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# **TREIBACHER INDUSTRIE, A.G. v. ALLEGHENY TECHNOLOGIES, INC.: A PERSPECTIVE ON THE LACKLUSTER IMPLEMENTATION OF THE CISG BY AMERICAN COURTS**

**Trevor Perea**

## **I. INTRODUCTION**

Vast differences exist between the legal systems of the countries that have ratified the United Nations Convention on Contracts for the International Sale of Goods (hereinafter "CISG" or "Convention"). It was under the pretense of resolving such differences that the Convention attempted to reconcile common law, civil law and socialist legal systems with the advent of one comprehensive international sales law.<sup>1</sup> It has been noted that the states already party to the Convention account for over sixty percent of the world's trade, a fact that indicates to some that international trade is supplanting domestic trade in terms of significance in a maturing global economy.<sup>2</sup> Given this context, it is no surprise that the CISG is generally characterized as enormously successful in its undertaking,<sup>3</sup> though it certainly has its share of detractors.<sup>4</sup> Despite the inevitable difficulties in creating and implementing such a body of law, the

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<sup>1</sup> See Larry A. DiMatteo, *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*, 23 SYRACUSE J. INT'L L. & COM. 67, 94 (1997) [hereinafter *International Contract Law Formula*].

<sup>2</sup> Michael P. Van Alstine, *Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law*, 37 VA. J. INT'L L. 1, 3 (1996).

<sup>3</sup> See Franco Ferrari, *What Sources of Law for Contracts for the International Sale of Goods? Why One Has to Look Beyond the CISG*, 25 INT'L REV. L. & ECON. 314 (2005).

<sup>4</sup> See Arthur Rosett, *The International Sales Convention: A Dissenting View*, 18 INT'L LAW 445 (1984); Alejandro M. Garro, *Reconciliation of Legal Traditions in the United Nations Convention on the International Sale of Goods*, 23 INT'L LAW 443, 444 (1989).

Convention has made magnificent strides towards achieving a bona fide international sales law, due in large part to its ability to eliminate many of the legal entanglements involved in international sales transactions that are created by merchants' ignorance of foreign domestic laws.<sup>5</sup>

The treaty itself becomes the governing domestic law once ratified by a member state, making it the applicable contract law to all international transactions falling under its internationality requirements,<sup>6</sup> although parties may opt out of the Convention under Article 6.<sup>7</sup> However, the CISG does not provide an exclusive set of rules by which disputes under it must be settled.<sup>8</sup> Rather, as is evident from its text, the Convention has a limited scope of application, and it wisely instructs its interpreters on how they should approach issues not expressly covered within its provisions.<sup>9</sup> The CISG's text states that "in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application."<sup>10</sup> This instructive principle, however, has not managed to alleviate the inherent biases of domestic tribunals towards their own more familiar bodies of law.<sup>11</sup>

Federal courts in the United States have varied in their adherence to this interpretative principle.<sup>12</sup> Article 7 of the CISG was implemented as a safeguard against domestic tribunal's

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<sup>5</sup> See Ron N. Andreason, *MCC-Marble Ceramic Center: The Parol Evidence Rule and Other Domestic Law Under the Convention on Contracts for the International Sale of Goods*, 1999 BYU L. REV. 352, 355 (1999).

<sup>6</sup> United Nations Convention on Contracts for the International Sale of Goods Apr. 11, 1980, 1980 U.S.T. 129, 1489 U.N.T.S. 3, available at <http://cisgw3.law.pace.edu/cisg/text/treaty.html>; [hereinafter CISG]; Bernard Audit, *The Vienna Sales Convention and the Lex Mercatoria*, in LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT 139, 174 (Thomas Carbonneau ed., Dobbs-Ferry, N.Y.: Transnational Juris, 1990).

<sup>7</sup> CISG, *supra* note 6, art. 6. See *Assante Technologies, Inc. v. PMC-Sierra, Inc.*, 164 F.Supp. 2d 1142 (N.D. Cal. 2001); Thomas J. Drago, & Alan F. Zoccolillo, *Be Explicit: Drafting Choice of Law Clauses in International Sale of Goods Contracts*, THE METROPOLITAN CORPORATE COUNSEL, May 2002, available at <http://www.cisg.law.pace.edu/cisg/biblio/zoccolillo1.html>.

<sup>8</sup> See generally Ferrari, *supra* note 3, at 328.

<sup>9</sup> See CISG, *supra* note 6, art. 7; Ferrari, *supra* note 3, at 328-30.

<sup>10</sup> See CISG, *supra* note 6, art. 7.

<sup>11</sup> See Camilla Baasch Andersen, *The Uniform International Sales Law and the Global Jurisconsultorium*, 24 J. L. & COM. 159, 161 (2005).

<sup>12</sup> Harry M. Flechtner, *The U.N. Sales Convention (CISG) and MCC-Marble Ceramic Center, Inc., v. Ceramica Nuova D'Agostino, S.P.A.: The Eleventh Circuit*

natural inclination to seek refuge in the familiar legal tenets of their jurisdictions when deciding matters governed by the Convention.<sup>13</sup> The now infamous decision in *Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr., Inc.*,<sup>14</sup> 993 F.2d 1178 (5th Cir. 1993), the first CISG case encountered by a federal court, went so far as to entirely disregard Article 7 by applying state law in direct opposition to the text of the CISG, effectively displacing the Convention as the substantive law governing the contract.<sup>15</sup> However, recent decisions have been more conscious of the importance of analyzing the text of the Convention and observing its "international character."<sup>16</sup> Despite improvements in the interpretative methodology of federal courts confronting CISG cases, it is obvious to most observers that more will be required from the courts if the Convention is ever able to achieve its goals.<sup>17</sup>

The errant decision's ability to undermine the Convention's stated purpose of removing "legal barriers in international trade and promot[ing] the development of international trade" cannot be underestimated.<sup>18</sup> Ernst Rabel, one of the CISG's foremost progenitors, professed that a uniform body of international law's vitality assumes an ability to successfully displace major contractual issues from domestic to international spheres.<sup>19</sup> While there will certainly be instances in which a countervailing domestic policy outweighs a given international

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*Weighs in on Interpretation, Subjective Intent, Procedural Limits to the Convention's Scope, and the Parol Evidence Rule*, 18 J.L. & COM. 259, 260 (1999).

