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## The Inapplicability of the Parol Evidence Rule to the United Nations Convention on Contracts for the International Sale of Goods

Peter J. Calleo

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## NOTE

### THE INAPPLICABILITY OF THE PAROL EVIDENCE RULE TO THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

#### I. INTRODUCTION

Many nations participating in today's ever expansive global economy are seeking to establish uniform systems of law to govern their cross-border transactions. These nations have recognized that uniform bodies of law often lead to increased efficiency, in terms of time and cost, in the arena of international transactions.<sup>1</sup> This twenty-first century goal towards unification of the law for transnational commerce can be traced back at least to the Middle Ages.<sup>2</sup> Merchants who traveled from port to port throughout the civilized world sought to create a uniform set of guidelines to facilitate their trade businesses.<sup>3</sup> The United Nations Convention on Contracts for the International Sale of Goods ("CISG" or "the Convention")<sup>4</sup> is the most recent and significant attempt by a num-

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1. See Anthony S. Winer, *The CISG Convention and Thomas Franck's Theory of Legitimacy*, 19 NW. J. INT'L L. & BUS. 1, 1-3 (1998); see also, e.g., Joseph Kahn, *World Trade: U.S.-India Agreement*, N.Y. TIMES, Jan. 11, 2000, at C4 (discussing a recent tariff elimination accord that will have the effect of opening trade for agricultural products, consumer goods, and textiles between India and the United States, the world's two largest democracies).

2. See Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 183, 186 (1994); see also, e.g., Helene Cooper, *Trading Blocks: Countries Have Long Sought to Limit Imports. The Results Have Sometimes Been Ugly*, WALL ST. J., Jan. 11, 1999, at R50 ("The Byzantine Empire was adept at bestowing special privileges on allies and favored industries. Just as the U.S. signed the North American Free Trade Agreement granting special trade status to Mexico and Canada, so did the Byzantine Empire reach a trade pact with Venice.").

3. See Ferrari, *supra* note 2, at 186.

4. *Final Act of the United Nations Conference on Contracts for the International Sale of Goods*, U.N. GAOR, 19th Sess., Annex 1, U.N. Doc. A/Conf.97/18 (1980) reprinted in 19 I.L.M. 668, 671 (1980) [hereinafter CISG]. To procure an up to date bibliography and other information regarding the United Nations Convention on Contracts for the International Sale of Goods ("CISG" or "Convention"), Pace Law School has established an Internet website that exclusively

ber of nations, including the United States, to codify private international law in the area of the international sale of goods.<sup>5</sup>

Two circuit courts, the Eleventh and Fifth Circuits, have taken a divergent approach with regard to whether the parol evidence rule, a United States domestic rule of law, comports with the language interpretation provision, Article 8, of the CISG.<sup>6</sup> The Eleventh Circuit, in *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino S.p.A.*,<sup>7</sup> held that the parol evidence rule is inconsistent with and does not apply to the CISG.<sup>8</sup> In contrast, *Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*,<sup>9</sup> an earlier decision from the Fifth Circuit, held that the parol evidence rule applies to the CISG.<sup>10</sup> A careful analysis of relevant CISG language, its legislative history, the CISG's goal to promote facility in international contract law, and the works of most contemporary commentators support *MCC-Marble Ceramic Center's* decision that the parol evidence rule cannot be administered as a direct application of Article 8.<sup>11</sup>

To help understand the issues in this Note more comprehensively, Part II provides a historical account of the CISG and a definition and application of the parol evidence rule. Part III contains an in depth discussion of the *MCC-Marble Ceramic Center* and *Beijing Metals* cases. Finally, Part IV explains why courts of the United States should adopt the CISG and parol evidence analysis employed in *MCC-Marble Ceramic Center* and not that of *Beijing Metals*. In addition, Part IV explores how the careful judicial analysis employed in *MCC-Marble Ce-*

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covers the Convention. See <<http://www.cisg.law.pace.edu>>. In Italy, the Centre for Comparative and Foreign Law Studies in Rome has recently compiled a collection of CISG related materials. See <<http://cnr.it/CRDCS>>.

5. See James J. Callaghan, *U.N. Convention on Contracts for the International Sale of Goods: Examining the Gap-Filling Role of CISG in Two French Decisions*, 14 J.L. & COM. 183, 183-85 (1995); Larry A. DiMatteo, *Resolving International Contract Disputes*, DISP. RESOL. J., Nov. 1998, at 75, 77-78. Moreover, the CISG has often been described as having the potential to serve as a true, modern *lex mercatoria*, or actual international sales law, for parties that engage in cross-border transactions. See Rod N. Andreason, Note, *MCC-Marble Ceramic Center: The Parol Evidence Rule and Other Domestic Law Under the Convention on Contracts for the International Sale of Goods*, 1999 BYU L. REV. 351, 354, 355. The CISG is not based on a particular set of domestic legal principles of any country in the world. See Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443, 480-83 (1989).

6. See *infra* Part III.

7. 144 F.3d 1384 (11th Cir. 1998).

8. See *id.* at 1389.

9. 993 F.2d 1178 (5th Cir. 1993).

10. See *id.* at 1184.

11. See *infra* Part IV.

*ramic Center* may serve as a model for courts in other CISG member nations interpreting Article 8 and other CISG provisions.

## II. HISTORY OF THE CISG AND THE PAROL EVIDENCE RULE

### A. *The CISG*

#### 1. Development of the CISG

The CISG is the culmination of an arduous international effort that commenced nearly seven decades ago to establish international contract law principles with respect to the sale of goods.<sup>12</sup> During the 1930s, the International Institute for the Unification of Private Law ("UNIDROIT" or "Principles") appointed a select group of European scholars to draft a uniform set of laws for the sale of international goods.<sup>13</sup> In 1935, the European group issued a preliminary draft.<sup>14</sup> However, during World War II, the group suspended its operations and did not resume drafting international sales contract law until 1951.<sup>15</sup> By 1958, the group, representing twenty-one nations, produced two drafts, one focusing on the international sale of goods, and the other, on a uniform law for the formation of contracts.<sup>16</sup> In 1964, a diplomatic conference met in Hague to finalize the two agreements.<sup>17</sup>

Two conventions resulted from the Hague Conference, the Uniform Law for the International Sale of Goods and the Uniform Law on the Formation of Contracts for the International Sale of Goods.<sup>18</sup> Although the work accomplished at the Hague Conference provided a significant contribution to the law of international trade, the two conventions did not obtain worldwide support.<sup>19</sup> Many nations felt that because only Western European scholars produced and drafted the con-

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12. See JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 49 (2d ed. 1991); Michael Kabik, *Through the Looking-Glass: International Trade in the "Wonderland" of the United Nations Convention on Contracts for the International Sale of Goods*, 9 INT'L TAX & BUS. LAW. 408, 415 (1992).

13. See HONNOLD, *supra* note 12, at 49 (analyzing the International Institute for the Unification of Private Law ("UNIDROIT" or "Principles")); Kabik, *supra* note 12, at 415.

14. See HONNOLD, *supra* note 12, at 49; Kabik, *supra* note 12, at 415.

15. See Anita C. Esslinger, *Chapter 4: Contracting in the Global Marketplace: The UN Conventions on Contracts for the International Sale of Goods and the Limitation Period in the International Sale of Goods*, SE06 A.L.I.-A.B.A. 69, 72 (1999); Winer, *supra* note 1, at 6.

16. See HONNOLD, *supra* note 12, at 49-50.

17. See Esslinger, *supra* note 15, at 72; Kabik, *supra* note 12, at 416.

18. See HONNOLD, *supra* note 12, at 50.

19. See *id.*; see also Esslinger, *supra* note 15, at 72 ("The UNIDROIT product broke the ice but was never widely accepted.").

ventions, the interests of non-Western European countries were not represented.<sup>20</sup>

To address the concerns of the other nations, the United Nations established the United Nations Commission on International Trade Law ("UNCITRAL") in 1966.<sup>21</sup> UNCITRAL's objective sought "the progressive harmonization and unification of the law of international trade . . . to eliminate legal obstacles to international trade and to ensure an orderly development of economic activities on a fair and equal basis."<sup>22</sup> The Commission appointed fourteen states represented by diverse members of the legal community to prepare text that would reflect the demands of the world over, and not just the Western European region.<sup>23</sup> In 1978, the fourteen-member group completed its work by combining, modifying, and revising the two conventions from the Hague Conference.<sup>24</sup> Finally, after approximately fifty years of incredible effort, and as a mark of its international significance, representatives from sixty-two nations and eight international organizations finalized and unanimously ratified the CISG.<sup>25</sup>

20. See HONNOLD, *supra* note 12, at 50, 53; Winer, *supra* note 1, at 7. The United States did not actively participate in this drafting process until 1963 when it joined the International Institute for the Unification of Private Law ("UNIDROIT"). See Kabik, *supra* note 12, at 416.

21. See HONNOLD, *supra* note 12, at 50. United States representatives participated in the United Nations Commission on International Trade Law ("UNCITRAL") working group. See Peter Winship, *Congress and the 1980 International Sales Convention*, 16 GA. J. INT'L & COMP. L. 707, 710 (1986).

22. Kabik, *supra* note 12, at 416 (quoting Kazuaki Sono, *UNCITRAL and the Vienna Sales Convention*, 18 INT'L LAW. 7, 8 (1984)).

23. See HONNOLD, *supra* note 12, at 54. One international political movement, the New International Economic Order ("NIEO") inspired the making of the CISG. See Winer, *supra* note 1, at 10-13. The NIEO, an intellectual movement that began in the 1970s, sought to bring economic parity between developing and developed nations. See *id.* at 9, 11. The United Nations officially endorsed the NIEO. See *id.* at 9. The United Nations Secretary General noted the CISG's goals of harmonizing and unifying international trade law and reported that the CISG was consistent with the NIEO movement. See *id.* at 12-13. The CISG preamble explicitly refers to the NIEO. See *id.* at 10. The preamble states in relevant part: "THE STATES PARTIES TO THIS CONVENTION, BEARING IN MIND the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order . . ." CISG, preamble. Subsequently, in the early 1980s the Reagan Administration continued the NIEO goal of achieving world economic parity by encouraging a new round of General Agreements on Tariffs and Trade ("GATT") negotiations that also sought to minimize the economic disparity between the wealthier northern industrialized countries and the poorer southern developing countries. See Lionel Barber, *EU-US Trade: Past, Present, and Future*, EUR., Nov. 1999, at 27, 28.

