

Case No. 05-13005

**UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT**

TREIBACHER INDUSTRIE, AG,
Plaintiff/Appellee,

v.

ALLEGHENY TECHNOLOGIES, INC.,
a Pennsylvania corporation, et al.,
Defendants,

TDY INDUSTRIES, INC.,
Defendant/Appellant.

On Appeal from the
United States District Court for the Northern District of Alabama
Case No: CV-01-HS-2872-NE

BRIEF OF APPELLEE TREIBACHER INDUSTRIE, AG

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**CERTIFICATE OF INTERESTED PARTIES AND
CORPORATE DISCLOSURE**

The plaintiff/appellee, Treibacher Industrie, AG, certifies that the following is a complete list of the trial judge, attorneys, persons, associations of persons, firms, partnerships, or corporations known to it that have an interest in the outcome of this case as defined by 11th Circuit Local Rule 26.1-1:

Judge:

Virginia Emerson Hopkins

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Corporate Disclosure:

TREIBACHER INDUSTRIE AG is holding shares in the following companies:

	Location	shares in %
TREIBACHER AUERMET d.o.o., Ravne Koroskem	Ravne, Slovenia	100,00
Grondmet (UK) Limited	Sheffield, United Kingdom	100,00
AKTIVSAUERSTOFF GmbH	Treibach, Austria	49,00
AS Silmet	Tallin, Estonia	10,01
Treibacher Industrie Inc.	Toronto, Canada	100,00
Mittlere Gurk Immobilienbesitz und Verwaltungs GmbH	Treibach, Austria	100,00

**The Main Shareholders of Treibacher Industrie AG –
Holding more than 10%**

	Location	shares in %
Custodia Holding AG	Munchen, Germany	40
Mercator Verwaltung GmbH	Wien, Austria	20
ES – Privatstiftung	Wien, Austria	25

STATEMENT REGARDING ORAL ARGUMENT

Treibacher does not request oral argument. Treibacher believes that the briefing in this case is adequate and shows that the judgment in favor of Treibacher should be affirmed.

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STATEMENT OF JURISDICTION

The district court had jurisdiction over the underlying dispute pursuant to federal question jurisdiction, 28 U.S.C. §1331, as the case arose under a treaty of the United States, i.e. the United Nations Convention for the International Sale of Goods (“CISG”). Doc. 1. Additionally, the district court had diversity jurisdiction, 28 U.S.C. §1332, as there was a controversy in excess of \$75,000 between citizens of a state and subjects of a foreign state. Doc. 1.

This Court has jurisdiction over this appeal as it is an appeal from a final decision of a district court entered on April 27, 2005, Doc. 84, 85. 28 U.S.C. §1291. The appeal was timely, as it was filed within 30 days of entry of the final decision. Doc. 86; Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

1. Whether the District Court's order finding in favor of Treibacher on its breach of contract claim should be reversed because the district court considered the eight-year course of dealing between the parties?

2. Whether TDY may argue on appeal that the CISG preempted Treibacher's promissory fraud claim when TDY failed to raise this argument before the District Court?

3. Whether TDY has demonstrated that the District Court's order finding in favor of Treibacher on Treibacher's promissory fraud claim was clearly erroneous?

4. Whether TDY has demonstrated that the District Court's order awarding damages to Treibacher was clearly erroneous?

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

Treibacher filed this breach of contract and fraud action case against TDY and other defendants on November 9, 2001. Doc. 1.¹ The bench trial of this matter was heard by the Hon. Virginia Hopkins, United States District Court for the Northern District of Alabama, from February 22, 2005 to February 24, 2005. (Doc. 78).

On April 27, 2005, Judge Hopkins rendered her order finding in favor of Treibacher on the breach of contract and promissory fraud claims, awarding Treibacher \$4,442,042 in compensatory damages, plus \$885,000.81 in pre-judgment interest. (Doc. 84, 85). TDY appealed on May 26, 2005. (Doc. 86).

II. STATEMENT OF FACTS

This case arose out of TDY's refusal to pay for goods which Treibacher had sold to TDY. At issue are two transactions – one in November, 2000 (“Deal I”), and a second in December, 2000 (“Deal II”). At the time of these transactions, the parties had a long standing relationship, where TDY had paid for all materials it had ever ordered from Treibacher - without exception. (Doc. 57¶(b)(5); Doc. 78, p. 587, 1.8-25). Treibacher had no reason to believe the transactions at issue here

¹ The other defendants were dismissed before trial. Doc. 51.

were any different. And, after listening to the evidence and observing the witnesses, the district court concluded there was, in fact, nothing different. The court found as a matter of fact that the parties had intended the two transactions at issue to be binding sales from Treibacher to TDY, and that TDY was required to pay for the goods it had ordered. (Doc. 84, p. 5-9).

TDY argued below that there was no sale, and submitted evidence supporting its contention that the parties had intended the transactions to be consignments. The trial court weighted TDY's evidence, along with the substantial evidence presented by Treibacher in support of its argument that a sale occurred, and found in favor of Treibacher. TDY now makes the same fact-based argument in this appeal, and invites this Court to weigh the facts afresh, giving undue emphasis to certain facts while discounting Treibacher's evidence which the district court found credible. For the reasons discussed in the argument section of this brief, Treibacher respectfully requests that this Court adhere to its mission of being a *reviewing* court and decline TDY's invitation.

As the trial court recognized, the key to resolving the question of whether the transactions at issue were sales or something else is the determination of the parties' intent. (Doc. 84, p. 21). Because the transactions involve the international sale of goods, the United Nations Convention for the International Sale of Goods ("CISG") governs. As will be discussed, *infra*, the CISG requires that the Court

consider four factors when seeking to find the intent of the parties: (1) any practices which the parties have established between themselves, (2) negotiations between the parties, (3) any subsequent conduct of the parties and (4) trade usages. (Doc. 78, p. 10, l.18-24; p. 27, l.12 - 28, l.12, p. 17, l.10-13). For ease of analysis, Treibacher discusses the evidence as it relates to each of these four factors.

A. PRACTICES BETWEEN THE PARTIES

1. The Trinitech Relationship.

The Plaintiff, Treibacher Industrie, is an Austrian corporation which began doing business in the United States through a sales agent, Trinitech International, Inc. in 1991. (Doc. 57, ¶5(b)) Treibacher entered into a “Consignment Stock Agreement” with Trinitech whereby this relationship was established. (PX 1) In order for Trinitech to withdraw goods from Treibacher’s consignment stock and deliver it to a third party, there had to be a “separately agreed sales contract”. (Doc. 78, p. 56, l.22 - 57, l.2; p. 58, l.4-18)

As the agent of Treibacher, Trinitech began selling hard metal powders to Defendant, TDY in 1993. (Doc. 57, ¶5(e); Doc. 78, p. 60, l.11-15) Although the documents between Trinitech and TDY used the term “consignment”, none of the documents defined the term, and the parties never discussed what the term meant. (Doc. 57, ¶5(b)).

In practice, Trinitech and TDY would discuss TDY's upcoming needs. Trinitech would then forward this information to Treibacher, which would inform Trinitech of the terms it could offer TDY to fill the identified needs. This information would then be communicated to TDY. (Doc. 78, p. 388, 1.6 - 391, 1.5; p. 713, 1.13 - 715, 1.2). When goods were delivered to TDY, Trinitech and TDY had already agreed to a particular price, and it was understood that TDY was acquiring the goods for its own consumption. (Doc. 78, p. 62, 1.1 - 64, 1.18). TDY never ordered Treibacher goods from Trinitech that TDY did not pay for. (Doc. 78, p. 123, 1.6-15). Nor did TDY ever return any portion of those goods or claim that it had the right to do so. (Doc. 78, p. 513, 1.17 - 514, 1.14).

a. 1993.

From the very beginning of their relationship in 1993, Trinitech established a course of dealing with TDY whereby goods were sold. The first sale is documented by a "blanket purchase order." (PX 4; Doc. 78, p. 66, 1.19-23).² In its Purchasing Policies and Procedures Manual, TDY defines the term "blanket purchase order" as :

The blanket purchase order is a long term commitment made to a vendor to purchase specific items for a pre-defined period of time and pre-defined quantity.

(PX 61, p. TOY 1257).

² The purchase order was originally with Teledyne, which, by name change, would become TDY. (Doc. 78, p. 478, 1.4-10).

While the release date of this definition was April 30, 2000, employees of TDY understood this to be the meaning of blanket purchase order throughout. (Doc. 78, p. 381, 1.8-12; p. 385, 1.19 - 386, 1.4; p. 501, 1.9-13; p. 547, 1.3-10).

b. 1994.

In 1994, Trinitech and TDY entered into a “Purchase/Sales Contract” that contained terms identifying the material sold, the quantity, the method of packaging, the price, the method of transportation and the delivery terms. (PX 5). The delivery term was “To Consignment.” This sales contract was consistent with Treibacher’s requirements of Trinitech that Trinitech could deliver Treibacher’s goods only on “separately agreed sales contracts.” (PX 1; Doc. 78, p. 67, 1.15 - 78, 1.6).

Not only was an agreement reached as to the terms and conditions of this Purchase/Sales Contract, but also the material was delivered, usage reports were issued by TDY, and the usage of the material was invoiced by Treibacher. (Doc. 78, p. 67, 1.15 - 78, 1.8). Robert Wiley, a former purchasing employee of TDY, acknowledged each of these facts. (Doc. 78; p. 510, 1. 9 - 513, 1.16). This transaction in which a sales contract is agreed upon, where usage reports are provided to Treibacher and whereby Treibacher then invoices the transaction, is consistent with the understanding of Treibacher as a sale, with “consignment” being merely a delivery term. (Doc. 78, p. 76, 1.5-18). Wiley confirmed that after

Trinitech ceased being Treibacher's sales agent, TDY and Treibacher continued to handle their transactions this way. (Doc. 78, p. 479 1.1 - 480, 1-9; p. 510, 1.9 - 513, 1.16).

c. 1995.

