# International Contracting

Law 6302/ 03877

3-Credit hours

4:30p-6p Wth, 215-TUII, Linzer/Lawson

## First Day Class Assignments for the Fall 2006 Semester

1. Your assignment before the first Class at 4:30 PM on Aug. 23, 2006, is to read the following cases: (The cases are printed below) :

A. MCC - Marble Ceramic Center, Inc., V. Ceramica Nuova D'agostino, S.P.A., 144 F 3rd 1384, (1998) 11th Cir.

B. CISG Advisory Council Opinion No. 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG.

2. For our second Class on Aug. 24, 2 006, please read the following from "Contract Law from a Drafting Prospective - An Introduction to Contract Drafting for Law Students" by Thomas Haggard : Pages 1-38.

3. For our third Class on Aug 30, 2006, please read the following from "Contract Law from a Drafting Prospective - An Introduction to Contract Drafting for Law Students" by Thomas Haggard : Pages 38 - 69.

4. For our fourth Class on Aug 31, 2006, please prepare Exercises13 -18 from "Contract Law from a Drafting Prospective - An Introduction to Contract Drafting for Law Students" by Thomas Haggard found on Pages 69- 96.

# Notice to Students:

The class attendance policy for this course will follow the Law Center's attendance policy. If a student's attendance falls below 80% the student will be dropped from the course and will not receive a grade. We will have a sign sheet that will be the only evidence of your attendance. Please make sure that you sign in for each class.

This class will follow the Law Center's computer-use-during-class policy, which prohibits the use of a computer in a way likely to distract other students. Such distracting use includes, but is

not limited to, playing games, watching movies or making distracting noise. The professor is allowed to make the infraction penalty a "constructive lack of attendance" for the class period during which the offense occurs.

The Law Center policy permits a professor to submit an adjustment to a student's grade based on class participation and/or attendance. You are on notice we reserve the right to adjust grades based on these factors.

Professors Linzer and Lawson

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 97-4250

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D. C. Docket No. 92-2108-CIV
MCC-MARBLE CERAMIC CENTER, INC.,
Plaintiff-Counter-Defendant-Appellant,
versus
CERAMICA NUOVA D'AGOSTINO, S.P.A.,
Defendant-Counter-Claimant-Appellee.

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Appeal from the United States District Court
for the Southern District of Florida

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(June 29, 1998)
Before EDMONDSON and BIRCH, Circuit Judges and FAY, Senior Circuit Judge.
BIRCH, Circuit Judge:
This case requires us to determine whether a court must consider parol evidence in a contract dispute governed by the United Nations Convention on Contracts for the International Sale of Goods ("CISG").(1) The district court granted summary judgment on behalf of the defendant-appellee, relying on certain terms and provisions that appeared on the reverse of a pre-printed form contract for the sale of ceramic tiles. The plaintiff-appellant sought to rely on a number of affidavits that tended to show both that the parties had arrived at an oral contract before memorializing their agreement in writing and that they subjectively intended not to apply the terms on the reverse of the contract to their agreements. The magistrate judge held that the affidavits did not raise an issue of material fact and recommended that the district court grant summary judgment based on the terms of the contract. The district court agreed with the magistrate judge's reasoning and entered summary judgment in the defendant-appellee's favor. We REVERSE.

BACKGROUND
The plaintiff-appellant, MCC-Marble Ceramic, Inc. ("MCC"), is a Florida corporation engaged in the retail sale of tiles, and the defendant-appellee, Ceramica Nuova d'Agostino S.p.A. ("D'Agostino") is an Italian corporation engaged in the manufacture of ceramic tiles. In October 1990, MCC's president, Juan Carlos Mozon, met representatives of D'Agostino at a trade fair in Bologna, Italy and negotiated an agreement to purchase ceramic tiles from D'Agostino based on samples he examined at the trade fair. Monzon, who spoke no Italian, communicated with Gianni Silingardi, then D'Agostino's commercial director, through a translator, Gianfranco Copelli, who was himself an agent of D'Agostino.(2)

The parties apparently arrived at an oral agreement on the crucial terms of price, quality, quantity, delivery and payment. The parties then recorded these terms on one of D'Agostino's standard, pre-printed order forms and Monzon signed the contract on MCC's behalf. According to MCC, the parties also entered into a requirements contract in February 1991, subject to which D'Agostino agreed to supply MCC with high grade ceramic tile at specific discounts as long as MCC purchased sufficient quantities of tile. MCC completed a number of additional order forms requesting tile deliveries pursuant to that agreement.
MCC brought suit against D'Agostino claiming a breach of the February 1991 requirements contract when D'Agostino failed to satisfy orders in April, May, and August of 1991. In addition to other defenses, D'Agostino responded that it was under no obligation to fill MCC's orders because MCC had defaulted on payment for previous shipments. In support of its position, D'Agostino relied on the pre-printed terms of the contracts that MCC had executed. The executed forms were printed in Italian and contained terms and conditions on both the front and reverse. According to an English translation of the October 1990 contract,(3) the front of the order form contained the following language directly beneath Monzon's signature:
“The buyer hereby states that he is aware of the sales conditions stated on the reverse and that he expressly approves of them with special reference to those numbered 1-2-3-4-5-6-7-8.”
R2-126, Exh. 3  5 ("Maselli Aff.").

