

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

APPELLANT'S REPLY BRIEF

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I. THE DISTRICT COURT INCORRECTLY APPLIED ARTICLES 8 AND 9 OF THE CISG.

A. Introduction

It is undisputed that Treibacher and TDY had a seven-year commercial relationship whereby:

- TDY would request Treibacher to ship goods to be held on consignment;
- Treibacher would ship the goods;
- TDY would hold the goods in a consignment store;
- TDY would use the goods on an as-needed basis;
- As the goods were used, TDY would inform Treibacher, which would then invoice TDY; and,
- TDY would pay Treibacher the invoiced price.

Treibacher relates this history in minute detail, Appellee’s Brief at 6-12, and argues that this “course of dealing” supports its contention that TDY purchased consigned materials when it ordered the materials, regardless of whether TDY ever used them. *Id.* at 29-44.¹ Treibacher’s argument is an exercise in obfuscation, and its reliance on the parties’ “course of dealing” is misplaced as a matter of law and fact.

¹ Treibacher omits a salient point from its lengthy recitation of the parties’ “course of dealing.” Treibacher did not invoice TDY for the goods at issue here until November 2001, after it had already sold some of the goods to other parties, and instituted this lawsuit against TDY. Doc 84 – Pg 18, PX 62.

First, under Article 9(2) of the CISG, an undefined contractual term must be interpreted in accordance with its meaning in international trade. If parties wish to give a term an idiosyncratic meaning contrary to the term's usage, they must expressly agree to do so. Treibacher does not assert, nor could it assert, that the parties expressly agreed to a definition of consignment different from the term's usage in the hard metals industry.

Second, even if a "course of dealing" could override a usage, only a "course of dealing" on the issue in dispute would have such an effect. Here, there was no pattern, practice, procedure, or agreement – no contemporaneous probative objective manifestations of any kind – indicating that Treibacher and TDY believed that consigned goods were purchased when ordered. Treibacher, like the District Court below, skirts over this key issue by loosely describing the parties' relationship as a series of yearly "sales contract[s]," "purchase orders," and "agreements." *See* Appellee's Brief at 6-12. However, the existence of "agreements between Treibacher and TDY" has never been in dispute. Rather, the sole question at issue is a term of those "agreements" – whether TDY incurred an obligation to pay for goods it never used (and, in some cases, did not even receive).

Stripped of the multiple misleading references to "purchases," "contracts," and "agreements," the "course of dealing" on which Treibacher relies to support the

existence of TDY's alleged obligation to pay for goods it never used remains nothing more than a single ambiguous instance where the parties discussed, but did not resolve, the possibility of returning goods held in consignment. Appellant's Opening Brief at 30-31.

B. CISG Article 9 Determines Whether a Trade Usage Will Be Part of the Parties' Contract.

TDY's Opening Brief showed that under the CISG, a trade usage that satisfies the criteria of Article 9(2) is applicable to the parties' contract, "unless otherwise agreed." Appellant's Opening Brief at 23. It is undisputed that the parties never discussed the contractual term 'consignment,' nor actually "agreed" on a meaning different than its trade usage. TDY presented expert evidence at trial of the trade usage of consignment. The District Court ignored trade usage and instead relied on a supposed "course of dealing" to interpret consignment.

Treibacher tries to divert attention from the conclusive effect of trade usages under Article 9(2). Describing Article 9(2) as an "isolated" provision that TDY invoked "out of context," Appellee's Brief at 26, Treibacher asserts that the District Court correctly relied on a supposed "course of dealing" rather than the trade usage, because this case should be governed by CISG Article 8(3). That article is a contract-interpretation provision. Joseph Lookofsky, *Understanding the CISG in the USA* 40 (§ 2.12) (2d ed. 2004). Under Treibacher's view, a trade usage would not

be binding, but instead should be only one of many factors that a trial court may consider.

However, where the plain language of Article 9(2) applies, then usage is incorporated into the contract, and no reason exists to resort to other sections of the CISG.

1. Clear and Specific Terms of Article 9 Make Trade Usages Binding.

Treibacher says that Article 9(2) is “isolated” and urges that its provisions making certain usages binding be disregarded in favor of the more open-ended treatment of “intent” and “understanding” under Article 8(3). Courts, however, are not free to pick and choose from among treaty provisions. “[T]reaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties.” *Rocca v. Thompson*, 223 U.S. 317, 332, 32 S. Ct. 207, 210 (1912). Article 9 was “fiercely debated,” and “represented a hard-won compromise which it would be undesirable to change.”² *See also* John O.

² *See* Summary Records of Meetings of the First Committee (7th Meeting, March 14, 1980, at 3:00 p.m.), at www.cisg.law.pace.edu/cisg/firstcommittee/Meeting7.html (remarks of Mr. Lebedev, of the U.S.S.R.).

Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* § 112A (3d ed. 1999) (“One of the most important features of the [CISG] is the legal effect it gives to commercial uses and practices.”).³

Treibacher’s contention that a usage is merely one consideration in ascertaining intent is contrary to the language and purpose of Article 9, which makes certain usages binding on the parties, unless they “otherwise agree.” Many courts from the United States and other CISG signatory nations have held that usages satisfying Article 9(2) are automatically part of the contract:

- *BP Oil Intn’l Ltd. v. Empresa Estatal Petoleos de Ecuador*, 332 F.3d 333, 337-38 (5th Cir. 2003) (holding that internationally known “Incoterms” such as “CFR” are “incorporated through Article 9(2)”);
- *St. Paul Guardian Ins. Co. v. Neuromed Medical Systems & Support, GmbH*, 2002 WL 465312, at *2 (S.D.N.Y.), Case No. 00 CIV. 9344 (SHS) (March 26, 2002) (same);
- Juzgado Nacional de Primera Instancia en lo Comercial No. 7 (National Commercial Court of First Instance), May 20, 1991, Case No. 50.272, “Elastar Sacifia v. Bettcher Industries Inc.,” (Argentina) (“Usages of international commerce are presently accepted as a source of law ... as the rule of the [CISG] mandates in its art. 9(2).”);⁴
- Oberster Gerichtshof (OGH) (Supreme Court), October 15, 1998, 2 Ob 191/98x (Austria) (holding that if the rules of the Austrian Timber

³ Text available at www.cisg.law.pace.edu/cisg/biblio/honnold.html.

⁴ Translation available at <http://cisgw3.law.pace.edu/cases/910520a1.html>.

Trade Usage satisfy Article 9(2), then the “Usage must be applied” to determine when a notice of defect was due);⁵

- Oberster Gerichtshof (OGH) (Supreme Court), February 27, 2003, 2 Ob 48/02a (Austria) (holding that a fish trader who acts contrary to an Article 9(2) international business custom requiring provision of “current-catch” fish “must be assumed” to have breached the contract).⁶
- *Marc Rich & Co. A.G. v. Iritecna S.p.A.*, Corte d’Appello di Genova (Court of Appeals), March 24, 1995, Case no. 211 (Italy) (holding that the accepted international term “FOB” is “binding as an international trade usage under Article 9”);⁷

To support its contention that Article 8(3), and not Article 9(2), applies here, Treibacher notes that the parties used the term ‘consignment’ in their dealings. Treibacher then relies on Professor Schlechtriem’s statement that Article 9(2)’s function is “gap filling” while Article 8(3) deals with interpretation. Appellee’s Brief at 41. Professor Schlectriem’s view actually supports TDY. Although TDY and Treibacher described their relationship as a consignment, they never discussed the meaning of the term, and left it undetermined. This is the “gap” that Article 9(2) fills by incorporating trade usage.

⁵ Translation available at <http://cisgw3.law.pace.edu/cases/981015a3.html>.

⁶ Translation available at <http://cisgw3.law.pace.edu/cases/030227a3.html>.

⁷ Translation available at <http://cisgw3.law.pace.edu/cases/950324i3.html>.

Treibacher's interpretation of Professor Schlechtriem's view also is inconsistent with the numerous court decisions cited above dealing with "FOB" and similar terms with established usages. Moreover, the rule Treibacher advocates would lead to the unacceptable result that if the parties had said nothing about consignment, the usage would be binding under Article 9(2), but because they used the word without elaboration, the matter is relegated to Article 8(3).

Treibacher further asserts that if TDY's position is accepted, Article 8(3) "might as well not exist," or will be rendered "meaningless." Appellee's Brief at 39, 43. However, where Article 9(2) applies, the issue of intent or understanding has been resolved, and there is no need to resort to Article 8(3)'s rules for ascertaining intent or understanding. Though Article 8(3) has no application to this dispute, its reference to usages nevertheless could serve a function in other cases. For example, Article 8(3) applies to usages that do not meet the criteria of Article 9(2), such as purely local usages that are not widely known in international trade. Peter Schlechtriem, *Uniform Sales Law—The UN-Convention on Contracts for the International Sales of Goods* 39 (Manz, Vienna: 1986) ("The usages to be considered when discovering the intended and/or objective meaning of a statement presumably include, in contrast to those mentioned in Article 9(2), usages which are

only local, national, or followed by a particular group of business people.”);⁸ Gyula Eörsi, *General Provisions*, in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, § 2.05, pp. 2-16 & 2-17 (Galston and Smit eds. 1984).⁹

Thus, properly considered, Article 9(2) does not render the mention of usage in Article 8(3) superfluous. Moreover, if there were an inconsistency between the specific provision of Article 9(2) and the general terms of Article 8(3), it is the specific treaty provision that should be given effect under the doctrine of *lex specialis derogat generalis*. See, e.g., Michael Esser, *Commercial Letters of Confirmation in International Trade: Austrian, French, German and Swiss Law and Uniform Law under the 1980 Sales Convention*, 18 Ga. J. of Intn’l Law 427, 453 (1988) (general provisions of Article 8 yield to the specific “silence is not consent” rule of CISG Article 18(1)); see generally Hugo Grotius, *De Jure Belli ac*

⁸ Text available at www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html.