24. See HONNOLD, *supra* note 12, at 54.

25. See *id.*; Winship, *supra* note 21, at 708. The Convention was executed in six official languages: Arabic, Chinese, English, French, Russian, and Spanish. See Esslinger, *supra* note 15, at 73. As of April 30, 2000, the following fifty-seven countries have become signatories to the Convention: Argentina, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovania, Bulgaria, Bu-

In 1988, the United States became the forty-second nation to adopt the treaty.<sup>26</sup> In accordance with Article 1,<sup>27</sup> the Convention automatically governs international sales contracts between contracting parties located in CISG member nations, unless those parties expressly agree to opt out of the CISG's applicability through private contract.<sup>28</sup>

## 2. Article 7: General Uniformity Provision

In light of its international character, the founders of the CISG drafted a broad uniformity provision, Article 7, for the Convention. Article 7 states:

- (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
- (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with

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rundi, Canada, Chile, China (PRC), Croatia, Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Guinea, Hungary, Iraq, Italy, Kyrgyzstan, Latvia, Lesotho, Lithuania, Luxembourg, Mauritania, Mexico, Moldova, Mongolia, Netherlands, New Zealand, Norway, Peru, Poland, Romania, Russian Federation, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States, Uruguay, Uzbekistan, Yugoslavia, and Zambia. See <<http://www.cisg.law.pace.edu>>. The Convention only covers contracts for the sales of goods. It does not govern other types of contracts that are ancillary to an international sales contract such as "distribution agreements, contracts of carriage and insurance, letters of credit, and dispute resolution clauses." Peter Winship, *Changing Contract Practices in Light of the United Nations Sales Convention: A Guide for Practitioners*, 29 INT'L LAW. 525, 527 (1995).

26. See *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992). The United States adopted the CISG as a self-executing treaty with the pre-emptive force of federal law. See Richard E. Speidel, *The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 NW J. INT'L L. & BUS. 165, 166 (1995). Considering that the United States trade deficit with other nations has been an issue of growing concern for a number of years, a user-friendly code governing contracts for the international sale of goods would help United States economic interests. See Joseph Kahn, *Trade Deficit Set Record in November: U.S. Urges Its Partners to Start Spending More*, N.Y. TIMES, Jan. 21, 2000, at C1. Based on preliminary reports, economists estimate that the trade deficit for 1999 is expected to be about \$267 billion. See *id.* Similarly, in 1997 United States exports and imports totaled \$688.7 and \$899 billion respectively. See Michael M. Weinstein, *Limits of Economic Diplomacy: Modest Goals in Push to Bring China Into Trade Group*, N.Y. TIMES, Apr. 8, 1999, at C1; see also Richard W. Stevenson, *U.S. Trade Deficit Continues to Balloon, Hitting \$19.4 Billion*, N.Y. TIMES, Apr. 21, 1999, at C1 (discussing the negative impact reduced exports have on the growth rate of the United States economy).

27. Article 1 states in pertinent part: "(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State." CISG, art. 1.

28. See CISG, art. 6; Winer, *supra* note 1, at 18.

the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.<sup>29</sup>

The founders of the CISG intended to achieve the Convention's uniformity goal mentioned in Article 7(1) "by removing artificial impediments to commerce caused by differences in national legal systems that govern international sales of goods."<sup>30</sup> The founders of the Convention also sought to achieve its uniformity objective by encouraging "the dissemination and use of the international case law (jurisprudence) and scholarly critique (doctrine) that will" interpret the language of the Convention.<sup>31</sup> Finally, recognizing the obligation of good faith as the bedrock of international business norms found in most national legal systems, the founders of the CISG made sure to include a good faith provision in Article 7(1) of the CISG.<sup>32</sup>

To determine if Article 7(2) governs a dispute or transaction, a court first has to ascertain whether an express term of the CISG can resolve the legal dilemma.<sup>33</sup> If not, then a court should resolve the dilemma in conformity with the general principles of the CISG, which are the pursuit of obtaining uniformity and simplicity in contract law. Only if express terms of the CISG or its general principles do not apply should a court consider any applicable rules of private contract law, such as the United States' parol evidence rule.

### 3. Article 8: Language Interpretation Provision

Article 8 deals with the interpretation of contract language and the conduct of parties.<sup>34</sup> Article 8 provides:

29. CISG, art. 7.

30. Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 88 AM. J. INT'L L. 89, 103 (1994); see also Winer, *supra* note 1, at 1 ("One international legal instrument that could facilitate the internationalization of markets would be the United Nations Convention on Contracts for the International Sale of Goods . . .").

31. HONNOLD, *supra* note 12, at 60 (emphasis omitted); see also Franco Ferrari, *CISG Case Law: A New Challenge for Interpreters?*, 17 J.L. & COM. 245, 260 (1997) (commenting on the persuasive import that foreign case law should have for courts that need to interpret CISG language).

32. See DiMatteo, *supra* note 5, at 76.

33. See CISG, art. 7(2).

34. See FRITZ ENDERLEIN & DIETRICH MASKOW, *INTERNATIONAL SALES LAW* 61 (1992); HONNOLD, *supra* note 12, at 162; Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 287-88 (1984). Article 8 applies in a wide variety of circumstances: from brief telephone or telex communications for small purchases to detailed contracts negotiated for larger, more complex transactions. See HONNOLD, *supra* note 12, at 163.

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

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

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.<sup>35</sup>

Article 8 is a crucial provision in the CISG because “most contract disputes turn on questions of [contract] interpretation.”<sup>36</sup> Due to the imprecision of language and the written word, “[n]o written contract is ever complete; even the most carefully drafted document rests on volumes of assumptions that cannot be explicitly expressed.”<sup>37</sup> To ease the difficult burden of interpreting contract language, the drafters of the CISG opted for a broad interpretation provision embodied in Article 8.<sup>38</sup>

Article 8(1) deals with the subjective intent of the parties,<sup>39</sup> and Article 8(2) covers the objective intent of the parties.<sup>40</sup> However, Arti-

35. CISG, art. 8

36. Rosett, *supra* note 34, at 286.

37. *Id.* at 287; *see also* Pacific Gas and Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 644 (Cal. 1968) (“‘A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry . . . .’”) (quoting Pearson v. State Soc. Welfare Bd., 353 P.2d 33, 39 (Cal. 1960)). The following dialogue between two characters in Luigi Pirandello’s classic novel, *Six Characters in Search of an Author*, further examines the communicative problems with language:

We each have within us a whole world of things—each of us a special, inner world. And how can we ever understand each other, when I understand my words according to the sense and values in my special world, while you, hearing me, necessarily understand my words with the sense and values that make up your inner world? We think that we understand each other, but we never really can.

MONROE H. FREEDMAN & WENDY M. ROGOVIN, *CONTRACTS: AN INTRODUCTION TO LAW AND LAWYERING*, PART THREE 463 (1998) (quoting LUIGI PIRANDELLO, *SIX CHARACTERS IN SEARCH OF AN AUTHOR AND OTHER PLAYS* 19 (1995)).

38. *See* Rosett, *supra* note 34, at 287.

39. *See* CISG, art. 8(1); Rosett, *supra* note 34, at 287. However, Article 8(1) also contains “could not have been unaware” objective language. *See* CISG, art. 8(1).

40. *See* CISG, art. 8(2); Henry D. Gabriel, *A Primer on the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code*, 7 *IND.*



cle 8(2) explicitly states that a party is only to refer to Article 8(2) if the subjective intent of a party cannot be determined.<sup>41</sup> Thus, the Convention gives primary consideration to a party's subjective intent.<sup>42</sup> To help determine the subjective or objective intent of a party,<sup>43</sup> Article 8(3), the last provision in Article 8, directs courts to give "due consideration . . . to all relevant circumstances of the case including the [parties'] negotiations."<sup>44</sup>

### B. Parol Evidence Rule

Before discussing the divergent parol evidence approach taken by the Eleventh and Fifth Circuits, a definition of the parol evidence rule and an explanation of its application is necessary.<sup>45</sup>

#### 1. The Parol Evidence Rule Defined

Notwithstanding its name, the parol evidence rule applies indiscriminately to both parol and written evidence.<sup>46</sup> The rule is a substantive, not an evidentiary, rule of law which seeks to give legal effect to contracting parties' final, and in certain instances, complete expressions of their agreement which they have reduced to writing.<sup>47</sup> If the parties

INT'L & COMP. L. REV. 279, 281 (1997).

41. See Gabriel, *supra* note 40, at 281-82.

42. See *id.*; Thomas M. Gaa, *Foreign Accounts: Marketing Loves Them—Financing and Collecting is the Problem*, N98-DBWB A.B.A. LEGAL EDUC. G-33, G-66 (1998).

43. See John E. Murray, Jr., *An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 11, 46-48 (1988).

44. CISG, art. 8(3).

45. This Note discusses the Farnsworth approach to the parol evidence rule. See E. ALLAN FARNSWORTH, *CONTRACTS* (3d ed. 1999).

46. See Arthur L. Corbin, *The Parol Evidence Rule*, 53 YALE L.J. 603, 603 (1944).

47. See FARNSWORTH, *supra* note 45, § 7.3, at 431. The parol evidence rule does not apply to subsequent negotiations. See *id.* § 7.6, at 449. The parol evidence rule also does not purport to exclude a certain type of evidence as an untrustworthy or unreliable method of proving a fact. See *id.* § 7.2, at 428 (citing J. WIGMORE, *EVIDENCE* § 2400 (Chadbourn rev. ed. 1981)). Rather, the rule prevents a litigant from attempting to show "the fact itself—the fact that the terms of the agreement are other than those in the writing." *Id.* Judge Birch in *MCC-Marble Ceramic Center, Inc.* also mentions that "a federal district court cannot simply apply the parol evidence rule as a procedural matter—as it might if excluding a particular type of evidence under the Federal Rules of Evidence, which apply in federal court regardless of the source of the substantive rule of decision." *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino, S.p.A.*, 144 F.3d 1384, 1389 (11th Cir. 1998). However, depending on how the rule is stated, the parol evidence rule may be viewed as either a substantive or an evidentiary rule of law. See JOHN D. CALAMARI & JOSEPH M. PERILLO, *CONTRACTS*, § 3.2, at 141 (3d ed. 1987). If a contracting party states the parol evidence rule as an integrated writing that supersedes prior or collateral agreements, the rule is substantive in nature. See *id.* On the other hand, if the parol evidence rule is stated as a particular writing that is conclusively presumed to contain the entire agreement and other evidence is inad-

have no intention of forming partial or complete, final expressions to an agreement, the parol evidence rule does not apply to that agreement at all.<sup>48</sup>

An agreement that contains final expressions is deemed to be integrated, and depending on the intention of the contracting parties, an integrated agreement may be deemed either partial or complete.<sup>49</sup> The legal effect of a partial integration prohibits a party from introducing evidence of prior or contemporaneous agreements or negotiations that contradict a term of the writing.<sup>50</sup> However, a partial integration does permit the admission of prior or contemporaneous agreements that are consistent<sup>51</sup> with the writing.<sup>52</sup> If the agreement is a complete integration, the parol evidence rule prohibits a party from introducing evidence of prior agreements or negotiations that are contradictory as well as consistent with the writing.<sup>53</sup> This is what makes the rule particularly harsh. "It is one thing to accept that what is written cannot be contradicted. It is quite another to accept that what is written cannot be supplemented even by consistent terms."<sup>54</sup>

Although it has been criticized as being too harsh in its application, the parol evidence rule does have legitimate goals.<sup>55</sup> One of the rule's principal purposes, an evidentiary function, is to foster the protection of

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missible, then the rule is an evidentiary rule of law. *See id.* The import of this distinction "relates to whether the parol evidence question can be raised for the first time on appeal." *Id.* If the rule is depicted as an evidentiary rule, a failure to object at trial will generally waive any error in the admission of improper evidence. *See id.*

48. *See* FARNSWORTH, *supra* note 45, § 7.3, at 431.