<sup>13</sup> CISG, *supra* note 6, art. 7; Larry A. Dimatteo, et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT'L L. & BUS. 299, 321 (2004) [hereinafter *CISG Jurisprudence*]; See Anthony J. McMahon, *Differentiating Between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of Goods: A Proposed Method for Determining "Governed By" in the Context of Article 7(2)*, 44 COLUM. J. TRANSNAT'L L. 992, 999 (2006).

<sup>14</sup> *Beijing Metals & Minerals Import/Export Corp. v. Am. Bus. Ctr., Inc.*, 993 F.2d 1178 (5th Cir. 1993).

<sup>15</sup> See *id.*

<sup>16</sup> See *Usinor Industeel v. Leeco Steel Prod.*, 209 F. Supp. 2d 880, 886 (E.D. Ill. 2002); *Chicago Prime Packers v. Northam Food Trading*, 320 F. Supp. 2d 702, 708-09 (N.D. Ill. 2004).

<sup>17</sup> See generally Fletcher, *supra* note 12, at 260.

<sup>18</sup> CISG, *supra* note 6, pmb1.

<sup>19</sup> Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention for the International Sale of Goods*, 18 YALE J. INT'L L. 1, 4 (1993).

concern,<sup>20</sup> the CISG can only effectuate this foremost of purposes through the courts application of the Convention's text during litigation.<sup>21</sup> Thus, an analysis of a decision by a federal court concerning the CISG must assess the degree to which the court offers guidance to practitioners and tribunals, not just in its own jurisdiction, but any jurisdiction into which the Convention may reach.<sup>22</sup>

The most recent exposition of the Convention in a United States federal court came about in the case of *Treibacher Industrie, A.G. v. Allegheny Technologies, Inc.*, 464 F.3d 1235 (11th Cir. 2006). In *Treibacher*, the principle issue facing the Eleventh Circuit was how to construe the meaning of a term in a contract governed by the CISG.<sup>23</sup> The court offered a detailed exposition of the Convention's text in correctly deciding this pivotal issue, ultimately holding that the meaning parties ascribe to a contractual term in their course of dealing establishes the meaning of the term in the face of a conflicting customary usage.<sup>24</sup> The court's examination of the Convention's provisions should prove an exemplary reference point for CISG interpretation, but questions remain as to whether the decision was indeed self-explanatory in light of other provisions of the CISG. These questions bear heavily on the potential of the *Treibacher* decision to effectuate the interpretative principles set forth in Article 7 of the CISG.

This Note seeks to recognize the *Treibacher* court's advancement of the CISG and its guiding principles, while also examining the decision's shortcomings in the context of a slowly evolving body of international case law surrounding the Convention. Part II of this note will provide a brief introduction to the CISG, including its historical underpinnings and general objectives. Part III will present the *Treibacher* decision and discuss its importance in relation to previous decisions handed down by federal courts. Part IV will discuss interpretative methodology's role in the development of the CISG and the growing body of international cases surrounding the Conven-

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<sup>20</sup> *Id.* at 3.

<sup>21</sup> Andreason, *supra* note 5, at 357.

<sup>22</sup> See Andersen, *supra* note 11, at 176-79.

<sup>23</sup> *Treibacher Industrie, A.G. v. Allegheny Techs., Inc.*, 464 F.3d 1235, 1238 (11th Cir. 2006).

<sup>24</sup> *Id.*

tion. Part V will analyze the success of the Treibacher court in meeting the challenges set out by the CISG and acknowledge some possible inconsistencies the decision may have with other provisions of the Convention.

## II. PUTTING THE CISG INTO CONTEXT: A BRIEF HISTORICAL OVERVIEW OF THE CONVENTION

In understanding why the CISG is regarded as an important achievement in uniform sales law, a modicum of attention should be paid to its predecessors. The CISG was preceded by two significant bodies of uniform sales law: the Uniform Law on the Formation of Contracts for the International Sale of Goods and the Uniform Law on the International Sale of Goods, both products of The Hague Conference convened on July 1, 1964.<sup>25</sup> These conventions were the end result of a long-running effort by Western Europe's foremost scholars to draft a uniform law of international trade, however, the lack of a more representative drafting committee hindered the convention's ability to gain acceptance in the international community.<sup>26</sup>

In 1966 the United Nations Commission on International Trade Law (hereinafter "UNCITRAL" or "Commission") was created by the United Nations General Assembly to provide the United Nations with a significant role in removing obstacles to international trade and to ensure a more varied constituency among the individuals actually developing the conventions.<sup>27</sup> An initial order of business for UNCITRAL was deciding whether or not the Hague conventions could be adopted.<sup>28</sup> The Commission declined adoption of both the ULIS and the ULF due to the concerns of many countries that the conventions were too deeply rooted in the legal traditions of Western Europe.<sup>29</sup>

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<sup>25</sup> Uniform Law on the International Sale of Goods (ULIS), July 1, 1964, 834 U.N.T.S. 107; Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 169.

<sup>26</sup> See Peter J. Calleo, *The Inapplicability of the Parol Evidence Rule to the United Nations Convention on Contracts for the International Sale of Goods*, 28 HOFSTRA L. REV. 799, 801 (2000).

<sup>27</sup> UNCITRAL, [www.uncitral.org/uncitral/en/about/origin.html](http://www.uncitral.org/uncitral/en/about/origin.html) (last visited Feb. 2, 2008); see Calleo, *supra* note 25.

<sup>28</sup> Dennis J. Rhodes, *The United Nations Convention on Contracts for the International Law of Goods: Encouraging the Use of Uniform International Law*, 5 TRANSNAT'L L. 387, 394 (1992).

<sup>29</sup> Calleo, *supra* note 26, at 801-02.