⁹ Text available at www.cisg.law.pace.edu/cisg/biblio/eorsi1.html.

“Usage” as used in Article 8(3) also may shed light on other provisions of a contract. For example, if there is a usage whereby one of the parties is responsible for shipping costs (or if the parties have adopted such a usage by using a term such as “FOB” or “CIF”), and the contract terms place on the other party a general obligation to pay “taxes,” the existence of the usage may be relevant in ascertaining the parties’ intention or understanding of who should pay any taxes on shipping costs.

Pacis, Vol. 2, Ch. 16 (“On Interpretation [of Treaties]”), § XXIX (Francis W. Kelsey, trans., Oceana 1964 repr.) (1646) (“[T]hat should be given preference which is most specific and approaches most nearly to the subject at hand; for special provisions are ordinarily more effective than those that are more general.”).

Accordingly, because Article 9(2) specifically incorporates trade usages into a contract, and because the usage of consignment resolves this dispute, there is no need to resort to the general provisions of Article 8(3) to ascertain intent. “In sum, definitions of trade terms can bind the parties ... when their regularity of observance meets the standards of Article 9(2).” Honnold, *supra* at 5, § 118(b).

2. The Consignment Usage Satisfies Article 9(2)

Treibacher argues that TDY has not identified a usage that satisfies Article 9(2) because TDY’s evidence pertained only to the usage of consignment within the United States. Appellee’s Brief at 46-47. However, the case law and commentary is virtually unanimous that a national usage observed by international traders doing business in the relevant country qualifies as an Article 9(2) usage.

Three decisions from Treibacher’s home country, Austria, make clear that a national or local usage can satisfy Article 9(2). In Oberlandesgericht (OLG) Graz (Court of Appeal), November 9, 1995, 6 R 194/95 (Austria), the court held that an Austrian buyer of granite from Italy could be bound by the Italian usage of the term

“Giallo Veneziano” to describe its color.¹⁰ In Oberster Gerichtshof (OGH) (Supreme Court), October 15, 1998, 2 Ob 191/98x (Austria), the court held that the Austrian Timber Trade Usage rule requiring notice of defects could be binding under Article 9(2) between an Italian buyer and an Austrian seller.¹¹ In Oberster Gerichtshof (OGH) (Supreme Court), March 21, 2000, 10 Ob 344/99g (Austria), the court held that local Bavarian timber-trade usages that were observed in cross-border trade could apply under Article 9(2) in a dispute between German and Austrian traders.¹²

These cases are consistent with the extensive commentary on Article 9(2). “A usage that is of local origin ... may be applicable if it is ‘widely known to, and regularly observed by’ parties in international transactions involving these situations.” Honnold, *supra* at 5, 128 (§ 120.1(e)). Professor Oviedo Albán, in the article cited by Treibacher, notes: “In conclusion, regarding the interpretation of Art. 9(2) of the Convention, much doctrine as well as jurisprudence point to possible applicability of *local* usages, but with the provisos that have been stated above [i.e.,

¹⁰ Translation available at <http://cisgw3.law.pace.edu/cases/951109a3.html>.

¹¹ Translation available at <http://cisgw3.law.pace.edu/cases/981015a3.html>.

¹² Translation available at <http://cisgw3.law.pace.edu/cases/000321a3.html>.

the need for observance in international transactions, *etc.*].”¹³ Similarly, in another article cited by Treibacher, Professor Goldstajn notes, “It is not necessary for [a usage] to be international, it should only be a usage which is applied in international trade. This can be a national or local custom which meets the requirements of the convention.” Aleksandar Goldstajn, *Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention*, in *International Sales of Goods: Dubrovnik Lectures*, Ch. 3, p. 98 (Petar Sarcevic & Paul Volken eds. 1986).¹⁴ Thus, Weiser’s unopposed expert testimony that foreign traders know, understand, and observe the trade usage of consignment in the United States identified a usage within the meaning of Article 9(2).

Treibacher also incorrectly asserts that the District Court rejected TDY’s evidence of the consignment trade usage. Appellee’s Brief at 48. The District Court’s Opinion and Order sidestepped the existence of a trade usage, Doc 84 – Pg 5-6, and instead relied on the parties supposed “course of dealing,” represented exclusively by the February 2000 incident.¹⁵

¹³ Jorge Oviedo Albán, *Remarks on the Manner in which the UNIDROIT Principles May Be Used to Interpret or Supplement CISG Article 9, § 4(b)* (2004), text available at www.cisg.law.pace.edu/cisg/biblio/oviedoalban5.html.

