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The Hierarchy That Wasn't There: Elevating "Usage" to its Rightful Position For Contracts Governed by the CISG

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The Hierarchy That Wasn't There: Elevating "Usage" to its Rightful Position For Contracts Governed by the CISG

*William P. Johnson**

Abstract: Under domestic U.S. sales law, usage of trade is relevant in ascertaining the meaning of an agreement, and it can be used to supplement, qualify, or explain an agreement. However, usage of trade may not be used under domestic U.S. sales law to contradict a written agreement. Moreover, any course of performance or course of dealing between the parties will prevail over inconsistent usage of trade. The United Nations Convention on Contracts for the International Sale of Goods, or CISG, similarly provides for consideration of usage to establish the terms of the agreement between the parties, as well as to determine party intent. When applying the CISG, U.S. courts have assumed that the same hierarchy they are accustomed to under domestic U.S. sales law that automatically relegates usage to a subsidiary role must exist under the CISG as well. But the CISG does not establish a hierarchy that requires usage to defer automatically to party conduct or to established party practice. Usage can be important for determining the terms of the agreement between the parties, especially when a commercial arrangement is consummated without a robust written agreement. Therefore, proper analysis of the role of usage is essential. This Article analyzes this issue and proposes a better understanding of the role of usage in the sale of goods contracts governed by the CISG.

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INTRODUCTION

Imagine an ornate boardroom at the top of an office tower overlooking a fast-paced, exciting, non-U.S. city, where a complex international business deal is negotiated and eventually finalized by sophisticated businesspersons and their counselors. The members of the negotiation teams speak different languages and engage in different business practices. They likely have different negotiation styles and values. But each is focused on getting the deal done.

Now imagine the tools used in connection with this negotiation involving parties from different parts of the world: smartphones, notebooks, leather briefcases, expensive business attire.

And what of their eventual contract? Perhaps an impressive image comes to mind of a lengthy, complicated, carefully drafted agreement, written in two languages, with multiple original copies, all signed by the parties and their respective witnesses. The agreement certainly has numerous exhibits attached to it. These exhibits were expressly incorporated into the agreement by reference, and they identify in detail the specific responsibilities of the parties, the scope of their arrangement, an agreed-upon means of measuring satisfactory performance, forms of ancillary agreements, and the allocation of a variety of anticipated risks.

These archetypal images, portrayed in film and literature, reflect one face of the international business transaction experience, and the impressive

written agreement is one iteration of the many kinds of contracts that are made by parties to business transactions. At times, contracting parties take the time to put in place a comprehensive written agreement that sets forth the mutually agreed-upon terms of their business deal. More often than one might imagine, however, commercial arrangements simply do not result in an executed written agreement that reflects the agreed-upon terms and allocation of risk and responsibility between the parties.¹ The fast pace of the world of commerce, the potential strain on the business relationship caused by an intense negotiation, the high cost of a business lawyer's time, the opportunity cost of the businessperson's time, and the belief that nothing bad will happen can all contribute to a simple failure to establish in writing the agreed-upon terms of the deal.

Even though the parties have not adopted a formal writing entitled "CONTRACT" or "AGREEMENT," once the parties reach a mutual understanding regarding their business arrangement and commence performance, they surely have a contract nevertheless, even though there is no written agreement that embodies the agreed-upon terms of that contract. This is true under different legal traditions.² To the extent that the parties have not expressly reached agreement, the law will fill the gaps with default contract terms, and those default terms are just as binding as if they were expressly written into the agreement by the parties themselves.

Expecting good things to happen, the parties may be oblivious to the nature of the terms that the law will recognize as binding terms of their unwritten contract. If the arrangement proceeds as planned, no unexpected contingencies materialize, and no losses occur, then the parties are likely to be happy and the terms of the contract between the parties are unlikely to matter.

But sometimes things go wrong. Sometimes serious contingencies materialize that cause at least one of the parties to be unable to perform, to regret the bargain struck, or to suffer significant unanticipated losses. Similarly, sometimes there are serious misunderstandings between the parties regarding their actual intent for the contractual allocation of risk and responsibility, whether due to cultural differences, language barriers, haste in the consummation of the transaction, or other causes. Those contingencies and misunderstandings can cause the relationship to deteriorate in such a way that the parties no longer have any expectation that good things will happen. When those kinds of situations arise, disputes often follow, and the terms of the contract can matter a great deal.

In such a case, the express terms of the contract may be reflected in a

¹ For some discussion of the actual practices of parties to commercial contracts with respect to entering into written agreements, see generally DANIEL KEATING, *SALES: A SYSTEMS APPROACH* 95–97 (5th ed. 2011).

² See, e.g., *THE PRINCIPLES OF EUROPEAN CONTRACT LAW* arts. 2.101 & 2.102 (2002); U.C.C. §§ 2-204(1), 2-207(3) (2011); *RESTATEMENT (SECOND) OF CONTRACTS* § 19 (1981).

variety of documents or sources, including communications between the parties (written, electronic, or even oral), order documents, shipping documents, standard terms and conditions, and the like. But the parties' bargain may also be reflected in other, less obvious sources, such as their conduct under the contract at issue,³ their conduct in the past,⁴ and the practices of other actors in the applicable industry or trade.⁵ Any or all of these sources could potentially be used to determine the terms of the contract between the parties as well, within the United States and in other jurisdictions.

But what if these disparate sources conflict? What if the parties' conduct in the past is at odds with the parties' conduct under this contract? What if the parties are behaving under this contract in a way that is inconsistent with the way similarly situated parties operating in the same industry behave under like contracts?

Under U.S. domestic law applicable to commercial transactions, finding the answers to these questions is generally quite simple. The Uniform Commercial Code (UCC) establishes a clear hierarchy when considering various sources to determine the terms of a contract governed by the UCC.⁶ Under the UCC, the parties' behavior under the contract at issue will prevail over the parties' behavior in the past.⁷ The parties' own

³ See, e.g., THE PRINCIPLES OF EUROPEAN CONTRACT LAW art. 1.105 (2002); U.C.C. § 1-303(a), (d) (2011).

⁴ See, e.g., U.C.C. § 1-303(b), (d) (2011); RESTATEMENT (SECOND) OF CONTRACTS § 223 (1981).

⁵ See, e.g., THE PRINCIPLES OF EUROPEAN CONTRACT LAW art. 1.105 (2002); U.C.C. § 1-303(c)–(d) (2011); RESTATEMENT (SECOND) OF CONTRACTS § 221 (1981).

⁶ See U.C.C. § 1-303(e) (2011). The UCC has been widely adopted into the law of the states of the United States. Article 2 of the UCC generally applies to all transactions in goods. See *id.* § 2-102 (2011). Article 2 of the UCC defines “goods:”

“Goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. “Goods” also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

Id. § 2-105(1). Thus, the scope of Article 2 of the UCC is quite broad. Moreover, Article 2 of the UCC has been adopted by every state throughout the United States, other than the State of Louisiana, making Article 2 the primary domestic sales law in the United States. See Uniform Commercial Code Locator, CORNELL UNIVERSITY LAW SCHOOL—LEGAL INFORMATION INSTITUTE, <http://www.law.cornell.edu/uniform/ucc.html#a2> (last visited Dec. 12, 2011). See also UNIFORM LAW COMMISSION, UCC ARTICLE 2, SALES AND ARTICLE 2A, LEASES (2003), SUMMARY, <http://www.uniformlaws.org/ActSummary.aspx?title=UCC%20Article%202,Sales%20and%20Article%202A,%20Leases%20%282003%29> (last visited Dec. 12, 2011).

⁷ Specifically, course of performance prevails over course of dealing. U.C.C. § 1-303(e) (2011).

behavior in the past will prevail over the conduct of other parties in the industry.⁸ Express terms will prevail over all of the foregoing.⁹

But what if the goods cross an international border? What if the transaction involves vegetables entering Texas from Mexico? Or automotive parts made in China that enter the United States by means of a Great Lakes port? Or costly machinery that is sold into Canada by a North Dakota manufacturer? Should the analysis by a U.S. court be any different?

Some U.S. courts have apparently assumed that the rules of the game are the same.¹⁰ That assumption is false. The analysis is different because the UCC will not govern the international sale of goods in the typical case.¹¹ Instead, for many international sales of commercial goods, the United Nations Convention on Contracts for the International Sale of Goods (CISG) will govern the transaction.¹² The hierarchy that is present in the UCC is absent in the CISG; and analysis under the CISG, reflecting not only the common law but also the intentional influence of different legal, economic, and social systems,¹³ is different from analysis under the UCC,

⁸ Specifically, course of dealing prevails over usage of trade. *Id.*

⁹ *Id.*; see also *id.* § 2-202.

¹⁰ See, e.g., *Treibacher Industrie, A.G. v. Allegheny Techs., Inc.*, 464 F.3d 1235, 1238–39 (11th Cir. 2006); *Hanwha Corp. v. Cedar Petrochemicals., Inc.*, 760 F. Supp. 2d 426, 433 (S.D.N.Y. 2011). In each case, the court assumed an automatic hierarchy that would cause party conduct to prevail over usage as an extrinsic source of contract terms, as discussed in Parts I.A and V.A, *infra*.

¹¹ While Article 2 of the UCC generally governs transactions in goods, see U.C.C. § 2-102 (2011), the United Nations Convention on Contracts for the International Sale of Goods, or CISG, *infra* note 12, will preempt the UCC when the CISG is applicable because the CISG, as a treaty made under the authority of the United States, is part of the supreme law of the land. For additional analysis by the author of preemption of the UCC by the CISG, see William P. Johnson, *Understanding Exclusion of the CISG: A New Paradigm of Determining Party Intent*, 59 BUFF. L. REV. 213, 223–26 (2011).

¹² United Nations Convention on Contracts for the International Sale of Goods, *opened for signature* Apr. 11, 1980, S. TREATY DOC. No. 98-9 (1983), 1489 U.N.T.S. 3 (entered into force Jan. 1, 1988) [hereinafter CISG]. Subject to certain exclusions, the CISG governs contracts for the sale of goods between parties whose places of business are in different countries when the countries are “Contracting States” (or parties to the CISG). *Id.* art. 1(1)(a). In the typical cross-border sale of goods transaction, when the parties know the goods are crossing an international border, the CISG will usually govern the transaction, if the parties’ places of business that are most directly involved with the transaction are in countries that have ratified the CISG. See *id.* arts. 1(2), 10(a). Because there are currently 78 parties to the CISG, including most of the major trading partners of the United States, the CISG is potentially relevant for a very large volume of international trade. See Dep’t of State Pub. Notice 1004, 52 Fed. Reg. 6262 (Mar. 2, 1987); see also U. N. Treaty Collection, Multilateral Treaties Deposited with the Secretary General, ch. X 10: International Trade and Development, United Nations Convention on Contracts for the International Sale of Goods, Status (last updated Apr. 18, 2009), available at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20X/X-10.en.pdf> [hereinafter CISG Status].

¹³ See CISG, *supra* note 12, pmb1.; see also CISG, *supra* note 12, at explanatory note by the UNCITRAL Secretariat on the UN Convention on Contracts for the Int’l Sale of Goods, ¶ 3 [hereinafter CISG Explanatory Note]. The CISG Explanatory Note was prepared by the

leading to different questions, different answers, and different outcomes. Yet, the simplicity and familiarity of the UCC and its hierarchical approach to extrinsic sources of contract terms is a tempting siren's call that U.S. courts have been unable to resist.