However, the Hague conventions proved to be milestone achievements in the development of a uniform international sales law, and would provide much of the framework for the Commission's drafting of the CISG.<sup>30</sup>

The United States, who played a relatively passive role during the Hague conference, decided to take an active role in the UNCITRAL efforts in order to ensure its interests found their way into final drafts.<sup>31</sup> At the Hague conference the United States' delegation suggested reforms that would bring the civil law oriented ULIS into accord with some of the basic common law tenets, specifically those manifested in the UCC.<sup>32</sup> However, the American's late entry into the revision process combined with the drastic nature of the modifications prevented a successful compromise on such issues.<sup>33</sup> Contrastingly, American involvement in UNCITRAL's efforts came at the outset of the drafting process, allowing the delegation's proposal's to gain acceptance and cohere many common and civil law concepts.<sup>34</sup> Ultimately, the American delegation played a major role in developing the CISG, with the UCC strongly effecting particular provisions.<sup>35</sup>

In this context, the CISG hardly seems as arcane as would be expected given its treatment by many American practitioners and jurists.<sup>36</sup> It is certain that at least portions of the Convention had their genesis in provisions of the UCC, a fact that should lend the Convention an air of familiarity to American courts.<sup>37</sup> Additionally, the text itself does not purport to offer

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<sup>30</sup> Rhodes, *supra* note 28, at 395; see Henry Landau, *Background to U.S. Participation in United Nations Convention on Contracts for the International Sale of Goods*, 18 INT'L LAW, WINTER 1984, at 29. (1984).

<sup>31</sup> Rhodes, *supra* note 28, at 395.

<sup>32</sup> Landau, *supra* note 30.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See Richard D. Kearny, *Uniform Law for International Sales Under the 1980 United Nations Convention*, 78 AM. J. INT'L L. 289, 289-92 (1984) (book review) (noting that similarities between the UCC and the CISG include such core issues as revocation of offers, notice of defective goods, passing of risk, foreseeability of damage and preservation of goods).

<sup>36</sup> See Andreason, *supra* note 5, at 352 (commenting that "the CISG has been largely avoided by international attorneys in the US, the federal courts have encountered very few CISG cases and rarely have devoted extended analysis to the Convention text.").

<sup>37</sup> See Andersen, *supra* note 11, at 169.

an exclusive set of solutions for any given dispute; rather, it simply “acknowledges the realities and practices of international trade” by presenting a set of general rules that practitioners can utilize in the manner best suited to their agreements.<sup>38</sup> Unfortunately, as noted above, the Convention has not realized its potential due to some of the inherent difficulties of applying a uniform international law.

Treibacher presented the Eleventh Circuit with a rare opportunity to extrapolate the text of the CISG and demystify the Convention as a tool for practitioners; however, the court’s success in achieving these objectives is questionable in light of previous federal court decisions.

### III. THE CISG SURFACES IN THE ELEVENTH CIRCUIT: THE *TREIBACHER* CASE

#### A. *The Facts*

Treibacher Industrie, AG (“Treibacher”), an Austrian vendor of hard metal powders, had agreed to sell specific quantities of tantalum carbide to TDY for use in its Alabama plant.<sup>39</sup> The contracts executed by the parties made the amounts specified subject to delivery to “consignment.”<sup>40</sup> TDY refused to accept delivery of all of the tantalum carbide specified in the contract, instead accepting only the amount it could use at that time.<sup>41</sup> TDY had surreptitiously purchased tantalum carbide from another seller at a lower price, and it subsequently notified Treibacher that it was not obligated to accept any amount of tantalum carbide specified in the contract over the amount that TDY wished to use.<sup>42</sup> Treibacher sold the surplus tantalum carbide to another buyer at a lower price than specified in the contract and later sought recovery in the district court for the balance of the amount it expected to receive in the contracts.<sup>43</sup>

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<sup>38</sup> Audit, *supra* note 6, at 175.

<sup>39</sup> *Treibacher*, 464 F.3d at 1236.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*



## B. *Issue*

As the parties did not dispute that the CISG governed the dispute,<sup>44</sup> the critical issue facing the Eleventh Circuit on appeal was whether the meaning of the term “consignment” should be interpreted according to its common usage in the trade or according to the parties’ understanding of the term in prior dealings.<sup>45</sup> TDY asserted that the CISG required construction of terms according to their customary trade usages in the industry, unless expressly agreed otherwise by the parties.<sup>46</sup> Treibacher’s position was that, through the course of their dealings in the prior seven years, the parties had understood the term “consignment” to mean that even though invoices would be delayed until the materials were withdrawn, a valid sale had taken place.<sup>47</sup> The lower court ultimately accepted the argument that under the CISG prior understanding through the parties’ course of conduct trumped customary trade usage.<sup>48</sup> TDY’s argument on appeal relied on the interpretation of Article 9 of the CISG.<sup>49</sup>

The argument hinged upon the contention that when the language of 9(2), which stated that “parties are considered, unless otherwise agreed, to have made applicable to their contract” customary trade usage, was read in light of the language in 9(1) binding parties to “any usage to which they have agreed by any practices which they have established between themselves,” it was manifest that parties could only avoid customary usage of a term by express agreement between themselves.<sup>50</sup> This interpretation was bolstered by the supposition that the word “agreed” in both provisions meant express agreements, as opposed to tacit agreements achieved through the course of conduct.<sup>51</sup>

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<sup>44</sup> *Treibacher*, 464 F.3d at n.5.

<sup>45</sup> *See id.* at 1236-40.

<sup>46</sup> *Id.* at 1237.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Treibacher*, 464 F.3d at 1237-40.

<sup>50</sup> *Id.* at 1238.

<sup>51</sup> *Id.*

### C. *The Eleventh Circuit's Holding*

The court in *Treibacher* offered an in-depth analysis of relevant CISG provisions in rejecting TDY's argument. In holding that, under the CISG, the meaning the parties ascribe to a contractual term in the course of dealings establishes the term's meaning in the face of conflicting customary usage of the term, the Eleventh Circuit took care to note the importance of reading the Convention so as to give proper effect to all its provisions.<sup>52</sup> In this case, the interplay between articles 8 and 9 was central to the reasoning of the court and interpreting the provisions harmoniously proved to be a central theme of the decision.

The Eleventh Circuit's analysis strictly adhered to the plain meaning of the Convention's text. The discussion of the issue in the opinion essentially begins with a recitation of Articles 8 and 9.<sup>53</sup> The court then applies TDY's interpretation to the provisions of the Convention in order to expose its inconsistency with the text as a whole.<sup>54</sup> In rejecting that the word "agreed," as used in both Articles 8 and 9, might require express agreement between the parties as to the meaning of a term that is not its customary usage, the court stated that "TDY's construction of article 9 would, however, render article 8(3) superfluous and the latter portion of article 9(1) a nullity."<sup>55</sup> The court's conclusion simply acknowledged the fact that article 8(3)'s inclusion of "any practices which the parties have established between themselves" as a factor in interpreting parties' acts and article 9(1)'s directive that parties are "bound by any practices which they have established between themselves" could not survive TDY's interpretation of the CISG.