¹⁴ Text available at www.cisg.law.pace.edu/cisg/biblio/goldstajn.html.

¹⁵ Treibacher also asserts that testimony at trial from Hinterhofer and Stromberger contradicts Weiser’s testimony about the usage. Appellee’s Brief at

C. Even if a “Course of Dealing” Could Override a Usage under Article 9(2), Treibacher Has Not Identified a Relevant “Course of Dealing.”

Assuming *arguendo* that a practice or “course of dealing” might suffice to override a usage otherwise subject to CISG Article 9(2), TDY’s Opening Brief demonstrated that the single incident cited by the District Court – the ambiguous February 2000 incident – cannot, as a matter of law, constitute a practice under the CISG. Other than a fruitless effort to mischaracterize the February 2000 incident,¹⁶ Treibacher makes no direct response to TDY’s argument that a single incident cannot constitute a practice under the CISG. Instead, it attempts to bolster the “course of dealing” argument by citing other evidence that is irrelevant.

With one exception reviewed below, the 1993-1999 “course of dealing” described by Treibacher has no bearing on the principal issue in this case: whether

23-24. The District Court did not cite this testimony in its discussion of usage for good reason. Doc 84 – Pgs 5, 19. Hinterhofer’s testimony was limited to the meaning of consignment “when Treibacher sells goods to its customers” and not to any wider usage in the hard metals industry, Doc 78 – Pgs 305:14-306:6, and Stromberger’s testimony regarding the meaning of consignment in the United States was limited to his dealings with TDY, where he admits there was no discussion of the term. Doc 78 – Pg 634.

¹⁶ Treibacher states that Hinterhofer’s notes on the February 2000 email “indicate” that TDY’s Atchley “did not have consent to return” the TiCN material. Appellee’s Brief at 12. As the District Court established in questioning Hinterhofer, the notes say nothing about consent or permission, or any similar concepts. Doc 78 – Pgs 140-141.

TDY was obligated to consume and pay for consigned materials. When the parties have no occasion to discuss or act on a particular point, their uneventful conduct – no matter how extensive – does not establish a practice relevant to a subsequent dispute. The fact that TDY ended up using all the materials shipped on consignment to it by Treibacher from 1993-2000 is equally “consistent” with both parties’ positions. Appellee’s Brief at 7; Appellant’s Opening Brief at 29-30.

Treibacher futilely mines the record for a relevant course of dealing, but uncovers only irrelevant cites that it stretches to support its argument. Treibacher claims that it is “undisputed” that Treibacher had no right to reclaim consigned material, Appellee’s Brief at 33, 46, citing as support only testimony about plant access from TDY’s former employee Harold Wiley:

Q. Okay. In fact, if a customer wanted to take some of that goods out of inventory, would they have to ask your permission?

A. Of course.

Q. Customer being a vendor?

A. Yes.

Q. They couldn’t just take it out, they had to contact you first, correct?

A. Yes.

Doc. 78 -- Pg 514. This is nothing more than common sense: no company would permit a person who appears at its facility claiming to represent a vendor to remove valuable consigned material without having made prior arrangements.

Contrary to this banal exchange with Wiley, the record is replete with references to Treibacher's unilateral authority to retrieve consigned material.

- Wiley noted that TDY recorded consigned material as being the supplier's, Doc. 78 – Pg 524:20-25, and that Treibacher or Trinitech would have been allowed to take consigned material. Doc. 78 – Pg 525:1-6.
- Conard Atchley testified that other suppliers withdrew consigned material from the TDY consignment store, Doc. 78 – Pg 476:2-6, and that Treibacher similarly could have done so. Doc. 78 -- Pgs 464:13-14, 474:16-19.
- John Johnson testified that consignors could retrieve their consigned materials and had done so. Doc. 78 – Pgs 598: 13-25, 599:1-3, 616: 13-20.
- Treibacher's Hinterhofer testified that in Treibacher's consignment arrangement with Trinitech, which was the "same" as the arrangement with TDY, Treibacher could "come and get the goods" or "go and get

the property” on consignment, Doc. 78 – Pgs 229:3-5, 283:18-22.

(retrieval of goods); Doc. 78 -- Pg 282:18-24) (arrangement with TDY was the same as prior arrangement via Trinitech as agent).

The one occasion from 1993-1999 when the nature of consignment became an issue undermines Treibacher’s present position. In October 1995, Trinitech and Treibacher discussed restricting TDY’s ability to purchase consigned materials. Trinitech advised Treibacher that:

[TDY’s] blanket order for the balance of 1995 did list quantities that they have already consumed but it also states that this order covers consumption through December 1995 to be reported in January 1996. They do expect us to keep material in consignment at this price through December. What is your recommendation for discussing this situation with them. I feel that ***if we raise prices or restrict purchases*** prior the end of 1995 that it will definitely affect future sales to [TDY].

