such claims could at best only preclude maturity of [Seller]'s claims. Moreover, their maturity was not contested by [Buyer]. Consequently, there was no failure by the Court of First Instance to take sufficient evidence.

**2. [Applicability of Seller's standard terms]**

**2.1.** [Buyer] also denies that it had tacitly submitted to [Seller]'s standard terms.

[Buyer] alleges that:

- By no means, had it remained silent after the communication of [Seller]'s standard terms;

- Instead, it had expressly insisted on the inclusion of its own terms and thereby excluded the applicability of other standard terms;
- Even for orders prior to the transactions at hand and in a subsequent order, had it pointed towards its standard terms;
- After having received the order confirmation, [Buyer] had no duty to contest [Seller]'s standard terms;
- With its order placement, [Buyer] had already sufficiently indicated that it would only want to enter into contract under its own standard terms.

The Court of First Instance had not mentioned the provisions of Art. 19 CISG which are relevant to this case. Following the prevailing notion (theory of residual validity), two deviating sets of standard terms would become part of the contract only insofar as they do not contain conflicting provisions. For the rest, provisions of statutory law would apply. Therefore, there is no effective set-off ban as provided for in [Seller]'s standard terms.

**2.2.** [Seller] assumes that its standard terms were properly incorporated into all contracts concluded between the parties and that, as a result, the set-off ban applied. The standard terms also provided for German law to apply, which would have been the result in any case under Art. 4(2) Rome Convention.

In contrast, [Buyer] asserted that all three conveyer bands were ordered under the exclusive effect of its own standard terms. [Buyer] alleged that, following previous orders, [Seller] knew that [Buyer] would only enter into a contract under its own purchase terms. Therefore, [Seller] could not exclude [Buyer]'s standard terms by a corresponding provision of its own terms. Due to the conflicting content of the two sets of terms, none of them had become part

of the contract. In the alternative, [Buyer] relied on a partial dissent. No set-off ban had ever been effectively stipulated.

**2.3.** In order to assess whether [Seller]'s standard terms (and therefore the set-off ban) have become part of the contract, the CISG applies. The dispute between [Seller] and [Buyer] involves an international sales contract in terms of Art. 1 CISG. For the relevant period of time (since 2002), the CISG has been in effect both in Germany and Austria. As a set of unified substantive law, an application of conflict of laws rules is dispensable (*Schwimann*, Internationales Privatrecht, 5; *Karollus*, UN-Kaufrecht, 30; *Honsell/Siehr*, Kommentar zum UN-Kaufrecht, Art. 1 para. 2).

**2.4.** The issue whether and at what time conflicting standard terms ("battle of forms") become part of the contract, is to be resolved according to Art. 19 CISG, because special battle-of-forms provisions were not integrated into the Convention during the drafting process. However, there is no actual gap in the Convention which would allow recourse to domestic law (as was assumed by the Court of First Instance) (*Karollus*, 70; *Staudinger/Magnus*, Art. 19 para 20; *Schlechtriem/Schwenzer*, Kommentar zum Einheitlichen UN-Kaufrecht (CISG), Art. 19 para. 20).

**3. [Elaboration on the relevance of Article 19 CISG]**

**3.1.** According to Art. 19(1) CISG, a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer. This includes the definite termination of the initial offer. The response submitted by the initial offeree triggers a new procedure of contract conclusion. The contract is finally concluded under the modified terms only through a positive response by the initial offeror, but not by mere silence (*Karollus*, 68).

Art. 19(2) CISG contains an exception to the general rule of Art. 19(1) CISG. A reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect.

**3.2.** Regularly and in almost all cases does a declaration of acceptance deviate from the initial offer in terms of Art. 19(1) CISG, because parties will attempt to incorporate standard terms into their contracts. Especially the use of standard terms by both parties involved leads, almost unavoidably, to differences between the content of offer and acceptance. Regularly, conflicts accrue especially through clauses that concern the defense of another party's standard terms. By way of those provisions, the effect of a party's own standard terms should constitute an essential part of that party's declaration of intent concerning the conclusion of the contract. Likewise, there should be no consideration of standard terms submitted by the other party. A conflict in standard terms will most likely arise wherever standard terms govern items to which the other party's terms remain silent. This is the case because a declaration that is silent on an issue is supplemented by codified legal rules, which usually leads to conflicting contract terms (*Schlechtriem/Schwenzer*, Art. 19 para. 19).

**4. [Offer, counter-offer and acceptance under Article 19]**

**4.1.** According to the findings made in the First Instance, [Buyer] attached its general terms of purchase and delivery to its order for the two conveyer bands of 10 April 2002.