49. *See id.* *Black's Law Dictionary* defines "integration" as follows:

1. The process of making whole or combining into one. 2. *Contracts.* The full expression of the parties' agreement, so that all earlier agreements are superseded, the effect being that neither party may later contradict or add to the contractual terms. . . .

*complete integration.* The fact or state of fully expressing the intent of the parties.

*partial integration.* The fact or state of not fully expressing the parties' intent, so that the contract can be changed by the admission of parol (extrinsic) evidence.

BLACK'S LAW DICTIONARY 812 (7th ed. 1999) (emphasis omitted).

50. *See* FARNSWORTH, *supra* note 45, § 7.3, at 431; RESTATEMENT (SECOND) OF CONTRACTS § 215 (1981); *see also* U.C.C. § 2-202 (1996) (stating that the writing "may not be contradicted by evidence of any prior agreement").

51. A writing that is consistent with the original agreement signifies that it would serve to "explain" or "supplement" the terms of the writing. *See* FARNSWORTH, *supra* note 45, § 7.3, at 433.

52. *See id.* at 431; RESTATEMENT (SECOND) OF CONTRACTS §§ 210(2), 215, 216.

53. *See* FARNSWORTH, *supra* note 45, § 7.3, at 431; RESTATEMENT (SECOND) OF CONTRACTS § 216(1).

54. FARNSWORTH, *supra* note 45, § 7.3, at 434.

55. *See* CALAMARI & PERILLO, *supra* note 47, § 3.2, at 141.

written contracts against perjured or otherwise unreliable testimony of oral terms.<sup>56</sup> The parol evidence rule also has a channeling function, by seeking to exclude prior agreements that have been superseded by a written agreement under a merger theory.<sup>57</sup> Thus, the rule encourages parties to put the final expression of their agreement in writing, with the desired object of securing stability and predictability in business transactions.<sup>58</sup>

## 2. Application of the Parol Evidence Rule

The parol evidence rule may be applied to the terms of a contract in two different ways: to prove whether parties intended to form an integrated agreement, and to help interpret the meaning of contractual terms.

To determine the extent to which the parol evidence rule helps to prove an integration, a two step approach may be employed.<sup>59</sup> The first determination is whether an agreement is integrated, which depends on the parties assenting to a final expression of at least some parts of their agreement.<sup>60</sup> This is a particularly difficult assessment to make. A written integrated agreement requires no particular form, and an oral agreement may even be considered integrated for parol evidence purposes.<sup>61</sup> The *Restatement (Second) of Contracts* ("Restatement") contains the prevailing view for integration: evidence of prior negotiations is admissible to help prove if the writing is intended as a final expression of its terms.<sup>62</sup>

Once a fact finder determines that contracting parties have formed an integrated agreement, the next question is whether the parties in-

56. *See id.* However, the rule has often been criticized for having the potential to exclude truthful evidence as well as perjurious testimony. *See id.*

57. *Black's Law Dictionary* defines "merger" in the following manner: "1. The act or an instance of combining or uniting. 2. *Contracts*. The substitution of a superior form of contract for an inferior form, as when a written contract supersedes all oral agreements and prior understandings." BLACK'S LAW DICTIONARY 1002 (7th ed. 1999).

58. *See CALAMARI & PERILLO, supra note 47, § 3.2, at 137.*

59. *See FARNSWORTH, supra note 45, § 7.3, at 431.*

60. *See id.*; Corbin, *supra note 46, at 612*; *see also* *Tow v. Miners Mem'l Ass'n*, 305 F.2d 73, 74 (4th Cir. 1962) (discussing the finding of an integration in an agreement that was not even signed by the contracting parties).

61. *See FARNSWORTH, supra note 45, § 7.3, at 432.* Even preliminary written proposals exchanged by the parties may be deemed final expressions if they are later assented to whether orally, in writing, or by other conduct. *See id.*; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. b (stating that "[a] letter, telegram or other informal document written by one party may be orally assented to by the other as a final expression of some or all of the terms of their agreement").

62. *See FARNSWORTH, supra note 45, § 7.3, at 432.*

tended the agreement to be partially or completely integrated.<sup>63</sup> This question can be answered in two different ways depending upon whether the fact finder adheres to the traditional, narrower Williston approach, or to the modern, liberal Corbin approach to the parol evidence rule.<sup>64</sup>

Under the classical Williston approach, the primary focus in determining whether an agreement is a partial or complete integration depends upon an objective examination of the language used in the contract.<sup>65</sup> If a contract appears on its face to be completely integrated, then a court shall accept this as presumptive evidence that the contract is a complete integration.<sup>66</sup> Under the Williston analysis, the only way to permit terms extrinsic to the agreement into evidence would be if there is some uncertainty as to the meaning of the words. This approach goes so far as to allow for the possibility that a contract can be formed without considering the intent of either of the two contracting parties as long as a court is able to give a plain meaning analysis to the contract.<sup>67</sup> Thus, if a court deems a contract to be unambiguously written, the court "will not even admit evidence of what the parties may have thought the meaning to be."<sup>68</sup>

However, under the modern Corbin approach to the parol evidence rule, which most United States courts presently follow,<sup>69</sup> courts focus

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63. See *id.* § 7.3, at 434-35. The greatest disagreement regarding application of the parol evidence rule has been with deciding whether an agreement was intended to be a complete and final expression by the contracting parties. See *id.* Due to the rule's inherent complexity and awkwardness, courts have not been able to develop a uniform method to apply the parol evidence rule. See Corbin, *supra* note 46, at 630-31. As a result, courts in the United States have taken many different approaches to help resolve its problem. See FARNSWORTH, *supra* note 45, § 7.3, at 434-35.

64. See Corbin, *supra* note 46, at 630-31.

65. See 4 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 633, at 1014-15 (Walter H. E. Jaeger ed., 3rd ed. 1961).

66. See *id.*

67. See CALAMARI & PERILLO, *supra* note 47, § 3.2, at 148; 1 WILLISTON, *supra* note 65, § 95, at 349-50.

68. 1 WILLISTON, *supra* note 65, § 95, at 350.

69. See Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195, 206 (1998). However, the Williston approach to extrinsic evidence for contract interpretation has recently been resurrected in the legal community under the New Textualist movement. See *id.* at 207. The New Textualist movement, of which Supreme Court Justice Antonin Scalia is a principal advocate, deals with statutory interpretation and seeks to exclude from judicial consideration extrinsic evidence of legislative intent. See *id.* at 195. This movement advances the belief that judges should only give words in a statute a meaning that would be attached to their ordinary, everyday meaning. See *id.* Like the Williston theory of contract interpretation, the New Textualist movement has been criticized for overstating the inherent clarity of a word's "plain meaning." See *id.* at 208. For an in depth discussion of the plain meaning rule, see Eric S. Lasky, Note, *Perplexing Problems with Plain Meaning*, 27 HOFSTRA L. REV. 891, 891-98 (1999).

more on the intention of the parties, as opposed to their integration practices.<sup>70</sup> In seeking to ascertain the parties' intent, courts shall take all circumstances into account, including the evidence of prior negotiations.<sup>71</sup> The rationale behind this approach is that "the completeness and exclusivity of the writing cannot be determined except in the light of [all the] circumstances"<sup>72</sup> in which the parties formed their contract.<sup>73</sup> The Corbin approach recognizes that to resolve the issue of whether a contract is a complete or partial integration is an arduous task.<sup>74</sup> "The writing cannot prove its own completeness and accuracy."<sup>75</sup> Therefore, under the Corbin analysis, courts will give wide latitude in determining whether contracting parties intended their contract to be a complete or partial integration.<sup>76</sup>

The *Restatement* has adopted the Corbin approach to the parol evidence rule and states that determining whether a writing is integrated should be proven by any relevant evidence.<sup>77</sup> The *Restatement* also recognizes that the "writing cannot of itself prove its own completeness, and wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties."<sup>78</sup> However, even under the more liberal Corbin approach, once a court concludes the terms of an agreement are partially or completely integrated, then the parol evidence rule applies to that agreement and will bar the admission of terms inconsistent with the writing.<sup>79</sup>

The *Uniform Commercial Code* ("UCC"), section 2-202, has also adopted the Corbin approach to parol evidence.<sup>80</sup> However, the UCC and

70. See FARNSWORTH, *supra* note 45, § 7.3, at 435.

71. See *Silver Syndicate, Inc. v. Sunshine Mining Co.*, 611 P.2d 1011, 1020 (Idaho 1979); CALAMARI & PERILLO, *supra* note 47, § 3.4, at 149.

72. FARNSWORTH, *supra* note 45, § 7.3, at 435.

73. See Corbin, *supra* note 46, at 603-04.

74. See FARNSWORTH, *supra* note 45, § 7.3, at 435; Corbin, *supra* note 46, at 630-38.

75. Corbin, *supra* note 46, at 630.

76. See FARNSWORTH, *supra* note 45, § 7.3, at 435.

77. See RESTATEMENT (SECOND) OF CONTRACTS § 209 (1981).

78. *Id.* § 210 cmt. b.

79. See *id.* §§ 209, 210.

80. See Ross & Tranen, *supra* note 69, at 205. U.C.C. § 2-202 provides:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

- (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and
- (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the

*Restatement* approaches to parol evidence vary in at least one important way. Unlike the *Restatement*, the UCC rejects the presumption that a writing is completely integrated if the parties to a contract deem some of their terms as final expressions of their agreement.<sup>81</sup> Therefore, with the absence of this presumption, the UCC approach is less deferential to the written terms of the contracting parties than the *Restatement* approach.

Besides permitting the admission of evidence to determine whether an agreement is a partial or complete integration, the Corbin approach also permits the admission of prior or contemporaneous agreements or negotiations into evidence to interpret the meaning of contract language<sup>82</sup>—i.e., when the contract language is vague or ambiguous.<sup>83</sup> In this case, a court also has the liberty to look to all the relevant circumstances surrounding the transaction.<sup>84</sup> This includes “all writings, oral statements, and other conduct by which the parties manifested their assent, together with any prior negotiations between them and any applicable course of dealing, course of performance, or usage.”<sup>85</sup> However, as with integration, even under the Corbin view, “evidence of prior negotiations might be excluded if it contradict[s] the language in question”

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agreement.

U.C.C. § 2-202 (1996).

81. See U.C.C. § 2-202 cmt. 1(a). Comment 1 emphasizes that “[t]his section definitely rejects: . . . [a]ny assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon . . . .” *Id.* Compare U.C.C. § 2-202 with RESTATEMENT (SECOND) OF CONTRACTS § 209(3). The *Restatement* explains that “[w]here the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.” RESTATEMENT (SECOND) OF CONTRACTS § 209(3).