(PX 8) (emphasis added). If Treibacher’s current view of consignment were correct (*i.e.*, that consignment is a mere deferred payment obligation), then Treibacher would have had no right to “restrict” TDY’s purchases of consigned materials; under Treibacher’s current view of the matter, TDY had already purchased 1995’s consigned goods.

Shortly thereafter, TDY made clear that it did not believe it had any obligation to use the consigned Treibacher material. In early 1996, Trinitech

requested pricing information. PX 9-A. When TDY had not heard back from Trinitech/Treibacher, Trinitech told Treibacher:

They [TDY] have issued their blanket orders with all our competitors for 1996 and have circulated this information to all of their internal people that require this information. They stated that they do not have pricing from Treibacher/Trinitech and *will not use our material* until they know if we are competitive or not.

(PX 9-B) (emphasis added). The situation is clear: TDY had obtained prices from its other consignors, and was threatening to use other suppliers' materials unless it received acceptable prices from Trinitech/Treibacher. If Treibacher's current position were correct, however, TDY had no basis for its threat because TDY had already purchased the consigned Treibacher material. Treibacher made no such objection to TDY's position.

Thus, Treibacher's resort to the parties' seven-year commercial relationship in an effort to supplement the District Court's reliance on the single February 2000 incident fails. There was no "course of conduct" during this period that supports Treibacher's interpretation of consignment.

D. In the Alternative, the District Court Erred by Not Considering Usage as a Factor under Article 8.

Treibacher's main argument is that Article 8(3) governs the issue in dispute and that usage is merely one among many factors considered under Article 8(3).

Even if Treibacher were correct on the application and interpretation of Article 8(3),

the judgment against TDY should still be reversed because the District Court misapplied Article 8(3) by failing to consider the usage and instead relying on one of the factors, the parties' alleged "course of dealing."

The District Court did not resolve whether the consignment usage claimed by TDY existed; instead, the District Court was of the view that the "course of dealing" resolved the question of what consignment meant to these parties. Doc 84 – Pg 5. Article 8(3), however, does not provide that the existence of one listed factor eliminates consideration of the other factors. To the contrary, Article 8(3) requires consideration 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." (emphasis added).¹⁷

The existence of a usage (whether international or purely local) could affect the court's findings on intent and reasonable understanding in many ways. Thus, at a minimum, the case should be remanded for a new trial where the question of the trade usage is given proper consideration as provided in Article 8(3).

E. Treibacher Failed to Respond to the Argument that the December 2000 Communications Were Legally Insufficient.

¹⁷ Treibacher argued that Professor Goldstajn's article provided a hierarchy of factors under the CISG. Appellee's Brief at 42-43. In fact, Professor Goldstajn's suggested hierarchy related to "sources of *lex mercatoria*" generally, and not an interpretation of CISG Articles 8 or 9. Goldstajn, *supra* at 11, p. 99.

In its Opening Brief, TDY noted that the December 2000 oral communications did not comply with Treibacher's announced practice of requiring written confirmations of oral agreements. Appellant's Opening Brief at 35-36. TDY argued that because the December communications did not comply with the "practices established" between the parties, they were legally insufficient to form a contract under the CISG. *Id.* at 36 (*citing* CISG Article 9(1)). Treibacher has not contested TDY's argument. Therefore, at a minimum, this case should be reversed and remanded with instructions to eliminate damages related to the December 2000 claim.

II. TREIBACHER'S PROMISSORY FRAUD CLAIM FAILS AS A MATTER OF LAW.

Treibacher's promissory fraud claim is premised on an allegedly false promise to purchase TaC. The District Court's fraud ruling relied on a finding that TDY was contractually obligated to purchase TaC. Doc 84 – Pg 24. Because, for the reasons discussed above, the judgment on Treibacher's breach of contract claim must be reversed, the judgment on its promissory fraud claim must be reversed as well.

In addition, the fraud claim fails as a matter of law because it was preempted by the CISG and because Treibacher did not satisfy all the elements of its claim.

A. TDY’s Preemption Issue Is Properly Before the Court

1. TDY Did Not Waive the Preemption Issue

Treibacher contends that TDY waived its preemption issue by failing to raise the issue below. Appellee’s Brief at 50. However, TDY’s Memorandum Brief in Support of its Motion for Summary Judgment argued:

It should first be noted that, if Treibacher were correct that the CISG applied in this case, most of [its] state law claims would be preempted. In accordance with the stated intent of the CISG to develop a uniform international law of sales, three courts have held that, where the CISG applies, it preempts state law contract causes of action. *See Usinor Industeel v. Leeco Steel Products, Inc.*, 209 F.Supp.2d 880, 884-85 (N.D. Ill. 2002); *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.*, 201 F.Supp.2d 236, 285 (S.D. N.Y. 2002); *Asante Technologies, Inc. v. PMC-Sierra, Inc.*, 164 F.Supp.2d 1142, 1150-52 (N.D. Ca. 2001) . . . In addition to the state law claim for breach of contract, the claims for unjust enrichment and conversion also would be preempted because these claims are “in actuality a contract claim” or “bridge the gap between contract and tort.” *Geneva Pharmaceuticals v. Barr Labs*, 201 F.Supp.2d at 286, n.30.