Clause 6(b), printed on the back of the form states:
“Default or delay in payment within the time agreed upon gives D'Agostino the right to . . . suspend or cancel the contract itself and to cancel possible other pending contracts and the buyer does not have the right to indemnification or damages.”
Id. 6.

D'Agostino also brought a number of counterclaims against MCC, seeking damages for MCC's alleged nonpayment for deliveries of tile that D'Agostino had made between February 28, 1991 and July 4, 1991. MCC responded that the tile it had received was of a lower quality than contracted for, and that, pursuant to the CISG, MCC was entitled to reduce payment in proportion to the defects.(4) D'Agostino, however, noted that clause 4 on the reverse of the contract states, in pertinent part:
“Possible complaints for defects of the merchandise must be made in writing by means of a certified letter within and not later than 10 days after receipt of the merchandise . . . .”

Although there is evidence to support MCC's claims that it complained about the quality of the deliveries it received, MCC never submitted any written complaints.
MCC did not dispute these underlying facts before the district court, but argued that the parties never intended the terms and conditions printed on the reverse of the order form to apply to their agreements. As evidence for this assertion, MCC submitted Monzon's affidavit, which claims that MCC had no subjective intent to be bound by those terms and that D'Agostino was aware of this intent. MCC also filed affidavits from Silingardi and Copelli, D'Agostino's representatives at the trade fair, which support Monzon's claim that the parties subjectively intended not to be bound by the terms on the reverse of the order form. The magistrate judge held that the affidavits, even if true, did not raise an issue of material fact regarding the interpretation or applicability of the terms of the written contracts and the district court accepted his recommendation to award summary judgment in D'Agostino's favor. MCC then filed this timely appeal.

DISCUSSION
We review a district court's grant of summary judgment de novo and apply the same standards as the district court. See Harris v. H&W Contracting Co., 102 F.3d 516, 518 (11th Cir. 1996). Summary judgment is appropriate when the pleadings, depositions, and affidavits reveal that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c).
The parties to this case agree that the CISG governs their dispute because the United States, where MCC has its place of business, and Italy, where D'Agostino has its place of business, are both States Party to the Convention.(5) See CISG, art. 1.(6) Article 8 of the CISG governs the interpretation of international contracts for the sale of goods and forms the basis of MCC's appeal from the district court's grant of summary judgment in D'Agostino's favor.(7) MCC argues that the magistrate judge and the district court improperly ignored evidence that MCC submitted regarding the parties' subjective intent when they memorialized the terms of their agreement on D'Agostino's pre-printed form contract, and that the magistrate judge erred by applying the parol evidence rule in derogation of the CISG.

Subjective Intent Under the CISG
Contrary 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.(8) Article 8(1) of the CISG instructs courts to interpret the "statements . . . and other conduct of a party . . . according to his intent" as long as the other party "knew or could not have been unaware" of that intent. The plain language of the Convention, therefore, requires an inquiry into a party's subjective intent as long as the other party to the contract was aware of that intent.
In this case, MCC has submitted three affidavits that discuss the purported subjective intent of the parties to the initial agreement concluded between MCC and D'Agostino in October 1990. All three affidavits discuss the preliminary negotiations and report that the parties arrived at an oral agreement for D'Agostino to supply quantities of a specific grade of ceramic tile to MCC at an agreed upon price. The affidavits state that the "oral agreement established the essential terms of quality, quantity, description of goods, delivery, price and payment." See R3-133 ¶¶¶¶ 9 ("Silingardi Aff."); R1-51 7 ("Copelli Aff."); R1- 47 7 ("Monzon Aff.").

The affidavits also note that the parties memorialized the terms of their oral agreement on a standard D'Agostino order form, but all three affiants contend that the parties subjectively intended not to be bound by the terms on the reverse of that form despite a provision directly below the signature line that expressly and specifically incorporated those terms.(9)

The terms on the reverse of the contract give D'Agostino the right to suspend or cancel all contracts in the event of a buyer's non-payment and require a buyer to make a written report of all defects within ten days. As the magistrate judge's report and recommendation makes clear, if these terms applied to the agreements between MCC and D'Agostino, summary judgment would be appropriate because MCC failed to make any written complaints about the quality of tile it received and D'Agostino has established MCC's non-payment of a number of invoices amounting to $108,389.40 and 102,053,846.00 Italian lira.