An important, yet somewhat understated factor in the court's decision was a particular interaction between the parties in February of 2000. After an email from a TDY employee expressed an intention to return unused tantalum carbide, an employee of *Treibacher* responded via telephone and alerted TDY's employee of TDY's contractual obligation to purchase all materials delivered.<sup>56</sup> TDY then kept, used, and paid for the remain-

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<sup>52</sup> *Id.* at 1238-39.

<sup>53</sup> *Id.*

<sup>54</sup> *Treibacher*, 464 F.3d at 1238-39.

<sup>55</sup> *Id.* at 1238.

<sup>56</sup> *Id.* at 1239.

ing tantalum carbide.<sup>57</sup> The court interpreted this action as TDY's "acquiescence" to Treibacher's interpretation of the contract.<sup>58</sup> The weight given to this interaction in the decision is unclear, but the court referred to it as "particularly telling."<sup>59</sup>

Ultimately, the *Treibacher* court held that under the CISG oral modification to a term's meaning could trump its common usage. This conclusion seems self-explanatory, as interpreting the word "agree" to require express agreements between the parties would essentially negate any need for a provision like Article 8(3). However, a deeper examination of some of the difficulties CISG interpreters face will help facilitate an understanding of the *Treibacher* decision's import. Additionally, discussion of past decisions concerned with interpretation of the Convention and the text of the Convention itself reveal that this decision's correct substantive result does not obviate its notable shortcomings.

#### IV. INTERPRETING THE CONVENTION

Domestic tribunals will inevitably be predisposed to deciding issues based upon the legal principles of their respective forum. The Convention's authors sought to curb this inclination by implementing Article 7.<sup>60</sup> Article 7(1) states that interpretation of the Convention should always regard its "international character" and the "need to promote uniformity in its application."<sup>61</sup> Article 7(2), a catchall provision, offers further guidance by stating that "questions . . . governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."<sup>62</sup> Thus, the Convention offers at least a starting point for interpreters confronted with issues not settled outright by the text's plain meaning.

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1239.

<sup>59</sup> *Treibacher*, 464 F.3d at 1239.

<sup>60</sup> See DiMatteo, CISG Jurisprudence, *supra* note 13.

<sup>61</sup> CISG, *supra* note 6, art. 7.

<sup>62</sup> *Id.*

Unfortunately, the language of Article 7 leaves tribunals of vastly different legal systems with little useful guidance in interpreting and applying an unusual body of international law. To combat the vagueness of the statute, it is essential that exposition of the CISG by national tribunals be informed by the “uniqueness” of the Convention and its aims.<sup>63</sup> Commentators frequently instruct courts encountering the Convention to be mindful of both the opportunity to develop a body of CISG case law and the potentially negative ramifications that their decisions may have in the international community.<sup>64</sup> To be successful in this regard courts are obliged to recognize the international community governed by the CISG to some extent.<sup>65</sup> Professor Harry M. Fletchner highlights the implications for CISG tribunals:

The mandate of article 7(1) requires those applying the Convention to transcend the modes of analysis they are accustomed to using for domestic legal questions. Indeed, they must develop a new international legal methodology incorporating the approaches and techniques found in other legal traditions. . . . All decision makers should, if possible, seek the perspective of authority from legal traditions other than their own.<sup>66</sup> Thus, the so-called mandate of Article 7 demands that interpretation of the Convention involve an analytical methodology congruous with the international nature of the Convention.

Nonetheless, establishing a viable methodology under Article 7 is deceptively complex. Initially, there is the idea of the Convention as autonomous, a supranational body of law freed from the shackles of domestic legal dogmas. This concept has led one commentator to suggest a consequent necessity for a “uniform autonomous terminology” that accounts for international authority, thereby assuring the Convention’s autonomy

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<sup>63</sup> Larry A. DiMatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 YALE J. INT’L L. 111, 133 (1997) [hereinafter *CISG Enforcement*].

<sup>64</sup> Calleo, *supra* note 26, at 826; see Andersen, *supra* note 11, at 176-79.

<sup>65</sup> See Marlyse McQuillen, Comment, *The Development of a Federal CISG Common Law in U.S. Courts: Patterns of Interpretation and Citation*, 61 U. MIAMI L. REV. 509 (2007); Flechtner, *supra* note 12, at 269-70.

<sup>66</sup> DiMatteo, *CISG Enforceability*, *supra* note 63, at 133 n.138.

and uniform application.<sup>67</sup> The same commentator further asserts that “nothing short of inspecting, and to some degree respecting, the interpretations of other jurisdictions will satisfy this requirement.”<sup>68</sup> However, while there is little doubt that CISG autonomy is an imperative, a broad fiat to implement autonomous terminology creates questions as to how to develop and harmonize such devices across a large number of dissimilar jurisdictions.

A decision-maker seeking such conformity with foreign tribunals' application of the CISG must harmonize its own legal tradition with the disparate legal traditions of these foreign jurisdictions. A common suggestion has been that common and civil law courts move towards a methodological nexus whereby civil law tribunals increasingly emphasize *case law* and common law tribunals look more frequently towards legal scholarship and legislative materials.<sup>69</sup> The importance of employing such methodology has been particularly stressed in cases of first impression.<sup>70</sup> However, this proposition does little to alleviate difficulties arising from the lack of hierarchical structure among international courts and the varying number of substantively correct results produced in different jurisdictions.<sup>71</sup> Regardless of this apparent limitation, an international body of CISG case law can exist as an “informal” but necessary tool in achieving uniformity.<sup>72</sup> What is more important is that foreign methodology and foreign authority are more actively utilized in meeting this objective. Whatever the chosen means, cohering different legal traditions and modes of analysis should be the prevailing concern in the development of case law and autonomous terminology.

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<sup>67</sup> Andersen, *supra* note 11, at 165.

<sup>68</sup> *Id.*

<sup>69</sup> See, e.g., DiMatteo, *CISG Enforceability*, *supra* note 63, at 133; Kazuaki Sono, *The Vienna Sales Convention: History and Perspective in International Sale of Goods: Dubrovnik Lectures* 1, 8 (Petar Sarcevic & Paul Volken eds., 1986) available at <http://cisgw3.law.pace.edu/cisg/biblio/sono.html>; DiMatteo, *International Contract Law Formula*, *supra* note 1, at 79.