In addition to finding a non-existent hierarchy in the CISG, U.S. courts have improperly imported UCC concepts of "course of dealing" and "course of performance" into their analysis of contracts governed by the CISG, even though course of performance and course of dealing are terms that do not appear in the CISG. Focusing on UCC concepts of course of performance and course of dealing has caused U.S. courts to fail to take note of and to apply carefully the CISG provisions that pertain to the CISG concept, "practices which [the parties] have established between themselves"¹⁴

As a consequence of UCC bias, U.S. courts have utterly failed to recognize the different approach required by the CISG, leaving businesspersons engaging in international sales transactions with unnecessary and undesirable uncertainty regarding the terms of their sales contracts. That uncertainty increases transaction costs and undermines efficiency. U.S. courts' incorrect analysis and misapplication of the CISG also hinder realization of the goals of the CISG to promote uniformity in its application and to contribute to the development of international trade.¹⁵

A different approach is needed. U.S. courts must engage in more careful analysis and application of the CISG and discontinue improperly relegating "usage" to a subsidiary position of deference not contemplated or supported by the CISG. Similarly, U.S. courts must not prematurely import UCC concepts into their analysis of the CISG or fail to take note of CISG concepts with which the U.S. court might not be familiar.

This Article identifies some of the multi-faceted problems that have arisen as a result of inaccurate perception by U.S. courts of the role usage is to play in a court's analysis of contracts governed by the CISG. The relationship between usage and practices the parties have established between themselves has been one significant problem in this area. This Article seeks to bring understanding to that relationship. This Article also identifies the role that usage is actually to play under the CISG—a role that is different from and more prominent than the role prescribed by the UCC. Finally, this Article identifies an analytical framework that courts can use to apply properly Article 9 of the CISG.

UNCITRAL Secretariat for informational purposes and is not an official commentary to the CISG. *See id.*

¹⁴ *Id.* art. 9(1); *see also id.* arts. 8(3) & 18(3).

¹⁵ *See id.* pmb. & art. 7(1).

I. IDENTIFYING THE PROBLEM: MISAPPLICATION OF ARTICLE 9 OF THE CISG

When the CISG is applicable to a contract for the sale of goods, usage can become a binding term of the contract pursuant to Article 9 of the CISG,¹⁶ which U.S. courts have recognized. In fact, notwithstanding the occasional lingering claim by U.S. courts that there is a dearth of U.S. case law analyzing or applying the CISG, which is no longer true,¹⁷ several U.S. courts have applied Article 9 of the CISG.¹⁸ Some have even considered the role of usage in analysis of issues under the CISG.¹⁹ Unfortunately, much of that analysis has been faulty.

The CISG bears some similarities to Article 2 of the UCC,²⁰ and for

¹⁶ See *id.* art. 9. Article 9 provides as follows:

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

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

Id.

¹⁷ As recently as early 2011, a federal district court in New York asserted that “caselaw interpreting the CISG is relatively sparse” *Hanwha Corp. v. Cedar Petrochemicals, Inc.*, 760 F. Supp. 2d 426, 430 (S.D.N.Y. 2011). That simply is no longer true, even with respect to U.S. case law; and it has not been true with respect to case law of non-U.S. courts for years. See Lisa Spagnolo, *A Glimpse Through the Kaleidoscope: Choices of Law and the CISG (Kaleidoscope Part I)*, 13 VINDOBONA J. INT’L COM. L. & ARB. 135, 153 & n.81 (2009) (stating that scarcity of CISG case law is a misconception and pointing out that there were at that time already more than 2,000 CISG cases on the Pace University CISG website).

¹⁸ See, e.g., *Treibacher Industrie, A.G. v. Allegheny Techs., Inc.*, 464 F.3d 1235, 1238–39 (11th Cir. 2006); *BP Oil Int’l, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333, 337–38 (5th Cir. 2003), *as amended on denial of reh’g*; *Riccitelli v. Elemer New England Marble & Granite, LLC*, No. 3:08CV01783 (DJS), 2010 WL 3767111, at *5–6 (D. Conn. Sept. 14, 2010); *ECEM European Chem. Mktg. B.V. v. Purolite Co.*, Civil Action No. 05-3078, 2010 WL 419444, at *13 (E.D. Pa. Jan. 29, 2010); *Berry v. Ken M. Spooner Farms, Inc.*, No. C05-5538FDB, 2006 WL 1009299 (W.D. Wash. Apr. 13, 2006), *rev’d* 254 Fed. Appx. 646 (9th Cir. 2007); *China N. Chem. Indus. Corp. v. Beston Chem. Corp.*, No. Civ.A. H-04-0912, 2006 WL 295395, at *6 (S.D. Tex. Feb. 7, 2006); *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GmbH*, No. 00 CIV. 9344(SHS), 2002 WL 465312, at *4 (S.D.N.Y. Mar. 26, 2002); *Shuttle Packaging Sys., L.L.C. v. Tsonakis*, No. 1:01-CV-691, 2001 WL 34046276, at *1–2 (W.D. Mich. Dec. 17, 2001); *Claudia v. Olivieri Footwear Ltd.*, No. 96 Civ. 8052(HB)(THK), 1998 WL 164824, at *6 (S.D.N.Y. Apr. 7, 1998).

¹⁹ See, e.g., *Treibacher Industrie, A.G.*, 464 F.3d at 1237–39; *BP Oil Int’l, Ltd.*, 332 F.3d at 337–38; *China N. Chem. Indus. Corp.*, 2006 WL 295395 at *6; *St. Paul Guardian Ins. Co.*, 2002 WL 465312 at *3–4.

²⁰ The supposed similarities between the UCC and the CISG have been noted by numerous U.S. courts and some commentators. See, e.g., *Schmitz-Werke GmbH & Co. v. Rockland Indus., Inc.*, 37 F. Appx. 687, 691 (4th Cir. 2002); *Delchi Carrier SpA v. Rotorex*

that reason, there is a temptation for U.S. courts simply to engage in UCC-like analysis of CISG provisions that are seemingly analogous to provisions of Article 2 of the UCC. In fact, U.S. courts have routinely asserted that UCC analysis of analogous CISG provisions is appropriate.²¹ Unfortunately, this has even been supported by some commentators.²² But engaging in such analysis is not appropriate; it can readily lead to misapplication of CISG provisions and to wrongly decided outcomes.²³ It also undermines the stated purpose of the CISG to promote uniform rules governing contracts for the international sale of goods. As Professor Franco Ferrari has cogently argued, it is both “impermissible and dangerous to assert that the concepts of the CISG and the UCC are analogous.”²⁴ U.S. courts’ misapplication of Article 9 provides one example of the consequences of failing to recognize that the CISG is not the same as the UCC.

A. *Treibacher Industrie, A.G. v. Allegheny Technologies, Inc.* and the Eleventh Circuit’s Improper Imposition of Automatic Hierarchy

One problem that has flowed from the bias for UCC-style analysis of CISG provisions perceived to be analogous to the UCC is the subsidiary role to which usage has improperly been relegated as one source for determining the terms of the parties’ agreement. One notable example of this is *Treibacher Industrie, A.G. v. Allegheny Technologies, Inc.* and the Eleventh Circuit’s unsupported claim that “under the CISG, the meaning the parties ascribe to a contractual term in their course of dealings establishes the meaning of that term in the face of a conflicting customary usage of the term.”²⁵ That statement reflects a confused view of the applicable provisions of the CISG that is inaccurate in at least two ways: its

Corp., 71 F.3d 1024, 1028 (2d Cir. 1995); *Hanwha Corp.*, 760 F. Supp. 2d at 430; *Raw Materials, Inc. v. Manfred Forberich GmbH & Co.*, No. 03 C 1154, 2004 WL 1535839, at *3–4 (N.D. Ill. July 7, 2004); JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG 45 n.250 (3d ed. 2008); see also Letter of Submittal from George P. Schultz, U.S. Sec’y of State, to Ronald Reagan, President of the United States of Am. (Aug. 30, 1983), in S. TREATY DOC. No. 98-9, at vi (1983) (“It will be noted that the Convention embodies the substance of many of the important provisions of the UCC and is generally consistent with its approach and outlook.”).

²¹ See, e.g., *Schmitz-Werke GmbH*, 37 F. App’x at 691; *Delchi Carrier SpA*, 71 F.3d at 1028; *Hanwha Corp.*, 760 F. Supp. 2d at 430; *Raw Materials*, 2004 WL 1535839, at *3–4.

²² See, e.g., LOOKOFSKY, *supra* note 20, at 45 n.250.

²³ See Ronald A. Brand & Harry M. Flechtner, *Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention*, 12 J.L. & COM. 239, 241 (1993) (“[A]lthough the Convention contains many terms and concepts that appear similar to ones in domestic U.S. law, the apparent similarity can be misleading. It is easy to distort the unfamiliar by forcing it into a pattern we already know.”).

²⁴ Franco Ferrari, *The Relationship Between the UCC and the CISG and the Construction of Uniform Law*, 29 LOY. L.A. L. REV. 1021, 1023 (1996).

²⁵ *Treibacher Industrie, A.G. v. Allegheny Techs., Inc.*, 464 F.3d 1235, 1240 (11th Cir. 2006).

use of the term “course of dealing” and its assumption that there is an automatic hierarchy.

The dispute in *Treibacher Industrie* arose out of two written agreements entered into by Treibacher Industrie, A.G. (Treibacher), an Austrian company and the seller in the transaction, and TDY Industries, Inc. (TDY), a U.S. company and the buyer, for the sale of specified quantities of tantalum carbide, a hard metal powder, which was to be delivered “to consignment.”²⁶ Treibacher began to supply the product, but after TDY received some of the product, TDY refused to accept additional deliveries and took the position that it was not obligated to do so.²⁷ After selling the remaining quantities of product to third parties at a loss, Treibacher filed suit against TDY, asserting six different claims, including breach of contract under the CISG and misrepresentation.²⁸ Following a motion for summary judgment that eliminated Treibacher’s other claims, Treibacher’s remaining claims for breach of contract and misrepresentation were tried to the bench sitting without a jury.²⁹

At its heart, the dispute concerned whether TDY was obligated by contract to take and pay for the entire quantity of product specified in the written agreements.³⁰ The genesis of the dispute was use by the parties in their written agreements of the term “consignment” and the disagreement between the parties regarding the meaning and effect of that term.³¹ TDY’s position was that there was no obligation to take and pay for specified quantities of product unless and until TDY took the product out of consignment and used it.³² TDY introduced evidence of usage in the applicable trade that supported that understanding of the term consignment.³³ Treibacher took the position that, notwithstanding use of the term consignment in their written agreements, the parties had an understanding that TDY was bound to take and pay for one hundred percent of the quantity of product specified in the written agreements.³⁴ Treibacher also offered evidence of the parties’ conduct to support its position.³⁵ Accepting Treibacher’s position on the matter, the trial court awarded Treibacher damages, and TDY appealed.³⁶

On appeal, the Eleventh Circuit affirmed the trial court’s judgment.³⁷

²⁶ *Id.* at 1236, 1236 n.1.

²⁷ *Id.* at 1236.

²⁸ *Id.* at 1236, 1236 n.3.

²⁹ *Id.*

³⁰ *Id.* at 1236–37.

³¹ *Treibacher Industrie, A.G.*, 464 F.3d at 1236–37.

³² *Id.* at 1237.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Treibacher Industrie, A.G.*, 464 F.3d at 1237.