Article 8(1) of the CISG requires a court to consider this evidence of the parties' subjective intent. Contrary to the magistrate judge's report, which the district court endorsed and adopted, article 8(1) does not focus on interpreting the parties' statements alone. Although we agree with the magistrate judge's conclusion that no "interpretation" of the contract's terms could support MCC's position,(10) article 8(1) also requires a court to consider subjective intent while interpreting the conduct of the parties. The CISG's language, therefore, requires courts to consider evidence of a party's subjective intent when signing a contract if the other party to the contract was aware of that intent at the time. This is precisely the type of evidence that MCC has provided through the Silingardi, Copelli, and Monzon affidavits, which discuss not only Monzon's intent as MCC's representative but also discuss the intent of D'Agostino's representatives and their knowledge that Monzon did not intend to agree to the terms on the reverse of the form contract. This acknowledgment that D'Agostino's representatives were aware of Monzon's subjective intent puts this case squarely within article 8(1) of the CISG, and therefore requires the court to consider MCC's evidence as it interprets the parties' conduct.(11)

II. Parol Evidence and the CISG

Given our determination that the magistrate judge and the district court should have considered MCC's affidavits regarding the parties' subjective intentions, we must address a question of first impression in this circuit: whether the parol evidence rule, which bars evidence of an earlier oral contract that contradicts or varies the terms of a subsequent or contemporaneous written contract,(12) plays any role in cases involving the CISG. We begin by observing that the parol evidence rule, contrary to its title, is a substantive rule of law, not a rule of evidence. See II E. Allen Farnsworth, Farnsworth on Contracts, §§§§ .2 at 194 (1990). The rule does not purport to exclude a particular type of evidence as an "untrustworthy or undesirable" way of proving a fact, but 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. As such, 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. Cf. id. §§§§ 7.2 at 196.(13)

The CISG itself contains no express statement on the role of parol evidence. See Honnold, Uniform Law §§§§ 110 at 170. It is clear, however, that the drafters of the CISG were comfortable with the concept of permitting parties to rely on oral contracts because they

eschewed any statutes of fraud provision and expressly provided for the enforcement of oral contracts. Compare CISG, art. 11 (a contract of sale need not be concluded or evidenced in writing) with U.C.C. §§§§ 2-201 (precluding the enforcement of oral contracts for the sale of goods involving more than $500). Moreover, article 8(3) of the CISG expressly directs courts to give "due consideration . . . to all relevant circumstances of the case including the negotiations . . ." to determine the intent of the parties. Given article 8(1)'s directive to use the intent of the parties to interpret their statements and conduct, article 8(3) is a clear instruction to admit and consider parol evidence regarding the negotiations to the extent they reveal the parties' subjective intent.

Despite the CISG's broad scope, surprisingly few cases have applied the Convention in the United States,(14) see Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1027-28 (2d Cir. 1995) (observing that "there is virtually no case law under the Convention"), and only two reported decisions touch upon the parol evidence rule, both in dicta. One court has concluded, much as we have above, that the parol evidence rule is not viable in CISG cases in light of article 8 of the Convention. In Filanto, a district court addressed the differences between the UCC and the CISG on the issues of offer and acceptance and the battle of the forms. See 789 F. Supp. at 1238. After engaging in a thorough analysis of how the CISG applied to the dispute before it, the district court tangentially observed that article 8(3) "essentially rejects . . . the parol evidence rule." Id. at 1238 n.7. Another court, however, appears to have arrived at a contrary conclusion. In Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr., Inc., 993 F.2d 1178 (5th Cir. 1993), a defendant sought to avoid summary judgment on a contract claim by relying on evidence of contemporaneously negotiated oral terms that the parties had not included in their written agreement. The plaintiff, a Chinese corporation, relied on Texas law in its complaint while the defendant, apparently a Texas corporation,(15) asserted that the CISG governed the dispute. Id. at 1183 n.9. Without resolving the choice of law question,(16) the Fifth Circuit cited Filanto for the proposition that there have been very few reported cases applying the CISG in the United States, and stated that the parol evidence rule would apply regardless of whether Texas law or the CISG governed the dispute. Beijing Metals, 993 F.2d at 1183 n.9. The opinion does not acknowledge Filanto's more applicable dictum that the parol evidence rule does not apply to CISG cases nor does it conduct any analysis of the Convention to support its conclusion. In fact, the Fifth Circuit did not undertake to interpret the CISG in a manner that would arrive at a result consistent with the parol evidence rule but instead explained that it would apply the rule as developed at Texas common law. See id. at 1183 n.10. As persuasive authority for this court, the Beijing Metals opinion is not particularly persuasive on this point.