In 1995, Trinitech faxed to Treibacher an order that TDY was looking to place. This order was accompanied by a blanket purchase order. Treibacher agreed to accept the order. The agreed material was then shipped, used and payment was made. (PX 6; Doc. 78, p. 78, 1.10 - 81, 1.8).

On September 19, 1995, Donnie Mullins³ of Trinitech faxed a message to Treibacher referring to the 1995 order as a "fixed contract." (PX 7; Doc. 78, p. 81, 1.17 - 83, 1.8; p. 737, 1.2 - 740, 1.24). Mr. Mullins first incorrectly testified this 1995 order did not require a fixed price, (Doc. 78, p. 737, 1.2 - 738, 1.9), but later admitted all the ordered material was consumed at the fixed price and that, in fact, the 1995 order was a contract wherein both parties were required to perform. (Doc. 78, p. 738, 1.10 - 744, 1.20).

³ Mullins is a former Trinitech employee for the period November, 1993 to November, 1996. (Doc. 78, p. 711) He is now the owner of an active vendor of defendant TDY. (Doc. 78, p. 757) He was called as a witness by the defense.

d. 1996.

The year 1996 followed form. Trinitech sought pricing from Treibacher for sales to TDY. (PX 9, Doc. 78, p. 91, 1.10 - 97, 1.20). Treibacher quoted prices to be communicated to TDY with the admonition to Trinitech that there were to be “...no shipments on customer consignment stock without a firm written order for the customer at prices in any case agreed by Treibacher.” (PX 10). Following this memorandum to Trinitech, TDY issued its blanket purchase order. (PX 11).

e. 1997.

Again in 1997, Trinitech sought authority to quote prices to TDY. (PX 12). Treibacher quoted prices, and suggested that TDY issue a blanket purchase order for the year but with quarterly price adjustment. (PX 13). An agreement was reached whereby TDY agreed to a “purchase contract for the first quarter only since this is simpler...”. (PX 14). TDY’s records show three (3) additional purchase orders were issued corresponding to the remaining three (3) quarters of 1997. (PX 15; Doc. 78, p. 364, 1.23 - 369, 1.21). TDY employee Conrad Atchley⁴ understood that a purchase order is equivalent to a contract of sale. (Doc. 78, p. 370, 1.3-5).

⁴ Conrad Atchley is a former employee of TDY, having first started with TDY in 1961. In 1995 he became TDY’s senior buyer and was the person who negotiated on behalf of TDY with Peter Hinterhofer of Treibacher.

2. The Direct Relationship Between Treibacher and TDY.

After the 1997 orders were placed, Treibacher ceased using Trinitech as its sales agent and began dealing directly with TDY. TDY admitted this change did not result in a substantial change in the method of doing business it had established with Trinitech. (Doc. 57, p.2).

a. 1998.

Business for 1998 began with a verbal agreement between Peter Hinterhofer⁵ of Treibacher and Robert Wiley of TDY, which agreement was confirmed by facsimile from Treibacher. (PX 16, Doc. 78, p. 103, 1.23 - 105, 1.1). This agreement was followed by the issuance of a blanket purchase order by TDY. (PX 17) This purchase order was sent to Treibacher. (Doc. 78, p. 108, 1.5- 109, 1.10; PX 17)⁶ The practice of verbal phone agreements followed by written confirmation is seen throughout the history of the dealings between Treibacher and TDY. (PX 16,17,18,21,40); (Doc. 78, p. 255, 1.10-17). In fact, TDY's Wiley taught TDY's Atchley how to place orders by phone. (Doc. 78, p. 487, 1.17-22, p. 509, 1.7-10).

⁵ Hinterhofer is the Treibacher employee who later negotiated with TDY regarding Deal I and Deal II.

⁶ Discussion of the meaning of "blanket purchase order" is scattered throughout the record. See, e.g., the testimony of Conrad Atchley (Doc. 78, p. 349, 1.22 - 350, 1.22; p. 362, 1.4-6; p. 377, 1.22 - 378,1.25; p. 381, 1.8-12); of Robert Wiley (Doc. 78, p. 501, 1.9-13) and of John Johnson (Doc. 78, p. 542, 1.9-22).

b. 1999.

In December, 1998, a verbal agreement was reached between Treibacher and TDY as to TDY's needs for the first half of 1999. (PX 18). This agreement was confirmed by fax, including an acknowledgement that this transaction was in accordance with the course of dealings which had been established between the parties: "Other details are as usual; i.e. delivery on consignment, the consignment inventory to be approximately a 1-2 month consumption." (PX 18; Doc. 78, p. 111 1.20 - 114, 1.10). The 1999 transaction again involved verbal agreement with written confirmation, and issuance of blanket purchase orders by TDY, followed by shipment, usage and payment. (PX 19; Doc. 78, p. 114, 1.15 - 117, 1.25; p. 388, 1.6 - 396, 1.7).

c. 2000.

In December 1999, verbal agreement was reached for the year 2000. This agreement was confirmed in writing. (PX 21). The market, however, was changing, with the price of TaC rising. During this year, and as a result of escalating prices, TDY agreed to a price increase on this material. (Doc. 78, p. 119, 1.2 - 123, 1.15). Such a price change would only be accomplished by mutual agreement between the parties. (Doc. 78, p. 121, 1.23 -122, 1.7; p. 540, 1.11 - 542, 1.8).

d. TDY's Unsuccessful Attempt to Return Unused Materials.

As part of the 2000 order, TDY agreed to the purchase of 200 kilograms of TiCN 50/50 and 200 kilograms TiCN 70/30. The product was delivered but, on February 24, 2000, Conrad Atchley of TDY asked to return it to Treibacher. (PX 27). On the same day he received this request, Treibacher's Peter Hinterhofer called Mr. Atchley and, as his handwritten notes indicate, told him shipment was made on his explicit request and that he did not have consent to return this material. (PX 27). Thus, in February, 2000, before the present dispute ever arose, Hinterhofer made it clear to TDY how Treibacher interpreted the parties' relationship. Once Treibacher ordered the product, it was obligated to keep it and pay for it. Tellingly, TDY acquiesced – it kept and paid for the material it had asked to return. (Doc. 78, p. 136, 1.1 - 140, 1.9, p. 403, 1.18 - 405, 1.10).

B. NEGOTIATIONS - THE TRANSACTIONS AT ISSUE IN THIS SUIT.

With this background in mind, the facts relating to the two major transactions at issue in this lawsuit, referred to by the parties and the court as Deal I and Deal II, are quite simple: TDY ordered goods consistent with its prior practices, but did not pay for them.

1. DEAL I.

In the Fall of 2000, the parties began the process of identifying TDY's needs for material in the upcoming year against a backdrop of material shortage and escalating prices. (Doc. 78, p. 143, 1.14 - 147, 1.13). John Johnson of TDY⁷ communicated the need for material to Treibacher. He stated, "...the blanket order that we had placed the first of the year was gone." (Doc. 78, p. 553, 1.17-21). He identified the tightness of the market and communicated his need for Treibacher to supply TDY, "*Since [Treibacher] was our sole source for this material.*" (Doc. 78, p. 553, 1.3-7). In November, 2000, a raw material supplier, Hi Temp, offered to Treibacher raw materials from which TaC could be produced. Treibacher asked Hi Temp to keep these materials available until November 13, 2000 so an agreement could be reached with the customer. Treibacher then offered the TaC to be produced from the material to TDY, with the indication the order had to be agreed upon prior to November 13th. (PX 30) (Doc. 78, p. 147, 1.15 - 148, 1.15).

On November 10, 2000, Hi Temp offered additional material to Treibacher, and an extension for a decision was given until November 14, 2000. (Doc. 78, p. 152, 1.22 - 154, 1.19). On November 13, 2000, Treibacher's Hinterhofer communicated the availability of this additional TaC to TDY, indicating he needed a decision by November 14th. Significantly, Hinterhofer told TDY that Treibacher

⁷ TDY's Johnson was the immediate superior of Conrad Atchley.

would only place the order for raw material if an agreement was in place with TDY. (Doc. 78, p. 155, 1.1-22).

On November 14, 2000, TDY's Atchley agreed by email to accept all quantities and prices Treibacher had offered. Atchley's email to Treibacher stated: "Hello Peter, I agree with the shipment's [sic] below, and also for the 1.6 ton of choice in Feb., Mar., and Apr. 2000. Thanks Conrad." (Doc. 78, p. 156, 1.9 - 157, 1.17; PX 32). **Only after TDY's agreement to the order did Treibacher place the order for the raw material.** (PX 33; Doc. 78, p. 157, 1.22 - 159, 1.2).

Following the agreement, on November 15, 2000, Treibacher sent a confirming memo to TDY stating, "I'd like to put down that you agreed as to quantities and prices mentioned below." (PX 34; Doc. 78, p. 159, 1.11 - 163, 1.4). Mr.

Atchley did not respond and does not dispute that an agreement was reached with respect to this order. (Doc. 78, p. 418, 1.22 - 419, 1.11).

2. DEAL II

On December 7, 2000, Hi Temp again offered Treibacher raw material, with a deadline of December 13, 2000 in which to accept this offer. (PX 39). This deadline was extended to December 15, 2000. (PX 39(b); Doc. 78, p. 175, 1.8 - 177, 1.3)).