In reaching its holding, the Eleventh Circuit stated in its opinion that the trial court had ruled that under the CISG “evidence of the parties’ interpretation of the term [consignment] in their course of dealings *trumped evidence of the term’s customary usage in the industry . . .*”³⁸ And the Eleventh Circuit continued by asserting that “the district court did not make a finding regarding the customary usage of the term because it found that the parties had established a meaning for the term in their course of dealings, *thus rendering customary usage irrelevant.*”³⁹

The Eleventh Circuit, in its de novo review of application of the CISG, should have looked carefully at the CISG and corrected what would have amounted to a misstatement of law. But a careful review of the trial court’s judgment reveals that the trial court did not conclude that an apparent course of dealing automatically trumps a conflicting usage or that course of dealing would render usage irrelevant.⁴⁰ Rather, the trial court focused on determining the parties’ actual intent regarding the meaning of the term consignment, which it did by carefully reviewing the evidence that was available to it.⁴¹ The trial court ultimately found that the parties shared an intent that TDY was obligated to purchase the quantities specified in the written agreements.⁴²

Indeed, although it referred repeatedly to course of dealing in its Memorandum of Decision,⁴³ the trial court otherwise essentially engaged in the kind of analysis that the CISG requires. The trial court looked carefully at the contract documents and order documents actually used by the parties, and it considered the parties’ communications,⁴⁴ their subsequent conduct,⁴⁵ and the credibility of witnesses and their testimony.⁴⁶

Based on its review of all of the circumstances of the case, described in some detail in seventeen pages of its Memorandum of Decision, the trial court found as a matter of fact that the parties intended to enter into a contract of sale of goods, “with transfer of title and payment deferred until withdrawal [of the goods from consignment], such withdrawal to occur within a (mutually agreed) reasonable time.”⁴⁷

³⁸ *Id.* (emphasis added). The Eleventh Circuit also stated, correctly, that the court below “found that Treibacher and TDY, in their course of dealings, understood the term to mean ‘that a sale had occurred, but that invoices would be delayed until the materials were withdrawn.’” *Id.*

³⁹ *Id.* at 1237 n.4 (emphasis added).

⁴⁰ See Memorandum of Decision, *Treibacher Industrie, A.G. v. TDY Indus., Inc.*, Case No.: CV-01-HS-2872-NE (N.D. Ala. Apr. 27, 2005).

⁴¹ See *id.* at 5–14.

⁴² See *id.* at 5–6, & 21.

⁴³ See *id.* at 1, 5, 9, & 18–20.

⁴⁴ See *id.* at 9–10, & 12–14.

⁴⁵ See *id.* at 5–6 & 10.

⁴⁶ See *id.* at 2 n.2.

⁴⁷ *Id.* at 21.

The trial court did not devote an inordinate amount of time to the consideration of arguably applicable trade usages. That does not mean that the trial court concluded that usage was automatically irrelevant. Indeed, notwithstanding the Eleventh Circuit’s statements, the trial court clearly did consider the evidence pertaining to usage, and it ultimately found the evidence to be inconsistent and unhelpful in respect of determining party intent. In fact, the trial court specifically acknowledged that there was evidence that, within the U.S. hard metals market, the trade usage of the term “consignment” meant that there was no obligation to pay for materials unless and until they were withdrawn from consignment. The court therefore considered evidence of usage without characterizing that evidence as irrelevant.⁴⁸ The trial court noted that it “heard *conflicting* testimony regarding the meaning of the term [consignment] in the industry.”⁴⁹

Ultimately, the trial court found, based on the evidence available to it, including the parties’ practices and their conduct, that the parties actually intended the term “consignment” to include an obligation, binding on TDY, to take and pay for all materials held by it on consignment.⁵⁰ That finding is a sensible finding that is supported by the record.

The trial court made its finding without making any express conclusion regarding any automatic hierarchical relationship between usage and course of dealing. Such a conclusion was unnecessary for the disposition of the case. Why the Eleventh Circuit decided that it was necessary to add its broad and inaccurate statement is unclear, and it is unfortunate that it occurred.

One possible explanation for the Eleventh Circuit’s mischaracterization of the record is its focus on an argument made by TDY in support of its position that its proposed definition of “consignment” derived from usage ought to control. Specifically, TDY argued that, “under the CISG, a contract term should be construed according to its customary usage in the industry unless the parties have expressly agreed to another usage.”⁵¹ The Eleventh Circuit appropriately rejected that desperate attempt to distort the language of the CISG, but it went too far, concluding that “the parties’ usage of a term in their course of dealings controls that term’s meaning in the face of a conflicting customary usage of the term.”⁵²

B. The Influence of the UCC

Had the court been applying the UCC, its statement would have been generally accurate, though perhaps oversimplified. Under the UCC, course

⁴⁸ *Id.* at 19.

⁴⁹ *Id.* at 5 (emphasis added).

⁵⁰ *See id.* at 5–6, 21.

⁵¹ *Treibacher Industrie, A.G. v. Allegheny Techs., Inc.*, 464 F.3d 1235, 1237 (11th Cir. 2006).

⁵² *Id.* at 1239.

of performance,⁵³ course of dealing,⁵⁴ and usage of trade,⁵⁵ as those terms are defined in Section 1-303 of the UCC, can become part of the agreement between the parties without express incorporation by the parties.⁵⁶ When applicable usage of trade, course of dealing, and course of performance seem to conflict, the UCC establishes a hierarchy. A court is first to construe those extrinsic sources of contract terms to be consistent with each other whenever the court can reasonably do so.⁵⁷ If the conflict cannot be reconciled, then course of dealing prevails over usage of trade, and course of performance prevails over both.⁵⁸ The CISG, by contrast, does not create a hierarchical relationship between usage and course of performance or course of dealing. In fact, the CISG does not even use the term course of dealing or the term course of performance. U.S. courts have not accounted for this when conducting analysis under the CISG of behavior that appears to establish a course of dealing, as that term is understood under the UCC.

Instead of course of dealing or course of performance, the CISG refers to “practices which [the parties] have established between themselves,”⁵⁹ which is, of course, a different term that has its meaning derived not from the UCC but from the CISG. Such party practice becomes a term of the parties’ agreement, insofar as “[t]he parties are bound” thereby by virtue of establishing the practice between themselves.⁶⁰ The CISG also includes “subsequent conduct of the parties” as one of the relevant circumstances courts are directed to consider when determining party intent.⁶¹ Thus, under both the CISG and the UCC, the behavior of the parties can be indicative of their shared intent to be bound. How that behavior is to be analyzed and ultimately incorporated into the parties’ agreement is certainly not the same

⁵³ The UCC defines “course of performance” to mean:

[A] sequence of conduct between the parties to a particular transaction that exists if: (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

U.C.C. § 1-303(a) (2011).

⁵⁴ Course of dealing is defined as “a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.” *Id.* § 1-303(b).

⁵⁵ Usage of trade is defined in the UCC as “any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question.” *Id.* § 1-303(c).

⁵⁶ *See* U.C.C. § 1-303(d) (2011).

⁵⁷ *Id.* § 1-303(e).

⁵⁸ *Id.*

⁵⁹ CISG, *supra* note 12, art. 9(1).

⁶⁰ *Id.*

⁶¹ *Id.* art. 8(3).

under the CISG and the UCC. While the CISG concepts are similar in some respects and will at times have the same or similar effects, the concepts are not equivalent and the appropriate methods of analysis are distinct. In any event, the CISG does not establish a hierarchy that causes conduct to prevail automatically over usage or that renders usage irrelevant. The Eleventh Circuit’s assertion to the contrary, claiming an automatic hierarchy, is not supported by the text of the CISG.

It is really no surprise that some U.S. courts are influenced by their understanding of the UCC and the common law when applying provisions of the CISG. This “homeward trend” was identified early in the history of the CISG.⁶² And under some limited circumstances, when a question governed by the CISG is not expressly settled by the CISG, it is eventually possible to answer the question “in conformity with the law applicable by virtue of the rules of private international law.”⁶³ In the limited circumstances when that occurs, any court adjudicating a conflict before it that is governed by the CISG will have its own rules of private international law, or conflicts of laws, and should apply those rules to determine the substantive body of law that would govern the dispute pursuant to those rules. In the United States, that will often be the UCC, unless the parties have effectively selected the laws of a jurisdiction outside the United States.⁶⁴ But courts should not leap to domestic principles to answer questions that are answerable by reference to the text of the CISG.

Even when the question is not expressly settled by the text of the CISG, the question must be answered, when possible, “in conformity with

⁶² See generally JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INT’L SALES (Kluwer Int’l 1989); Harry Flechtner, *Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods*, 19 PACE INT’L L. REV. 29, 30–31 (2007).

⁶³ CISG, *supra* note 12, art. 7(2).

⁶⁴ In the United States, under the UCC, the parties are free to choose the state or country whose laws will govern their transaction, as long as the transaction bears a reasonable relation to the state or country selected: “Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.” U.C.C. § 1-301(a) (2011). The official comments to Section 1-301 of the UCC confirm that the parties to a multi-state transaction or a transaction involving foreign trade have the right to choose their own law, but that the right to choose their own law “is limited to jurisdictions to which the transaction bears a ‘reasonable relation.’” *Id.* § 1-301 official cmt. 1. The official comments continue: “Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs.” *Id.* Thus, if the parties include a choice-of-law clause in their agreement, U.S. courts will generally enforce the parties’ choice of law, at least when the jurisdiction selected bears some relationship to the transaction or one or both of the parties, and perhaps even when it bears no such relationship. If the parties have not effectively selected a jurisdiction’s law to govern their contract, U.S. courts will generally apply the UCC. *See id.* § 1-301(b).

the general principles on which [the CISG] is based,” before the court may turn to domestic law.⁶⁵ Still, courts should begin with the text of the CISG, but U.S. courts have simply not focused carefully enough on the actual text of the CISG before leaping to the comfortable UCC.

II. THE APPROACH PRESCRIBED BY THE CISG

A. The Text of the Treaty

The CISG fundamentally is a multilateral treaty. In order to understand how usage should be applied under the CISG, applicable international law governing treaty interpretation requires beginning with the text of the treaty itself.⁶⁶ Usage can become part of the parties’ agreement under Article 9 of the CISG, and it is that article that is the focus of this analysis. But the term “usage” is used in five different sub-articles of the CISG.⁶⁷ Each is briefly described in this Part II.A.

1. Article 9

Most important for analysis of the presumed hierarchical relationship between “usage” and other extrinsic sources of contract terms (and arguably for the role of usage under the CISG generally) is Article 9.⁶⁸ Article 9 of the CISG establishes two means for usage to become a binding part of the agreement between the parties, either as an agreed-upon term or as an implied term.

⁶⁵ CISG, *supra* note 12, art. 7(2).

⁶⁶ See Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 115 U.N.T.S. 331 [hereinafter Vienna Convention]. While the United States is not a party to the Vienna Convention, the Vienna Convention is widely recognized as a codification of customary international law governing treaties. To the extent the Vienna Convention is a codification of customary international law, it is generally binding as a matter of international law even on those states that are not parties to the Vienna Convention. See, e.g., Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

⁶⁷ See CISG, *supra* note 12, arts. 4, 8(3), 9(1), 9(2), & 18(3).

⁶⁸ Article 9 of the CISG provides in its entirety as follows:

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

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

Id. art. 9.

a. Usage as Agreed-Upon Term

Article 9(1) of the CISG provides that “[t]he parties are bound by any usage to which they have agreed.”⁶⁹ The parties are also bound under Article 9(1) by “any practices which they have established between themselves.”⁷⁰ Quite simply, if there is a usage that the parties have agreed to or there is a practice that they have established between themselves, then the parties are contractually bound by such usage and by such practice.