82. See CALAMARI & PERILLO, *supra* note 47, § 3.12, at 176; FARNSWORTH, *supra* note 45, § 7.12, at 476-77. “Interpretation is the process by which a court ascertains the meaning that it will give to the language used by the parties in determining the legal effect of the contract.” *Id.* § 7.7, at 452. However, with use of the contemporary parol evidence rule, courts have experienced a great deal of confusion in determining when “interpretative” statements end and when “contradictory” or “additional” statements begin. See *id.* § 7.12, at 480. For example, Farnsworth states that if a contract is awkwardly drafted, this does not necessarily mean a court will allow a party to admit extrinsic evidence to help clarify the meaning of the contract’s words. See *id.* Some courts have attempted to solve this problem by saying that interpretations relate to the meaning of contract language, such as problems of ambiguity and vagueness, and do not relate to problems with inaccurate or incomplete contract language. See *id.*

83. See, e.g., *Hokama v. Relinc Corp.*, 559 P.2d 279, 283 (Haw. 1977) (holding that “all evidence outside of the writing . . . [shall] be considered by the court if there is any doubt or controversy as to the meaning of the language embodying” the bargain of the parties).

84. See FARNSWORTH, *supra* note 45, § 7.10, at 467.

85. *Id.* § 7.10, at 467.

when using the parol evidence rule for interpretation.<sup>86</sup> Moreover, if a fact finder determines a contract to be a complete integration, not even additional, consistent terms may be admitted into evidence.<sup>87</sup>

In the following Part, the factual and legal analyses employed in the *MCC-Marble Ceramic Center* and *Beijing Metals* cases illustrate differing views over the applicability of the parol evidence rule to the CISG.

### III. THE DIVERGENT APPROACH OVER APPLICATION OF THE PAROL EVIDENCE RULE TO THE CISG

#### A. *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.*<sup>88</sup>

In *MCC-Marble Ceramic Center*, the plaintiff company, a United States purchaser, contracted with the defendant company, an Italian manufacturer of ceramic tiles for the purchase of tiles.<sup>89</sup> The two parties memorialized their agreement by using a standard, pre-printed order form provided by the seller.<sup>90</sup> Some time thereafter, the buyer claimed the defendant sent tile shipments that were of a lesser quality than what was bargained for.<sup>91</sup> As a result, the buyer sued for breach of contract.<sup>92</sup>

The seller counterclaimed and sought damages for nonpayment of past deliveries.<sup>93</sup> Further, because the plaintiff did not send a written complaint in compliance with the contract language to the defendant, the defendant also argued that the plaintiff lost its right to complain about the alleged receipt of the lower quality ceramic tile.<sup>94</sup> The plaintiff countered that, as per its mutual oral agreement with the defendant, it

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86. *Id.* § 7.12, at 477 n.10 (emphasis omitted); *see also* Taylor v. State Farm Mut. Auto. Ins. Co., 854 P.2d 1134, 1139 (Ariz. 1993) (holding that “even under the Corbin view, the court can admit evidence for *interpretation* but must stop short of *contradiction*”). *But see* Mark L. Movsesian, *Are Statutes Really “Legislative Bargains”? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145, 1162 (1998) (“Under contemporary principles, where extrinsic evidence shows that the parties shared an intent at odds with the objective meaning of the written agreement, their intent, not the writing, prevails.”).

87. *See* FARNSWORTH, *supra* note 45, § 7.12, at 480.

88. 144 F.3d 1384 (11th Cir. 1998).

89. *See id.* at 1385.

90. *See id.* On the reverse side of the form, there was a provision stating that if the buyer had any problems with the quality of the goods delivered, the buyer had to submit a written complaint within ten days of receipt of the merchandise. *See id.* at 1386.

91. *See id.*

92. *See id.* at 1385.

93. *See id.* at 1386.

94. *See id.*

was not bound to the terms on the reverse side of the form.<sup>95</sup> The plaintiff had three affidavits, one from a MCC-Marble Ceramic Center employee and two from Ceramica employees, that substantiated its claim.<sup>96</sup>

At trial, the district court held that the contract was a complete integration, and, pursuant to the parol evidence rule, did not admit the affidavits into evidence because they would have contradicted the terms of the written agreement.<sup>97</sup> The court reasoned that because the plaintiff failed to make a complaint in accordance with the terms of the contract, in writing, and within ten days, the plaintiff did not raise any triable issue of material fact.<sup>98</sup> As a result, the district court granted summary judgment for the defendant.<sup>99</sup>

The Court of Appeals for the Eleventh Circuit reversed the district court's decision.<sup>100</sup> After engaging in a two part analysis, the Eleventh Circuit held that, because the parol evidence rule did not apply to contracts governed by the CISG, the plaintiff should have been permitted to admit the affidavits into evidence to contradict the terms of the written agreement.<sup>101</sup> The court principally based its reasoning on Article 8 of the CISG.<sup>102</sup> In accordance with Article 8(1), the court stated that "[c]ontrary to what is familiar practice in United States courts, the CISG appears to permit a substantial inquiry into the parties' subjective intent, even if the parties did not engage in any objectively ascertainable means of registering this intent."<sup>103</sup> Thus, a plain reading of Article 8(1) required an inquiry into a contracting party's subjective intent, as long as one party was "aware" of the other party's subjective intent.<sup>104</sup> The court determined that the affidavits the plaintiff wished to admit into evidence were exactly the type of evidence intended to be covered by Article 8(1).<sup>105</sup> The plaintiff's affidavit, given by a company representative, discussed its subjective intent to avoid being bound by the reverse side of the agreement.<sup>106</sup> The defendant's affidavits, given by two company representatives, acknowledged the plaintiff's subjective intent not to be

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95. *See id.*

96. *See id.*

97. *See id.* at 1391.

98. *See id.* at 1388.

99. *See id.* at 1386.

100. *See id.* at 1393.

101. *See id.* at 1392. The court held for the plaintiff, notwithstanding the fact that the form contract appeared on its face to be a complete integration. *See id.* at 1386.

102. *See* CISG, art. 8.

103. *MCC-Marble Ceramic Ctr., Inc.*, 144 F.3d at 1387.

104. *See id.*

105. *See id.* at 1388.

106. *See id.*



bound by the terms on the reverse side of the agreement.<sup>107</sup> Therefore, according to the court, based on Article 8(1), the affidavits should have been admitted into evidence.<sup>108</sup>

The court next held that, in light of the Convention's desire to consider the subjective intent of the parties, the CISG rejected the parol evidence rule.<sup>109</sup> First, the court based its reasoning on the fact that the CISG contained no express parol evidence or statute of frauds provision, and, pursuant to Article 11, explicitly provided for the enforcement of oral contracts.<sup>110</sup> Second, in accordance with Article 8(3), giving "due consideration . . . to all relevant circumstances"<sup>111</sup> mandated admitting the plaintiff's affidavits, even if they contradicted the terms of the contract, "to the extent they reveal[ed] the parties' subjective intent."<sup>112</sup> The court also noted, in conformance with the Convention's goal of establishing uniform principles of law to govern international sales contracts,<sup>113</sup> "[c]ourts applying the CISG [could not] . . . upset the parties' reliance on the Convention by substituting familiar principles of domestic law [e.g., the parol evidence rule] when the Convention requires a different result."<sup>114</sup>

To support its rejection of the parol evidence rule, the court further reasoned that a party could not avoid the terms of a contract by simply submitting evidence showing the lack of subjective intent to be bound by certain written contract terms.<sup>115</sup> Consequently, the affidavits evidencing the plaintiff's and defendant's subjective intents did not represent conclusive proof of the contracting parties' intentions.<sup>116</sup> However, the party opposing the admission of the affidavits had to prove its in-

107. *See id.*

108. *See id.* at 1389.

109. *See id.* at 1392.

110. *See id.* at 1399; CISG, art. 11. Compare the CISG with the UCC, which contains both a parol evidence rule (U.C.C. § 2-202) and a statute of frauds provision (U.C.C. § 2-201). However, the UCC does permit parties to use oral agreements, but only in limited circumstances where the oral agreements do not exceed \$500.00. *See* U.C.C. § 2-201 (1996).

111. CISG, art. 8(3).

112. *MCC-Marble Ceramic Ctr., Inc.*, 144 F.3d at 1389.

113. *See id.* at 1390; CISG, art. 7.

114. *MCC-Marble Ceramic Ctr., Inc.*, 144 F.3d at 1391; *see* George P. Schultz, *Letter of Submittal from the President of the United States to United States Senate* (1983), reprinted in 22 I.L.M. 1369, 1369 (1983).

115. *See MCC-Marble Ceramic Ctr., Inc.*, 144 F.3d at 1391; *see also* Klopfenstein v. Pargeter, 597 F.2d 150, 152 (9th Cir. 1979) (affirming summary judgment against appellant despite his submitting an affidavit detailing his subjective intent not to be bound by the writing. The court held "[u]ndisclosed, subjective intentions are immaterial in . . . commercial transaction[s], especially when contradicted by objective conduct.").

116. *See MCC-Marble Ceramic Ctr., Inc.*, 144 F.3d at 1391.

admissibility at trial, not at the summary judgment stage.<sup>117</sup> Furthermore, the court reasoned that if the parties wanted to preserve their written contract, they could have used a merger clause to supersede all prior oral or written agreements.<sup>118</sup> Finally, based on Article 8(3), the court mentioned that whether or not the plaintiff intended to be bound by the reverse side of the form contract also depended on the parties' course of conduct and dealings with each other subsequent to their written agreement.<sup>119</sup> Thus, the Eleventh Circuit held that the parol evidence rule was inconsistent with Article 8(1) and (3) of the CISG.<sup>120</sup>

Shortly after the *MCC-Marble Ceramic Center* decision, the Northern District for Illinois in *Mitchell Aircraft Spares, Inc. v. European Aircraft Service, AB*<sup>121</sup> adopted *MCC-Marble Ceramic Center's* parol evidence holding. There, the plaintiff, an Illinois based buyer, sued the defendant, a Swedish seller of aircraft parts, on a breach of contract claim for selling the wrong items to the plaintiff.<sup>122</sup> First, on deciding the choice of law issue, the *Mitchell* court held that the CISG governed the breach of contract claim, but Illinois law governed any contract formation issues.<sup>123</sup> Next, the court had to determine whether it could consider parol evidence in trying to resolve the dispute.<sup>124</sup> Finding no case on point in Illinois or in the Seventh Circuit, the court held that the *MCC-Marble Ceramic Center* opinion from the Eleventh Circuit was highly persuasive.<sup>125</sup> The *Mitchell* court decided that the "CISG requires the

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117. *See id.* In this case, the court indicated that the defendant company was allowed to undermine the credibility of an employee's affidavit. Silingardi, the employee, signed an affidavit stating his awareness of the plaintiff's subjective intent not to be bound by the reverse side of the form contract. *See id.* at 1391 n.20. The defendant wanted to bring forth evidence tending to prove that at the time of his employment with Ceramica, Silingardi was a disgruntled employee. *See id.*

118. *See id.*

119. *See id.* at 1392.

120. *See id.* at 1392-93.