Treibacher's Hinterhofer then communicated an offer to TDY's Atchley on December 7th or 8th by phone. In this conversation, Hinterhofer again told Atchley

that there was a deadline within which to acquire the raw material, and the raw material would only be acquired if agreement was reached with TDY. (Doc. 78, p. 177, 1.4-22). In a December 14, 2000 phone conversation with Treibacher's Hinterhofer, TDY's Atchley agreed to purchase 2,000 kilograms of TaC at a price of \$1,100.00 per kilogram. (Doc. 78, p. 179, 1.10 - 181, 1.6).⁸ Treibacher confirmed this verbal agreement in writing on December 15, 2000. (PX 40; Doc. 78, p. 179, 1.10-23).⁹ This December agreement has been termed Deal II. (Doc. 78, p. 182, 1.15-18).

C. SUBSEQUENT CONDUCT.

1. Silence Following Confirmation.

As was the practice of the parties, Treibacher confirmed the agreement reached with TDY on Deal I by e-mail dated November 15, 2000, (PX 34), and confirmed the agreement on Deal II, involving \$2,200,000 of TaC, by e-mail dated December 15, 2000. (PX 40). At no time following either of these confirmations did TDY deny the existence of the agreements. (Doc. 78, p. 419, 1.4-11) (PX 40; Doc. 78, p. 429, 1.8 to p. 432, 1.10).

⁸ Hinterhofer recalls the specifics of the conversation. (Doc. 78, p. 155, 1.1-25; p. 178, 1.11 - 181, 1.6). Atchley recalls the conversation, but does not recall the specifics. (Doc. 78, p. 427, 1.18 - 429, 1.7).

⁹ Hinterhofer's e-mail says ". . . I'd like to put down that you confirmed to purchase 2.000 Kgs of TaC contained in the quality . . . of your choice. . . ." (PX 40).

2. Continued Assurance of Performance.

Following Deal I and Deal II, the parties had numerous discussions relative to these transactions. At every turn, TDY assured performance and acted as if there was a valid, enforceable contract of the sale. At no time before its lawyers got involved did TDY indicate it was not bound to pay for the goods it had ordered.

First, on December 13, 2000, Hinterhofer and Atchley spoke by phone wherein TDY requested delivery of 1,000 kilograms of TaC 50/50 from Deal I for March delivery. A portion of material from Deal I had already been delivered. (Doc. 78, p. 167, l.13 - 169, l.23) This conversation was confirmed by e-mail on December 14, 2000. (PX 34)

On February 8, 2001, Treibacher told TDY that it needed TDY's specification of the TaC mixtures on Deal I and Deal II. (PX 43; Doc. 78, p. 169, l.24 - 171, l.15). In response to that e-mail, TDY did not deny the existence of Deal I or Deal II but, rather, specified additional material for delivery. This specification by TDY was then confirmed by Treibacher. (Doc. 78, p. 171, l.16 - 174, l.4). TDY acknowledges that, following the February 8, 2001 communication, it understood Treibacher believed there was an agreement, and TDY took no action to disabuse Treibacher of that understanding. (Doc. 78, p. 434, l.18 - 436, l.11).

Following the February communication, TDY refused to pay for the goods it had ordered pursuant to the earlier agreements. Treibacher then initiated several contacts regarding the balance of Deal I and II. (Doc. 78, p. 184, 1.7-14). Eventually, Treibacher's Hinterhofer met with TDY's Atchley on May 8, 2001 in Huntsville, Alabama wherein a plan was discussed to use material TDY had ordered under both Deal I and Deal II. At no time during this meeting did TDY indicate that it was not bound by the agreements it had reached. (Doc. 78, p. 438, 1.11 - 440, 1.19); (PX 64; Doc. 78, p. 184, 1.15 - 188, 1.16).¹⁰ Nor did TDY dispute the existence of these sales contracts in a phone conversation following the May 8th meeting. (Doc. 78, p. 188, 1.10-16).

On May 31, 2001, Treibacher's Ulf Stromberger and TDY's John Johnson met in Reutte, Austria, wherein the balances of Deal I and Deal II were again discussed and a solution sought. Again, TDY did not deny the existence of Deal I or Deal II but, rather, TDY indicated it "would put together a plan for this" material. (PX 52(b)(penultimate paragraph); Doc. 78, p. 643, 1.25 - 646, 1.16; p. 560, 1.8 - 562, 1.10)

The parties exchanged numerous additional written communications following these meetings. Treibacher e-mailed TDY on June 5, 2001 and June 26, 2001. TDY never denied the existence of sales agreements in response to these e-

¹⁰ Treibacher's documents containing dates will reflect the European custom of placing the day, month and year in order such that May 8, 2001 reads 8/5/2001.

mails. (PX 44; Doc. 78, p. 188, 1.22 - 190, 1.3); (PX 45, 46; Doc. 78, p. 190, 1.9 - 191, 1.24; p. 563, 1.8 - 565, 1.4).

On June 27, 2001, Treibacher again e-mailed TDY seeking a solution as to Defendant's use of materials under Deals I and II. Consistent with its earlier statements, TDY did not deny the existence of Deal I or Deal II, but stated that "I will sell this material. . . ." (PX 46,47,71; Doc. 78, p. 192, 1.12 -193, 1.16; p. 647, 1.23 - 649, 1.14; p. 570, 1.19 - 574, 1.19; p. 577, 1.4-13).

On June 28, 2001, Treibacher again spelled out, in detail, Deals I and II, referring to them as a "contract" and demanding usage within a reasonable time. (PX 47). TDY did not refute the existence of the "contract" in its reply e-mail of July 3, 2001. (PX 48; Doc. 78, p. 652, 1.9 - 653, 1.5; p. 577, 1.14 - 580, 1.24).

This persistent pattern of demands by Treibacher followed by TDY's assurance of performance and failure to deny the existence of a binding contract continued for several months. (PX 49). (See also Doc. 78, p.587, 1.3-25; PX 43-50; PX 51; PX 52; PX 53; PX 54). In fact, it was not until Treibacher received a letter from TDY's general counsel dated August 23, 2001 that TDY denied the existence of a binding agreement. (Doc. 77, Bates 2 607 – 2 608).

3. TDY's Acquisition of Substitute Material.

Over the months that TDY was delaying payment for the goods it ordered from Treibacher and stringing Treibacher along with false promises of finding a

“resolution,” TDY was actually involved in secret negotiations with another supplier.

Following Deal I and while negotiations were on-going as to Deal II, TDY purchased TaC from Defense Logistics Agency (DLA), through the intermediary ELG, in order “to conceal our identity.” (PX 56; Doc. 78, p. 442, 1.4 - 447, 1.5). TDY never disclosed to Treibacher that it was seeking to buy material elsewhere or did not intend to honor the agreements reached as to Deals I and Deal II if it were able to find cheaper goods, (Doc. 78, p. 589, 1.7 - 590, 1.9), nor did it disclose to Treibacher in discussing Deal II that it had already obtained goods elsewhere.

During the first quarter of 2001, TDY obtained TaC or tantalum oxide, from which TaC could be made, on six occasions from five different vendors. The price of that material was below the price TDY had agreed to pay Treibacher.¹¹ (PX 60).

On April 25, 2001, TDY acquired 25,010 pounds of tantalum oxide from which it could produce 9,775 kilograms of TaC.¹² This acquisition was again through the intermediary, ELG. (PX 43-54). TDY did not divulge to Treibacher this acquisition but, rather, continued to represent the materials under Deal I and Deal II would be used. (PX 57 and 58; Doc. 78, p. 591, 1.5 - 593, 1.14). The cost

¹¹ The price of TaC under Deal I was \$925.00 per kilogram (PX 32) and was \$1,100.00 per kilogram under Deal II (PX 40).

¹² The order for TaC placed under Deal I and Deal II totaled 5,100 kilograms.

of this ELG material was a “lot lower” than the TaC purchased under Deal I and Deal II. (Doc. 78, p. 451, 1.8-16).

D. MITIGATION

As soon as it became clear to Treibacher that TDY would not accept and pay for the material under Deal and Deal II, and, indeed, had never intended to pay for the material, Treibacher sought to mitigate its damages. Treibacher offered evidence that it obtained the highest possible price for that material. (PX 65; Doc. 78, p. 329, 1.22 - 332, 1.11). The first such sale in mitigation was agreed upon on September 9, 2001. (PX 65(d)). This was only seventeen days after the date of TDY’s letter denying the existence of a binding agreement. (Doc. 77, Bates 2607-08). TDY never told Treibacher before the trial of this case that its mitigating sales were untimely or at inappropriate prices, nor did TDY present evidence at trial that a different buyer was available to buy any of the materials at a different price.

E. EVIDENCE REGARDING THE USAGE OF THE TERM “CONSIGNMENT”

The term “consignment” was used on documents between the parties to describe the transactions. However, the documents did not define the term, and the parties did not discuss what the term “consignment” meant. (Doc. 57, ¶5(b)). There was conflicting evidence as to what the word “consignment” means in the trade. TDY offered evidence from an expert witness whose sales experience was

limited to the U.S. markets that, in the United States, “consignment” means that a sale is not complete until the purchaser actually uses the product. Treibacher offered contrary testimony through several witnesses, who indicated that in international trade, “consignment” simply means that payment for contracted goods need not be made until the goods are used. It does not mean that a sale has not taken place. Treibacher also pointed out that TDY had signed a document entitled “Purchase/Sales Contract” with Trinitech which showed “consignment” as a mere delivery term. (PX 5-A). The district court heard this conflicting evidence, and concluded that the use of the term “consignment” on the documents did not change the fact that Deals I and II were final sales. (Doc. 84, p. 5). This evidence is discussed below.

1. TDY’s Evidence.

a. Chuck Weiser.