Our reading of article 8(3) as a rejection of the parol evidence rule, however, is in accordance with the great weight of academic commentary on the issue. As one scholar has explained:

“”The language of Article 8(3) that "due consideration is to be given to all relevant circumstances of the case" seems adequate to override any domestic rule that would bar a tribunal from considering the relevance of other agreements. . . . Article 8(3) relieves tribunals from domestic rules that might bar them from "considering" any evidence between the parties that is relevant. This added flexibility for interpretation is consistent with a growing body of opinion that the "parol evidence rule" has been an embarrassment for the administration of modern transactions.

Honnnold, Uniform Law §§§§ 110 at 170-71.(17) Indeed, only one commentator has made any serious attempt to reconcile the parol evidence rule with the CISG. See David H. Moore, Note,

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. Moore argues that the parol evidence rule often permits the admission of evidence discussed in article 8(3), and that the rule could be an appropriate way to discern what consideration is "due" under article 8(3) to evidence of a parol nature. Id. at 1361-63. He also argues that the parol evidence rule, by limiting the incentive for perjury and pleading prior understandings in bad faith, promotes good faith and uniformity in the interpretation of contracts and therefore is in harmony with the principles of the CISG, as expressed in article 7.(18) Id. at 1366-70. The answer to both these arguments, however, is the same: although jurisdictions in the United States have found the parol evidence rule helpful to promote good faith and uniformity in contract, as well as an appropriate answer to the question of how much consideration to give parol evidence, a wide number of other States Party to the CISG have rejected the rule in their domestic jurisdictions. One of the primary factors motivating the negotiation and adoption of the CISG was to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party's legal system might otherwise apply. See Letter of Transmittal from Ronald Reagan, President of the United States, to the United States Senate, reprinted at 15 U.S.C. app. 70, 71 (1997). Courts applying the CISG cannot, therefore, upset the parties' reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result. We may only achieve the directives of good faith and uniformity in contracts under the CISG by interpreting and applying the plain language of article 8(3) as written and obeying its directive to consider this type of parol evidence.

This is not to say that parties to an international contract for the sale of goods cannot depend on written contracts or that parol evidence regarding subjective contractual intent need always prevent a party relying on a written agreement from securing summary judgment. To the contrary, most cases will not present a situation (as exists in this case) in which both parties to the contract acknowledge a subjective intent not to be bound by the terms of a pre-printed writing. In most cases, therefore, article 8(2) of the CISG will apply, and objective evidence will provide the basis for the court's decision. See Honnold, Uniform Law §§§§ 107 at 164-65. Consequently, a party to a contract governed by the CISG will not be able to avoid the terms of a contract and force a jury trial simply by submitting an affidavit which states that he or she did not have the subjective intent to be bound by the contract's terms. Cf. Klopfenstein v. Pargeter, 597 F.2d 150, 152 (9th Cir. 1979) (affirming summary judgment despite the appellant's submission of his own affidavit regarding his subjective intent: "Undisclosed, subjective intentions are immaterial in [a] commercial transaction, especially when contradicted by objective conduct. Thus, the affidavit has no legal effect even if its averments are accepted as wholly truthful."). Moreover, to the extent parties wish to avoid parol evidence problems they can do so by including a merger clause in their agreement that extinguishes any and all prior agreements and understandings not expressed in the writing.(19)

Considering MCC's affidavits in this case, however, we conclude that the magistrate judge and the district court improperly granted summary judgment in favor of D'Agostino. Although the affidavits are, as D'Agostino observes, relatively conclusory and unsupported by facts that would objectively establish MCC's intent not to be bound by the conditions on the reverse of the form, article 8(1) requires a court to consider evidence of a party's subjective intent when the other

party was aware of it, and the Silingardi and Copelli affidavits provide that evidence. This is not to say that the affidavits are conclusive proof of what the parties intended. A reasonable finder of fact, for example, could disregard testimony that purportedly sophisticated international merchants signed a contract without intending to be bound as simply too incredible to believe and hold MCC to the conditions printed on the reverse of the contract.(20) Nevertheless, the affidavits raise an issue of material fact regarding the parties' intent to incorporate the provisions on the reverse of the form contract. If the finder of fact determines that the parties did not intend to rely on those provisions, then the more general provisions of the CISG will govern the outcome of the dispute.(21)

MCC's affidavits, however, do not discuss all of the transactions and orders that MCC placed with D'Agostino. Each of the affidavits discusses the parties' subjective intent surrounding the initial order MCC placed with D'Agostino in October 1990. The Copelli affidavit also discusses a February 1991 requirements contract between the parties and reports that the parties subjectively did not intend the terms on the reverse of the D'Agostino order form to apply to that contract either. See Copelli Aff. ¶¶¶¶ 12.
D'Agostino, however, submitted the affidavit of its chairman, Vincenzo Maselli, which describes at least three other orders from MCC on form contracts dated January 15, 1991, April 27, 1991, and May 4, 1991, in addition to the October 1990 contract. See Maselli Aff. ¶¶¶¶ 2, 25.