There are difficult questions that flow from this provision of the CISG and its application. For example, how is a court to determine whether the parties have agreed to a usage? What if it seems the parties have agreed to a usage, but the usage conflicts with an express term of the parties’ written agreement? What if the usage conflicts with a practice the parties have established between themselves? These questions, not answered explicitly by Article 9(1), must be considered in light of the general principles on which the CISG is based, discussed in Part II.B.⁷¹

b. Usage as Implied Term

Under Article 9(2), if certain requirements are satisfied, a usage can be deemed to have been made part of the parties’ agreement as an implied term.⁷² Article 9(2) provides as follows:

The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.⁷³

By looking carefully at Article 9(2) and its constituent parts, it is plain to see that in order to determine whether a usage is an implied term of the parties’ agreement, the court must consider whether three distinct requirements are satisfied with respect to the usage in question: (i) whether the usage in question is a usage that each party either actually knew of or ought to have known of, (ii) whether in international trade the usage is widely known to parties to like contracts, and (iii) whether in international trade the usage is regularly observed by parties to like contracts.

Article 9(2) also provides the parties with an ‘out.’ That is, if there is some usage that satisfies the three requirements of Article 9(2) that would automatically become a binding implied term of the parties’ agreement, the

⁶⁹ *Id.* art. 9(1).

⁷⁰ *Id.*

⁷¹ *See id.* art. 7(2).

⁷² *See id.* art. 9(2).

⁷³ *Id.*

parties are nevertheless free to agree that the usage is not part of their agreement.⁷⁴ If they do so, then the parties' agreement will prevail over the default inclusion of the usage as an implied term of their agreement under Article 9(2). Thus, a sort of logical reasoning can be seen when the requirements of Article 9(2) can be satisfied, and the logical reasoning essentially provides as follows:

Similarly situated third parties in international trade know about this usage, and those third parties abide by the usage.

The parties to this contract also either knew or ought to have known about this usage, and they did not manifest agreement not to be bound by it.

Therefore, it is appropriate to conclude that these parties intended to abide by the usage.

Of course, how the parties manifest agreement not to be bound by any such usage is a more difficult question. Party conduct could provide evidence of agreement not to be bound by usage, but courts should not assume that apparently inconsistent party conduct should automatically prevail over usage that would be applicable under Article 9(2). The Illustration in Part II.D. offers one example of how this could be so.

When party conduct appears to constitute a course of dealing or course of performance under the UCC, the court should remember that those UCC concepts are not relevant for the Article 9 analysis. Thus, party conduct should never prevail over usage simply because the court concludes that the conduct constitutes course of dealing or course of performance. That is not the proper inquiry under the CISG. Even when the conduct might be deemed to constitute a practice that the parties have established between themselves under the CISG, the conduct still should not automatically prevail over the usage simply because it constitutes established party practice. The text of Article 9 does not direct courts to apply an automatic hierarchy, after all.⁷⁵ Rather, to determine whether usage or party conduct should prevail in case of an apparent conflict, courts should be guided by the CISG principles of freedom of contract and determining party intent, discussed in Part II.B., and courts should conduct their analysis by using the analytical framework that is contemplated by Article 9.

Ultimately it is important for courts, as well as practitioners and their clients, to recognize that under Article 9, a usage can become a binding term of the parties' agreement, just as surely as if it were unambiguously written into the agreement. If usage does become a binding term, it should

⁷⁴ See *id.* Article 9(2) provides for usage and party practice to become implied terms of the parties' agreement, "unless otherwise agreed." *Id.*

⁷⁵ See *id.* art. 9.

be treated as any other contract term—which might require additional interpretation or analysis, as the analytical framework demonstrates.

2. Usage in other Articles of the CISG

a. Article 8(3)

Even when a usage does not become part of the parties’ agreement under Article 9, usage can still be relevant under Article 8(3) of the CISG for determining the intent of the parties, including for purposes of interpreting the parties’ agreement.⁷⁶ Courts are directed by Article 8(3) of the CISG to give “due consideration” to usage (among other things) when determining the actual intent of the parties, as well as when determining the understanding a reasonable person would have had with respect to statements made by a party or other conduct of a party.⁷⁷ Notably, consideration of usage to determine party intent is mandatory, not permissive.⁷⁸ That is, it is not simply the case that courts are permitted to consider usage; they are obligated under Article 8(3) to do so. Moreover, there is no hierarchy established by Article 8(3) for usage relative to any other source a court is to consider when determining party intent.

Unlike Article 9(2), Article 8(3) does not limit the scope of usage that is potentially relevant, in that Article 8(3) does not require the usage to be usage that the parties knew of or ought to have known of.⁷⁹ Similarly, the role to be played by usage under Article 8(3) is not limited to usages that are widely known to or regularly observed by parties to like contracts in international trade.⁸⁰ Rather, under Article 8(3), any usage—industry standards, customs in the trade, industry practices, and the like—can be considered for determining party intent to the extent the usage constitutes a “relevant circumstance.”⁸¹

Of course, it may be sensible for a court to give greater weight to usages that are known to the parties, as well as to usages that are widely known and regularly observed by parties to like contracts, when considering the role usage ought to play in the determination of party intent. Arguably, this is appropriate under Article 8(3), in light of the need for the court to give “due consideration” to the usage as a “relevant” circumstance for

⁷⁶ See *id.* art. 8(3).

⁷⁷ CISG, *supra* note 12, art. 8(3). Article 8(3) provides specifically as follows: “In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.” *Id.*

⁷⁸ See *id.* (providing that due consideration “is to be given to all relevant circumstances,” including usage).

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ See *id.*

purposes of determining party intent; to the extent that the court concludes that the usage does not constitute a relevant circumstance, it is not helpful in determining party intent. But there is no bright-line rule established under Article 8(3) regarding the weight to be given to any particular usage; the court is to give due consideration to any usage that either party offers as evidence of the parties' intent.⁸² This is so, even when the usage is not a term of the contract.

b. Articles 4 and 18(3)

There are two other sub-articles of the CISG that use the term usage—Articles 4 and 18(3).⁸³ Article 4 addresses principles of invalidity.⁸⁴ Article 4 provides that, except as otherwise expressly provided in the CISG, questions regarding the validity of the contract and its provisions and of any usage are outside the scope of the CISG.⁸⁵ Such questions are therefore to be answered by means of Article 7, which requires settling such questions “in conformity with the general principles on which [the CISG] is based.”⁸⁶ If there are no such principles, then the questions that are not settled by the CISG are to be settled “in conformity with the law applicable by virtue of the rules of private international law.”⁸⁷ Of course, the validity of a usage as a contract term, as with any contract term, is only relevant when the usage is actually a term of the parties' agreement. Knowing whether a usage is a term of the parties' agreement requires application of Article 9.

Article 18(3) describes what constitutes an acceptance in the formation of a contract under the CISG.⁸⁸ That is, performance of an act alone normally cannot constitute acceptance (unless there is notice given to the offeror).⁸⁹ But it is possible that an applicable usage could allow acceptance to occur by performance of an act (even without notice).⁹⁰ Of course, knowing whether any such usage is applicable to the formation of

⁸² *See id.*

⁸³ *See id.* arts. 4 & 18(3).

⁸⁴ *See id.* art. 4.

⁸⁵ *Id.*

⁸⁶ *Id.* art. 7(2).

⁸⁷ *Id.*

⁸⁸ *See id.* art. 18(3).

⁸⁹ *See id.* art. 18(2).

⁹⁰ Article 18(3) provides as follows:

However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Id. art. 18(3).

the contract between the parties also requires application of the principles contained in Article 9.

It is Article 9 that is ultimately the relevant article for determining whether a usage is a term of the parties’ agreement. Courts should thus begin their analysis with the text of Article 9. To the extent a question remains unanswered, the court should turn to the general principles on which the CISG is based for additional guidance.⁹¹

B. General Principles

As we seek to understand the role of usage under the CISG, it is important to note that the CISG itself offers instruction regarding how to interpret its provisions. Whenever there is a question concerning a matter that is governed by the CISG and the question is not expressly settled by some provision of the CISG, the question is to be answered “in conformity with the general principles on which [the CISG] is based.”⁹² While the CISG does not define those general principles, a careful review of the CISG can reveal numerous principles that permeate the CISG. This Article identifies two arguably relevant principles on which the CISG is based. Instead of resorting immediately to the UCC, courts should consider carefully the general principles on which the CISG is based. Often that will obviate the need—indeed, the appropriateness—of turning to domestic sales law.

1. Freedom of Contract

One fundamental principle on which the CISG is based is freedom of contract.⁹³ The principle of freedom of contract permeates the CISG and its provisions.⁹⁴ Freedom of contract is formalized in Article 6 of the CISG, which establishes clearly a right to depart from the default terms of the CISG.⁹⁵

Article 6 is subject only to Article 12, which establishes the fundamental non-derogable terms of the CISG:

Any provision of article 11,⁹⁶ article 29⁹⁷ or Part II⁹⁸ of this

⁹¹ See *id.* art. 7(2).

⁹² *Id.* If, and only if, there are no applicable general principles available to answer the question, then the question is to be answered “in conformity with the law applicable by virtue of the rules of private international law.” *Id.*

⁹³ See *id.* art. 6. Article 6 establishes a very broad freedom of contract. Subject only to Article 12 of the CISG, the parties may “derogate from or vary the effect of any of [the CISG’s] provisions.” *Id.* (emphasis added).

⁹⁴ See, e.g., *id.* arts. 9(2), 35(2), 58(3) & 65(1).

⁹⁵ See *id.* art. 6.

⁹⁶ “A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.” *Id.* art. 11.

Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.⁹⁹

Article 12 has a limited effect for two reasons. First, the scope of Article 12 is limited in that it relates only to domestic requirements as to form.¹⁰⁰ Second, not many parties to the CISG (currently 11 out of 78 parties) have made a declaration under Article 96; the United States has not made such a declaration.¹⁰¹

While some domestic sales laws establish broad categories of non-derogable terms, such as duties of good faith, reasonableness, and the like (this is so under the UCC, for example),¹⁰² the CISG simply does not.¹⁰³

⁹⁷ Article 29(1) provides that “[a] contract may be modified or terminated by the mere agreement of the parties.” *Id.* art. 29(1). Paragraph (2) of Article 29 continues:

A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

Id. art. 29(2).

⁹⁸ Part II of the CISG is concerned with formation of the contract. *See id.* Part.II.

⁹⁹ *Id.* art. 12.

¹⁰⁰ That is, Article 96 of the CISG allows parties to the CISG to declare that domestic writing requirements, such as a domestic statute of frauds, will be effective, notwithstanding the terms of the CISG that reject writing requirements, see CISG, *supra* note 12, art. 96, and Article 12 provides that when an Article 96 declaration has been made, the domestic requirements as to form prevail over the CISG’s rejection of requirements as to form. *See id.* art. 12.

¹⁰¹ *See* CISG Status, *supra* note 12.

¹⁰² *See, e.g.*, U.C.C. § 1-302(b) (2011).

¹⁰³ For a contrary view, see LOOKOFSKY, *supra* note 20, at 165 (“The validity (enforceability) of a standard term which (e.g.) purports to disclaim the obligations set forth in Article 35(2) and/or limit liability in the event of breach is a question outside the CISG: the Convention is simply ‘not concerned with’ the validity of clauses like these.”). However, this view of the CISG is not supported by the text of the CISG. It is true that the CISG is not concerned with the validity of the contract or of any of the contract’s provisions. *See* CISG, *supra* note 12, art. 4. But that is so with respect to the validity of any clause in the contract; there is no special treatment accorded to clauses purporting to limit either party’s liability. Indeed, the CISG contemplates in other sections that a contract could include such a clause. *See, e.g., id.* art. 19(3) (addressing how a contract term relating to the “extent of one party’s liability to the other” should be analyzed in the battle of the forms). The explanatory note supports this as well: “[W]hen a question concerning a matter governed by this Convention is not expressly settled in it, the question is to be settled in conformity with the general principles on which the Convention is based. *Only* in the absence of such principles should the matter be settled in conformity with the law applicable

Moreover, the CISG does not contain the same hurdles to modification of certain important terms, such as warranty terms, that other bodies of sales law contain.¹⁰⁴ Thus, parties generally have the autonomy to mutually define their will regarding their respective contractual rights and duties. The principle of freedom of contract under the CISG generally compels a court to defer to the discernible will of the parties.