Turning to Treibacher’s promissory fraud claim, TDY stated:

Treibacher’s fraud claim is based on an allegation that TDY falsely represented that it “would accept the finished product, use the finished product in [its] business and pay the agreed upon purchase price for the product.” (Complaint at ¶ 44). This claim, which essentially is nothing more than a breach of contract claim disguised as a fraud claim, is a claim for promissory fraud.

Doc 94 – Pgs 23, 25. TDY’s Memorandum thus informed the District Court that (1) a claim that duplicates a contract claim is preempted; and (2) Treibacher’s promissory fraud claim duplicated its contract claim. TDY therefore preserved the preemption issue.

It is of no moment that TDY did not also raise the issue earlier in its answer or again at trial. “In federal practice any question which has been presented to the trial court for a ruling and not thereafter waived or withdrawn is preserved for review.” *Evans v. Bexley*, 750 F.2d 1498, 1499 n.1 (11th Cir. 1985) (quoting *United States v. Harue Hayashi*, 282 F.2d 599, 601 (9th Cir. 1960)); *see also id.* (“The plaintiffs did not raise these issues in their complaint. They did, however, cite them in opposition to the trustees’ motion for summary judgment We may therefore review the plaintiffs’ case.”); *Browning v. AT&T Paradyne*, 120 F.3d 222, 225-226 (11th Cir. 1997) (issue raised in opposition to summary judgment preserved on appeal though not raised at hearing or in subsequent motion).

In short, TDY presented its preemption argument to the District Court in support of summary judgment. It is therefore entitled to raise the issue on appeal from entry of a final judgment.

2. In the Alternative, this Court Should Exercise its Discretion to Consider Preemption.

Waiver is “not a jurisdictional limitation but merely a rule of practice,” and this Court therefore retains discretion to consider issues raised for the first time on appeal. *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 360 (11th Cir. 1984). This Court has identified five circumstances where it will exercise its discretion to consider a new issue, *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1332 (11th Cir. 2004), including, first, if the issue “involves a pure question of law, and . . . refusal to consider it would result in a miscarriage of justice,” and, fifth, it “presents significant questions of general impact or of great public concern.” *Id.*

As to the first circumstance, the application of the Supremacy Clause and the CISG to Treibacher’s Alabama claim for promissory fraud is a question of treaty interpretation, which, like statutory interpretation, is a pure question of law. Moreover, allowing the fraud judgment against TDY to stand would constitute a miscarriage of justice. A \$5,000,000 judgment is a disproportionate penalty for TDY’s alleged failure to raise a purely legal issue with sufficient specificity. *Skinner v. City of Miami*, 62 F.3d 344, 348 (11th Cir. 1995) (“[T]he refusal to consider [the issue raised for the first time on appeal] would result in a miscarriage of justice – especially when a \$1.3 million verdict is at issue. The issue, moreover,

was not ignored entirely during the proceedings below.”). Furthermore, a party erroneously found liable for fraud is undeserving of the opprobrium and collateral consequences that follow. *See, e.g.*, 37 Am. Jur. 2d § 453 (noting the “prejudicial and in terrorem effects” of fraud charges, which “may be said to involve moral turpitude”); *Ziamba v. Cascade Intern., Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) (defendants deserving of protection “against spurious charges of immoral and fraudulent behavior”).

The other applicable exception to waiver relates to “significant questions of general impact or great public concern.” The CISG governs international purchase and sale of goods involving United States residents and residents of other CISG nations. CISG Art. 1. Its scope and interpretation are of growing importance to the United States and foreign companies engaged in such sales. *See* United States Census Bureau, *Foreign Trade Statistics*, “U.S. International Trade in Goods and Services - Annual Revision for 2004” (over \$800 billion in goods exported and \$1.4 trillion imported in 2004).¹⁸ The issue here goes to the core purpose of the CISG as a unifier of legal rules governing commercial transactions.

One of the primary factors motivating the negotiation and adoption of the CISG was to provide parties to international contracts for the sale of goods some degree

¹⁸ Found at http://www.census.gov/foreign-trade/Press-Release/2004pr/final_revisions/index.html#goods, Ex. 4.

of certainty as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party's legal system might otherwise apply.

MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.P.A., 144

F.3d 1384, 1391 (11th Cir. 1998); *see also Dean Witter*, 741 F.2d at 361 (legal issue that implicates the "principal purpose" of federal statute should be reviewed even if not raised below). Allowing state-law tort claims to proceed alongside a CISG contract claim would undermine the unifying purpose of the CISG, and lead to divergent outcomes among CISG signatory nations depending on which country heard the claim. Indeed, even among the United States, the forum of the CISG action would determine the viability of duplicative common-law tort claims.