Mr. Weiser was a paid expert witness who worked for TDY from 1972 to 1977. During that period, he sold product for TDY in the United States. (Doc 78, p. 763, 1.3-15). He then left TDY and became employed with the hard metal vendor, H.C. Starck, where he marketed Starck’s product within the United States. (Doc. 78, p. 759, 1.9-25, p. 764, 1.15-20). Mr. Weiser made no sales to foreign companies. (Doc. 78, p. 773, 1.1-10). Mr. Weiser testified there is a system used in the United States for marketing hard metal powders. (Doc. 78, p. 778, 1.10 -

779, 1.13). He does not know if that system is used in other countries. Mr. Weiser stated the elements of consignment, in the United States, to be that the customer has no obligation to purchase goods ordered on consignment. (Doc. 78, p. 782, 1.5 - 784, 1.20). Under Weiser's understanding of consignment, the customer has the absolute right to return goods. (Doc. 78, p. 785, 1.10-12). Of course, that understanding is inconsistent with the fact that goods ordered from Treibacher on "consignment" could not be returned, (PX 27; Doc. 78; p. 138, 1.23 - 140, 1.9), and inconsistent with documents signed by TDY showing consignment as a mere delivery term. (PX 5-A). His opinion sheds no light on how consignment transactions are treated in international, as opposed to domestic, markets.

b. John Johnson.

TDY's Johnson first testified there are uniform elements of consignment which include no obligation to use or pay for the goods ordered by the customer. (Doc. 78, p. 614, 1.23 - 617, 1.8) Shortly thereafter, however, he testified that consignment agreements are done on an "individual basis" and such agreements with different companies may have different terms. (Doc. 78, p. 617, 1.16 - 619, 1.18).

2. TDY's Evidence.

a. Peter Hinterhofer.

Mr. Hinterhofer was educated in commercial school, and received training in international trade. He has both bought and sold goods with trading partners in numerous countries, including Germany, Italy, France, Great Britain, the Middle East, Japan, Korea, South Africa, the United States, China, Russia, Australia and South America. (Doc. 78, p. 50, 1.1 - 51, 1.2). In Hinterhofer's experience, "consignment" is simply a delivery system that allows the customer to defer a payment until the goods are utilized in its manufacturing process. (Doc. 78, p. 305, 1.14 - 306, 1.6). This process is first initiated by the parties entering into a contract of sale, with consignment simply being a delivery term of that contract. (Doc. 78, p. 306, 1.7 - 307, 1.8).

b. Ulf Stromberger.

Mr. Stromberger holds a Masters Degree in Material Science and was first employed by Treibacher in 1996 as Commercial Director of the Business Unit. (Doc. 78, p. 629, 1.1-25). He, too, has been involved in sales to customers in Europe, the Middle East, the Far East, South Africa and the United States. Based on that experience, he understands consignment as a delivery and billing system

that first requires a binding contract as to price and quantity. (Doc. 78, p. 633, l.13 to p. 635, l.16).

c. Robert Packer.

Packer is the former President of Ultra Met where he first started employment in 1972. (PX 72, p.8). Ultra Met is a United States company which purchased hard metal powders from Treibacher. (PX 72, p.9). These purchases included the term “on consignment.” (PX 72, p.10). Mr. Packer’s understanding of the consignment agreement with Treibacher he reached on behalf of Ultra Met was that goods he ordered on consignment obligated Ultra Met to both use and pay for all ordered material. (PX 72, p. 46, 52). This was consistent with Treibacher’s interpretation of its relationship with TDY.

III. STANDARD OF REVIEW.

The standard of review for a bench trial is well-established: legal issues are reviewed de novo and findings of fact are reviewed for clear error. Achille Lauro Lines S.R.L. v. West Indies Transport Limitada, S.A., 2002 WL 31431559 (11th Cir. 2002). In conducting its review, the Court should be careful to draw the distinction between conclusions of law and the facts upon which those conclusions have been based. As such, the Court’s de novo review is limited in scope to questions of law. Newell v. Prudential Ins. Co., 904 F.2d 644, 649 (11th Cir,

1990). “Purely factual issues are subject to the ‘clearly erroneous’ standard of review.” In re Grand Jury Subpoena, 957 F.2d 807 (11th Cir. 1992) (citing Newell, 904 F.2d 644 at 649).

Findings of fact, whether based on oral or documentary evidence, should not be set aside unless clearly erroneous, and due regard should be given to the opportunity of the trial court to judge of the credibility of the witnesses.¹³

Fed.R.Civ.P. 52(a). A clearly erroneous finding exists only when “the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed.” United States v. United States Gypsum Co., 333 U.S. 364 (1948). Moreover, on appeal, there is a strong presumption that the district court’s findings of fact are correct. Fishing Fleet, Inc. v. Trident Ins. Co Ltd., 598 F.2d 925 (5th Cir. 1979).

In applying the clearly erroneous standard, this Court does not retry issues of fact or substitute its judgment of the issues for that of the trial court. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S.Ct. 1562 (1969). The clearly erroneous standard does not entitle a reviewing court to reverse the finding of the trier of fact simply because it would have decided the case differently. Anderson v. Bessemer City, 470 US 564, 105 S.Ct. 1504 (1985). When two logically sound

¹³ The district court specifically noted “the Court’s factual findings are based on its observations of the witnesses, the documents admitted into evidence, and its trial notes.” (Doc. 84, p. 2).

interpretations of the evidence exist, the trial judge's selection of one over another cannot be found clearly erroneous on appeal. Walters v. City of Atlanta, 803 F.2d 1135 (11th Cir. 1986).

SUMMARY OF THE ARGUMENT

Stripped to its core, this case is quite simple: TDY ordered goods from Treibacher and refused to pay for them. The district court listened to the evidence, observed the witnesses, and found that contracts of sale had been formed and breached. These findings are supported by substantial evidence, and the district court's findings of fact should not be disturbed.

TDY, however, wants this Court to ignore the facts of this case. Instead, in its appeal, TDY argues it is entitled to prevail because the facts of what happened in this case do not matter. TDY is wrong.

First, TDY argues the district court erred when it considered the course of dealings between these parties because, TDY argues, the course of dealings between these parties is irrelevant. Citing only an isolated portion of the CISG out of context, TDY argues the meaning of this contract must be determined solely by looking at what others would say certain words in the contract meant, and it is reversible error for the district court to have considered what *these* parties thought of the contract. That is as wrong as it sounds. The truth is that CISG states precisely what one would expect -- the course of dealings between the parties, as

well as “all relevant circumstances of the case,” must be considered. When all the evidence authorized by the CISG is considered, as it must be, Treibacher is entitled to prevail.

Even if TDY were correct, and the counterintuitive were true (i.e. that the case should be decided on the basis of what other, unnamed parties would believe, and not what these parties actually believed), Treibacher would still prevail, because Treibacher presented substantial evidence as to the meaning of “consignment” in international trade. The district court was entitled to receive and give appropriate weight to this evidence of *international* trade usage, as opposed to the limited evidence of domestic trade usage offered by TDY.

Likewise, TDY does not want this Court to consider the facts relating to promissory fraud. Rather, for the first time on appeal, TDY argues the promissory fraud claim was preempted by the CISG. TDY has waived this argument because it never raised it in the district court. Regardless, the CISG applies only to contracts involving sales, and does not preempt common law tort claims such as fraud. When the facts are considered, it is clear there is substantial evidence supporting the district court’s finding of promissory fraud.

Further, the evidence fully supports the district court’s findings regarding damages. TDY’s has shown no reason why the amount is incorrect, and has failed

to meet its burden on its vague claim that Treibacher did not adequately mitigate its damages.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND IN TREIBACHER'S FAVOR ON THE BREACH OF CONTRACT CLAIM.

A. The District Court Properly Found a Contract of Sale After Due Consideration to all Relevant Circumstances.

Under the CISG,¹⁴ the intent of the parties controls the meaning and interpretation of a contract. See Switzerland 5, April 2005 Supreme Court, case/document no. 4C.474/2004.¹⁵ Where a written contract contains words which are susceptible to more than one reasonable interpretation, as both the parties and the district court agree is the case here, then it is the job of the fact finder to receive and consider extrinsic evidence to determine, as a matter of fact, what the parties intent was. See CISG Art. 8(3). Citing one portion of the CISG out of context, TDY asks this Court to disregard these long-settled tenets of contract construction embodied in the CISG and consider *only* “usage of trade”, to the exclusion of all other evidence of the parties’ intent. As one would expect, the CISG does not require that the fact finder put on such blinders when seeking to glean the parties’ intent. Indeed, it does not even permit it.

Contrary to TDY’s assertion, the CISG *mandates* that in determining the parties’ intent, “due consideration *is to be given* to all relevant circumstances of

¹⁴ Cases and other authority on the CISG can be accessed on the internet, and the appropriate web addresses will be provided.

¹⁵ <http://cisgw3.law.pace.edu/cases/050405SI.html>

the case.” (emphasis added) CISG Art. 8(3). The entire subsection reads as follows:

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.

CISG Art. 8(3). The district court did precisely what this Article requires; it looked at each of the listed factors, as well as other “relevant circumstances.” Reviewing these factors as applied to the facts of this case, it is clear the district court’s judgment in favor of Treibacher was supported by substantial evidence. The record is replete with years of verbal agreement, subsequent confirmation, delivery, usage and payment. (Doc. 78, p. 104, l.3-24; p. 106, l.8-10, p. 112, l. 4-21). Leading up to Deal I and Deal II, TDY had used and paid for all goods it ordered from Treibacher. (Doc. 78, p. 587, l.18-25). Also, the parties could neither unilaterally return the goods nor require the return of the goods, further evidencing their respective obligations to deliver, use and pay for the material. (Doc. 78, p. 136, l.10- 140, l.9; p. 514, l.9-14).