Ultimately, the principle of freedom of contract should inform and guide a court’s approach to analysis of the CISG and the application of its terms to a contract governed by the CISG. When the court can determine the parties’ will, that will should generally govern. That naturally leads to the next question, which is how best to determine the will of the parties under the CISG. It leads also to the next general principle on which the CISG is based: the principle of determining party intent.

2. *Determining Party Intent*

Article 8 of the CISG establishes fundamental principles regarding the need to determine and the manner of determining party intent.¹⁰⁵ Article 8 does two especially important things. First, it provides that the actual intent of the parties prevails over an inconsistent objective manifestation of intent when the actual intent of the parties can be determined.¹⁰⁶ Second, it adopts a very broad approach for determining party intent by requiring courts to consider “all relevant circumstances.”¹⁰⁷

Article 8 of the CISG provides as follows:

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

by virtue of the rules of private international law.” *Id.*, Explanatory Note, ¶ 13.

¹⁰⁴ See, e.g., U.C.C. § 2-316(2) (2011) (establishing specific requirements as to form and content that must be satisfied for the UCC implied warranties of merchantability and fitness for particular purpose to be excluded under U.C.C. § 2-316(2)); cf. CISG, *supra* note 12, art. 35(2) (providing for warranties to exist by implication in a contract governed by the CISG, except when the parties have “agreed otherwise,” and providing no specific requirements as to form or content for such agreement).

¹⁰⁵ See CISG, *supra* note 12, art. 8. For additional analysis by the author of the important role that Article 8 should play in a court’s analysis of a contract governed by the CISG, see Johnson, *supra* note 11, 266–87.

¹⁰⁶ See CISG, *supra* note 12, art. 8.

¹⁰⁷ *Id.* art. 8(3).

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.¹⁰⁸

Under Article 8(3), the court must give due consideration to all relevant circumstances of the case. Article 8(3) provides specific examples of items that are relevant circumstances, including the parties' negotiations, established party practice, the parties' conduct following formation of the contract, and usage.¹⁰⁹ Courts must give due consideration to any and all of these items in order to determine the intent of the parties, whether determining actual intent or objective manifestation of intent.¹¹⁰ Each party must be given the opportunity to use such evidence to show that the parties agreed on an actual understanding of their bargain, even when the evidence might be inconsistent with the objective understanding that would otherwise be given to the parties' bargain.¹¹¹

Looking carefully at Article 8, one can see that a party to a robust written agreement, signed by both parties, might seek to introduce extrinsic evidence of a "[practice] which the parties have established between themselves"¹¹² that tends to show that the parties have agreed outside the four corners of their written agreement on an allocation of risk or responsibility that seems to contradict the apparent allocation contained in the written agreement. It is further possible that one of the parties might introduce evidence of an applicable usage that further contradicts both the party practice and the objective understanding of the express terms of the written agreement. Courts must consider such evidence.

This is likely to be culturally difficult for some U.S. courts, commentators, and practitioners, due to the sanctity under the U.S. parol evidence rule of the written word.¹¹³ While the parol evidence rule of the UCC would specifically preclude the possibility of such contradictory evidence of the practice and of the usage when the writing is a final expression of the parties' agreement,¹¹⁴ Article 8 of the CISG specifically calls for the court to give due consideration to the evidence of the party

¹⁰⁸ *Id.* art. 8.

¹⁰⁹ *Id.* art. 8(3).

¹¹⁰ *See id.* art. 8.

¹¹¹ *See id.*

¹¹² *Id.* art. 8(3)

¹¹³ *See* U.C.C. § 2-202 (2011) (providing that when the parties have put their agreement in writing that constitutes a final expression of their agreement, those parties are then prevented by the parol evidence rule from introducing any evidence of extrinsic terms that would contradict the writing, and if the writing is a complete and exclusive statement of their agreement, then the parties are largely prevented from introducing evidence of even consistent terms).

¹¹⁴ *See id.*

practice and of the usage.¹¹⁵ Moreover, while the UCC establishes an order of precedence for usage of trade, course of dealing, and course of performance, Article 8 does not.

It is true that the writing, as an objective manifestation of the parties' mutual intent to be bound, might ultimately prove to be the very best evidence available of the actual intent of the parties, and it could be that party practice might prove to be better evidence than usage of actual party intent. But this is not always true. Under the principles established by Article 8, the writing is not dispositive of the parties' intent, and party practice does not automatically prevail over usage when determining party intent.

Like the principle of freedom of contract, the need to determine and the method of determining party intent should inform and guide a court's approach to analysis of the CISG and the application of its terms to a contract governed by the CISG. It is this principle that should inform the court's construction of any priority given to sources of the terms of a contract governed by the CISG.

C. Discerning the Hierarchy

When there is usage that arguably has become part of the parties' agreement through either Article 9(1), because the parties have agreed upon that usage, or Article 9(2), because the usage satisfies the three discrete requirements of Article 9(2) and the parties have not opted out of the usage, such usage is as much part of the parties' agreement as if it were written into the written agreement. Any such usage will clearly prevail over default provisions of the CISG, in accordance with the principle of freedom of contract.¹¹⁶ But what if the usage conflicts with another express term of the parties' written agreement? Or with practices which the parties have established between themselves? How do those distinct sources of contract terms relate to each other?

Some commentators have argued persuasively that a practice established by the parties between themselves ought to prevail over any usage that would otherwise be part of the parties' agreement as an implied term under Article 9(2).¹¹⁷ This view of Article 9 can be justified by the "unless otherwise agreed" clause of Article 9(2).¹¹⁸ Article 9(2) provides for usage to become an implied term of the parties' agreement when the

¹¹⁵ See CISG, *supra* note 12, art. 8(3).

¹¹⁶ See *id.* art. 6. "Taken together, Articles 6 and 9 confirm that the CISG default regime plays 'second fiddle' to the specific kind of consensus often reached between merchants working within the relevant trade environment (what some jurists aptly label the 'bargain in fact')." LOOKOFSKY, *supra* note 20, at 44.

¹¹⁷ See, e.g., 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, 335-36 (2005).

¹¹⁸ CISG, *supra* note 12, art. 9(2).

requirements of Article 9(2) are satisfied with respect to the usage in question, but it also explicitly allows the parties to otherwise agree.¹¹⁹ To the extent that the parties can be deemed to have agreed that a practice established between themselves is binding on them, if it conflicts with an Article 9(2) usage, the parties have arguably implicitly otherwise agreed that the usage is *not* part of their agreement. The argument has merit, and it is one way that a conflict between an Article 9(2) usage and an Article 9(1) party practice could be reconciled.

However, the text of Article 9 does not require such an order of precedence in every instance.¹²⁰ Rather, Article 9(2) establishes a mechanism for usage to become an implied term of the parties' agreement (when the requirements of Article 9(2) are satisfied) unless the parties have otherwise agreed. How the parties manifest such agreement is not addressed by Article 9(2).

In addition, Article 9(1) provides that party practice can bind the parties, but, unlike usage under Article 9(1), party practices are not binding on the parties under Article 9(1) specifically as a result of party agreement.¹²¹ Rather, it occurs when the parties have "established" the practice between themselves.¹²² How the parties can establish the practice between themselves is not addressed by Article 9.¹²³ In addition, because Article 9(1) refers specifically to party agreement with respect to usage that is binding on the parties and does not refer to party agreement with respect to party practice it should not be assumed that an established party practice necessarily is something to which the parties have agreed in the sense of Article 9(2).

An order of precedence between party practice that is binding on the parties under Article 9(2) and usage that is binding on the parties under Article 9(1) is therefore simply not established by Article 9. Rather, courts are bound to determine which contract term—the party practice or the applicable usage—the parties intended should prevail. To determine that party intent, courts should use the principles set forth in Article 8. In so doing, the court may determine that the parties intended the express terms of a writing to prevail over inconsistent party practice and usage and that the parties intended some party practice to prevail over usage as a matter of fact. However, it is important to recognize that the CISG does not compel such an outcome as a matter of law, and it is improper to conclude as a matter of law that party practice will trump an inconsistent usage every time. Rather, careful factual inquiry and thoughtful analysis of the facts found should be used to determine what the parties actually intended.

¹¹⁹ *See id.*

¹²⁰ *See id.* art. 9.

¹²¹ *See id.* art. 9(1).

¹²² *Id.*

¹²³ *See id.* art. 9.

D. Usage Intended to Prevail over Practice: An Illustration

An illustration helps to explain how not assuming that party practice automatically prevails over usage can facilitate respecting the actual intent of the parties. Imagine the following situation:

Seller is a Spanish corporation with its place of business in Spain. Seller designs, produces, markets, and installs customized, complex systems for use in a variety of industrial packaging and labeling applications. Buyer is a Delaware corporation with its place of business in the United States. Buyer is a supplier of automotive products to the automotive industry and also supplies replacement parts to consumers through automotive parts dealers. Buyer uses packaging and labeling systems for its products.

Buyer plans to update and expand its manufacturing capacity and requires six new packaging and labeling systems. Each system will be shipped and installed individually over a period of eighteen months. Each will be customized to fit the facility where it will be used.

Buyer and Seller negotiate and agree on the basic terms of a deal for the first system, including price, delivery date, warranty terms, and the like (but not choice of law), and the parties reduce their agreement to a writing, which both parties sign.

Within the applicable industry, both inspection and acceptance testing of the systems are customary, including for cross-border transactions. The inspection and acceptance testing process routinely occur in two stages: the first stage customarily occurs at the seller’s plant of manufacture prior to shipment, and the second stage consists of a final acceptance test that takes place at the buyer’s facility after installation is complete. It is customary in this industry globally for the seller to bear the cost of such inspection and testing (and the anticipated cost is typically built into the quote and pricing for the equipment). Seller and Buyer are both aware of all of the foregoing. The written agreement signed by Seller and Buyer is silent on inspection and testing.

Seller commences performance and produces, delivers, and installs the system. Buyer inspects the system and completes an acceptance test only after delivery and installation. Buyer is satisfied with the system, and the parties then execute a written agreement for a second system, with different specifications and a new price and delivery location and date, but otherwise identical to the first written agreement. The parties perform under the second agreement. Satisfied with the second system, Buyer decides to order the final four systems, and the parties enter into a third written agreement, this time for all four of the remaining systems Buyer wishes to purchase. Seller commences performance, delivering and installing

first one and then another system under the third written agreement.

During the course of production, delivery, and installation of the first four systems (the individual systems under the first two written agreements and the two systems under the third written agreement), Buyer inspects and completes acceptance testing only at its facility each time.

Upon delivery and installation of the fourth system, it becomes evident to both parties that the system is defective and out of specification, which appears at first blush to be due to manufacturing error.

Seller quickly proposes a commercial solution at its expense, and Buyer agrees. Seller repairs the defect and nonconformity to Buyer's satisfaction.