<sup>70</sup> See V. Susanne Cook, *The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity*, 16 J.L. & COM. 257 (1997).

<sup>71</sup> Franco Ferrari, *The CISG's Uniform Interpretation by Courts - An Update*, 9 VINDOBONA J. INT'L COM. L. & ARB. 233, 250 (2005).

<sup>72</sup> DiMatteo, *CISG Enforceability*, *supra* note 63, at 133.

Unfortunately, the value of using foreign authority is often tempered by its practicality. For starters, there is the broad question of how domestic courts assimilate foreign case law into an analysis at all. Given the abovementioned difficulties in creating and utilizing a binding international case law, foreign decisions are generally suggested to have only persuasive value to courts.<sup>73</sup> In theory, this view of foreign authority will have the effect of promoting autonomy and predictability while deterring "idiosyncratic interpretation."<sup>74</sup> A divergent authority suggests that foreign cases should not be precedent if international case law already exists.<sup>75</sup> This issue notwithstanding, a more practical impediment for judges, arbitrators and lawyers is how to access such authority.<sup>76</sup> While online databases operated by UNCITRAL and various universities throughout the world have done much to ameliorate accessibility issues,<sup>77</sup> access may still vary among jurisdictions depending on available resources. Regardless, access to foreign authority is not a panacea for the vast, critical differences in interpreters' ability to acquire, process, and apply such authority in a manner that furthers the Article 7 mandate.

Further complicating the role of foreign CISG authority is the Convention's treatment of domestic law. The Convention does not cover issues expressly excluded from the CISG, so domestic law is appropriately employed to settle issues of validity, property law or product liability, none of which are treated by the CISG.<sup>78</sup> While domestic law may be referenced under the Convention, certain guidelines arguably exist before such exception should be taken.<sup>79</sup> One author makes the point that

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<sup>73</sup> *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 320 F. Supp. 2d 702, n.11 (N.D. Ill. 2004); Sunil R. Harjani, *The Convention on Contracts for the International Sale of Goods in United States Courts*, 23 Hous. J. Int'l L. 49, 66 (2000); Ferrari, *supra* note 71, at 250.

<sup>74</sup> Andersen, *supra* note 11, at 169.

<sup>75</sup> Michael J. Bonell, *Article 7*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION, 65, 74 (C. Massimo Bianca & Michael J. Bonell eds., 1987).

<sup>76</sup> Ferrari, *supra* note 71, at 242.

<sup>77</sup> *Id.* at 243.

<sup>78</sup> *Id.* at 239.

<sup>79</sup> DiMatteo, *CISG Jurisprudence*, *supra* note 13, at 313 n.50 ("Before the reference to the proper domestic law . . . one may follow two methods . . . first is the analogical application of specific provisions . . . second is the reference to general principles which are explicitly stated . . . or are derived from the set of the Conven-

such recourse should be a "last resort" and much consideration should be given to the Convention's carefully constructed ambiguities before applying domestic law.<sup>80</sup> However, such ambiguities allow a strong argument for uniformity in CISG application occasionally taking a back seat to domestic tribunals' need to interpret expressions in accordance with domestic legal principles.<sup>81</sup> Therefore, the Convention, though an autonomous, substantive body of law, complicates uniform application across signatory states by not fully foreclosing or explaining the role of domestic law.

Consequently, American courts commonly face the challenge of distinguishing matters appropriately settled by domestic law and those properly decided based solely on the Convention's text and "general principles." It is often argued that interpretation of not only ambiguities but also gaps in the Convention's text should be conducted without consulting domestic law whenever possible.<sup>82</sup> Divergent arguments find resort to domestic law proper in the case of gaps in the CISG, but entirely inappropriate otherwise.<sup>83</sup> There is also an important distinction between gaps resulting from matters outside the Convention's scope and those resulting from the Convention's failure to expressly resolve an issue, with the former arguably excluded from Article 7(2)'s directive that discrepancies be "settled in conformity with the general principles on which [the Convention] is based."<sup>84</sup> An explanation for both the confusion

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tion's provisions." (quoting Anna Kazimierska, *The Remedy of Avoidance Under the Vienna Convention on the International Sale of Goods*, in PACE REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 172 (1999-2000), available at <http://www.cisg.law.pace.edu/cisg/biblio/kazimierska.html>)).

<sup>80</sup> See DiMatteo, *CISG Jurisprudence*, *supra* note 13, at 314.

<sup>81</sup> Ferrari, *supra* note 71, at 240-41 (stating "This is true for instance in respect of the expression 'private international law' employed by the CISG. Since the CISG constitutes a substantive law convention that does not set forth private international law rules, the reference to 'private international law' has to be understood as a reference to the private international law of the forum.").

<sup>82</sup> Ferrari, *supra* note 71, at 237.

<sup>83</sup> Calleo, *supra* note 26, at 827.

<sup>84</sup> Franco Ferrari, *Uniform Interpretation of the 1980 Sales Law*, 24 GA. J. INT'L & COMP. L. 183, 217 (1994) [hereinafter 1980 Sales Law]. See also Anthony J. McMahon, Note, *Differentiating Between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of Goods: A Proposed Method for Determining "Governed By" in the Context of Article 7(2)*, 44 COLUM. J. TRANS-NAT'L L. 992 (2006).

and the numerous gaps in the Convention is that the CISG is a “product of studied ambiguity” and extensive compromise among the delegates from the various nations that participated in its drafting.<sup>85</sup> As a result, the provisions of the Convention require broad interpretation, or what has been termed “code based interpretative methodology.”<sup>86</sup> This analytical approach, typical to the code based civil law systems, contrasts with American courts’ reliance on the common law for filling statutory gaps.<sup>87</sup> Article 7, however, demands that the “general principles” underlying the CISG displace the common law in this regard, a concept that has proven difficult for American courts to grasp.<sup>88</sup>

It is difficult to pin down exactly how courts should go about adopting new interpretative methodology in applying the Convention. Interpreting the CISG, at the very least, requires an understanding of the whole body of law, meaning provisions and their underlying justifications cannot be isolated from the general principles flowing throughout the Convention.<sup>89</sup> Numerous factors suggest that this understanding should not be too difficult for the American jurist to attain.<sup>90</sup> These factors include the Convention’s efficient, concise language, its strong similarities to the UCC and the heavy use of cross-referencing between articles.<sup>91</sup> One commentator has noted that the European signatories, in addition to their geographic proximity and more established lines of communication, have the advantage of

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<sup>85</sup> DiMatteo, *CISG Jurisprudence*, *supra* note 13, at 315.