MCC's affidavits do not discuss the subjective intent of the parties to be bound by language in those contracts, and D'Agostino, therefore, argues that we should affirm summary judgment to the extent damages can be traced to those order forms. It is unclear from the record, however, whether all of these contracts contained the terms that appeared in the October 1990 contract.(22) Moreover, because article 8 requires a court to consider any "practices which the parties have established between themselves, usages and any subsequent conduct of the parties" in interpreting contracts, CISG, art. 8(3), whether the parties intended to adhere to the ten day limit for complaints, as stated on the reverse of the initial contract, will have an impact on whether MCC was bound to adhere to the limit on subsequent deliveries. Since material issues of fact remain regarding the interpretation of the remaining contracts between MCC and D'Agostino, we cannot affirm any portion of the district court's summary judgment in D'Agostino's favor.

CONCLUSION
MCC asks us to reverse the district court's grant of summary judgment in favor of D'Agostino. The district court's decision rests on pre-printed contractual terms and conditions incorporated on the reverse of a standard order form that MCC's president signed on the company's behalf. Nevertheless, we conclude that the CISG, which governs international contracts for the sale of goods, precludes summary judgment in this case because MCC has raised an issue of material fact concerning the parties' subjective intent to be bound by the terms on the reverse of the pre-printed contract. The CISG also precludes the application of the parol evidence rule, which would otherwise bar the consideration of evidence concerning a prior or contemporaneously negotiated oral agreement. Accordingly, we REVERSE the district court's grant of summary judgment and REMAND this case for further proceedings consistent with this opinion.

FOOTNOTES

1. United Nations Convention on Contracts for the International Sale of Goods, opened for signature April 11, 1980, S. Treaty Doc. No. 9, 98th Cong., 1st Sess. 22 (1983), 19 I.L.M. 671, reprinted at, 15 U.S.C. app. 52 (1997).

2. Since this case is before us on summary judgment, we consider the facts in the light most favorable to MCC, the non-moving party, and grant MCC the benefit of every factual inference. See Welch v. Celotex Corp., 951 F.2d 1235, 1237 (11th Cir. 1992).

3. D'Agostino provided the translation of the contract. MCC has never contested its accuracy.

4. Article 50 of the CISG permits a buyer to reduce payment for nonconforming goods in proportion to the nonconformity under certain conditions. See CISG, art. 50.

5. The United States Senate ratified the CISG in 1986, and the United States deposited its instrument of ratification at the United Nations Headquarters in New York on December 11, 1986. See Preface to Convention, reprinted at 15 U.S.C. app. 52 (1997). The Convention entered into force between the United States and the other States Parties, including Italy, on January 1, 1988. See id.; Filanto S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992).

6. Article 1 of the CISG states in relevant 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 . . . .
CISG, art. 1.

7. Article 8 provides:
(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 conduct of a party are to be interpreted according to the understanding a reasonable person of the same kind as the other party would have had in the same circumstances.
(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.
CISG, art. 8.

8. In the United States, the legislatures, courts, and the legal academy have voiced a preference for relying on objective manifestations of the parties' intentions. For example, Article Two of the Uniform Commercial Code, which most states have enacted in some form or another to govern contracts for the sale of goods, is replete with references to standards of commercial reasonableness. See e.g., U.C.C. §§§§ 2-206 (referring to reasonable means of accepting an offer); see also Lucy v. Zehmer, 196 Va. 493, 503, 84 S.E.2d 516, 522 (1954) ("Whether the writing signed . . . was the result of a serious offer . . . and a serious acceptance . . . , or was a

serious offer . . . and an acceptance in secret jest . . . , in either event it constituted a binding contract of sale between the parties."). Justice Holmes expressed the philosophy behind this focus on the objective in forceful terms: "The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct." Oliver W. Holmes, The Common Law 242 (Howe ed. 1963) quoted in John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention §§§§ 107 at 164 (2d ed. 1991) (hereinafter Honnold, Uniform Law).

9. MCC makes much of the fact that the written order form is entirely in Italian and that Monzon, who signed the contract on MCC's behalf directly below this provision incorporating the terms on the reverse of the form, neither spoke nor read Italian. This fact is of no assistance to MCC's position. We find it nothing short of astounding that an individual, purportedly experienced in commercial matters, would sign a contract in a foreign language and expect not to be bound simply because he could not comprehend its terms. We find nothing in the CISG that might counsel this type of reckless behavior and nothing that signals any retreat from the proposition that parties who sign contracts will be bound by them regardless of whether they have read them or understood them. See e.g., Samson Plastic Conduit and Pipe Corp. v. Battenfeld Extrusionstechnik GMBH, 718 F. Supp. 886, 890 (M.D. Ala. 1989) ("A good and recurring illustration of the problem . . . involves a person who is . . . unfamiliar with the language in which a contract is written and who has signed a document which was not read to him. There is all but unanimous agreement that he is bound . . . . ")

10. The magistrate judge's report correctly notes that MCC has not sought an interpretation of those terms, but rather to exclude them altogether. We agree that such an approach "would render terms of written contracts virtually meaningless and severely diminish the reliability of commercial contracts." R2-102 at 5-6.