Now, however, Buyer informs Seller that it intends to exercise its industry right to inspect and test the final two systems at Seller's facility, at Seller's expense, prior to shipment. Seller resists, arguing that there have been three systems with no problem; that Seller accepted responsibility for the problems with the fourth; and that there is therefore no need for costly and time-consuming pre-shipment inspection or testing by Buyer. (Unbeknownst to Buyer, Seller has not accounted for the costs of pre-shipment inspection and testing when quoting the prices for these six systems due to an internal miscommunication. Seller also reasonably fears that this would cause delay in its performance, which would put Seller in breach.) Buyer replies that it is unwilling to accept delivery of the final two systems without pre-shipment inspection and testing at Seller's expense; and Buyer is going to insist on its industry-standard right to inspect and test at Seller's facility at Seller's expense. Seller argues that the parties have established both a course of dealing and a course of performance that render any such industry practice irrelevant.

Ultimately unable to resolve their disagreement, the parties find themselves in litigation, with claims and counter-claims for breach of contract, each party claiming that the other party has unjustifiably refused to perform.

In order to determine which party is in breach by not performing, the court hearing the parties' respective claims will likely have to determine whether the usage relating to pre-shipment inspection and testing is part of the parties' agreement, whether the parties' practices have established a term of their agreement, or both. If it is both, then the court will have to determine which term the parties intended to prevail.

On its face, it appears that the parties have established a UCC course of performance under the final written agreement and a course of dealing

under the previous two agreements for inspection and acceptance testing of the systems to occur after delivery only.¹²⁴ Applying *Treibacher Industrie*, it would be fairly simple to conclude that the parties’ apparent course of dealing prevails over any potentially applicable usage that would call for a different outcome, obviating the need for any analysis of the parties’ intent regarding the role usage should play, with the result that the parties’ contract only requires inspection and testing to occur after delivery has occurred. But that is problematic at several levels. The CISG, which governs the transaction in this Illustration,¹²⁵ requires a different analysis.

The CISG requires the court not to consider whether there is a course of dealing or a course of performance—UCC terms and concepts that are not reproduced in the CISG—but instead to determine whether there are any practices which they have established between themselves.¹²⁶

Moreover, repeated performance in a particular way does not automatically amount to a practice that the parties have established between themselves.¹²⁷ Because Article 9 tells us little regarding how to determine whether the parties have established a practice between themselves, it is necessary to consider the general principles on which the CISG is based to make such a determination.¹²⁸ One such principle, established by Article 8, is the principle of determining party intent, and it is therefore appropriate to analyze whether the parties have even established a practice that they intended to be bound by, with a preference for actual intent if it can be determined.

Finally, even if we were to conclude that the parties have established a practice between themselves, Article 9 does not provide that practices established by the parties between themselves should automatically prevail over a conflicting usage that is otherwise applicable to the parties’ agreement.¹²⁹ Rather, general principles on which the CISG is based should once again inform the court’s consideration of the precedence that should be given.

Thus, the court must analyze usage described in the Illustration and its relationship with apparent party practice in a way that is actually contemplated by the CISG. It is entirely possible that a court would conclude that the parties intended the usage concerning pre-shipment testing and acceptance to be part of their agreement. It is possible that the practice established by the first four instances of performance was not

¹²⁴ See U.C.C. § 1-303(a)–(b) (2011).

¹²⁵ Because the underlying contract is a contract of sale of goods between parties who have their respective places of business in different countries (Spain and the United States), and those countries are both parties to the CISG, the CISG applies by its terms. See CISG, *supra* note 12, art. 1(1)(a).

¹²⁶ *Id.* art. 9(1).

¹²⁷ See *id.*

¹²⁸ See *id.* art. 7(2).

¹²⁹ See *id.* art. 9.

intended to establish a different term of the parties' agreement but was instead merely a non-binding waiver by Buyer of an assertion of its contractual rights in those instances. In that case, application of the Eleventh Circuit's reasoning in *Treibacher Industrie* would yield the wrong result.

Fortunately, the analysis contemplated by the CISG is not unwieldy. Careful review of Article 9 and the general principles on which the CISG is based suggests a useful analytical framework for dealing with difficult questions under Article 9.

III. ARTICLE 9 ANALYTICAL FRAMEWORK

By marching carefully through a series of four questions while suspending UCC bias and assumptions, courts can analyze issues under Article 9 and apply Article 9 in a way that is actually contemplated by the CISG.

First, is there any usage to which the parties have agreed under Article 9(1)? When determining the answer to this question, it is important to note that such usage need not be a usage observed in international trade, and it need not be widely known or regularly observed by third parties.¹³⁰ It is enough that the contracting parties have in some way agreed to be bound by the usage, have agreed to observe the usage, have agreed to make the usage applicable to their agreement, or have otherwise explicitly or implicitly agreed to the usage.¹³¹ Article 9(1) requires no particular means of manifesting such agreement; it is a simple factual inquiry.

If a party claims that a usage is part of a contract under Article 9(1), it is up to the finder of fact to determine whether, as a matter of fact, the parties have agreed to the usage. And the party arguing for application of the usage should bear the burden of showing that the parties have so agreed. Part of the analysis should focus on whether the parties actually intended to be bound by the usage, and that analysis should be grounded in the principles contained in Article 8.

If the finder of fact finds that the parties have agreed to the usage, then the usage is a term of the parties' agreement. However, that does not necessarily end the analysis. Sometimes a contract term is not enforceable because it conflicts with another contract term. The continuing analysis using the Article 9 analytical framework will help determine whether the conflicting term is enforceable. But as a starting point, it is important to recognize that the usage is, in fact, a term of the parties' agreement, just as surely as if it were written into the agreement itself.

Second, is there any practice that the parties have established between themselves under Article 9(1)? It is important to note that the

¹³⁰ See *id.* art. 9(1).

¹³¹ See *id.*; see also *id.* art. 6.

parties may have established a practice between themselves with or without consciously agreeing to the practice. It is also important to note that a practice may be established between the parties without constituting a course of performance or a course of dealing under the UCC. Indeed, it is inappropriate for courts to refer to or draw upon those UCC concepts when analyzing whether the parties have established a practice between themselves. Notably, Article 9(1) itself requires no particular means of demonstrating that a practice has been established by the parties.¹³² Once again, this requires a factual inquiry to determine whether, as a matter of fact, the parties have established a practice between themselves, and Article 8(3) of the CISG requires consideration of all relevant circumstances to determine whether the parties intended to establish a practice between themselves.

If a party claims that a practice is part of a contract under Article 9(1), it is up to the finder of fact to determine whether, as a matter of fact, the parties have established the practice between themselves. The party arguing for application of the party practice should bear the burden of showing that the parties have established the practice between themselves. Part of the analysis should focus on whether the parties actually intended to establish a practice between themselves or intended to be bound by a practice. That analysis should be grounded in the principles contained in Article 8.

If the finder of fact finds that the parties have established the practice between themselves, then the party practice is a term of the parties' agreement. This is so, even if the term based on the established party practice conflicts with a usage that constitutes a term under Article 9(1). Article 9(1) does not address how those conflicting terms should be reconciled.¹³³ Thus, once again, the analysis is not yet complete, but we know that the party practice is, in fact, a term of the parties' agreement.

Third, is there any usage that constitutes an implied term of the parties' agreement under Article 9(2)? This third question requires a more involved, two-part analysis. The first part of the analysis focuses on whether the usage is the type of usage that falls within the scope of Article 9(2).

In order to determine whether a usage is within the scope of Article 9(2), and therefore potentially an implied term of the parties' agreement, the court must consider whether three distinct requirements are satisfied with respect to the usage in question.¹³⁴

- (i) Did each party know, or ought each party to have known, of the claimed usage?

¹³² See *id.* art. 9(1).

¹³³ See *id.*

¹³⁴ See *id.* art. 9(2).

(ii) Is the claimed usage a usage that in international trade is widely known to parties to contracts of the type involved in the particular trade concerned?

(iii) Is the claimed usage a usage that in international trade is regularly observed by parties to contracts of the type involved in the particular trade concerned?

The party arguing for application of the usage as an implied term should bear the burden of showing that these three requirements have been satisfied. If the answer to any of these three questions is “no,” then the usage is not part of the parties’ agreement under Article 9(2).

If the answer to each of the questions is “yes” and the usage is therefore the type of usage that falls within the scope of Article 9(2), then the second part of the analysis asks whether the parties nevertheless opted out of the usage. Specifically, did the parties agree not to have impliedly made applicable to their contract the usage in question?

It is important to note that the inquiry in the second part of the analysis is not whether the parties affirmatively agreed to make the usage applicable to their contract. Such affirmative agreement is not required under Article 9(2).¹³⁵ In fact, if there is such affirmative agreement, then Article 9(1) is the appropriate section to apply.¹³⁶ Rather, the inquiry is whether the parties have agreed *not* to make the usage a part of their agreement. Notably, however, Article 9(2) requires no particular means of manifesting that agreement.¹³⁷ Once again, it requires factual inquiry to determine whether the parties have manifested such agreement.

Once the first part of the analysis shows that there is a usage that is applicable under Article 9(2), then the burden should shift to the party who would like to evade application of the usage as an implied term of the parties’ agreement to show that the parties opted out of it.

If a party claims that a usage is part of a contract of sale of goods under Article 9(2), it is up to the finder of fact to determine whether, as a matter of fact, the usage is the type of usage that is within the scope of Article 9(2) by applying the first part of the two-part analysis. If the other party then claims that the parties have nevertheless opted out of the usage, then it is up to the finder of fact to determine whether that other party has met its burden to show that the parties have in fact opted out of the usage. If the finder of fact finds that the usage is the type of usage that is within the scope of Article 9(2) and does not find that the parties have opted out of the usage, then the usage is a term of the parties’ agreement. This is so, even if the usage conflicts with another contractual term that is based on established party practice under Article 9(1). How those conflicting

¹³⁵ *See id.*

¹³⁶ *See id.* art. 9(1).

¹³⁷ *See id.* art. 9(2).

contractual terms should be reconciled is not expressly addressed in Article 9.

Fourth, we’ve identified terms of the contract under Article 9; do any of these terms conflict with each other or with another apparent express term of the contract? If so, which term prevails? If none of the terms conflict with each other, then each is enforceable as a binding term of the parties’ agreement (in the absence of an applicable domestic principle of invalidity rendering the term unenforceable).¹³⁸

If there is a conflict, then the conflict must be resolved. Because the text of Article 9 does not establish an order of precedence, the conflict must be resolved by reference to the general principles on which the CISG is based.¹³⁹

As we have seen, the principle of freedom of contract enshrined in Article 6 generally requires deference to the will of the parties. And the principles pertaining to determining party intent established in Article 8 require deference to the parties’ actual intent, if actual intent can be determined, and to objective intent, if actual intent cannot be determined, after giving due consideration to all relevant circumstances.¹⁴⁰

Thus, the objective of the finder of fact should be to determine whether the parties actually intended one contractual term to prevail over another. If determinable, that actual intent should establish the order of precedence. If actual intent is not determinable, then the fact finder should focus on the objective manifestation of the parties’ intent regarding the order of precedence. In either case, the inquiry should be fact-intensive and conducted on a case-by-case basis. Such an inquiry should focus on all of the evidence available, including party communications, party conduct, and usage. Ultimately, it is the responsibility of the fact finder to find the facts by weighing all available evidence as best the fact finder can, and to make a determination that does not assume any hierarchy.

IV. THE *TRAVAUX PRÉPARATOIRES* OF THE CISG

The *travaux préparatoires* support the foregoing analytical framework. When the text of a treaty is insufficient to answer a question definitively, the treaty’s *travaux préparatoires*, or drafting history, should be considered. Specifically, a treaty’s drafting history is relevant to confirm the text, context, object, and purpose of the treaty, and to resolve ambiguity, as well as to prevent a manifestly absurd or unjust result.¹⁴¹ It is therefore

¹³⁸ See *id.* art. 4.

¹³⁹ See *id.* art. 7(2).

¹⁴⁰ See *id.* art. 8.