Thereupon, [Seller] attached its standard terms to the corresponding order confirmation. The two sets of terms differ partially, particularly on the question of applicable law and because [Buyer]'s standard terms do not contain provisions on set-off, which is expressly precluded by [Seller]'s standard terms. Therefore, [Seller]'s response ("order confirmation") deviates from [Buyer]'s offer for the conclusion of a sales contract (the order qualifies as an offer, *cf.* 2 Ob 547/93). Pursuant to Art. 19(1) CISG, the initial offer put by [Buyer] (including its incorporated standard terms) was not accepted by [Seller]. Consequently, a contract had not been concluded that would be subject to [Buyer]'s standard terms.

**4.2.** [Seller]'s order confirmation including its hint towards the effect of [Seller]'s standard terms under exclusion of [Buyer]'s standard terms forms the last declaration in terms of Art. 19(1) CISG. As a result, it qualifies as a counter-offer. The question arises whether [Buyer] accepted this offer which would have caused the incorporation of [Seller]'s standard terms.

**5. [Applicability of Article 8 and Articles 14 *et seq*., especially Article 18]**

**5.1.** Art. 18 CISG states that an acceptance is formed by a statement made by or other conduct of the offeree indicating assent to an offer. Acceptance is a declaration of intent that can be communicated expressly or impliedly. The implied, indirect declaration of consent by the offeree is established through a certain action which earnestly and doubtlessly expresses its consent and intent to be bound. Relevant in that respect is, under Art. 8 CISG, the reasonable understanding by an objective third person under consideration of all circumstances of the individual case. It must be looked to the objective meaning of a declaration. Examples of such conduct might be: Acceptance of the goods, payment of the purchase price, sending of an invoice or its signing by the buyer (*Honsell/Schnyder/Straub*, Art. 18 paras. 28 *et seq*.). Pursuant to Art. 8 CISG, statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was (Art. 8(1) CISG). If the intent cannot be determined, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances (Art. 8(2) CISG). Art. 8(3) CISG provides that 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 the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties. The parties' subsequent conduct formed by declaration, notices and actions can be used in order to determine the initial intentions, if these are in doubt. The wording of Art. 8(3) CISG exceeds this and also embodies modifications of the content of the contract. The wording of this provision can also be understood in a way that contradictory conduct by a party bars that party from relying on a different meaning of its former conduct (*Honsell/Melis*, Art. 8 para. 14; RIS-Justiz [*] RS0107631).

**5.2.** The CISG does not impose particular requirements for the incorporation of standard terms into contracts of sale. The corresponding rules must be developed from Arts. 14 *et seq*. CISG which govern the conclusion of contract. Therefore, standard terms will become part of the contract only if they form part of the offer according to the offerer's intent as far as it is objectively recognizable (Art. 8(1) and (2) CISG). This can also happen impliedly or might result from negotiations between the parties or from practices that have been established between them (RIS-Justiz RS0104921).

**6. [Whether Buyer expressed its implied consent to Seller's counter-offer]**

**6.1.** Taking these rules for interpretation as the starting point, the question arises whether [Buyer] has expressed its implied consent to the counter-offer by [Seller] (order confirmation of 11 April 2002). If so, a contract of sale would have been concluded on the basis of this offer under inclusion of [Seller]'s standard terms.

**6.2.** According to the factual findings by the Court of First Instance, [Buyer] has made reference to its standard terms only in its order dated 10 April 2002. In the course of further correspondence, [Buyer] refrained from making references to its terms. On the other hand, [Seller] has pointed to its standard terms in all further pieces of correspondence. Furthermore, [Seller] has not only pointed to its own standard terms in the response to [Buyer]'s offer of 10 April 2002, but it even expressly requested that [Buyer]'s standard terms did not apply at all and repudiated them. This is evident from [Seller]'s order confirmation of 11 April 2002 (exhibit A) and is established by the Appellate Court without infringing the procedural principle of immediacy (*cf.* RIS-Justiz RS0118509; RS0042533; RS0041866). There had been no opposing reaction by [Buyer] against the exclusion of its standard terms. Instead, it is remarkable that, after this exclusion of [Buyer]'s standard terms, [Buyer] did not anymore point to the validity of its own standard terms. In particular, there have been no such references in the request for an offer of 28 August 2002 and in [Buyer]'s order dated 1 October 2002.