11. Without this crucial acknowledgment, we would interpret the contract and the parties' actions according to article 8(2), which directs courts to rely on objective evidence of the parties' intent. On the facts of this case it seems readily apparent that MCC's affidavits provide no evidence that Monzon's actions would have made his alleged subjective intent not to be bound by the terms of the contract known to "the understanding that a reasonable person . . . would have had in the same circumstances." CISG, art 8(2).
12. The Uniform Commercial Code includes a version of the parol evidence rule applicable to contracts for the sale of goods in most states:
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 . . . or by course of performance . . . ; 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 agreement.
U.C.C. §§§§ 2-202.

13. An example demonstrates this point. The CISG provides that a contract for the sale of goods need not be in writing and that the parties may prove the contract "by any means, including

witnesses." CISG, art. 11. Nevertheless, a party seeking to prove a contract in such a manner in federal court could not do so in a way that violated in the rule against hearsay. See Fed. R. Evid. 802 (barring hearsay evidence). A federal district court applies the Federal Rules of Evidence because these rules are considered procedural, regardless of the source of the law that governs the substantive decision. Cf. Farnsworth on Contracts §§§§ 7.2 at 196 & n. 16 (citing cases).

14. Moreover, the parties have not cited us to any persuasive authority from the courts of other States Party to the CISG. Our own research uncovered a promising source for such decisions at the Pace Law School website, but produced no cases that address the issue of parol evidence.

15. The Beijing Metals opinion does not state the place of the defendant's incorporation, but the defendant must have been a United States corporation because the court noted that the case was a "diversity action." Beijing Metals, 993 F.2d at 1183 n.9. Cf. 28 U.S.C. §§§§ 1332 (providing no statutory grant for suits between aliens unless a citizen of a State is present); 15 James W. Moore, Moore's Federal Practice §§§§ 102.77 (3d ed. 1998) (observing that diversity jurisdiction is not present in suits between two foreign citizens).

16. The Fifth Circuit unwittingly may have solved the problem in the very next footnote, where it observed that the agreement between the parties, which attempted to settle a dispute regarding an earlier sales contract, was not itself a contract for the sale of goods and therefore fell outside the Uniform Commercial Code. Beijing Metals, 993 F.2d at 1183 n.10. See CISG, art. 1(1) ("This Convention applies to contracts of sale of goods . . . .") (emphasis added).

17. See also Louis F. Del Duca, et al., Sales Under the Uniform Commercial Code and the Convention on International Sale of Goods, 173-74 (1993); 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. Int'l & Comp. L. Rev. 279, 281 (1997) ("Subjective intent is given primary consideration . . . . [Article 8] allows open-ended reliance on parol evidence . . . ."); Herbert Berstein & Joseph Lookofsky, Understanding the CISG in Europe 29 (1997) ("[The CISG has dispensed with the parol evidence rule which might otherwise operate to exclude extrinsic evidence under the law of certain Common Law countries."); Harry M. Fletchner, Recent Developments: CISG, 14 J.L. & Com. 153, 157 (1995) (criticizing the Beijing Metals opinion and noting that "[commentators generally agree that article 8(3) rejects the approach to the parol evidence questions taken by U.S. domestic law.") (collecting authority); 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, 12 (1988) ("We are struck by a new world where there is . . . no parol evidence rule, among other differences."); 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, 57 (1991).

18. Article 7 of the CISG provides in pertinent part:
(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 the general principles on which it is based . . . .

CISG, art. 7.

19. See Ronald A. Brand & Harry M. Fletchner, Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention, 12 J.L. & Com. 239, 252 (1993) (arguing that article 8(3) of the CISG will not permit the consideration of parol evidence when the parties have expressly excluded oral modifications of the contract pursuant to article 29); see also I Albert Kritzer, Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods 125 (1989) (counseling the use of a merger clause to compensate for the absence of a parol evidence rule in the CISG).

20. D'Agostino attempts to explain and undermine the affidavit of its representatives during the transaction, by calling Silingardi a "disgruntled" former employee. Appellee's Br. at 11, 39. Silingardi's alleged feelings towards his former employer may indeed be relevant to undermine the credibility of his assertions, but that is a matter for the finder of fact, not for this court on summary judgment.