In its opinion, the district court first found a consignment stock agreement existed between Treibacher and its sales agent, Trinitech, whereby it sold the consigned material to third parties, under separately agreed sales contracts, following which a commission was paid. The district court contrasted this type of

consignment with the later *sales* on consignment to TDY. In Treibacher's dealings directly with TDY, the district court noted the material was intended for consumption, not re-sale; there was no restriction on how the TDY could use the material, and TDY received no commission for its use of the material but, rather, was responsible to pay the agreed price. (Doc. 84, p. 3-6; see also Doc. 78, p. 62, 1.1 - 64, 1.18). In other words, the TDY transactions were contracts of sale.

The district court then made detailed findings of fact for each and every year of the eight year history of transactions between the parties. Included in these detailed findings was its notation of the fact that in 1994 TDY signed a "Purchase Sales Contract" (PX 5), whereby consignment was shown merely as a delivery term. The reference to "consignment" as one of many terms under a contract of sale supports the district court's conclusion that the terms "sale" and "consignment" are not mutually exclusive. The district court found that, "[t]his type contract with delivery into consignment, subsequent usage, and invoicing is seen throughout the relationship of the parties." (Doc. 84, p.7).

Following analysis of the years 1993 through 1998, the district court found the 1999 transaction between Treibacher and TDY showed the course of conduct and practice between the parties whereby agreements were reached by telephone as to quantity and price for an extended period. In this 1999 transaction, the district court also noted Treibacher's confirmation of the agreement, with a reference to

consignment being only a delivery term whereby inventory was to be used in approximately one to two months. (Doc. 84, p. 9).

Hearing the matter *ore tenus* and judging the credibility of the witnesses, the district court found the testimony of Peter Hinterhofer to be reliable to the effect that once the agreement was reached, Treibacher was obligated to deliver and TDY was obligated to use and pay for the agreed material at the agreed price. Any terms could only be changed by mutual agreement. (Doc. 84, p.9; see also Doc. 78, p.112, 1.5 - 125, 1.15, p. 336, 1.24 - 337, 1.6).

The district court's eight year analysis also includes the year 2000, where two significant events took place. First, in February, 2000, TDY actually sought permission to return material it had ordered "on consignment." Treibacher's Hinterhofer responded immediately, stating the material could not be returned; it had been explicitly ordered. (PX 27). TDY's response to this was acquiescence. Therefore, as of February 2000, TDY unquestionably knew that Treibacher considered goods ordered by TDY to have been sold as of that time, and TDY did nothing to disabuse Treibacher of that belief. Second, in November and December, 2000, and with knowledge of its inability to return material, TDY's Atchley chose to order the material described in Deal I and Deal II from Treibacher.

The fact that TDY had requested a return of material, which request had been refused, must be viewed in light of all the circumstances, including the fact that TDY had never returned material but had always used the material ordered (Doc. 78, p.587, 1.18-25) and that Treibacher could not require the return of material without the permission of TDY. (Doc. 78, p. 514, 1.3-17)

TDY's practice of entering into a sales contract for the purchase of Treibacher's material began in 1994 and continued through Deal I and Deal II. The course of dealing shows verbal agreement as to quantity and price (Doc. 78, p. 487, 1.17-22 and p. 509, 1. 7-10), with subsequent confirmation by Treibacher. (PX 16, 17, 18, 21,40; Doc. 78, p. 255, 1.10-17). While TDY's issuance of subsequent blanket purchase orders following some of these agreements do not constitute the contract itself, it has strong probative value in showing TDY's state of mind relative to the agreements.

A blanket purchase order was understood by testifying employees of TDY to be a long term commitment to purchase specific items, which understanding was consistent with TDY's Policy and Procedure Manual. (Doc. 78, p. 381, 1.8-12; p. 385, 1.19 - 386, 1.4; p. 501, 1.9-13, p. 547, 1.3-10). TDY's John Johnson understood

issuance of a blanket purchase order evidenced an obligation. (Doc. 78, p. 543, 1.13-22).¹⁶

As stated by TDY's former employee Robert Wiley, it was TDY's standard practice to issue to vendors purchase orders to have goods shipped. (Doc. 78; p. 490, 1.3-8). He also testified that a purchase order that states "reference blanket" is a blanket order. (Doc. 78, p. 490, 1.3 - 491, 1.18). Treibacher's Hinterhofer testified that these purchase orders were not the agreement but, rather, the actual agreement typically occurred by telephone. (Doc. 78, p. 313, 1.1-5). The purchase orders were simply TDY's response to the agreement.

On the two occasions in question, Treibacher located raw material in a market of scarcity and placed those goods on hold until it could get a firm commitment from TDY. TDY was told on both occasions that Treibacher would not purchase the raw material without this firm commitment. (Doc. 78, p. 155, 1.1-22). With knowledge of this fact, and consistent with past practices, TDY agreed to accept, use and pay for the material under both Deals I and II. (PX 32, 40). Following this agreement, letters of confirmation were sent. Hinterhofer's

¹⁶ John Johnson attempted to claim that the blanket purchase orders of TDY are not really blanket purchase orders but, rather, are tracking purchase orders. However, he admitted that the word "tracking" does not appear on the document, the word blanket does appear, there is no provision in TDY's Policy and Procedure Manual for a tracking purchase order. There is, however, a single and specific reference to blanket orders in that manual. (Doc. 78, p. 543, 1.23 - 527, 1.10).

recollection and testimony on these negotiations and agreements were specific (Doc. 78, p. 155, l.1-25; p. 178, l.11 - 181, l.6) and uncontested by TDY's Atchley. (Doc. 78, p. 427, l.18 - 429, l.7).

Following the agreements and the confirmations of the agreements, TDY did nothing. For seven months, Treibacher requested that TDY perform under the contracts. At no point during this time did TDY give any indication that Deals I or II were not valid sales contracts. (PX 43 to 54). Conversely, TDY repeatedly told Treibacher that it will "use" the material, (PX 48), it will "put together a plan" (PX 52) and even, "I will sell the material." (PX 47).

International courts applying the CISG have considered just such evidence in other cases. For example, in Switzerland 5, April 2005, supra. at §4, the Court found the only issue to be:

"Whether a reasonable person in position of the [buyer], based on the confirmation of purchase and the entire circumstances of the contractual negotiations and the behavior of the [seller] after receipt of the confirmation of purchase would have assumed a contract was concluded..."¹⁷

The same can be said here. The district court's conclusion that there were contracts for sale under Deal I and Deal II is consistent with the tests as put forth under Article 8 based on Treibacher's confirmation of the sale, the entire

¹⁷ <http://cisgw3.law.pace.edu/cases/050405SI.html>

circumstances of the negotiations, the behavior of TDY following receipt of confirmation and, additionally, the past practices of the parties.

For the above reasons, the district court was not only correct in its findings, but was compelled to this end.

B. The District Court Correctly Examined The Course of Dealing Between The Parties.

TDY's arguments to avoid the consequence of the sale have been a moving target. First, TDY argued that the CISG did not apply because the transaction was a bailment, not a sale. (Doc. 33, p. 7-17). Then, in its trial brief filed less than one week before trial, TDY argued that the transaction could be either a bailment or a consignment, but that the CISG still did not apply. (Doc. 66, p. 4-21). Now, TDY argues that the CISG *does* apply, but the transaction still was not a sale. See Appellant's Brief.

TDY's position regarding the proper inquiry under the CISG has also changed. In its trial brief, TDY argued that, assuming the CISG applies, the court must look at CISG Art. 8(3), including "practices which the parties have established between themselves," to determine what type of contract was formed. (Doc. 66, p. 18). TDY went on to argue that under Articles 8(3) and 9(1) and (2), "the parties' established practices and trade usage actually are *binding terms of the contract*," (Doc. 66, p. 20 (emphasis in original)), and that "[u]nder Article 9(1)

[the history of the parties' dealings] must be considered in determining whether any alleged agreement between the parties was a contract of sale, because the parties were 'bound' by their established practices." (Doc. 66, p. 20-21).

Now, in the most recent version of TDY's argument, TDY has abandoned that position and wants this Court to examine the dispute in a vacuum. TDY now says that the course of dealings between the parties is irrelevant. Where, as here, no written contract term addresses the dispute, TDY says that courts should not look at what these parties did in the past, or what these parties came to expect from one another. In other words, the Court should ignore the facts of the case. Rather, TDY says, the Court should resolve the dispute based on what some nameless companies in nameless places usually do. This, of course, is nonsense. In addition to being counterintuitive, TDY's position is at odds with the CISG.

As the district court noted in its memorandum opinion, and as TDY previously acknowledged in its trial brief, (Doc. 66), the CISG mandates that the court examine the course of dealings between the parties.

(1) For the purposes of this Convention 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.

(2) If the preceding paragraph is not applicable, 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.

(3) 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.

CISG Art. 8. Likewise, Article 9(1) provides that parties are bound by their course of dealings:

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

Consistent with these provisions, as discussed above, the district court heard the evidence provided by both parties, and found that the course of dealings and subsequent conduct between the parties established that there were, in fact, binding sales which had occurred. (Doc. 84, p. 5 and 14).

TDY now argues the findings of fact made by the district court are irrelevant, and the district court instead should look solely to international trade usages, i.e. what others do in similar contracts. As sole support, TDY cites Article 9(2):

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

According to TDY, because Article 9(2) does not include the phrase “and by any practices which they have established between themselves,” which is found in

Article 9(1), then the drafters of the CISG intended to cut out the inquiry into practices between the parties altogether.

TDY's analysis is flawed for many reasons. First, TDY does not even acknowledge the existence of Article 8(3), which states "[i]n 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." If TDY is correct and the Court cannot look at the course of dealings, then Article 8 might as well not exist. Likewise, TDY's interpretation of Article 9(2) renders Article 9(1), which also provides that the court examine the course of dealings, meaningless.