¹⁴¹ See Vienna Convention, *supra* note 66, arts. 31(2) & 32. U.S. courts, in particular, have shown a willingness to use a treaty’s *travaux préparatoires* to interpret the treaty. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 reporters’ n.1 (1987) (“United States courts, accustomed to analyzing legislative materials,

important to consider what, if anything, the *travaux préparatoires* tell us about the hierarchical relationship between applicable usage and other means of determining the contents of the parties' contract.

A draft of the CISG was prepared by the United Nations Commission on International Trade Law (UNCITRAL), and a diplomatic conference of plenipotentiaries consisting of representatives of 62 independent states, including the United States, was convened in 1980 to consider the draft.¹⁴²

Close examination of the *travaux préparatoires* of the conference reveals that the drafters considered an amendment to Article 9 that would have had the effect of creating a hierarchy as between usage and party conduct.

The First Committee of the Conference considered the draft Convention on Contracts for the International Sale of Goods approved by UNCITRAL.¹⁴³ And several amendments to Article 9 (numbered in the draft as Article 8) were proposed.¹⁴⁴ An amendment proposed by Pakistan would have placed usage in a subsidiary position to the conduct of the parties by proposing the following amendment: "Replace the words 'unless otherwise agreed' in paragraph (2) of article [9] by the words 'unless their conduct shows otherwise'."¹⁴⁵ Later, the Pakistan representative clarified that the proposed language was to be added to Article 9(2) without replacing any text.¹⁴⁶ Thus, Article 9(2) would have read as follows:

have not been hesitant to resort to *travaux préparatoires*.").

¹⁴² See United Nations Conference on Contracts for the International Sale of Goods, Vienna, Austria, Mar. 10–Apr. 11, 1980, *Final Act of the United Nations Conference on Contracts for the International Sale of Goods*, ¶¶ 1–3, U.N. Doc. A/CONF.97/18 (Apr. 11, 1980), reprinted in United Nations Conference on Contracts for the International Sale of Goods, *Official Records*, U.N. Doc. A/CONF.97/19, at 176–77 (1991) [hereinafter *Official Records*], available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf>; see also CISG, *supra* note 12, CISG Explanatory Note, available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>.

¹⁴³ United Nations Conference on Contracts for the International Sale of Goods, Vienna, Austria, Mar. 10–Apr. 11, 1980, *Text of Draft Convention on Contracts for the International Sale of Goods approved by the United Nations Commission on International Trade Law*, U.N. Doc. A/CONF.97/5 (Mar. 14, 1979), reprinted in *Official Records*, *supra* note 142, at 5–14.

¹⁴⁴ "Amendments were submitted to [Article 8] by China (A/CONF.97/C.1/L.24), Czechoslovakia (A/CONF.97/C.1/L.40), India (A/CONF.97/C.1/L.34), Sweden (A/CONF.97/C.1/L.19), Pakistan (A/CONF.97/C.1/L.64), United States of America (A/CONF.97/C.1/L.6), France (A/CONF.97/C.1/L.23) and Egypt (A/CONF.97/C.1/L.44)." United Nations Conference on Contracts for the International Sale of Goods, Vienna, Austria, Mar. 10–Apr. 11, 1980, *Report of the First Committee*, art. 8, ¶ 2, U.N. Doc. A/CONF.97/11 (Apr. 7, 1980) [hereinafter *Report of the First Committee*], reprinted in *Official Records*, *supra* note 142, at 89.

¹⁴⁵ *Id.* ¶ 3(v) [sic].

¹⁴⁶ United Nations Conference on Contracts for the International Sale of Goods, Vienna, Austria, Mar. 10–Apr. 11, 1980, *Summary Records of the First Committee, 7th Meeting*, ¶ 26, U.N. Doc. A/CONF.97/C.1/SR.7 (Mar. 14, 1980) [hereinafter *Summary Records–7th Meeting*], reprinted in *Official Records*, *supra* note 142, at 266.

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

That amendment arguably would have had the effect of creating an automatic hierarchy between usage that would otherwise be part of the parties’ agreement under Article 9(2) and inconsistent party conduct. But the Pakistan amendment was rejected, and no hierarchy was established.¹⁴⁷

One delegate’s explanation for his opposition underscores why it is sensible not to assume that party practice should automatically prevail over binding usage:

Mr. HJERNER (Sweden) said that the Pakistan amendment (A/CONF.97/C.1/L.64) seemed attractive at first sight but raised the question of what conduct was relevant for purposes of interpretation, especially in regard to implied acceptance. Doubts came immediately to mind regarding the relevant time: was the conduct in question the conduct at the time of conclusion of the contract or that of a later time, *when a reluctant party failed to comply with the custom in question?* He accordingly urged that the text should be left as it stood.¹⁴⁸

Thus, the absence of an automatic hierarchy between usage and party practice is the result of an apparently deliberate, reasoned decision.

V. RECENT CONTINUATION OF IMPROPER IMPOSITION OF AUTOMATIC HIERARCHY

Nevertheless, the absence of an automatic hierarchy has not yet been recognized by U.S. courts. This particular misunderstanding and misapplication of Article 9 of the CISG continues as U.S. courts continue to have difficulty recognizing the analysis required under Article 9 in light of the general principles on which the CISG is based.

A. *Hanwha Corp. v. Cedar Petrochemicals, Inc.*

Early in 2011, a U.S. federal court heard a case involving a contract dispute that grew out of a battle of the forms.¹⁴⁹ The question of contract formation was governed by the CISG.¹⁵⁰ On cross-motions for summary judgment, the plaintiff, Hanwha Corporation (“Hanwha”), a Korean

¹⁴⁷ *Report of the First Committee, supra* note 144 ¶ 6.

¹⁴⁸ *Summary Records–7th Meeting, supra* note 146, ¶ 28 (emphasis added).

¹⁴⁹ *Hanwha Corp.*, 760 F. Supp. 2d at 428–29.

¹⁵⁰ *See id.* at 431.

company and the would-be buyer in the sale of goods transaction at issue, argued that summary judgment was inappropriate because disputed issues of fact “regarding the norms of contracting practices in the Korean petrochemicals industry” remained unresolved.¹⁵¹ Citing no authority, the court perfunctorily dismissed that argument, reasoning that when “parties have established a course of dealing between themselves, industry norms that might otherwise apply are irrelevant.”¹⁵² That statement, of course, is simply not true under the CISG. Unfortunately for Hanwha, the court improperly denied it the opportunity to show that the parties actually intended the norms of contracting practices in the Korean petrochemicals industry to constitute a part of their agreement.

To be clear, Hanwha should not have automatically prevailed on the merits of its argument regarding Korean norms even if the court applied the analytical framework required by Article 9. Hanwha would have been required to meet its burden of showing that the norm constituted a part of the agreement as usage under either Article 9(1) or Article 9(2). Then, to the extent the usage conflicted with another term, the court would have been required to determine that the usage in question was intended by the parties to prevail over the other term. That might have been difficult. Still, Hanwha should have had the opportunity to offer evidence showing that the norms were part of the parties’ agreement under Article 9.

Because the court provided no authority for its conclusion,¹⁵³ it is unclear what it was that led the court to its conclusion. However, it certainly seems likely that this conclusion was grounded in the court’s understanding of the UCC. Indeed, earlier in its opinion the court reasoned that UCC analysis could be appropriate when the CISG provision at issue is analogous to a UCC provision.¹⁵⁴ Similarly, the court seems to be implicitly reasoning that course of dealing prevails over *inconsistent* usage of trade, which would be accurate under the UCC.¹⁵⁵ Finally, the court’s reference to course of dealing betrays the court’s unfortunate ignorance of the applicable provisions of the CISG.

B. *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.*

In another example, *Geneva Pharmaceuticals*, a complex case involving numerous parties, antitrust and breach-of-contract claims, and

¹⁵¹ *Id.* at 433.

¹⁵² *Id.*

¹⁵³ *See id.*

¹⁵⁴ *See id.* at 430.

¹⁵⁵ *See* U.C.C. § 1-303(e)(3) (2011). Even under the UCC, however, the court would nevertheless be obligated to consider usage of trade and to attempt to reconcile applicable course of dealing and usage of trade that appear to be inconsistent with each other. *See id.* (“Except as otherwise provided in subsection (f), the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other.”).

complicated facts, the U.S. bias and disregard for the text of the CISG was especially egregious.¹⁵⁶ The court determined that the CISG governed the sales contract at issue.¹⁵⁷ In its recitation of potentially applicable provisions of the CISG, the court wildly mischaracterized Article 9, misstating the method of determining whether usage and party practice are terms of the parties’ agreement: “The usages and practices of the parties or the industry are automatically incorporated into any agreement governed by the [CISG], unless expressly excluded by the parties.”¹⁵⁸ Despite its conclusion that the CISG governed, the court ultimately relied on non-CISG case law, including a 1949 decision that predated the CISG, to conclude that a party could not “rely on industry custom to trump an agreed-upon obligation.”¹⁵⁹ In that portion of the court’s analysis, the court never even considered Article 9 of the CISG, opting instead to rely on non-CISG case law.¹⁶⁰

VI. FAILING TO CONSIDER USAGE

Courts are not the only ones to misunderstand Article 9. Contracting parties also do not always recognize the roles usage can play under Articles 8 and 9 of the CISG and therefore sometimes fail to make the argument that usage ought to help define the terms of the contract or party intent.

A. Contract Formation

In one of the early decisions by a U.S. court applying Article 9 of the CISG, the court had before it a motion for summary judgment in a dispute involving an Italian seller of shoes, Calzaturificio Claudia S.n.c. (Claudia), and a U.S. buyer, Olivieri Footwear Ltd. (Olivieri).¹⁶¹ Claudia brought a breach of contract claim (among other claims) against Olivieri and moved for summary judgment on the basis of Claudia’s invoices and the delivery terms set forth in those invoices.¹⁶²

In considering the motion, the court applied the CISG.¹⁶³ The court correctly recognized that, under the CISG, it was required to consider a broader spectrum of evidence than it normally would under the UCC.¹⁶⁴ Claudia’s invoices certainly constituted one kind of evidence of party intent that was appropriate for the court to consider. In addition, the court

¹⁵⁶ See *Geneva Pharm. Tech. Corp. v. Barr Labs., Inc.*, 201 F. Supp. 2d 236, 281–85 (S.D.N.Y. 2002), *rev’d on other grounds*, 386 F.3d 485 (2d Cir. 2004).

¹⁵⁷ See *id.* at 281 n.26.

¹⁵⁸ *Id.* at 281.

¹⁵⁹ *Id.* at 284.

¹⁶⁰ See *id.* at 281–85.

¹⁶¹ See *Claudia*, 1998 WL 164824 at *1.

¹⁶² See *id.* at *1–2.

¹⁶³ See *id.* at *4.

¹⁶⁴ See *id.* at *5.

recognized the need to consider other evidence, including “[e]vidence concerning any negotiations, agreements, or statements made prior to the issuance of the invoices in issue”¹⁶⁵ It quoted Article 9 of the CISG, reasoning that the parties were bound by any usage to which they have agreed, as well as by any practices they had established.¹⁶⁶

In conducting its analysis, the court then considered Claudia’s invoices, Olivieri’s faxes, and third-party shipping documents, as well as the apparent practices of the parties, all as evidenced by the available record.¹⁶⁷ In so doing, the court appears to have engaged in the kind of analysis required by the CISG under Articles 8 and 9.