<sup>86</sup> See Karen B. Giannuzzi, *Contracts for the International Sale of Goods: Temporarily Out of “Service”?*, 28 LAW & POL’Y INT’L BUS. 991 (1997). See also Joanne M. Darkey, *A U.S. Court’s Interpretation of Damage Provisions Under the U.N. Convention for the International Sale of Goods: A Preliminary Step Towards an International Jurisprudence of CISG or a Missed Opportunity?*, 15 J.L. & COM. 139, 140 (1995); Ronald Brand & Harry Flechtner, *Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention*, 12 J.L. & COM. 239, 260 (1993).

<sup>87</sup> Cf. Jeffrey Hartwig, *Schmitz-Werke GMBH & CO. v. Rockland Industries Inc. and the United Nations Convention on Contracts for the International Sale of Goods (CISG): Diffidence and Developing International Legal Norms*, 22 J.L. & COM. 77, 84 (2003) (discussing the analytic tradition of U.S. courts and its effect on interpretation of the Convention).

<sup>88</sup> *Id.* at 84-85.

<sup>89</sup> DiMatteo, *CISG Jurisprudence*, *supra* note 13, at 319.

<sup>90</sup> Cf. DiMatteo, *International Contract Law Formula*, *supra* note 1, at 79.

<sup>91</sup> *Id.*



resolutions designed by the Sub-Committee on the Uniform Interpretation of European Treaties that offer specific guidelines for the interpretation of supranational legislation.<sup>92</sup> American jurists may not have the benefit of such proximity and accord with many neighboring signatory states' legal systems, but the Convention's fluency and occasional similarity to the UCC should provide a degree of comfort nonetheless.

Though the UCC has been credited with the genesis of numerous CISG provisions,<sup>93</sup> American courts that indulge in analogizing the two will stray from Article 7's mandate. Recourse to the UCC in divining the Convention's treatment of similar issues could pose complicated problems even in a relatively simple case like *Treibacher*. For instance, Article 9(2) includes in the parties' contract trade usages widely known in "international trade" and which the parties knew or should have known.<sup>94</sup> Clearly, such trade usages may or may not include domestic or local usages depending on the facts of the dispute.<sup>95</sup> But beyond the threshold issue of whether a trade usage is widely known in international trade is the disparate importance a particular usage may have in different jurisdictions.<sup>96</sup> One authority points out that developing nations tend to view, and as a result resist, trade usages as derivatives of the industrial world and its interests.<sup>97</sup> Similarly, socialist regimes place limited import on trade usages due to their intrinsic incompatibility with a planned economy.<sup>98</sup> This conflict was at the core of the much-debated compromise made by the Convention's drafters.<sup>99</sup> The Convention's predecessor, the Uniform Law for the International Sale of Goods, prescribed a "normative" solution to this problem that made usages applicable whether or not parties knew of or consented to the terms.<sup>100</sup> Article 9 of the CISG is in large part a response to the protests by

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<sup>92</sup> *Id.* at 81.

<sup>93</sup> See Kearny, *supra* note 35.

<sup>94</sup> CISG, *supra* note 6, art. 9(2).

<sup>95</sup> See Franco Ferrari, *The Relationship Between the UCC and the CISG and the Construction of Uniform Law*, 29 LOY. L.A. L. REV. 1021, 1031 (1996) [hereinafter *Relationship*].

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Van Alstine, *supra* note 2, at 48.

<sup>100</sup> *Id.* at 47-48.

socialist countries and developing nations that viewed the inclusion of such terms as a perpetuation of the industrialized West's interests.<sup>101</sup> Article 9's treatment of trade usages has been described as a "specific expression" of the Convention's emphasis on party autonomy.<sup>102</sup> Party autonomy is derived from Article 6 of the CISG.<sup>103</sup> Unlike Article 6 of the CISG, "UCC Article 2 offers no authorized way generally to exclude trade usages and courses of dealings."<sup>104</sup> Additionally, courts have taken pains to read trade usage as consistent with express terms in UCC contracts.<sup>105</sup> Ultimately, viewing the treatment of trade usage by the CISG and the UCC as substantively similar is, as one scholar put it, "simply wrong."<sup>106</sup> Thus, the *Treibacher* decision, in which the issue centered on application of trade usage to the contract, would find resort to the UCC's analogous provisions a hindrance to properly interpreting the Convention.

Despite Article 7's mandate and the Convention's fundamentally different treatment of such issues, some courts have still turned to analogous provisions of the UCC for interpretative aid. In *Delchi Carrier Spa v. Rotorex Corp.*, the court held that analogous provisions of the UCC could be used to interpret the CISG.<sup>107</sup> The court qualified its holding by stating that UCC case law was not per se applicable.<sup>108</sup> The *Delchi* decision, which was affirmed in *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*,<sup>109</sup> found such recourse appropriate even in light of Article 7.<sup>110</sup> *Chicago Prime*, to be fair, offered an extensive review of relevant foreign case law in its exposition of the

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 49.

<sup>103</sup> CISG, *supra* note 6, art. 6.

<sup>104</sup> Avery Wiener Katz, *The Relative Costs of Incorporating Trade Usage into Domestic Versus International Sales Contracts: Comments on Clayton Gillette, Institutional Design and International Usages Under the CISG*, 5 CHI. J. INT'L L. 181, 187 (2004).

<sup>105</sup> *Id.* at 186

<sup>106</sup> See Ferrari, Relationship, *supra* note 96.

<sup>107</sup> *Delchi Carrier Spa v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2d Cir. 1995).

<sup>108</sup> *Id.* at 1028.

<sup>109</sup> *Chicago Prime Packers*, 320 F. Supp. 2d at 708-09.

<sup>110</sup> *Delchi*, 71 F.3d at 1027.