Despite the centrality of the preemption issue to the CISG, precedent on CISG preemption is lacking. No court of appeals has addressed the issue, and the international case law is sparse. Appellant's Opening Brief at 45-47. By considering preemption, this Court can provide much-needed guidance on a "significant question[] of general impact or of great public concern." *Dean Witter*, 741 F.2d at 361.

B. Treibacher's Promissory Fraud Claim Is Preempted

1. The Facts Underlying Treibacher's Promissory Fraud and Contract Claims Are the Same.

Treibacher contends that its promissory fraud claim is not preempted because “breach of contract is not one of [the elements of promissory fraud].” Appellee’s Brief at 53. Whether a hypothetical promissory fraud claim could be proven without duplicating a concurrent claim for breach of contract is irrelevant. *In this case*, Treibacher proffered identical evidence to support both its breach of contract and promissory fraud claims. TDY’s alleged contractual “firm commitment to buy” TaC from Treibacher also constituted the alleged (1) false representation (2) of a material existing fact (3) that was justifiably relied upon (4) and caused damage – four of the elements of a promissory fraud claim. Doc 78 – Pg 701, Doc 84 – Pg 11-12, 13. Also, Treibacher alleged no injury or damages from promissory fraud that differ from those caused by the alleged breach of contract. The promissory fraud claim is simply a contract claim masquerading as a tort, and is therefore preempted. *See* Appellant’s Opening Brief at 47-49.

2. Article 61 Does Not Exempt Fraud Claims from Preemption.

Treibacher contends that CISG Art. 61 *sub silentio* preserves its Alabama promissory fraud claim. Appellee’s Brief at 53. CISG Article 61 is the first Article in the Section entitled “Remedies for Breach of Contract by Buyer.” Article

61(1)(a) identifies the various non-monetary rights a seller may exercise against a breaching buyer, including specific performance and avoidance. *See* Art. 61(1)(a) (citing Arts. 62-65). Article 61(2) then provides that “The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.” Treibacher contends that the reference to “other remedies” preserves its promissory fraud claim. This contention is wrong for two reasons.

First, Treibacher’s contention is based on an obvious and fundamental error. It conflates claims (*i.e.* the right to redress for alleged fraud or under other common-law theories) with remedies (the means by which a contractual right is enforced): “[I]t 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.’” Appellee’s Brief at 53 (emphasis added).

Second, the textual structure of Articles 61 through 65 makes clear that the “other remedies” referred to in Section 61(2), and available to a seller upon a buyer’s breach, are those listed in CISG Articles 62-65. Not surprisingly, they do not include the right to sue for promissory fraud. “Other remedies” in the section entitled “Remedies for Breach of Contract by the Buyer,” refers to those specifically enumerated means available to redress a breach of contract. Because Article 61

does not deal with claims at all, its silence on the issue of promissory fraud claims has no persuasive value.

C. Treibacher’s Promissory Fraud Claim Fails under Alabama Law.

In *Goodyear Tire & Rubber Co. v. Washington*, 719 So. 2d 774, 776-777 (Ala. 1998), the Alabama Supreme Court held that promissory fraud must be proven by direct evidence of an intent to deceive, or evidence of “a consistent pattern of purposefully making distinct unkept promises to [the plaintiff] or other customers.” Any lesser showing risks allowing a plaintiff to convert every contractual breach into a “promissory fraud.”

Treibacher can not and does not argue that it satisfied *Goodyear Tire*. Instead, Treibacher relies on dicta in *Byrd v. Lamar*, 846 So. 2d 334, 342-43 (Ala. 2002), for the proposition that intent to deceive can be proved through post-promise circumstantial evidence. Appellee’s Brief at 55. However, the plaintiff in *Byrd* satisfied one of the alternative *Goodyear Tire* standards by presenting evidence of numerous, distinct unkept promises to both him and other similarly situated students. *Byrd*, 846 So. 2d at 345-346 (relying on the plaintiff’s deposition testimony and an affidavit of a non-party to deny summary judgment on promissory fraud claim). Because *Byrd* did not turn on a general showing of post-promise circumstantial evidence, the court’s reference to the possibility of such proof is mere dicta, and therefore not binding authority that could modify *Goodyear Tire*. See,

e.g., *Adair v. Adair*, 62 So. 2d 437, 442 (Ala. 1952) (“The *dictum* in the Tissier case, *supra*, was not authoritative and not binding upon the courts.”); *Auvil v. Johnson*, 806 So. 2d 343, 348 (Ala 2001) (refusing to follow Alabama Supreme Court’s prior statement on grounds that “this statement was not necessary to the decision . . . [therefore], the statement is mere dictum.”).