Interestingly, there is no reference in the court’s analysis to any potentially applicable usage. Is this absence of any reference to usage due to the court’s assumption that the practices established by the parties would prevail over inconsistent usage? Is it due to the absence of relevant usage in the applicable industry? Is it simply due to failure by the parties to recognize the role that usage can play in determining party intent and establishing the terms of the parties’ contract, and thus, a failure to offer evidence of potentially applicable usages? Because the court does not address the issue, it is difficult to conclude with certainty which of the foregoing is true.

It seems unlikely that the court affirmatively concluded that the parties’ practices prevailed over inconsistent usage. In fact, despite Claudia’s arguments regarding the parties’ practices, the court concluded that Claudia had “simply not submitted sufficient evidence to demonstrate conclusively the parties’ prior practices. . . .”¹⁶⁸ Therefore, unless there is some other explanation, the parties may have missed an opportunity to construct a favorable argument based on usage.

B. Obligation to Pay Interest and the Applicable Interest Rate

Similarly, in another early decision by a U.S. court applying Article 9 of the CISG, one of the main issues before the court on post-trial motions for judgment as a matter of law and, alternatively, a new trial, was the rate of interest that had been awarded to the plaintiff, Zapata Hermanos Sucesores, S.A. (Zapata), a Mexican seller, by the jury.¹⁶⁹ Although it ultimately reduced the damages awarded to Zapata by a small amount,¹⁷⁰ the court essentially held for Zapata, finding adequate support for the jury’s

¹⁶⁵ *Id.* at *6.

¹⁶⁶ *See id.*

¹⁶⁷ *See Claudia*, 1998 WL 164824 at *6–8.

¹⁶⁸ *Id.* at *8.

¹⁶⁹ *See Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, No. 99 C 4040, 2001 WL 877538, at *2–4 (N.D. Ill. July 19, 2001).

¹⁷⁰ *See id.* at *2.

findings.¹⁷¹

The defendant, Hearthside Baking Co., Inc. doing business as Maurice Lenell Cooky Company (Lenell), argued that no interest whatsoever was payable because Lenell was never in arrears, an argument that Lenell constructed based on its course of conduct under the parties’ contract.¹⁷² Zapata countered Lenell’s argument by referring to express payment terms in the order documents, which seemed to contemplate the possibility that Lenell could be in payment default.¹⁷³ The court concluded that the question of interest was ultimately a question for the jury, and the jury weighed the evidence and found in Zapata’s favor.¹⁷⁴

In considering the role played by the jury, the court included by footnote the relevant jury instruction, which addressed damages recoverable by Zapata if the jury found a breach of contract by Lenell.¹⁷⁵ The jury instruction addressed recovery of interest on any amounts past due, and it suggested that the jury was entitled to find, as a matter of fact, that the parties agreed—either expressly or even through a course of conduct—that no interest was recoverable.¹⁷⁶ If the parties did not agree that no interest was recoverable, then the jury was instructed to determine the rate of interest, which would be the rate agreed upon by the parties, if any, or a reasonable rate if none was agreed upon by the parties.¹⁷⁷

The jury was also instructed on finding the terms of any contracts that might have formed between Zapata and Lenell, including terms established by “the parties’ course of dealings [if the course of dealing became] part of the common understanding between the parties.”¹⁷⁸

The overall emphasis on finding and deferring to the agreement of the parties is laudable. But of course, the instruction should have referred not to course of dealing but instead to practices the parties established between themselves, and it should have included instructions allowing the jury to determine whether the parties were bound by any usage.¹⁷⁹ Reference to Article 9 of the CISG or usage was also notably absent from the court’s analysis.

Usage could have been helpful to one or the other of the parties here. Usage might have been relevant to show that interest either was or was not customarily paid in the applicable trade. Usage might also have been relevant to show an appropriate default rate of interest or a method of

¹⁷¹ *See id.* at *1.

¹⁷² *See id.* at *3.

¹⁷³ *See id.*

¹⁷⁴ *See id.*

¹⁷⁵ *See Zapata*, 2001 WL 877538 at *3 n.6.

¹⁷⁶ *See id.*

¹⁷⁷ *See id.*

¹⁷⁸ *Id.*

¹⁷⁹ *See CISG*, *supra* note 12, art. 9(1).

determining that rate.

It is entirely possible that there was no identifiable rate of interest that either party could show would amount to such usage. It is also possible that any such rate was lower than the rate desired by Zapata and higher than the rate Lenell was willing to accept. It is also possible, however, that the parties failed to consider looking to potentially applicable usage to determine the applicable rate of interest. Given the absence of any discussion of usage, the absence of careful analysis of Articles 8 and 9 of the CISG, and the court's references to UCC terms, it seems likely that there was a simple failure to recognize that the analysis under the CISG is different from UCC analysis.

More recently, in *San Lucio, S.r.l. v. Import & Storage Services, LLC*, there was a dispute between an Italian supplier and U.S. buyers of cheese, and the parties agreed that the dispute was governed by the CISG.¹⁸⁰ The supplier, San Lucio, S.r.l. (San Lucio), brought a claim against the buyers for breach of the buyers' payment obligations and filed a motion for partial summary judgment seeking an order that Italian, not U.S., law would govern determination of the applicable rate of prejudgment interest and recovery of attorneys' fees.¹⁸¹ In considering San Lucio's request for prejudgment interest and attorneys' fees pursuant to Italian law, the court noted that Article 78 of the CISG entitles a party to prejudgment interest when the other party fails to make or is late in making a payment that is due.¹⁸² The rate of interest, however, is not established by the CISG, and the court resorted to U.S. law to fix the rate.¹⁸³ Similarly, the court noted that the CISG is silent on payment of attorneys' fees.¹⁸⁴ Even though Italian law provides for attorneys' fees to be awarded to the prevailing party, the court noted that U.S. law does not.¹⁸⁵ Consequently, attorneys' fees were not recoverable because U.S. law was applied.¹⁸⁶

The court in *San Lucio, S.r.l.* conducted a reasonably cogent analysis of the CISG, but it leapt too quickly to domestic law to determine whether attorneys' fees were recoverable. Moreover, there may have been another missed opportunity here to consider usage. As with the *Zapata Hermanos Sucesores, S.A.* decision,¹⁸⁷ the applicable rate of interest was in dispute, and usage might have been helpful in resolving that dispute. It is also possible that there was applicable usage relating to the ability of a prevailing party to recover attorneys' fees. In either case, the parties might

¹⁸⁰ See *San Lucio, S.r.l. v. Imp. & Storage Servs., LLC*, Civil Action No. 07-3031 (WJM), 2009 WL 1010981, at *1 (D.N.J. Apr. 20, 2009).

¹⁸¹ See *id.*

¹⁸² See *id.* at *3.

¹⁸³ See *id.*

¹⁸⁴ See *id.* at *1.

¹⁸⁵ See *id.* at *1, n.1.

¹⁸⁶ See *San Lucio*, 2009 WL 1010981 at *4.

¹⁸⁷ See *Zapata*, 2001 WL 877538, at *2-4.

have missed an opportunity to construct a favorable argument based on some potentially applicable usage.

CONCLUSION

If the contracting parties have taken the time and incurred the cost necessary to put in place a robust written agreement establishing the relevant agreed-upon terms of their arrangement, a party should be foreclosed from attempting to evade its unambiguous responsibilities under the agreement by incorporating a more favorable contract term based on otherwise applicable usage under Article 9 of the CISG. The role of the court is to determine the parties’ intent—actual intent, when possible—and the written contract in that case very likely offers the best evidence available of the actual intent of the parties.

But if, as is often the case in the fast-paced world of commercial transactions, the parties have not reduced their agreement to a writing, then each of the parties would be remiss not to consider potentially applicable usage as one important source for determining the binding terms of the contract of sale of goods between the parties.

Whether there is an apparent written agreement or not, if either party seeks to introduce evidence of usage as a potential term of the parties’ agreement, then the court must consider whether the usage in question has become a term of the parties’ agreement. The court must do this without giving automatic preference to any other source of contract terms, including any practices the parties seem to have established between themselves and any conduct of the parties.

Naturally, the concerned commercial lawyer might chafe at the notion that an express agreement, mutually adopted by the parties, could somehow later be undermined by a creative (and perhaps spurious) argument based on some discovered usage that would call for an allocation of risk or responsibility that is different from that established by the written agreement. To be clear, this Article does not advocate for using usage to undermine the bargain in fact that has been struck by the parties, nor does the CISG compel—or even permit—such a result. Rather, the CISG contemplates determining the actual intent of the parties and deferring to their will.¹⁸⁸ What better evidence of that actual intent is there than the parties’ own written agreement? Ultimately, it is likely that a robust written agreement that has been affirmatively adopted by the parties is the very best evidence available for determining the parties’ actual intent to be bound. Similarly, the actual conduct of the parties could offer good evidence regarding their mutual understanding of their bargain.

But the truth is that sometimes parties adopt writings that are inaccurate or incomplete. At other times, one party will offer up a writing

¹⁸⁸ See CISG, *supra* note 12, arts. 6 & 8.

that it claims constitutes the agreement between the parties, but that writing might not reflect the parties' actual bargain. When that happens, the writing may not be good evidence of the parties' actual intent at all. Article 8 of the CISG recognizes this and instructs courts to consider all the circumstances, including usage, when determining what the parties intended. This is true even when there is a writing and the writing seems at first blush to compel a certain outcome.

Similarly, sometimes parties engage in conduct that is not required by their contract. And that conduct might be inconsistent with an otherwise applicable usage. The usage can be a binding term of the contract under Article 9 of the CISG nevertheless. The mere fact that parties have engaged in certain conduct that appears to constitute an established practice should not foreclose the possibility of considering usage as the contract term that ought to prevail, to the extent such a priority was actually intended by the parties, which is a question of fact. Deeming usage irrelevant when there appears to be party conduct that is inconsistent with the usage ignores that possibility and can lead to the actual intent of the parties being ignored. That result is not consistent with the CISG. Courts surely should consider the contents of any relevant writing and any actual conduct of the parties. But "the investigation is not to be limited to those words or conduct even if they appear to give a clear answer to the question."¹⁸⁹

Unfortunately for decision makers, there is no bright-line rule that emerges when analyzing and applying Article 9 of the CISG. However, there is an analytical framework courts can use by marching through the individual parts of Article 9 to determine the terms of the contract. If any of the terms of the parties' agreement conflict with each other, then it is up to the finder of fact to determine which contract term the parties intended to prevail, without assuming an automatic hierarchy.

When there is a usage that is arguably relevant for supplying a term of the contract between the parties and there is also an apparent practice that the parties seem to have established between themselves, the practice, as something affirmatively undertaken by the parties, could reflect the parties' actual intent regarding their mutual agreement to be bound. But this will not be true in every instance, and the CISG does not compel—or even allow—the conclusion that the practice automatically prevails over the usage. On the contrary, the CISG requires giving due consideration to the possibility that the parties intended the usage to prevail over the practice. If that was the parties' intent, then the court should defer to party intent and recognize the usage as an enforceable, binding term of the parties' agreement that is not trumped by party practice. By doing so, the *ex ante*

¹⁸⁹ United Nations Conference on Contracts for the International Sale of Goods, Vienna, Austria, Mar. 10—Apr. 11, 1980, *Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat*, art. 7, ¶ 5, U.N. Doc. A/CONF.97/5 (Mar. 14, 1979), reprinted in *Official Records*, *supra* note 142, at 18.

will of the parties is respected.

But U.S. courts have largely failed to look carefully at the text of Article 9 and have not considered the possibility that usage could prevail over conduct or party practice. Courts are obligated to consider that possibility, and it is important that they live up to that obligation for the sake of the rule of law and for promoting uniformity, predictability and certainty in international trade and commerce. Until courts get this analysis consistently right, there will continue to be unnecessary and undesirable uncertainty regarding binding terms of contracts governed by the CISG.