CISG.<sup>111</sup> Still, the holdings stand as a point of criticism for many observers.<sup>112</sup>

## V. THE *TREIBACHER* COURT'S INTERPRETATION

The *Treibacher* court's challenge was to define the interplay between articles 8 and 9 in deciding whether trade usage or the parties' oral modification controlled the meaning of the disputed contractual term. While the court's decision is ostensibly simple, the interaction between these two articles is not. Article 8(3) of the CISG allows "all relevant circumstances of the case" to be included in discerning parties intent as to the meaning of a term. Like UCC Article 2, trade usages, course of performance, course of dealing and express terms are all fair game in extracting the parties' actual understanding of a contractual term. While these factors are all within the ambit of Articles 8 and 9, the Convention's text does not seek to order these items in any way, thereby leaving domestic tribunals with the task.<sup>113</sup> This fact is especially notable in reference to an American court's decision because the UCC does provide a hierarchy among these terms; thus, American jurists may be tempted to cross-reference the UCC's treatment of these terms in its interpretation of the CISG, a methodology that has been suggested in at least one American decision<sup>114</sup> and strongly criticized by commentators.<sup>115</sup> The role that international application will have in determining a "uniform notion" of trade usage under the Convention has been repeatedly emphasized.<sup>116</sup> Consequently, it is imperative that American jurists approach these

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<sup>111</sup> *Chicago Prime Packers*, 320 F. Supp. 2d at 712-14.

<sup>112</sup> Francesco G. Mazzotta, *Why Do Some American Courts Fail to Get It Right?*, 3 LOY. U. CHI. INT'L L. REV. 85, 100 (2005).

<sup>113</sup> Timothy N. Tuggey, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?*, 21 TEX. INT'L L.J. 540, 546 (1986).

<sup>114</sup> See *Delchi*, 71 F.3d at 1028. See also *Chicago Prime Packers*, 320 F. Supp. 2d at 709 (quoting *Delchi*).

<sup>115</sup> See James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales*, 32 CORNELL INT'L L.J. 273, 289 (1999). See also Hartwig, *supra* note 88, at 89.

<sup>116</sup> See Ch. Pamboukis, *The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods*, 25 J.L. & COM. 107, 111 (2005).

provisions with an astute awareness for the Convention's autonomy and resist recourse to familiar domestic principles.

The *Treibacher* court avoided elaborate examination of the Convention's provisions in reaching the correct substantive result and adhering to Article 7(2)'s mandate that confusion be "settled in conformity with the general principles on which [the Convention] is based." While Article 8 does not establish a formal hierarchy among factors such as course of dealing, course of performance or trade usage, Article 9 seems to suggest some semblance of order.<sup>117</sup> However, Article 9 does not clarify the role of subsequent conduct mentioned in 8(3), leaving questions about the impact of "silent acquiescence" on an interpretation of the parties' past conduct.<sup>118</sup> In its decision, the *Treibacher* court found such "acquiescence" in addition to the parties' practice over a seven year period to be determinative in deciding the parties' actual understanding of the term "consignment."<sup>119</sup> In so doing the court resisted TDY's suggestion that trade usage controlled the meaning of a contractual term unless a contrary express agreement between the parties existed. Instead, the court accepted the following argument put forth by *Treibacher*:

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. . . 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).<sup>120</sup>

This argument is significantly strengthened by its reading of the provision in the context of the Convention's greater whole. It correctly identifies the practical effects that the provi-

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<sup>117</sup> Jack M. Graves, *Course of Performance as Evidence of Intent or Waiver: A Meaningful Preference for the Latter and Implications for Newly Broadened Use Under Revised U.C.C. Section 1-303*, 52 *DRAKE L. REV.* 235, 243 (2004).

<sup>118</sup> *Id.*

<sup>119</sup> *Treibacher*, 464 F.3d at 1238.

<sup>120</sup> Brief of Plaintiff-Appellee at 40, *Treibacher Industrie, A.G. v. Allegheny Technologies, Inc.*, No. 05-13005 (11th Cir. Aug. 8, 2005) (quoting JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION*, 124-31 (3d ed. (1999))

sion has on interpretation of a contractual term while cross-referencing numerous other provisions of the CISG that function under a similar guiding principle. Unlike TDY's reading of the Convention, which completely removes the provision from its context, Treibacher's interpretation adheres to Article 7(2)'s directive.

It is important to note some of the *Treibacher* decisions shortcomings. The court did little to extend the reach of this decision beyond the facts of this case. Unfortunately, no foreign authority was mentioned in the decisions, nor was there reference to anything beyond the text of the Convention and the record. Whether the issue in the case required such analysis is debatable. Irrespective of the necessity of citing authority, the decision will probably do little in the way of developing an international precedent as its analysis avoided the myriad of issues that may arise in interpreting the relevant provisions.

Reading the CISG so as not to negate any of its provisions is a necessary step to its construction, but it may not have been sufficient step in terms of achieving a complete analysis of its application to the dispute. Article 8 of the CISG focuses on interpreting statements and conduct of parties as opposed to interpreting the Convention's text.<sup>121</sup> The framework for such interpretation is set forth in Article 8(1) through 8(3). However, the *Treibacher* decision, though it restated Article 8 in its entirety, reveals no insight into how Article 8 operates. Article 8(1) provides that statements of parties' are first to be evaluated subjectively when the other party knew or should have known what the intent;<sup>122</sup> Article 8(2) further states that if such knowledge of intent does not exist, the evaluation becomes objective, based on a reasonable person standard.<sup>123</sup> Both standards are subject to Article 8(3)'s inclusion of "all relevant circumstances," which has been widely read to include course of performance and course of dealing.<sup>124</sup> These interpretative

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<sup>121</sup> JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG IN THE USA 40 (2d ed. 2004).

<sup>122</sup> CISG, *supra* note 6, art. 8(1). See LOOKOFSKY *supra*, note 122, at 40.

<sup>123</sup> CISG, *supra* note 6, art. 8(2). See LOOKOFSKY *supra*, note 122, at 40.

<sup>124</sup> CISG, *supra* note 6, art. 8(3); John E. Murray, Jr., *An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 11, 48 (1988).

steps are not unfamiliar to American practitioners,<sup>125</sup> but they may create confusion in the context of the CISG.<sup>126</sup> The court's reluctance to conduct an analysis of the parties' conduct through the framework of Article 8 was a missed opportunity to develop an analytical *modus operandi* for such disputes under the Convention.