It must furthermore be taken into account that the sales contract (partially modified) was in fact performed and that [Buyer] paid the part of the purchase price which it considered as justified subject to its purported counterclaims. Considering all of these circumstances, it must be assumed that [Buyer] impliedly accepted [Seller]'s counter-offer of 11 April 2002. [Seller]'s standard terms have been properly incorporated into the contract because they have been referred to in this counter-offer.

**6.3.** With regard to the contracts concluded at a later time, the problem of conflicting standard terms does not arise. The findings by the Court of First Instance demonstrate that [Buyer] has not at all referred to its standard terms.

**7. 7.1.** [Buyer]'s appeal does not successfully establish a different legal assessment:

**7.2.** [Buyer]'s invocation that it had referred to its standard terms for transactions prior to the contracts in question does not support its legal position. As [Buyer] refrained from pointing to its standard terms after the exclusion contained in [Seller]'s standard terms, it must be considered that [Buyer] itself did not assume the effective inclusion of its standard terms into the contract.

**7.3.** Even the alleged inclusion of [Buyer]'s standard terms in an order dated 4 September 2002 (exhibit 34) does not help [Buyer] at hand. It is not determined whether or not this order had actually reached [Seller]. This can not be concluded without further proof. Especially, the corresponding conveyer band is not subject to the present proceedings and it has not been established that [Seller] had delivered another conveyer band to [Seller] apart from the transactions in question. Finally, [Buyer]'s payment for such an order was not demonstrated.

**7.4.** [Buyer] cannot successfully derive that [Seller] impliedly waived the effect of its standard terms on the grounds that [Seller] actually delivered the goods. Again, [Seller] has repeatedly and expressly pointed to the effect of its own standard terms and to the exclusion of [Buyer]'s standard terms.

**8. 8.1.** [Buyer] has impliedly submitted itself to the [Seller]'s standard terms. Therefore, [Seller]'s standard terms are relevant at hand. They contain a choice of German law, which includes the CISG. A choice of law does not in itself form a waiver of the CISG in favor of the non-unified domestic provisions of sales law (7 Ob 275/03x; 1 Ob 77/01g; likewise the prevailing notion in literature, see: *Lurger*, Die neuere Rechtsprechungsentwicklung zum UN-Kaufrechtsübereinkommen, JBl [*] 2002, 750).

**9. 9.1.** The CISG does not contain provisions for the test of substantive validity of standard terms. The test applies under the law applicable according to conflict of laws rules, here: German law. However, the standard of appropriateness needs to be adjusted to unified law and internationally accepted usages (*Staudinger/Magnus*, Art. 4 paras. 25 *et seq*.; *Witz/Salger/Lorenz/Lorenz*, International Einheitliches Kaufrecht, Art. 4 paras. 16 *et seq*.; *Schlechtriem/Schwenzer/Ferrari*, Art. 4 para. 20).

**9.2.** The Court of First Instance has properly taken German law into account, which also remained uncontested during the appellate proceedings. A set-off ban is allowed under German law, even if incorporated through standard terms. Set-off bans included in standard terms are only ineffective as far as they refer to claims that are uncontested or effectively determined in court (*Münchener Kommentar/Schlüter*, BGB [*], § 387 paras. 58 and 62, with reference to § 307 as the relevant provision for commercial transactions). [Seller]'s set-off ban does expressly not refer to claims uncontested or effectively determined in court. It is therefore effective under German law. The set-off ban would also be effective pursuant to Austrian law (*cf*. RIS-Justiz [*] RS0117944). This demonstrates that [Seller]'s set-off ban is in line with international standards. Moreover, it does not conflict with the principle of good faith underlying the CISG. Even [Buyer] itself did not contest the legal effect of [Seller]'s set-off ban during the appellate proceedings.

Under these circumstances, [Buyer]'s appeal is not justified.

**10. [Ancillary decisions]**

**10.1.** The decision on costs of appellate proceedings is based on §§ 41, 50 ZPO [*].

**10.2.** Further appeal is not admissible. The relevant legal issue at hand, namely, whether or not [Buyer] has impliedly accepted [Seller]'s offer of 11 April 2002 in conjunction with the standard terms introduced by [Seller], has no relevance transcending the present dispute.

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**FOOTNOTES**

* For purposes of this translation, Plaintiff of Germany is referred to as [Seller] and Defendant of Austria is 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]; **BGB** = *Bürgerliches Gesetzbuch* [German Civil Code]; **JBl** = *Juristische Blätter* [Austrian Law Journal]; **RIS-Justiz** = *Rechtsinformationssystem des Bundes* [Austrian Federal Database on Law]; **ZPO** = *Zivilprozessordnung* [Austrian Code of Civil Procedure].

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