121. 23 F. Supp. 2d 915 (N.D. Ill. 1998).

122. *See id.* at 916-18.

123. *See id.* at 918. Sweden and the United States, both party States to the CISG, agreed that the CISG governed most of the issues in this case. *See id.* However, when Sweden accepted the CISG for ratification, Sweden expressly declared that it would not be bound by Part II, the formation of contract section, of the CISG. *See id.* Nevertheless, Sweden's decision to opt out of Part II had no bearing on whether Article 8 applied to the case, because that Article is found in Part I of the CISG. *See id.* at 920-21.

124. *See id.* at 920.

125. *See id.* The court in *Mitchell*, *see id.*, also relied on *Claudia v. Olivieri Footwear Ltd.*, No. 96 Civ. 8052(HB)(THK) 1998 WL 164824, at \*1 (S.D.N.Y. Apr. 7, 1998), which held that "contracts governed by the CISG are freed from the limits of the parol evidence rule and there is a wider spectrum of admissible evidence to consider in construing the terms of the parties' agreement." *Claudia*, 1998 WL 164824, at \*5. In *Claudia*, the court determined that the CISG governed the dispute between an Italian manufacturer and seller of shoes and an American buyer. *See id.* at

court to consider parol evidence inasmuch as that evidence [would be] probative of the subjective intent of the parties."<sup>126</sup> Thus, because the court determined that the parol evidence rule did not apply, the court held that it was free to consider any extrinsic evidence concerning the purchase of aircraft parts.<sup>127</sup>

*B. Beijing Metals & Minerals  
Import/Export Corp. v.  
American Business Center, Inc.*<sup>128</sup>

In 1988, the plaintiff, Beijing Metals and Minerals Import/Export Corporation ("MMB") entered into sales agreements, with the defendant, American Business Center Incorporated ("ABC") for the purchase of fitness equipment to help develop the weightlifting market in Canada and the United States.<sup>129</sup> ABC agreed to furnish MMB with design prints and samples for the research and development of weightlifting products that MMB was to manufacture for ABC.<sup>130</sup> According to ABC, from the outset of their contractual relationship MMB produced and shipped defective goods.<sup>131</sup> After MMB was notified of the defective goods, MMB and ABC entered into an oral agreement in which MMB was to send ABC replacement goods in conformance with the contract specifications.<sup>132</sup> At that time the parties also orally agreed to change the method of contract payment to a ninety-day maximum period, in which ABC was to pay MMB for the equipment.<sup>133</sup>

According to the president of ABC, MMB did not want to reduce these two oral agreements into written form for political reasons.<sup>134</sup> As a result, in order to accommodate MMB, ABC agreed not to put the two oral agreements into writing.<sup>135</sup> However, subsequent to their agreement, ABC only paid for two invoices and declined to pay for approximately

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\*1, \*4. After the American buyer failed to pay the Italian shoe manufacturer for a prior delivery of shoes, the Italian shoe manufacturer sued the American purchaser on a breach of contract claim. *See id.* at \*1.

126. *Mitchell Aircraft Spares, Inc.*, 23 F. Supp. 2d at 920.

127. *See id.*

128. 993 F.2d 1178 (5th Cir. 1993).

129. *See id.* at 1179-80.

130. *See id.*

131. *See id.* at 1180.

132. *See id.*

133. *See id.*

134. *See id.* Unfortunately, the court failed to mention the political reasons that induced Beijing Metals and Minerals Import/Export Corporation ("MMB") not to put the oral terms of the agreement into written form. *See id.*

135. *See id.*

twenty-seven shipments totaling more than \$1.2 million.<sup>136</sup> MMB then notified ABC that if it did not promptly respond with a payment plan, MMB would no longer ship the fitness equipment to ABC.<sup>137</sup> In response, the president of ABC negotiated a payment agreement with MMB.<sup>138</sup>

Notwithstanding their newly formed agreement, ABC alleged that MMB failed to ship replacement goods to ABC.<sup>139</sup> As a result, ABC stopped payment on a check it issued to MMB.<sup>140</sup> MMB then filed suit in the United States District Court for the Southern District of Texas to recover the contract amount from ABC.<sup>141</sup> In its defense, ABC maintained that the payment agreement was only part of a larger, more comprehensive agreement, which also comprised the two oral agreements.<sup>142</sup> ABC's defense notwithstanding, the trial court granted summary judgment in MMB's favor, and as a result awarded MMB a money judgment in the amount of \$1.7 million.<sup>143</sup> "The district court held that the parol evidence rule prevented the two oral agreements [from] being a defense to ABC's obligations under the written payment agreement."<sup>144</sup> The agreement was written unambiguously and did not point to any evidence of contingent collateral agreements.<sup>145</sup>

On appeal, the Court of Appeals for the Fifth Circuit affirmed the district court's parol evidence rule holding.<sup>146</sup> Without any explanation or substantiation, the court determined that the parol evidence rule applied to the case regardless of whether the CISG or Texas state law governed the dispute.<sup>147</sup> The Fifth Circuit then engaged in a two prong analysis to support its holding. First, the court found that the payment agreement was a complete agreement.<sup>148</sup> The agreement was written in clear language, contained an itemized payment schedule reached by

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136. *See id.*

137. *See id.*

138. *See id.* Having acknowledged that American Business Center Incorporated ("ABC") owed MMB \$1.2 million, ABC's president agreed to make the first payment totaling approximately \$198,000. *See id.*

139. *See id.* at 1185.

140. *See id.* at 1181.

141. *See id.*

142. *See id.* at 1180.

143. *See id.* at 1181.

144. *Id.* at 1182.

145. *See id.* In support of its reasoning, the court indicated that the payment agreement contained meaningful consideration and made no mention of replacement goods. *See id.*

146. *See id.* at 1184.

147. *See id.* at 1182 n.9.

148. *See id.* at 1183.

unanimous agreement between the two parties, and in no way suggested the existence of contingent extrinsic agreements regarding the future shipment of replacement goods.<sup>149</sup> Second, the court held that the two alleged oral agreements were barred from being admitted into evidence because they were not collateral agreements<sup>150</sup> that would have been allowed to be admitted into evidence, provided they were consistent with the written agreement.<sup>151</sup> Therefore, the *Beijing Metals* court allowed the parol evidence rule to govern the outcome of the case.

#### IV. THE MCC-MARBLE CERAMIC CENTER PAROL EVIDENCE AND CISG ANALYSIS: THE CORRECT APPROACH

##### A. Plain Language of the CISG Compared to the Parol Evidence Rule

###### 1. Article 8

A plain meaning analysis of all three provisions of Article 8 suggests that *MCC-Marble Ceramic Center* adopted the proper approach in its rejection of the application of the parol evidence rule to the CISG's interpretation provision. The court in *MCC-Marble Ceramic Center* stated that, contrary to common practices under United States statutory and case law, the CISG allows for "a substantial inquiry into the parties' subjective intent, even if the parties did not engage in any objectively ascertainable means of registering this intent."<sup>152</sup> The court based this statement on the fact that Article 8(1) instructs courts to interpret the conduct of a party "according to his intent where the other party knew or could not have been unaware what that intent was."<sup>153</sup>

The incorporation of objective language in Article 8(1) and (2) of the CISG does temper the subjective intent language of Article 8(1). Besides stating actual awareness, Article 8(1) also includes the language

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149. *See id.*

150. The court defined an agreement as collateral if it was made for a separate consideration, or was an agreement that "the parties might naturally make separately and would not ordinarily be expected to [be] embod[ied] in the writing; and . . . not be so clearly connected with the principal transaction as to be part and parcel thereof." *Id.* at 1184 (citing *Weinacht v. Phillips Coal Co.*, 673 S.W.2d 677, 680 (Tex. App. 1984, no writ)).

151. *See id.* The court found the oral agreement for replacement goods, which included a \$400,000 off-set provision for the loss caused by the delivery of the nonconforming goods, was not made for a separate consideration and was inconsistent with the integrated contract. *See id.*

152. *MCC-Marble Ceramic Ctr., Inc.*, 144 F.3d at 1387.

153. CISG, art. 8(1).

“could not have been unaware”<sup>154</sup> to help establish one party’s appreciation of the other party’s subjective intent. Likewise, Article 8(2) provides a “reasonable person”<sup>155</sup> standard to aid in ascertaining the meaning of an agreement. However, the language in Article 8(2) explicitly mentions that the conduct of a party will only “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”<sup>156</sup> if Article 8(1) does not apply.<sup>157</sup>

The facts in *MCC-Marble Ceramic Center* can be used as an example to show the nexus between Article 8(1) and (2). The plaintiff had specific evidence, two affidavits, establishing the defendant’s knowledge of the plaintiff’s subjective intent not to be bound by the reverse side of their pre-printed form contract.<sup>158</sup> Based on a literal reading of Article 8(1), the affidavits represent the kind of evidence the CISG allows to be admitted to prove the terms of a contract.<sup>159</sup> Therefore, the objective language in Article 8(1) and (2) did not apply to the case.

The *MCC-Marble Ceramic Center* court did acknowledge that only in rare circumstances, such as in that case, would one party acknowledge the subjective intent of another party’s desire not to be bound by certain terms of an agreement.<sup>160</sup> Rather, in most cases Article 8(2) would apply, and objective evidence would provide the basis for a court’s decision.<sup>161</sup> Nevertheless, when the CISG governs a case and CISG language requires a court to first attempt to determine the subjective intent of the contracting parties, courts cannot apply familiar domestic rules, such as the parol evidence rule, to those cases.<sup>162</sup> Application of the rule would lead to a different result, from a plain meaning analysis of Article 8.

Article 8(3) directs courts to give “due consideration . . . to all relevant circumstances of the case including the [parties’] negotiations”<sup>163</sup> to determine the intent of a party or the understanding a reasonable person would have under the same circumstances.<sup>164</sup> However, Ar-

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154. *Id.*

155. *See id.* art. 8(2).

156. *Id.*

157. *See id.*

158. *See MCC-Marble Ceramic Ctr., Inc.*, 144 F.3d at 1385.

159. *See id.* at 1387.

160. *See id.* at 1391.

161. *See id.*; HONNOLD, *supra* note 12, at 164-65.

162. *See MCC-Marble Ceramic Ctr., Inc.*, 144 F.3d at 1390.

163. CISG, art. 8(3).

164. *See id.*

ticle 8(3) does not specify the type of negotiations a court may consider. Thus, under the plain meaning of the language of Article 8, the negotiations can refer to prior, contemporaneous, or subsequent negotiations of the parties. The lack of specificity of the language used in Article 8(3) also supports a plain meaning analysis that the negotiations may be either consistent or contradictory to the written agreement. Therefore, Article 8(3) takes an expansive approach to admitting parol evidence.