After restating Article 8(3), the court in *Treibacher* made the blanket statement that "parties' usage of a term in their course of dealing controls that term's meaning in the face of a conflicting customary usage of the term."<sup>127</sup> This statement and the evidence of the parties' course of dealing and course of performance were determinative.<sup>128</sup> While this holding does align with conventional wisdom of Articles 8 and 9,<sup>129</sup> it likely merited more discussion in the opinion. Article 8(3)'s authorization of considering such factors is ostensibly aimed at discerning the intent of parties, but, as previously discussed, the statute does not label any of these factors any more important than the next. Contrastingly, the Uniform Commercial Code explicitly permits course of performance and acquiescence to be used in determining the meaning of the agreement.<sup>130</sup> The *Treibacher* court relied entirely on evidence of course of dealing, yet the court supplied no authority and only a limited treatment of the Convention's text in doing so. Numerous cases have extrapolated the meaning of Article 9(1) in defining what kind of practices between parties would satisfy its requirements.<sup>131</sup> In spite of the Convention's lack of specific criteria in Article 9(1), there is authority for the proposition that certain degrees of fre-

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<sup>125</sup> LOOKOFSKY, *supra* note 122, at 40.

<sup>126</sup> See Murray, *supra* note 125 at 48.

<sup>127</sup> *Treibacher*, 464 F.3d at 1238-39.

<sup>128</sup> *Id.*

<sup>129</sup> LOOKOFSKY, *supra* note 122, at 41-42.

<sup>130</sup> U.C.C. § 2-208 (2003); see Peter H. Pfund, *The 1980 U.N. Convention on Contracts for the International Sale of Goods (CISG): Background and Status*, 570 PLI/Corp 39, 55 (1987).

<sup>131</sup> See Zivlgericht [ZG Basel] [Civil Court] Dec. 21, 1992, p4 1991/238 (Switz), available at, available at <http://cisgw3.law.pace.edu/cases/921221s1.html>; Fovárosi Biróság Metropolitan Court of Budapest [BM] Mar. 24, 1992, A212G.41.471/1991 (Hung.), available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=19&step=Abstract>; Turku Court of Appeal, Apr. 12, 2002 (Fin.), available at <http://cisgw3.law.pace.edu/cases/020412f5.html>; OLG Bielefeld [LG] [District Court] Nov. 24 1998, 11061/98 (F.R.G.), available at <http://cisgw3.law.pace.edu/cases/981124g1.html>.

quency and duration must be attained to satisfy the terms of the provision.<sup>132</sup> The court's inability to develop the roles played by these factors limits the reach of this decision and minimizes its utility in the international case law evolving around the CISG.

Another issue that the court circumvented was the application of a trade usage in general under the CISG. While both parties presented ample evidence supporting differing interpretations of "consignment," there was no finding by the court as to customary usage of the term at issue because course of dealing controlled the disputed term's meaning.<sup>133</sup> Article 9(2)'s inclusion of trade usages is subject to limitations of the parties' knowledge and the need for the usage to be widely known and observed in international trade.<sup>134</sup> These limitations are important vestiges of the compromises made by the drafters aimed at protecting parties in undeveloped or socialist countries.<sup>135</sup> Questions abound as to what is needed to satisfy Article 9(2).<sup>136</sup> One authority, in part quoting a statement by John Honnold, has come to the conclusion that:

The formulation of Article 9(2) ("international trade") must "not be understood to prevent in all cases usages of a purely local or national origin from being applied without any reference thereto by the parties." According to Honnold, "a usage that is of local origin (the local practices for packing copra or jute, or the delivery dates imposed by arctic climate) may be applicable if it is 'widely known to and regularly observed by' the parties."<sup>137</sup> Perhaps a cursory examination of this or similar issues concerning trade usage in Article 9 would have fleshed out the *Treibacher* decision.

An ancillary but important aspect of the *Treibacher* court's dilemma is the operation of Article 29 in respect to such a dispute. Article 29(2) states that written agreements requiring written amendments cannot be altered by oral agreement be-

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<sup>132</sup> Ch. Pamboukis, *supra* note 117, at 116.

<sup>133</sup> *Treibacher*, 464 F.3d at n.4.

<sup>134</sup> CISG, *supra* note 6, art. 9(2). See LOOKOFISKY, *supra* note 122, at 41.

<sup>135</sup> LOOKOFISKY, *supra* note 122, at 42.

<sup>136</sup> Pamboukis, *supra* note 117, at 116.

<sup>137</sup> *Id.* at 120 (quoting JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 124 (3d ed. (1999))).

tween the parties.<sup>138</sup> This provision's operation in a situation like the one presented in *Treibacher* confounds what is otherwise a self-explanatory holding. Because the Convention has rejected the parol evidence rule,<sup>139</sup> a merger clause seeking to exclude the evidence used by the *Treibacher* court will have to be carefully worded. Unlike the UCC, which imposes a high standard for implementing such a merger clause,<sup>140</sup> the CISG does not proffer guidance. One authority recommends explicitly referencing UCC 2-202 to affect his purpose.<sup>141</sup> Assuming an effective merger clause is implemented, the question becomes whether the parties in *Treibacher* would have been confined to a trade usage accepted by the court or whether Article 9 would still support *Treibacher's* argument. While the court need not explicitly decide an issue of this nature, the benefits of an extended analysis may have provided valuable insight for future tribunals.

## VI. CONCLUSION

The decision in *Treibacher* is an encouraging foray into the CISG landscape by an American court. But while the decision reached was substantively correct, the path the court chose to tread in reaching it leaves much to be desired. For the Convention to truly fulfill its promise of removing legal barriers and promoting the interests of international trade, tribunals must strive to achieve more than correct results. The Convention requires courts across every signatory state to consolidate and develop methodologies and mechanisms that can be applied uniformly wherever a dispute may arise. Application of the CISG, in a sense, requires an international syndicate of national courts, a challenge that will require a conscientious attempt to cohere the foreign and the domestic. Answering this challenge is the CISG's mandate to every domestic tribunal. Whether national courts respond accordingly is still an open question.

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<sup>138</sup> CISG, *supra* note 6, art. 29(2).

<sup>139</sup> See CISG AC-Opinion No. 3, Parol Evidence Rule, Plain Meaning Rule, Contracted Merger Clause, and the CISG, Oct. 23, 2004, Richard Hyland, Rutgers School of Law.

<sup>140</sup> U.C.C. § 2-202 (2003), Cmt. 2. See also *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 8-9 (4th Cir. 1971).

<sup>141</sup> Murray, *supra* note 125, at 45-46.