One of the cardinal rules of statutory construction is that "[a] statute should be construed so that effect is given to all its provisions, so that no part of it will be inoperative or superfluous, void or insignificant." Calzadilla v. Banco Latino Internacional, 413 F.3d 1285, 1287 (11th Cir. 2005). TDY's interpretation goes against this rule. A statutory construction which effectively negates other provisions simply cannot be correct.

The truth is, of course, as TDY acknowledged in its trial brief. Under the CISG, practices which the parties have established between themselves do, in fact, bind them. As one commentator explained:

Expectations that have the force of contract can be established by patterns of conduct established by the seller and the buyer. Under Article 9(1) the parties are bound by the “practices which they have established between themselves.”

“Practices” are established by a course of conduct that creates an expectation that this conduct will be continued. Article 8(2) provides that the “conduct of the party” (Party A) is to be “Interpreted according to the understanding that a reasonable person of the same kind as the other party (Party B) would have had in the same circumstances.” Under Article 9(1) a course of conduct by A in past transactions may create an expectation by B that will bind A in a future contract. . . . In short, the reference in Article 9(1) to practices established by the parties is one example of many situations where binding expectations may be based on conduct. See Articles 19(2), 21(2), 35(2)(b), 47(2), 73(2).

John O. Honnold, Uniform Law for International Sales Under the 1980 United

Nations Convention, 3rd Ed. (1999), pp. 124-131.¹⁸ Honnold goes onto explain that

Article 8(3) exists for the specific purpose of allowing the courts to examine all relevant evidence:

Article 8(3) cuts through technical rules that might bar access to relevant materials: ‘Due consideration’ is to be given to ‘all relevant elements of the case including (a) negotiations, (b) practices established between the parties (Article 9(1)), (c) usages (Article 9(2)) and (d) the parties subsequent conduct.’”

Uniform Law, supra. at §109.

¹⁸ <http://cisgw3.law.pace.edu/cisg/biblio/ho9.html>.

Honnold's inclusion of Article 9(2)'s usage as a factor to be considered under Article 8(3) supports the proposition that such usage is but one of four elements the Court must examine under 8(3) to determine the intent of the parties, not the sole and exclusive consideration as advanced by TDY. See also Honnold, Uniform Law §112 (The function of Article 8(3) is for, "the interpretation of the statements and conduct of the parties."); see Schelechtrien, Uniform Sales Law – The UN Convention for the International Sale of Goods §IV(B) (explaining that Art. 9(2) is for "gap-filling" where there is a missing term, not to define a term that is present).¹⁹

Courts follow this interpretation of the CISG. For example, in Switzerland 5, April 2005 Supreme Court, supra, Switzerland's Supreme Court was faced with a dispute whereby the seller submitted an offer for 70t of triethylene tetramine. The buyer responded by confirming he would purchase 60t at a price to be determined. The seller then sent analysis data and made reference to the buyer's confirmation, and later communicated about shipment delays.

The lower court ruled a contract was not formed, as the buyer's acceptance did not conform to the offer. In reversing the lower court's conclusion, the Supreme Court of Switzerland established the only issue to be:

Whether a reasonable person in the position of the
[buyer] based on the confirmation of purchase and the

¹⁹ <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem-09.html>.

entire circumstances of the contractual negotiations and the behavior of the [seller] after receipt of the confirmation of purchase, could have assumed that a contract was concluded on the terms asserted by the [buyer].

The Court then found, “the finding of the previous instance that no contractual commitment existed cannot be upheld in light of Article 8(2), CISG.” This is the proper use of Article 8, which is an examination of all relevant circumstances to determine the intent of the parties.

Other Commentators agree that international trade usage is not the only factor to be examined. Aleksander Goldstein suggests a hierarchy ranking of factors to be considered, as follows:

1. The contract;
2. The practices established between the contracting parties;
3. General conditions or standard contract form;
4. Usages of trade;
5. The Convention (unless excluded by the contract);
6. The general principles underlying the Convention;
7. The national law applicable to the contract (if so provided by the contract, or failing an agreement by the parties, by virtue of the rules of private international law);

8. In all cases of the mandatory provisions of the applicable domestic law;
9. Judicial and international arbitration case law; and
10. Scholarly writing (indirectly).

Goldstein, Usage of Trade and Other Autonomous Rules of International Trade

According to the U.N. (1980) Sales Convention. Thus, TDY's reliance on

scholarly writings and, in particular the treatise by Mr. Goldstein, in support of the theory that usage trumps practices is less than compelling. In fact, Mr. Goldstein suggests the opposite.²⁰

TDY offers absolutely no authority stating that Article 9(2) renders Articles 8 and 9(1) meaningless. Instead, TDY relies upon a tortured interpretation of CISG drafting history. TDY argues that, because Article 9(2) did not include the proposed phrase “[or] unless their conduct shows otherwise,” this means that international trade usage trumps whatever course of dealings occurred between the parties. In support, TDY selectively quotes from a treatise by Schlechtrien. (Appellant's Brief at p. 26). However, the language immediately preceding the portion quoted by TDY puts the passage in its true context, and shows that the

²⁰ While some scholars may disagree with Goldstein's hierarchy, the importance of the ranking is not that “usage” is in fourth place. Rather, it is the acknowledgment that it is only one piece of evidence in a long list that a court is to consider under the CISG.

CISG merely does not allow *one party unilaterally* to disclaim international trade usages:

The Conference also rejected a Pakistani proposal that would have permitted *one party's conduct* to prevent a finding that the parties had agreed on a usage.

Peter Schlechtriem, Uniform Sales Law – The UN Convention on Contracts for the International Sale of Goods, p. 41. (emphasis added) ²¹

Here, of course, the district court did not rely upon the conduct of a single party in reaching its findings of fact. Instead, the district court heard the evidence, reviewed the witnesses' demeanor, and concluded that the course of conduct of *both parties* showed there was a valid and binding contract. (Doc. 84, p. 5).

In summary, the only way to give effect to all provisions of the CISG is to do what the district court did – look at all the circumstances surrounding the transactions, including the conduct of the parties.

C. Even If the Court Was Required to Look at Trade Usage to the Exclusion of Other Evidence, TDY Failed to Establish a Widely Known International Trade Usage Which Would Entitle it to Prevail.

TDY argues the district court was obligated under the CISG to look only at “trade usage” evidence, and then leaps to the conclusion that if the court had done so, TDY would have prevailed. As is discussed above, Treibacher disagrees with

²¹ <http://cisgw3.law.pace.edu/cisg/biblio/slechtriem-09.html>.

TDY's premise. But even if the premise were correct, TDY's conclusion that it should prevail would not follow. A review of the record reveals that TDY's usage of trade evidence was extremely limited, and was rebutted by substantial evidence offered by Treibacher.

For a "trade usage" to be implied in contracts, Article 9(2) requires that it be "a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned." CISG Art. 9(2).

In other words, "[i]n order for there to be an implied agreement that a usage will be binding on the parties, the usage must meet two conditions: it must be one 'of which the parties knew or ought to have known' and it must be one 'which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.'" Secretariat Commentary to Article 9.²² TDY's evidence hardly met this definition.

TDY offered evidence from two witnesses on "trade usage." TDY's John Johnson first testified that the word "consignment" always includes no obligation to use or pay for goods ordered by the customer. (Doc. 78, p. 614, 1.23 - 617, 1.8). He then acknowledged, however, that consignment agreements are done on an "individual basis," and such agreements with different companies can have

²² <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-09.html>.

different terms. (Doc. 78, p. 617, 1.16 - 619 1.18). In other words, there was no standard, regularly observed usage.

TDY also offered Chuck Weiser “as an expert...in knowing the marketing system generally that it (his U.S. employer) used *in the United States*.” (Doc. 78, p. 772, 1.2-7) (emphasis added). Weiser’s expertise was the sale of goods for his U.S. employer to U.S. companies. (Doc. 78, p. 763, 1.13-15, p. 764, 1.4-20). He had no foreign sales experience. (Doc. 78, p. 773, 1.1-10). The foundation of his opinion that there exists an established meaning of consignment is his U.S. sales experience and some undisclosed conversation he has had with unnamed customers. (Doc. 78, p.769, 1.22 - 770, 1.24).

Based on this experience, he testified that United States companies use a system of consignment which means the customer is: (1) not obligated to use the goods (Doc. 78, p. 783, 1.22-24), and (2) can absolutely return them at will. (Doc. 78, p. 785, 1.10-12). Of course, this testimony is of little value given that it is based entirely on the domestic markets, and provides no information about what an European company dealing all over the world knew or should have known. Also, the system Weiser understands falls outside the actual practices of the parties in this case, in that the undisputed facts show TDY could not return material it ordered (Doc. 78, p. 136, 1.1 - 140, 1.9) and Treibacher could not require TDY’s return of consigned goods. (Doc. 78, p. 14, 1.3-17).

In contrast to this limited evidence of domestic practices, Treibacher submitted the testimony of Treibacher's employees who market and procure materials on consignment worldwide. (Doc.78, p. 50, 1.1 - 51, 1.2; 633, 1.13 - 634, 1.7). Each of these employees testified consignment was a method of marketing whereby a firm contract was first established and consignment used as a delivery and billing system which allowed payment upon use. (Doc. 78, p. 305, 1.14 - 306, 1.6; 634 1.20 - 635, 1.16). Unlike TDY's witnesses, the Treibacher witnesses had experience and presented evidence about *international* trade usage.