If the *MCC-Marble Ceramic Center* court applied the contemporary parol evidence rule, the plaintiff would have been unable to introduce the affidavits—which exhibited his subjective intent not to be bound to the terms on the reverse side of the agreement—into evidence.<sup>165</sup> The evidence the plaintiff sought to admit clearly contradicted the terms of its written agreement with the defendant.<sup>166</sup> Moreover, whether the court deemed the agreement in dispute to be completely or partially integrated is irrelevant. The plaintiff still would not have been permitted to admit the affidavits into evidence because they were contradictory in nature.<sup>167</sup>

The *Beijing Metals* court's determination that the parol evidence rule applied to the Convention violated the plain language of the Convention. First, the court applied the *Restatement* presumption that a writing that appeared to be final on some of its terms constituted a complete integration.<sup>168</sup> However, no provision in the CISG contains any basis for making such a presumption.<sup>169</sup> Next, the *Beijing Metals* court engaged in another type of parol evidence rule analysis. The court held that the two oral agreements were not collateral and consistent with the terms of the original contract, and, therefore, could not be admitted into evidence.<sup>170</sup> As with the complete integration presumption, Article 8 also makes no explicit mention of the collateral agreement exception to the admission of parol evidence, which developed under United States common-law.<sup>171</sup>

165. See *supra* Part III.A.

166. See *supra* Part III.A. The plaintiff did not wish to be bound by the express terms of the agreement, which appeared to be a complete integration. See *MCC-Marble Ceramic Ctr., Inc.*, 144 F.3d at 1388.

167. The application of the parol evidence rule regarding the interpretation of contract language is irrelevant in *MCC-Marble Ceramic Center*. The plaintiff did not attempt to admit parol evidence to establish the meaning of ambiguous or even unambiguous language. Rather, the plaintiff sought to admit additional evidence that would have contradicted the terms of a complete integration, the pre-printed form contract. See *MCC-Marble Ceramic Ctr., Inc.*, 144 F.3d at 1388.

168. See RESTATEMENT (SECOND) OF CONTRACTS § 209(3); *supra* Part III.B.

169. See CISG.

170. See *supra* Part III.B.

171. See Harry M. Flechtner, *More U.S. Decisions on the U.N. Sales Convention: Scope, Pa-*

As demonstrated through the facts of *MCC-Marble Ceramic Center* and *Beijing Metals*, applying the parol evidence rule to the Convention would unnecessarily encumber Article 8. Application of the parol evidence rule is not necessary when the plain language of the CISG leads to a clear resolution to determine the breadth of evidence a court may wish to admit.<sup>172</sup>

## 2. Article 11

Besides the fact that the CISG does not have an explicit parol evidence rule, Article 11 also supports the notion that the parol evidence rule does not apply to the CISG. Article 11 states: "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."<sup>173</sup> This language suggests that, in addition to having no explicit parol evidence provision, the founders of the CISG also neglected to provide a statute of frauds requirement where a contract had to be evidenced by a writing to be considered valid.<sup>174</sup>

Allowing contracting parties to form contracts without any particular form demonstrates the importance the CISG places on the subjective intent of contracting parties. Moreover, Article 11 also allows for the contract to be proven by any means, including the testimony of witnesses.<sup>175</sup> Therefore, based on the plain language in Article 11, which is very general and broad in scope, the plaintiff in *MCC-Marble Ceramic Center*, should have been allowed to present the affidavits to the fact finder to prove if they were part of a more comprehensive agreement between the parties.

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*rol Evidence, "Validity" and Reduction of Price Under Article 50*, 14 J.L. & COM. 153, 158 (1995).

172. See ALBERT H. KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 125 (1989).

173. CISG, art. 11.

174. Compare Article 11 of the CISG with the Statute of Frauds requirement in the UCC, which states:

Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

U.C.C. § 2-201(1) (1996).

175. See CISG, art. 11.



A counter-argument to the above mentioned proposal would be that Article 2 of the UCC, which also applies to contracts involving the sale of goods, permits application of the parol evidence rule.<sup>176</sup> Thus, as the parol evidence rule applies to the UCC, it also should apply to the CISG. However, the UCC contains an explicit parol evidence rule provision, whereas the CISG does not.<sup>177</sup> Moreover, the UCC has a statute of frauds requirement whereby contracts over five-hundred dollars have to be evidenced by a writing and in a certain form.<sup>178</sup> Applying the parol evidence rule to a code that requires a contract for more than a nominal amount to be in writing is a logical function of the code's language. However, applying the parol evidence rule to a code, such as the CISG, which does not require a contract to be evidenced by a writing, runs contrary to a literal reading of Article 11, which seeks to uphold contracting parties' agreements, whether in oral or written form.

### 3. Articles 6, 12, and 96

Articles 6, 12, and 96, when read in conjunction with one another, further support the notion that the parol evidence rule should not apply to the CISG. Article 6 provides that the parties who would otherwise be bound by the CISG "may exclude the application of [the] Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions."<sup>179</sup> Article 12 states in pertinent part:

Any provision of article 11, article 29<sup>180</sup> or Part II<sup>181</sup> of this Convention that allows a contract of sale or its modification . . . 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.<sup>182</sup>

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176. See U.C.C. § 2-202.

177. See *id.*

178. See U.C.C. § 2-201.

179. CISG, art. 6. Article 1 of the CISG sets the parameters for parties that are bound to the Convention. See CISG, art. 1.

180. Article 29 contains the modification and termination provisions for the CISG. This Article provides:

- (1) A contract may be modified or terminated by the mere agreement of the parties.
- (2) 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.

CISG, art. 29 (footnote added).

181. Beginning with Article 14, Part II contains the formation of contract provisions for the CISG. See CISG Part II (footnote added).

182. CISG, art. 12.

Next, in accordance with Articles 12 and 96, a contracting party using the CISG can make a declaration that “[a]ny provision . . . that allows for a contract of sale . . . 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.”<sup>183</sup>

Based on the statutory scheme, the Convention allows for contracting parties who wish to reduce their terms only in written form and not have them be proven by any means, to expressly do so. Similarly, Articles 6, 12, and 96 would also permit the parties to apply the parol evidence rule to the CISG. As long as they make an express declaration under Article 96, parties may derogate from provisions of the CISG.<sup>184</sup> However, without making an express “declaration” to the contrary, Article 8—which allows contracts to be oral, in no specific form if written, and to be proven by any means—does not embrace the parol evidence rule. Article 11 will automatically govern the contract.<sup>185</sup>

### B. *Legislative History of the CISG Regarding the Parol Evidence Rule*

A review of excerpts from the Convention’s legislative history indicates its founders’ intent to explicitly exclude any type of preclusive evidentiary rule such as the United States’ parol evidence rule.<sup>186</sup>

During the seventh meeting of the drafting sessions in 1980, one of the representatives for Canada proposed the following amendment to what is currently Article 11:

Between the parties to a contract of sale evidenced by a written document, evidence by witnesses shall be inadmissible for the purposes of confuting or altering its terms, unless there is *prima facie* evidence resulting from a written document from the opposing party, from his evidence *or from a fact the existence of which has been clearly demonstrated*. However, evidence by witnesses shall be admissible for purposes of interpreting the written document.<sup>187</sup>

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183. *Id.* (emphasis added).

184. *See* CISG, art. 6, 12.

185. *See* CISG, art. 11, 96.

186. Reviewing legislative intent is important because the primary rule for the interpretation of a statute is to ascertain the intention of the legislative body that enacted the statute into law. *See* Ross & Tranen, *supra* note 69, at 208.

187. JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 662 (1989) (quoting Canada’s proposed amendment).

The Canadian Representative introduced the amendment in order to place "a limitation on admissible evidence in cases where contracting parties had freely chosen to have a written contract."<sup>188</sup> Thus, unless supported by additional evidence from a written document produced by the opposing party or some type of circumstantial evidence, the language of the amendment sought to exclude evidence by witnesses.<sup>189</sup>

The Austrian Representative and his delegation opposed the amendment, because it "was aimed at limiting the free appreciation of evidence" by the judge.<sup>190</sup> Preventing a judge from reviewing all the evidence violated a "fundamental principle of Austrian law."<sup>191</sup> Similarly, the Representative for Japan opposed the amendment, which he defined as a mere "restatement of the rule on extrinsic evidence which prevailed in English-speaking common-law countries."<sup>192</sup> The Japanese Delegation refused to accept such a rigid rule that was difficult to apply and lacked a uniform body of jurisprudence even in the common-law countries.<sup>193</sup> The Japanese Representative further stated that representatives who had participated in previous discussions regarding this Article had never made a parol evidence rule proposal as proffered by the Canadian delegation.<sup>194</sup>

This amendment did not receive wide support from the participating delegations.<sup>195</sup> Upon vote, the Committee rejected the amendment and sought to adopt Article 11 as written in its current form.<sup>196</sup> Thus, this portion of legislative history from the Convention reveals its drafters' intention and decision to preclude the parol evidence rule, or a similar type of rule, from the CISG.<sup>197</sup>

188. *Id.* at 491.

189. *See id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *See id.*

194. *See id.*

195. *See id.* Only one other nation, Iraq, supported the Canadian proposal. Concurring with the Canadian Representative, the Iraqi Representative commented that the amendment "provid[ed] a minimum protection with regard to admissibility of evidence." *Id.*

196. *See id.*

197. In addition, the UNIDROIT Principles significantly inspired the founders of the CISG and are to be read in conjunction with the CISG. *See DiMatteo, supra* note 5, at 76; Winer, *supra* note 1, at 6. The Principles do not contain any parol evidence rule or analogous type provision. *See Joseph M. Perillo, UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 FORDHAM L. REV. 281, 290 (1994); *see generally* David A. Levy, *Contract Formation Under the UNIDROIT Principles of International Commercial Contracts, UCC, Restatement, and CISG*, 30 UCC L.J. 249, 249 (1998) (comparing the UNIDROIT Principles to the UCC, common-law, and the CISG).

*C. The CISG Founders' Intent to Establish  
Uniformity in International Contract Law*

Application of the parol evidence rule to contracts governed by the CISG would directly contravene the uniformity objective mentioned in Article 7(1),<sup>198</sup> one of the most significant provisions in the CISG's "General Provisions" section.<sup>199</sup>

Not all countries use the parol evidence rule or even have a working knowledge of the rule.<sup>200</sup> The parol evidence rule originated at common-law for reasons unique to the common-law system.<sup>201</sup> It developed as a method for common-law judges to control juries who ignored credible and reliable written evidence of contracts.<sup>202</sup> In particular, the United States, more than any other common-law country, has maintained the trial by jury as the standard for both criminal and civil cases.<sup>203</sup> As "[m]ore than ninety per cent of the world's criminal jury trials, and nearly all of [the world's] civil jury trials, take place in the United States . . . it is here that the problem of lay participation in the judicial process has been posed and discussed most sharply."<sup>204</sup>

In civil law countries there are no jury trials in civil cases, and they only occur rarely in criminal cases.<sup>205</sup> Moreover, in the common-law system, where the parties' attorneys seek to find the truth through a process of examination and cross-examination, the judge's role in this process is passive.<sup>206</sup> In civil law countries on the other hand, the judges are active participants, who find themselves engaged in the truth finding process, i.e., the direct questioning of witnesses, throughout the entirety

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198. CISG, art. 7(1).