21. Article 50, which permits a buyer to reduce payment to a seller who delivers nonconforming goods, and article 39, which deprives the buyer of that right if the buyer fails to give the seller notice specifying the defect in the goods delivered within a reasonable time, will be of primary importance. Although we may affirm a district court's grant of summary judgment if it is correct for any reason, even if not relied upon below, see United States v. $121,100.00 in United States Currency, 999 F.2d 1503, 1507 (11th Cir. 1993), and the parties have touched upon these articles in their briefs, they have not provided us with sufficient information to resolve their dispute under the CISG. MCC's affidavits indicate that MCC may have complained about the quality of the tile D'Agostino delivered, but they have provided no authority regarding what constitutes a reasonable time for such a complaint in this context. Accordingly, we decline to affirm the district court's grant of summary judgment on this basis.
22. The Maselli affidavit claims that at the February 4, 1991 contract contained the terms in question, see Maselli Aff. ¶¶¶¶¶¶¶ 5-6, but MCC argues that at least some of the forms were never translated into English and, therefore, the record does not reveal whether the terms appear in all the contracts. We leave the resolution of these matters to the district court on remand.

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# CISG Advisory Council Opinion No. 3 [1]

## Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG [2]

Opinion [black letter text]
Comments
1. Introduction

To be cited as: CISG-AC Opinion no 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, 23 October 2004. Rapporteur: Professor Richard Hyland, Rutgers Law School, Camden, NJ, USA.

Adopted by the CISG-AC on its 7th meeting in Madrid with no dissent. Reproduction of this opinion is authorized.

The opinion is dedicated to the memory of our dear friend, colleague, and teacher Allan Farnsworth who passed away on 31 January 2005.

PETER SCHLECHTRIEM, Chair
ERIC E. BERGSTEN, MICHAEL JOACHIM BONELL, ALEJANDRO M. GARRO, ROY M. GOODE, SERGEI N. LEBEDEV, PILAR PERALES VISCASILLAS, JAN RAMBERG, INGEBORG SCHWENZER, HIROO SONO, CLAUDE WITZ, Members
LOUKAS A. MISTELIS, Secretary

Opinion
1. The Parol Evidence Rule has not been incorporated into the CISG. The CISG governs the role and weight to be ascribed to contractual writing.

2. In some common law jurisdictions, the Plain Meaning Rule prevents a court from considering evidence outside a seemingly unambiguous writing for purposes of contractual interpretation. The Plain Meaning Rule does not apply under the CISG.

3. A Merger Clause, also referred to as an Entire Agreement Clause, when in a contract governed by the CISG, derogates from norms of interpretation and evidence contained in the CISG. The effect may be to prevent a party from relying on evidence of statements or agreements not contained in the writing. Moreover, if the parties so intend, a Merger Clause may bar evidence of trade usages.

However, in determining the effect of such a Merger Clause, the parties' statements and negotiations, as well as all other relevant circumstances shall be taken into account.

Comments

1. INTRODUCTION

1.1. Interpretation and Evidence under the CISG

1.1.1. The CISG provides norms and principles for the interpretation and evidence of international sales transactions. These include Article 8, which generally permits all relevant circumstances to be considered in the course of contract interpretation, Article 9, which incorporates certain usages into the contract, and Article 11,[3] which indicates that a contract and its terms may be proved by any means, including by witnesses. These rules prevail over domestic rules on interpretation and evidence of contractual agreements. Since these are default rules, Article 6 permits the parties to derogate from them or vary their effect.

1.1.2. Article 6 permits the parties to derogate from them or vary their effect, e.g., by merger clauses. This Opinion considers some issues that arise when a court or tribunal is asked to determine whether the parties intended by a merger clause to derogate from the Convention's norms governing contract interpretation.

1.2. The Parol Evidence Rule

1.2.1. The Parol Evidence Rule refers to the principles which common law courts have developed for the purpose of determining the role and weight to ascribe to contractual writings. The basic purpose of these principles is "to preserve the integrity of written contracts by refusing to allow the admission of [prior] oral statements or previous correspondence to contradict the written agreement."[4] In order to allow the intent of the writing to prevail, the judge may exclude what is known as extrinsic or parol evidence, particularly statements made during the negotiations. The Parol Evidence Rule applies to the general law of contracts, including the sale of goods law of common law jurisdictions.[5]

1.2.2. The Parol Evidence Rule is believed to have developed as a method for judges to prevent common law juries from ignoring credible and reliable written evidence of the contract.[6] The US legal system maintains the right to a jury trial in civil matters, and most civil jury trials take place in the United States.[7] As a result, the Parol Evidence Rule has become more important in US law than in other common law systems.

1.2.3. The Parol Evidence Rule comes into play when two circumstances meet. First, the agreement has been reduced to writing. Second, one of the parties seeks to present extrinsic or parol evidence to the fact finder. Extrinsic or parol evidence includes evidence of the negotiations or of agreements related to the contractual subject matter which was not incorporated into the written contract. A typical case involves representations made during the negotiations by Seller or Seller's representatives regarding the quality of the goods. Under the Parol Evidence Rule, Seller may ask the tribunal to bar introduction of evidence of any representations not incorporated into the written contract.