Treibacher also presented the evidence of a fact witness, Robert Packer, that supported Treibacher's interpretation. Packer testified that he had actually done business with Treibacher where the sale was "on consignment." (Doc. 84, p.5; PX 72). Mr. Packer understood this to mean he was obligated to use and pay for the goods. (PX 72, p. 46). This testimony effectively rebuts Weiser's hearsay based contention that no purchasers of hard metal powders in the United States would do business in this fashion. It was also consistent with the history of Treibacher's relationship with TDY.

Given the limitations of TDY's evidence of experience in the domestic markets, and the contrary evidence offered by Treibacher, the district court was certainly free to reject TDY's evidence of domestic trade. Ample legal precedent supports the court's decision:

As for the requirement for usages to be *widely known*, it is not required that they are so known in all the commercial places; rather, they may be widely known in regional or parochial operations, provided they arise from transactions in international trade. **That is to say, the application of usages developed or emanating from transactions in *domestic* trade should be rejected as irrelevant for the purposes of international trade. In principle, only usages that are observed in international trade, not domestic, should form the source of the legal effects envisaged in Art. 9 CISG.**

Jorge Oviedo Albán, Remarks on the Manner in which the UNIDROIT Principles May Be Used to Interpret or Supplement CISG Article 9, § 4(b).²³

TDY suggests the district court failed to make a finding of fact as to its version of “consignment,” which TDY would then bootstrap into an Article 9(2) exclusivity argument. This is an incorrect characterization of the district court’s finding. The district court specifically noted TDY’s position on consignment and rejected it in favor of a finding that a contract of sale existed. (Doc. 84, p.5). In light of Mr. Weiser’s lack of experience in dealing internationally, the failure of the parties to practice a basic tenet of his system, i.e. the absolute right to return, the court’s ability to view and weigh the conflicting testimony of TDY’s manager, John Johnson, and the worldwide experience of Treibacher’s managers in dealing with consignment terms, the district court’s rejection of TDY’s position was overwhelmingly supported by the evidence.

²³ <http://cisgw3.law.pace.edu/cisg/principles/uni9.html>.

So, even if TDY were correct, and Article 9(2) invalidated several other articles and sections of the CISG, the district court's judgment should not be disturbed. The substantial evidence showed the transaction was a binding sale.

II. THE DISTRICT COURT CORRECTLY FOUND IN FAVOR OF TREIBACHER ON THE PROMISSORY FRAUD CLAIM.

A. TDY Waived Its Argument That the CISG Preempts the State Law Fraud Claim.

TDY argues Treibacher's state law fraud claim is preempted by the CISG. TDY, however, has waived this argument because it never raised it in the district court.

“Where federal preemption affects only the choice of law, the defense may be waived if not timely raised.” Saks v. Franklin Covey Co., 316 F.3d 337, 349 (2nd Cir. 2003).²⁴ Indeed, where preemption involves a choice-of-law question, it must be asserted as an affirmative defense. Dueringer v. General American Life Ins. Co., 842 F.2d 127, 130 (5th Cir. 1988).

For example, in Violette v. Smith & Nephew Dyonics, Inc., 62 F.3d 8 (1st Cir. 1994), the defendant claimed on appeal that the plaintiff's state law products

²⁴ This is not a situation where the CISG preemption is jurisdictional in that it dictates the choice of forum. Rather, the CISG dictates only the choice of law. Therefore, the preemption is waivable. International Longshoremen's Association v. Davis, 476 U.S. 380, 390, n.9 (1986) (noting that holding that jurisdictional preemption cannot be waived does not extend to situation where preemption concerns only choice of law).

liability claim was preempted by the Federal Food, Drug and Cosmetic Act of 1938. 62 F.3d at 10. Although the preemption defense was raised in the answer, the defendant did not substantively address it in any other manner before the district court. The First Circuit refused to consider the preemption argument because the defendant “waived the preemption issue by raising it substantively for the first time after trial” 62 F.3d at 10:

[Defendant] had ample opportunity and incentive to assert the preemption issue below. It chose, however, neither to file a motion to dismiss nor to press for summary judgment on the issue. In its Pretrial Memorandum . . . [t]here is no mention of preemption. Nor did [defendant] assert preemption in its trial brief, its numerous motions in limine, its two motions for directed verdict, and its motion for judgment n.o.v. of for a new trial. . . . To allow [defendant] to resurrect the issue here would undermine the logic behind our refusal to consider issues not presented below: [defendant] “cannot evade the scrutiny of the district court . . . on appeal with a new claim in order to create essentially a new trial.”

Violette, 62 F.3d at 11. See also Dueringer, 842 F.2d at 129-130 (holding that argument that ERISA preempted state law claim was waived because issue was not raised in the trial court).

The same situation is presented here. TDY never raised preemption in its trial brief. (Doc. 66). It never raised preemption at trial. And, unlike the defendant in Violette, TDY never even raised preemption in its answer. (Doc. 5). Therefore, it cannot raise the issue on appeal.

B. Even if the Defense of Preemption Was Not Waived, the CISG Does Not Preempt a State Law Fraud Claim.

Even if the defense of preemption had not been waived, the defense fails because the CISG does not preempt fraud claims. As the CISG is a treaty, there is no dispute the CISG preempts state contract law involving any international sale of goods pursuant to the Supremacy Clause of the Constitution of the United States. U.S. Const. Art VI, cl. 2. Indeed, this is why the district court examined the transaction at issue under the guise of the CISG.

It is undisputed “[s]tate law must yield when it is inconsistent with the policy or provisions of a treaty or of an international compact or agreement. United States v. Pink, 315 U.S. 203, 230-231 (1942)(internal citations omitted). While it is clear that “CISG is a treaty and thus federal law, and under the Supremacy Clause, it preempts inconsistent provisions of state law,” Usinor Industeel v. Leeco Steel Prods., Inc., 209 F. Supp. 2d 880, 884 (N.D. Ill. 2002), the fraud claim raised here is not inconsistent with the CISG at all. The goal of the CISG is “the adoption of uniform rules *which govern contracts for the international sale of goods* and . . . the removal of legal barriers in international trade.” CISG Preamble (emphasis added). The CISG does not address the issues of promissory fraud, misrepresentation, betrayal, intentional harm to economic interests or any other common law tort. All it does is address contracts for the international sale of goods.

Contrary to TDY's argument, the fact that state law contract claims are preempted does not mean that all claims which may arise between contracting parties are preempted. The CISG enjoys only a limited scope of preemption. Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 201 F. Supp. 2d 236, 286 (S.D.N.Y. 2002), aff'd in part and rev'd in part, 386 F.3d 485 (2d Cir. 2004). In fact, courts have expressly held that "[t]he CISG does *not* apply to tort claims." Id. (emphasis added) (citing Asante Tech., Inc. v. PMC-Sierra, Inc., 164 F. Supp. 2d 1142, 1151 (N.D. Cal. 2001); see also Viva Vino Import Corp. v. Farnese Vini S.r.l., 2000 U.S. Dist. LEXIS 12347 (E.D. Pa. Aug. 29, 2000); Peter Schlechtriem, The Borderland of Tort and Contract: Opening a New Frontier?, 21 Cornell Int'l L.J. 467, 473-74 (1988) (emphasis added).

Indeed, commentators on the CISG have recognized the CISG simply has no application to tort claims such as fraud, and that domestic law governs claims for fraud:

Article 4, like ULIS Article 8, limits the Convention's sphere of application to the rules on formation of contract and the rights and obligations of the seller and the buyer arising from it (Article 4 sentence 1). . . . Therefore, domestic law still regulates such matters as the capacity to contract and the consequences of mistake, gross unfairness, unconscionability and fraud.

Dr. Peter Schlechtriem, Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods, § III(F).²⁵

TDY has no authority for its newly raised assertion that the CISG preempts the fraud claim. Instead, TDY must rely upon the general proposition that “[j]ust because a party labels a cause of action a ‘tort’ does not mean that it is automatically not pre-empted by the CISG. A tort that is in actuality a contract claim, or that bridges the gap between contract and tort law may very well be pre-empted.” Geneva Pharm, 201 F. Supp. 2d at 286 n.30. TDY ignores the fact that, in this case, the breach of contract claim is not the same as the fraud claim. Proof of fraud in Alabama requires six elements, see discussion at 55, infra, and breach of contract is not one of them.

Furthermore, Article 61(2) of the CISG explicitly states “[t]he seller is not deprived of any right he may have to claim damages by exercising his right to *other* remedies.” CISG Art. 61 (emphasis added). As such, because fraud claims are not addressed in the CISG as a means of contractual remedy, it can be inferred that state law fraud claims were exactly one of the claims contemplated by the drafters when they included the seller’s rights to “other remedies.”

“Preemption cannot occur absent ‘the clear and manifest purpose of Congress,’ the best evidence of which is found in the plain text of the statute.”

²⁵ <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem.html#a63>

Caterpillar Inc. v. Usinor Industeel, 2005 U.S. Dist. LEXIS 6355, at *35 (citing Time Warner Cable v. Doyle, 66 F. 3d 867, 874-75 (7th Cir. 1995) (quoting CSX Transp. Inc. v. Easterwood, 507 U.S. 658, 664 (1993))). Simply put, there is nothing in the CISG which indicates an intention to preempt state law fraud claims. Therefore, those claims are not preempted.

C. The District Court’s Finding Regarding Promissory Fraud Are Supported by Substantial Evidence.

TDY advances two arguments regarding the promissory fraud claims. First, TDY contends the district court relied exclusively on “post-promise circumstantial evidence,” in support of its finding and such evidence is insufficient, as a matter of law, to establish a claim for promissory fraud. (See TDY Br., p. 50-51). Second, TDY asserts the district court lacked a sufficient factual basis on which to conclude that TDY acted with the requisite “present intent to deceive.” (See TDY Br., p. 21). Both arguments should be rejected, and the district court should be affirmed.