The Alabama Supreme Court repeatedly has rejected promissory fraud claims premised solely on post-promise circumstantial evidence of an intent to deceive. *See, e.g.*, *Gewin v. TCF Asset Management Corp.*, 668 So. 2d 523, 527 (Ala. 1995) (affirming directed verdict for defendant on grounds that intent to deceive could not be inferred from circumstantial evidence submitted at trial); *Pinyan v. Community Bank*, 644 So. 2d 919, 924 (Ala. 1994) (affirming summary judgment on same grounds). That is all Treibacher proffered in this case. As a matter of law, this evidence is not “of such a quality” that an intent to deceive “may fairly and reasonably [be] infer[red].” *Gewin*, 668 So. 2d at 526-27; *see also* Appellant’s Opening Brief at 51-55.

III. TREIBACHER DID NOT ESTABLISH THAT IT TOOK REASONABLE MEASURES TO MITIGATE ITS LOSS.

Treibacher contends that TDY failed to satisfy its burden of proving that Treibacher breached its duty to mitigate under CISG Article 77. Appellee’s Brief at 58-59. In support of this contention, Treibacher relies on Oberlandesgericht (OLGZ) Celle (Appellate Court), 2 September 1998 (Germany). Appellee’s Brief at 58. In fact, that decision unmistakably holds that the *party seeking damages* for breach of contract bears the burden of producing evidence of the measures it took to mitigate its loss. In that case, the seller “declared the contract avoided” and the buyer sought damages. Relying on CISG Article 77, the court affirmed a lower court’s denial of damages:

The Court of First Instance furthermore correctly denied a claim for damages based on Art. 77 CISG – failure to mitigate losses on the part of the buyer by failing to enter a substitute transaction. . . . The assertion that a substitute transaction was not possible in the relevant period of time . . . is not enough. . . . *It is decisive that the buyer does not offer any explanation regarding her efforts to instigate a substitute purchase.* It is true that the burden of proof for a failure to mitigate damages is on the creditor, that is the seller in the present dispute. *But the onus of proof is irrelevant because the buyer was at least obliged to submit which offers for a substitute transaction she obtained and from which companies.* (emphasis added).

In its brief, Treibacher quotes only the portion of the above text which says, “It is true that the burden of proof for a failure to mitigate damages is on the [party

claiming breach].” Appellee’s Brief at 58. By truncating the quotation, Treibacher misrepresented the holding of the case. Read in full context, the case makes clear that the party who seeks damages carries the initial burden of showing that it took reasonable measures to mitigate the loss. Treibacher’s citation to Landgericht (LG) Darmstadt (Trial Court), 9 May 2000 (Germany), Appellee’s Brief at 58, similarly does not support Treibacher’s contention that TDY carried the burden of proof on mitigation. In that decision, a German trial court rejected a buyer’s claim of breach and noted, “While the Court does not find that the buyer possesses a claim for damages, it would like to point out that the buyer – by ordering the production of manuals elsewhere instead of requesting delivery from the seller – violated her obligation to mitigate damages under Article 77 CISG.”

These holdings are consistent with the first sentence of Article 77, which mandates that a party seeking damages for breach of contract “*must*” mitigate its losses. It is also in accord with commentary: “Article 77 applies directly when a party relies on an actual breach. . . . [O]nce the buyer has reason to know that the seller’s performance will not be forthcoming, he is expected to take such affirmative steps as are appropriate in the circumstances to avoid loss.” Lookofsy, *supra* at 3, p. 124 (§ 6.17); *see also id.* (“a party who fails to take reasonable measures to mitigate cannot recover damages for the loss which could have been mitigated”).

The text of the CISG, commentary on the subject, and even the cases cited by Treibacher support the same rule: a party who seeks damages for breach of contract must show the reasonable measures it took to mitigate its loss. Only after the plaintiff satisfies this burden is the defendant required to identify “the possibilities of alternative conduct and which part of the damages would have been prevented by this alternative conduct.” Appellee’s Brief at 59 (quoting Oberster Gerichtshof (OGH) (Supreme Court), February 6, 1996, 10 Ob 518/95 (Austria)). Treibacher did not present any evidence to justify its delay (in a volatile, declining market) from late July 2001 – when TDY unmistakably made clear it did not believe it had any obligation to purchase unconsumed TaC – to October 2001, when Treibacher began selling the TaC it had never shipped to TDY. The undisputed evidence showed that had Treibacher acted promptly under Article 77, it would have significantly reduced or entirely eliminated its damages from TDY’s alleged breach. Appellant’s Opening Brief at 55-56. TDY therefore is entitled to remand on the question of damages.

CONCLUSION

Based on the foregoing and its principal brief, TDY respectfully requests the Court to grant the relief requested at page 58 of its principal brief.

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(s) _____

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing upon the following counsel of record by Federal Express on this the 1st day of September, 2005, addressed as follows:

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