199. See Winer, *supra* note 1, at 13.

200. See HONNOLD, *supra* note 12, at 171 & n.18. For example, the French Civil Code rule, which is similar to the parol evidence rule, does not apply to commercial transactions, and Germany does not even have a comparable rule. See *id.* at 171 n.18.

201. See CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 210-11 (1954); Flechtner, *supra* note 171, at 158-59.

202. See MCCORMICK, *supra* note 201, § 211.

203. See Gerhard Casper & Hans Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUD. 135, 135-36 (1972).

204. *Id.* at 136.

205. See Max Rheinstein, *Comparative Law—Its Functions, Methods and Usages*, 22 ARK. L. REV. 415, 422 (1968). In Western Europe, the jury trial is in eclipse: the German jury disappeared in 1924 and was replaced by a mixed professional, lay person tribunal in 1941; the French jury fell in 1941; and in Italy, the Fascists eliminated the jury trial in 1931. See Casper & Zeisel, *supra* note 203, at 135. In Eastern Europe there no longer is a trial by jury. See *id.* "Only Austria, Norway, a few jurisdictions in Switzerland, and Belgium have retained the jury." *Id.* However, the juries in those countries operate under severe restrictions. See *id.*

206. See Rheinstein, *supra* note 205, at 422.

of the case.<sup>207</sup> While the common-law system created the parol evidence rule to control juries, civil code countries did not have such a need.<sup>208</sup> To allow the rule to apply to the CISG mainly for the accommodation of the United States, would undermine the Convention's goal to achieve a uniform system of contract law.

The founders of the Convention also sought to achieve the Convention's uniformity goal in Article 7(1) by encouraging "the dissemination and use of the international case law (jurisprudence)" that will apply and interpret the language of the Convention.<sup>209</sup> In developing international case law for the promotion of uniformity, United States courts have to consider that they will have an international and not merely a national audience when they write opinions involving the CISG.<sup>210</sup> By precluding application of the parol evidence rule, the decision in *MCC-Marble Ceramic Center* fosters the creation of a cohesive body of international CISG jurisprudence,<sup>211</sup> currently in a state of infancy in the United States.<sup>212</sup> *MCC-Marble Ceramic Center* produced an opinion that rendered a meaningful analysis of Article 8 without seeking the assistance of a domestic rule of law, such as the parol evidence rule.<sup>213</sup> The court thoroughly discussed all three provisions of Article 8.<sup>214</sup> As a result, even if courts disagree with the outcome in *MCC-Marble Ceramic Center*, the opinion may at least serve as an exemplary

207. *See id.* The comprehensive powers of a judge are especially pervasive in the Socialist governed countries. *See id.*

208. *See supra* notes 202, 207 and accompanying text.

209. HONNOLD, *supra* note 12, at 60 (emphasis omitted); *see* CISG, art. 7(1).

210. *See* HONNOLD, *supra* note 12, at 142-44. In a famous English case, *Fothergill v. Monarch Airlines Ltd.*, which involved the Warsaw Convention, the international convention which governs the liability of air carriers, the House of Lords gave the word "damage" a broader meaning than understood under English law due to the international setting of the case. *See* 2 Lloyd's Rep. 209, 217 (1980). However, requiring courts to consider jurisprudence from other nations raises at least two practical problems: "(1) foreign case law is not readily available . . . and (2) even where it can be retrieved, [foreign case law] is often written in a language unknown to [an interpreting court]." Ferrari, *supra* note 31, at 254.

211. *See* Andreason, *supra* note 5, at 362-63, 373, 379; *see also* Dennis J. Rhodes, Comment, *The United Nations Convention on Contracts for the International Sale of Goods: Encouraging the Use of Uniform International Law*, 5 TRANSNAT'L LAW. 387, 388 (1992) (asserting that the CISG has played an integral role in uniform international law).

212. Because of the paucity of current United States case law that discusses the CISG, courts that decide to interpret CISG provisions would serve the especially important task of developing United States CISG case law. *See* Helen Kaminski Pty. Ltd. v. Marketing Australian Prod., Inc., Nos. M-47 (DLC), 96B46519, 97-8072A, 1997 WL 414137, at \*3 (S.D.N.Y. July 23, 1997) (stating "that there is little to no case law on the CISG in general"); *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992) (acknowledging that there is virtually no case law interpreting the CISG in the United States).

213. *See MCC-Marble Ceramic Ctr., Inc.*, 144 F.3d at 1386-91.

214. *See id.*

approach for United States courts to follow when they must interpret not only Article 8, but any CISG provision that may apply to their case.<sup>215</sup>

In contrast, instead of undertaking a thorough analysis of pertinent CISG provisions, *Beijing Metals* adopted a common approach many courts adhere to when confronted with the challenge of interpreting unfamiliar provisions from international agreements. Often when faced with such a dilemma, courts seek the application of more commonly known domestic rules for assistance.<sup>216</sup> Courts may look to domestic law when gaps exist in an international body of law.<sup>217</sup> However, when the plain language of a convention calls for a clear approach for action, then the application of domestic rules should be avoided.<sup>218</sup> To do otherwise would violate the uniformity concerns of the CISG.

Moreover, the *Beijing Metals* court did not even explain why or how the parol evidence rule applied to the CISG.<sup>219</sup> The court did not compare and contrast the parol evidence rule to Article 8, or any other CISG provisions.<sup>220</sup> Because the court insufficiently addressed the application of the CISG to the facts of the case, *Beijing Metals* is not as instructive as *MCC-Marble Ceramic Center* for courts that have to interpret CISG provisions. Therefore, the holding in *Beijing Metals* does not foster the development of a uniform system of international jurisprudence.

Applying the parol evidence rule to the CISG would also violate the "observance of good faith" provision mentioned in Article 7(1).<sup>221</sup> If the parol evidence rule applied to the CISG, then civil code countries and other nations that lack such a rule would have a substantial burden of learning how to apply the rule to international agreements for the sale of goods. As previously discussed, it is often difficult to determine

215. Prior to the *MCC-Marble Ceramic Center* decision, a German court used Article 8 to examine pre-contract negotiations and determined that an agreement existed between the two parties in the case. Unknown parties, 5 O 543/88, LG Hamburg, Unilex D., 1990 (1990, 6(6)).

216. See KRITZER, *supra* note 172, at 118-19.

217. See *id.*

218. See *MCC-Marble Ceramic Ctr., Inc.*, 144 F.3d at 1391. The following observation was made with regard to resorting to private law to fill gaps in the Convention:

Reference to private international law rules is the least problematic aspect of this provision[Article 7(2)]. The true danger lies in courts unnecessarily resorting to these rules. The provision itself requires that before the rules are consulted, the reader must first find that there is a gap in the text, and then find that the Convention does not provide an answer through its underlying principles.

KRITZER, *supra* note 172, at 118 (quoting Peter Winship, *Private International Law and the U.N. Sales Convention*, 21 CORNELL INT'L L.J. 529 (1988)).

219. See *Beijing Metals*, 993 F.2d at 1178-87.

220. See *id.*

221. See CISG, art. 7(1).

whether parties to an agreement formed an “unintegrated,” “partially integrated,” or “completely integrated” document.<sup>222</sup> Misuse of the complex parol evidence rule would thus unnecessarily cause transaction costs to increase in the global economy.<sup>223</sup> Adding unnecessary costs to international transactions would not foster the Convention’s intent to promote the observance of good faith in international trade.

Furthermore, if the parol evidence rule were made applicable to the CISG, nations not familiar with the rule may gain distrust with nations that wish to apply the rule to the CISG.<sup>224</sup> The nations who would be placed at a legal disadvantage may then have an incentive to seek application of their complex domestic rules, unfamiliar to common-law countries, to gain their own legal upper-hand.<sup>225</sup> Hence, this potential act of reciprocity by other member nations would create a greater departure from the CISG’s desire to observe good faith in international trade.<sup>226</sup>

222. See *supra* Part II. Due to the rule’s inherent awkwardness, not even the United States, the common-law country that most regularly applies the rule, has a uniform parol evidence rule as developed under its case law. See HONNOLD, *supra* note 187, at 491. Furthermore, England, itself a common-law country and the place of origin of the parol evidence rule, sought abolishment of its use, because the rule has been an “embarrassment for the administration of modern transactions.” HONNOLD, *supra* note 12, at 171.

223. See Peter Winship, *Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention*, 37 LOY. L. REV. 43, 46 (1991).

224. See HONNOLD, *supra* note 12, at 161.

225. See *id.*; cf. Callaghan, *supra* note 5, at 183 (explaining that the United States centric view of trying to solve international trade conflicts by seeking uniform application of United States commercial laws is no longer tolerated by its trading partners, if it ever was); John Tagliabue, *Resisting Those Ugly Americans: Contempt in France for U.S. Funds and Investors*, N.Y. TIMES, Jan. 9, 2000, § 3, at 1 (discussing how the recent increase of United States investment in France as a result of the global economy has lead to increased apprehension of unwanted United States cultural influence in France). President Reagan noted that “[United States] sellers and buyers cannot expect that foreign trading partners will always agree on the applicability of United States law. Insistence by both parties on this sensitive point can prolong and jeopardize the making of . . . contract[s].” See Schultz, *supra* note 114, at 1369.

These observations may be especially true today in light of the recent adoption of the Euro, the new world currency, established by the joint effort of eleven European nations. See Jonathan Fuerbringer, *New Rival Arrives, but Dollar Is Still the World’s Champion*, N.Y. TIMES, Jan. 5, 1999, at C6. The Euro is expected to increase the economic and political bargaining power of the European nations and rival the United States dollar. See Rinaldo Gianola, *Euro, debutto alla grande: Da Sydney a Tokyo la nuova moneta batte dollaro e yen*, LA REPUBBLICA (Italy), Jan. 4, 1999, at 2.

226. See HONNOLD, *supra* note 12, at 161. Unbeknownst to many individuals, from 1840 to 1914, the world had already experienced a period of globalization that was, in a way, more dramatic than the integration of world markets that has been taking place since 1945. See *Trade Before the Tariffs*, ECONOMIST, Jan. 8-14, 2000, at 83 (reviewing KEVIN O’ROURKE & JEFFREY WILLIAMSON, *GLOBALISATION AND HISTORY: THE EVOLUTION OF A NINETEENTH-CENTURY ATLANTIC ECONOMY* (1999)). “Transport costs and trade barriers fell faster; international capital flows as a share of national output were far larger; and cross-border migration was far greater.” *Id.* However, countries that did not benefit from the globalization phenomenon soon put an end to its

Finally, the *MCC-Marble Ceramic Center* court acted in accordance with the catchall language in Article 7(2): “[q]uestions . . . governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.”<sup>227</sup> The court based its decision on express provisions of the CISG, namely Articles 8 and 11.<sup>228</sup> This would have provided a sufficient analysis under Article 7(2). However, the *MCC-Marble Ceramic Center* court took an additional step. To further support the strength of its holding, the court also based its decision on the general principles of the Convention: the promotion of uniformity and good faith in cross-border contracts involving the sale of goods.<sup>229</sup>

In contrast, the *Beijing Metals* court did not render its decision in accordance with Article 7(2). Instead of first attempting to explain its reasoning based on express provisions or the general principles of the Convention, the court reflexively applied private international law, the United States parol evidence rule.<sup>230</sup>

The quality of the United States court decisions that need to interpret Article 8 will not be compromised if the parol evidence rule were excluded from the Convention. If contracting parties wish to use the parol evidence rule to limit the scope of admissible evidence, they can do so by making express declarations pursuant to the applicable CISG provisions.<sup>231</sup>

To avoid parol evidence problems regarding prior agreements, parties may also add a merger clause to their written contracts. A typical merger clause includes language which indicates that all of the terms in a particular contract are intended to be final and complete expressions of the contracting parties.<sup>232</sup> The approach that a majority of courts fol-

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occurrence. *See id.*

227. CISG, art. 7(2).

228. *See MCC-Marble Ceramic Ctr., Inc.*, 144 F.3d at 1386-90.