1. The District Court Correctly Examined Post-Conduct Circumstantial Evidence to Find That TDY Acted With The Requisite Fraudulent Intent

TDY faults the district court for relying on circumstantial evidence concerning TDY’s post-agreement conduct to find in Treibacher’s favor on Treibacher’s promissory fraud claim. (See TDY Br., p. 50). According to TDY, a

plaintiff must present “direct documentary evidence, or direct testimony” of an intent not to fulfill a promise or of a “consistent pattern of purposefully making distinct unkept promises.” Id. In other words, TDY contends that “post-promise circumstantial evidence” cannot, as a matter of law, satisfy Treibacher’s burden of proof as to its promissory fraud claim. Id. at 51. TDY is wrong.

As an initial matter, TDY cannot now be heard to complain regarding the district court’s examination of post-agreement evidence because TDY conceded this point before the district court. In TDY’s Brief in Support of Motion to Reconsider Amendment of Pleadings, TDY agreed that “the parties’ post-December 2000 conduct is relevant in determining the parties’ intent in entering into the alleged agreement.” (Doc. 75, p. 10). TDY cannot therefore now place fault with the district court’s use of this evidence.

Furthermore, TDY is incorrect as a matter of law. Alabama law has long recognized that post-agreement circumstantial evidence may be used to support an allegation of fraudulent intent, so long as the evidence is of such quality that the ultimate fact to be proved may fairly and reasonably be inferred. See Marshall Durbin Farms, Inc. v. Landers, 470 So.2d 1098, 1101 (Ala. 1985). See also Byrd v. Lamar, 846 So.2d 334, 342-43 (Ala. 2002)(“A defendant’s intent to deceive can be established through circumstantial evidence that relates to events that occurred after the alleged misrepresentations were made.”).

Accordingly, the district court properly considered circumstantial post-agreement evidence in finding in Treibacher's favor as to its promissory fraud claim.

2. The District Court's Finding Regarding Promissory Fraud Is Supported by Substantial Evidence

Under Alabama law, a claim of promissory fraud requires proof of six elements: (1) false representation; (2) of a material existing fact; (3) that is justifiably relied upon by the plaintiff; (4) that causes damage to the plaintiff as a proximate result of the reliance; (5) proof that at the time of the misrepresentation, the defendant had the intention not to perform the act promised; and (6) proof that the defendant had an intent to deceive. Triple J. Cattle, Inc. v. Chambers, 621 So.2d 1221, 1224 (Ala. 1993) quoting Padgett v. Hughes, 535 So.2d 140, 142 (Ala. 1988). With regard to promissory fraud in general and the element of present intent to deceive in particular, the Alabama Supreme Court has often recognized that intent to deceive is an issue "peculiarly within the province of the trier or facts." Hodges v. Pittman, 530 So.2d 817, 819 (Ala. 1988).

Here, the promissory fraud claim was supported by *more than* substantial evidence. Treibacher had been TDY's only source of the materials at issue for many years. As late as the Fall of 2000, TDY encouraged Treibacher to continue to supply TaC during the tight market and specifically told Treibacher that it "was our sole source for this material." (Doc. 78, p. 553, 1.3-7). However, in this very

same time period, TDY began looking for another source of materials. Not only did TDY not inform Treibacher that it was looking elsewhere, it used an intermediary company to bid on the raw materials (to be used by TDY to produce the materials previously purchased solely from Treibacher) in order “to conceal [its] identity.” (PX-56; Doc. 78, p. 450, l. 9-16, p.583, l.9-15). Furthermore, Treibacher presented undisputed testimony and evidence that TDY knew, on November 14, 2000, and on December 14, 2000, that Treibacher would not purchase raw materials to supply TDY unless TDY made a “firm commitment.” (Doc. 78, p.155, l.1-22, p.177, l.4 - 178, l.22). With this knowledge, TDY induced Treibacher to order the materials by making such a commitment, all the while secretly looking for a cheaper source.

These facts led the district court to conclude that TDY intended, from the beginning, to induce Treibacher to enter into the contracts, but not to honor them unless TDY was unable to locate a cheaper source before it needed to use the materials ordered, which constitutes an undisclosed contingency. (Doc. 84, p. 23-24). Under Alabama law, a promise to perform based on an undisclosed contingency, which is intended to induce reliance upon the promise, is sufficient evidence for a trier of fact to infer the intent required to support a promissory fraud claim. See Hillcrest Center, Inc. v. Rone, 711 So.2d 910 (Ala. 1997). Accordingly, the district court’s finding regarding promissory fraud should be affirmed.

III. THE DISTRICT COURT CORRECTLY FOUND THAT TREIBACHER USED REASONABLE EFFORTS TO MITIGATE ITS DAMAGES; TDY FAILED TO MEET ITS BURDEN OF DEMONSTRATING THE CONTRARY.

TDY's allegation of failure to mitigate is an afterthought. Although TDY mentioned failure to mitigate in its answer, (Doc. 26), it was not mentioned in TDY's summary judgment motion, (Doc. 33), in its trial brief, (Doc. 66), it was not argued at trial, and it was not raised in any post-trial submission. Even if TDY has properly preserved this issue, it has failed to meet its burden.

As TDY correctly points out, the CISG requires that "a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss...resulting from the breach." CISG Art. 77. The burden of proof for a failure to mitigate damages under the CISG is on the breaching party.²⁶ See Appellate Court (Oberlandesgericht) Celle 2 September 1998, ("It is true that the burden of proof for a failure to mitigate damages is on the [party claiming failure to mitigate]")²⁷; Germany (Landgericht Darmstadt) 9 May 2000.²⁸ Whether a party has used reasonable efforts to mitigate its damages is a question of fact, Owens v. Clow Corp., 491 F.2d 101, 103 (5th Cir. 1974), reversible on appeal only

²⁶ The breaching party bears the burden of proving failure to mitigate damages outside the context of the CISG, as well. See McBrayer v. Teckla, Inc., 496 F.2d 122, 128 (5th Cir. 1974)("[B]urden of proving that damages could have been mitigated is on . . . the breaching party.").

²⁷ <http://cisgw3.law.pace.edu/cases/980902g1.html>.

²⁸ <http://cisgw3.law.pace.edu/cases/000509g1.html>.

³⁰ <http://cisgw3.law.pace.edu/cases/960206a3.html>.

if clear error is shown. Bunge Corp. v. Freeport Marine Repair, Inc., 240 F.3d 919 (11th Cir. 2001).

As the Supreme Court of Austria has pointed out, the burden of demonstrating failure to mitigate damages under the CISG is substantial:

The claim of the breach of the duty to mitigate damages is an exception leading to the loss of the claim for damages. It requires the [breaching party] to put *forward detailed facts and the supporting evidence* showing why the [non-breaching party] has breached its duty to mitigate damages, the *possibilities of alternative conduct* and which part of the damages would have been prevented by this alternative conduct.

Austria 6 February 1996 Supreme Court.³⁰ Where the non-breaching party “solely claim[s] the breach of the duty to mitigate damages in a general manner in the course of the suit,” the burden of proof has not been met and no reduction in damages will be allowed. Id.

Here, TDY did not meet its burden. Instead, TDY makes a general request that its damages be reduced, but fails to identify an amount by which Treibacher should have reduced its damages. TDY then seeks a remand so that TDY can cure its failure to present evidence on this point.

The only record evidence TDY mentions is an offhand comment in its own June 27, 2001 e-mail (PX 47), which contains speculation as to the possible prices of the goods. On its face, the speculative assertion that prices had not fallen as of June 27 is inconsistent with TDY’s secretive purchase of materials for lower prices

earlier in the year. (PX 60; infra pp. 19-20). TDY offered no evidence regarding the amount by which Treibacher's damages could have been lessened had Treibacher sold at a different time or to a different buyer. Nor does TDY point to any evidence tending to show that Treibacher's efforts themselves in the months following TDY's breach were unreasonable. Instead, TDY generally faults Treibacher for failing to mitigate its damages to a greater extent that it did.

This general criticism does not meet TDY's burden of proof before the district court, nor does it meet its burden of proof before this Court. See A.A. Profiles, Inc. v. City of Fort Lauderdale, 253 F.3d 576 (11th Cir. 2001)(factual findings made by district court in connection with its damages computation will only be reversed if clearly erroneous). In the absence of a more detailed showing from TDY, the district court was correct to credit the testimony of Treibacher's witnesses regarding Treibacher's efforts to mitigate its damages. (Doc. 84, p. 17). Based on this testimony, the district court found that Treibacher began trying to sell the TAC to other customers as soon as it learned definitely of Treibacher's breach. (Doc. 78, p. 330, l.3 - 331, l.11). TDY offered no evidence that Treibacher did not exercise reasonable diligence, or that there was some other customer which would have been willing to buy the materials at some earlier time or some higher price. (Doc. 84, p. 17). Treibacher's mitigation efforts resulted in

a 17% decrease in the amount of damages that it would otherwise have incurred as a result of TDY's breach. (Doc. 84, p. 17).³¹

In addition, the district court found that, to the extent time elapsed between TDY's breach and Treibacher's mitigation efforts, any alleged delay was a result of TDY's continuing representations that it would use the materials. (Doc. 84, p. 18). TDY's general appellate attacks on Treibacher's mitigation efforts are insufficient to show that these findings were clearly erroneous.

³¹ At the times of trial and as of this date, TDY has possession of \$1,600,000 worth of TaC, as valued at contract price, which may be used by TDY to further mitigate damages.

CONCLUSION

For the above stated reasons, the judgment of the district court is due to be affirmed.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in 14 point Times New Roman and contains 13,972 words.

CERTIFICATE OF SERVICE

I certify that on this 8th day of August, 2005, a true and correct copy of the foregoing was served on the following via United States Mail:

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