229. *See id.* at 1390.

230. *See Beijing Metals*, 993 F.2d at 1182-83. When the court argued that the UCC did not apply to the dispute because the contract at issue resembled a settlement agreement more than a sale of goods contract, the court had a chance to argue the CISG was also inapplicable to the case. However, the court declined to do so, and instead decided that the CISG may have also governed the case. *See id.* at 1183 n.9.

231. As discussed *supra* notes 179-85 and accompanying text, Articles 12 and 96 permit parties to deviate from the terms of the CISG and adopt the parol evidence rule. Moreover, the parties can contract for a specific type of parol evidence rule such as the modern Corbin or classic Williston approach. *See Ross & Tranen, supra* note 69, at 229.

232. *See FARNSWORTH, supra* note 45, § 7.3, at 436; *see also* Ronald A. Brand & Harry M.



low is to give conclusive effect to merger clauses because they specifically deal with expressing the intention of contracting parties as to their desired degree of integration.<sup>233</sup> However, the minority view taken by courts is to deny the conclusive effect of merger clauses.<sup>234</sup> Some of the courts that have adopted the minority approach have decided that a merger clause should only be one of many factors to be considered in determining the existence of a total integration.<sup>235</sup> Other courts that adhere to the minority approach have suggested only merger clauses that are actually agreed upon by the parties, as opposed to a boilerplate merger clause, should have conclusive effect.<sup>236</sup> Nevertheless, even if not conclusive evidence, merger clauses may at least serve as probative evidence to help an undecided court determine whether parties to an agreement decided to produce an unintegrated, partially integrated, or completely integrated document.

Furthermore, courts will not give conclusive effect to a party's evidence that attempts to prove his or her subjective intent.<sup>237</sup> Just like other questions of fact, parties will have to prove their subjective intent through the proper discovery channels.<sup>238</sup> Moreover, the United States *Federal Rules of Evidence* ("FRE") also will serve as a safeguard to prevent the admission of unreliable or irrelevant extrinsic evidence.<sup>239</sup> The FRE, a body of procedural rules, applies to the CISG, even though the CISG is an international agreement. A court is always free to use procedural rules regardless of the substantive source of law, whether it be national or international, that governs a case.<sup>240</sup>

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Flechtner, *Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention*, 12 J.L. & COM. 239, 252 (1993) (discussing the effect of merger clauses on contracts governed by the CISG).

233. See CALAMARI & PERILLO, *supra* note 47, § 3-6, at 156; FARNSWORTH, *supra* note 45, § 7.3, at 436; see also *Tapper Chevrolet Co. v. Hansen*, 510 P.2d 1091, 1094 (Idaho 1973) (holding "the integrated character of the parties' written contract is established by its 'merger' provision").

234. See *Sierra Diesel Injection Serv., Inc. v. Burroughs Corp.*, 874 F.2d 653, 657 (9th Cir. 1989) (holding that the merger clause in a pre-printed form contract did not determine integration as a matter of law); RESTATEMENT (SECOND) OF CONTRACTS, § 209 cmt. b (stating that a declaration of a merger clause does not have conclusive effect).

235. See CALAMARI & PERILLO, *supra* note 47, § 3.6, at 156.

236. See *id.*

237. See *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino, S.p.A.*, 144 F.3d 1384, 1389 (11th Cir. 1998).

238. See *id.*

239. For example, a party that wished to prove a contract through the aid of extrinsic evidence could not do so in a way that would violate the rule against hearsay. See FED. R. EVID. 802; *MCC-Marble Ceramic Ctr., Inc.*, 144 F.3d at 1389.

240. See *MCC-Marble Ceramic Ctr., Inc.*, 144 F.3d at 1389; note 13 and accompanying text.

Therefore, to help achieve uniformity in international contract law, courts can avoid application of the parol evidence rule while simultaneously having the ability to preserve the integrity of written contracts through other viable and available methods.

*D. Academic Commentary in Support of the  
MCC-Marble Ceramic Center  
Parol Evidence Analysis*

Most CISG commentators agree that in comparison with the parol evidence rule, Article 8 provides for a broader examination of evidence to ascertain the subjective intent of contracting parties.<sup>241</sup> As opposed to the explicit parol evidence rule provisions in the UCC or the *Restatement*, neither the language in Article 8, nor any other provisions of the CISG mention any special method for determining the intent of contracting parties.<sup>242</sup> John Honnold, one of the official United States representatives to the Convention, has commented that, "Article 8 does not directly address the 'parol evidence rule'; references to this and other technical domestic rules would have cluttered the draft and would have mystified jurists from legal systems that have no such rule."<sup>243</sup>

However, at least two legal scholars, Ronald A. Brand and Harry M. Flechtner, are of the opinion that the parol evidence rule is consistent with Article 8 with regard to the interpretation of contract lan-

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241. See HONNOLD, *supra* note 12, at 171; KRITZER, *supra* note 172, at 125 (noting "the Convention has no parole evidence rule of the type recited in UCC 2-202"); Andreason, *supra* note 5, at 360 ("Since negotiations are a type of evidence the parol evidence rule specifically prohibits, the Convention writers' efforts to include prior negotiations demonstrates their clear desire to reject the parol evidence rule."); Samuel J.M. Donnelly & Mary Ann Donnelly, *Commercial Law*, 49 SYRACUSE L. REV. 271, 303 (1999) ("The Parol Evidence Rule like the Statute of Frauds is not part of the CISG so the agreement of the parties can be evidenced by oral statements made prior to or contemporaneously with any writing."); Esslinger, *supra* note 15, at 84 ("The U.C.C.'s parol evidence rule is thus effectively *revoked* for CISG contracts."); Flechtner, *supra* note 171, at 158; Henry D. Gabriel, *The Inapplicability of the United Nations Convention on the International Sale of Goods as a Model for the Revision of Article Two of the Uniform Commercial Code*, 72 TUL. L. REV. 1995, 2007 (1998) ("[T]he CISG also does not have a parol evidence rule."); Murray, *supra* note 43, at 12 ("We are struck by a new world where there is no consideration, no statute of frauds, and no parol evidence rule, among other differences."); Winship, *supra* note 223, at 57 (discussing that "Article 8(3) of the Convention rejects domestic rules that bar the fact finder from considering any evidence other than a written contract document without regard to the parties' intent").

242. See Flechtner, *supra* note 171, at 157. Compare CISG, art. 8 with U.C.C. § 2-202 (1996). When the UCC applies to a case, Article 2 explicitly includes a parol evidence rule provision to be taken into consideration. See U.C.C. § 2-202.

243. HONNOLD, *supra* note 12, at 170.

guage.<sup>244</sup> “According to modern authorities, the parol evidence rule does not bar evidence that relates to interpreting existing terms of a writing . . . .”<sup>245</sup> Moreover, “[f]ar from invalidating such a rule, CISG Article 8(3) emphasizes the importance of the parties’ intent . . . .”<sup>246</sup> However, with regard to proving whether a contract is a partial or complete integration, Brand and Flechtner concede the dissimilarities between Article 8 and the parol evidence rule.<sup>247</sup> Moreover, with regard to determining the subjective intent of contracting parties, both commentators also admit that “the Convention [clearly] does not adopt the somewhat bizarre and abstruse methods for determining intent associated with the parol evidence rule.”<sup>248</sup>

Another commentator, David H. Moore, has argued that in applying the modern form of the parol evidence rule to an agreement, a judge also gives “due consideration” to all the relevant circumstances of the case.<sup>249</sup> According to Moore, the modern form of the parol evidence rule “requires the court to determine whether a writing is completely or partially integrated by looking to the intent of the parties, intent that may be indicated ‘by any relevant evidence’” including prior negotiations.<sup>250</sup> Likewise, Moore mentions that besides examining prior negotiations to determine whether the parties intended a partial or complete integration, courts will look to prior negotiations to help interpret the language used in a contract.<sup>251</sup>

Contrary to Moore’s analysis, even under the modern parol evidence rule, once a judge determines that a writing is an integration, whether partial or complete, terms that contradict the writing are not admissible.<sup>252</sup> Furthermore, upon a finding of a complete integration, courts will even prohibit admitting terms that are consistent with and supplement the writing.<sup>253</sup> On the other hand, Article 8(3) will let a court admit evidence of prior oral or written agreements that are inconsistent with the contract to prove the subjective intent of the parties. The broad

244. See Brand & Flechtner, *supra* note 232, at 251-52.

245. *Id.* at 251.

246. *Id.*

247. See *id.*

248. *Id.*

249. See David H. Moore, *The Parol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*, 1995 BYU L. REV. 1347, 1361 (1995).

250. *Id.*

251. See *id.* at 1357 n.45; *supra* Part II.A.2.

252. See U.C.C. § 2-202 (1996); RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. a (1981).

253. See *supra* Part II.B.1.

sweeping “due consideration” language of Article 8(3) permits the admissibility of evidence without considering a special set of exclusionary evidentiary rules.<sup>254</sup> Thus, the CISG goes further than the parol evidence rule to obtain the subjective intent of the parties by admitting a wider range of evidence of prior negotiations.

## V. CONCLUSION

Although the parol evidence rule may be consistent with Article 8 in some circumstances, Article 8 takes a more liberal approach in permitting extrinsic evidence. Article 8 is to be so liberally construed that even if a document were found to be a complete integration, Article 8 would still permit the admission of evidence of prior agreements to contradict the terms of the contract.<sup>255</sup> Article 8 allows for such admission because obtaining the subjective intent of the contracting parties is crucial to the CISG. Furthermore, having an abstract and difficult rule, such as the parol evidence rule, runs contrary to the Convention’s goals of seeking to establish uniformity and simplicity in the law for the international sale of goods. Therefore, courts in the United States should follow the Eleventh Circuit Court’s approach in precluding the application of the parol evidence rule to contracts governed by the Convention. In addition, courts in other CISG member nations should look to the cogent *MCC Marble-Ceramic Center* analysis as a model when they are confronted with interpreting not only Article 8 but other CISG provisions as well.

*Peter J. Calleo\**

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254. See Flechtner, *supra* note 171, at 157 n.13.

255. See *supra* Part IV.A.

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