1.2.4. In English law, the Parol Evidence Rule involves a rebuttable presumption that the writing was intended to include all the terms of the contract.[8] English courts first examine the writing to determine whether it was meant to serve as a true record of the contract.[9] Thus, under English law, the party relying on a writing has the benefit that, when the writing appears to be complete, it is presumed to represent the complete contract, subject to the other party's right of rebuttal.[10]

1.2.5 In US law, the Parol Evidence Rule operates in two steps.[11] A US court asks first whether the writing was "integrated," meaning whether the writing was intended to represent the final expression of the terms it contains. The parties' notes, or a mere draft of the agreement, for example, would usually be deemed not to be integrated. A writing signed by the parties and containing detailed specifications will usually be found to be integrated. If the writing is integrated, neither party may introduce parol evidence to contradict the terms of the writing. If the writing is deemed to be integrated, the second step is to determine whether it is "completely integrated," namely whether it was intended to represent the complete expression of the parties' agreement. If the writing is completely integrated, parol evidence may not be introduced either to contradict or to supplement the writing's terms.

1.2.6. Different methods are used in US law to determine whether a writing is completely integrated.[12] Some courts engage in a conclusive presumption that a writing fully incorporates the contract. Other courts presume that the writing is completely integrated unless, by its terms, it refers to factors beyond its four corners. Still other courts allow evidence of extrinsic circumstances, though not of the preliminary negotiations, when considering whether the writing is integrated. Perhaps the most liberal method is that proposed by the Restatement (Second) of Contracts--all extrinsic evidence, including the negotiations, may be considered when determining whether the parties intended the writing to be the complete and final statement of their obligations.[13] US sales law has adopted a similarly liberal approach.[14]
1.2.7. The Parol Evidence Rule was designed to serve both an evidentiary and a channeling function, but its efficacy has often been challenged.[15] The evidentiary function serves to protect a contractual writing against perjured or unreliable testimony regarding parol terms. The channeling function excludes prior agreements that have been superseded or merged into the writing. Despite its name, the Parol Evidence Rule is a substantive rule of contract interpretation rather than a rule of evidence.[16] The Parol Evidence Rule therefore applies when the substantive law governing the contract contains a Parol Evidence Rule.

1.2.8. The civil law generally does not have jury trials in civil cases [17] and civilian jurisdictions usually do not place limits on the kind of evidence admissible to prove contracts between merchants. Though the French Civil Code, for example, incorporates a version of the Parol Evidence Rule for ordinary contracts,[18] all forms of proof are generally available against merchants.[19] In German law, no Parol Evidence Rule exists for either civil or commercial contracts, though German law presumes that a contractual writing is accurate and complete.[20] This is also the case in other laws, e.g., Japanese law[21] and Scandinavian laws.

1.2.9. Statements, agreements, and conduct that arise after the conclusion of the writing are treated differently in the different common law systems. In US law, they are not considered parol evidence and are therefore not barred by the Parol Evidence Rule.[22] English law, on the contrary, attempts to avoid the situation in which a contract's meaning when concluded varies at a later date. Therefore, English law does not permit evidence of the parties' statements or conduct after the conclusion of the contract to impact the issue of contract interpretation.[23]

1.3. The Plain Meaning Rule

Even when the Parol Evidence Rule bars parol evidence for purposes of contradicting or supplementing a contract's terms, parol evidence is generally still admissible for the purpose of interpreting terms found in the writing. Nonetheless, a US law doctrine known as the Plain Meaning Rule, where adopted, bars extrinsic evidence, particularly evidence of prior negotiations, for the purposes of interpreting a contract, unless the term in question has first been found to be ambiguous. In contrast to the Parol Evidence Rule, the Plain Meaning Rule concerns only contract interpretation and does not purport to bar contradictory or supplementary terms. The Plain Meaning Rule is based on the proposition that, when language is sufficiently clear, its meaning can be conclusively determined without recourse to extrinsic evidence.[24] Under the Plain Meaning Rule, the preliminary analysis concerns whether the contract term in dispute is clear. Only if the term is deemed ambiguous, may evidence of prior negotiations be admitted for purposes of clarification.[25]

1.4. Merger Clauses

The parties may wish to assure themselves that reliance will not be placed on representations made prior to the execution of the writing. The Merger or Entire Agreement Clause (the "Merger Clause") has been developed to achieve certainty in this regard. The Merger Clause, which usually appears among the concluding terms of a written agreement, provides that the writing contains the entire agreement of the parties and that neither party may rely on representations made outside the writing.[26]

2. THE PAROL EVIDENCE RULE

The Parol Evidence Rule has not been incorporated into the CISG. The CISG governs the role and weight to be ascribed to contractual writing.

2.1. The CISG includes no version of the Parol Evidence Rule. To the contrary, several CISG provisions provide that statements and other relevant circumstances are to be considered when determining the effect of a contract and its terms. The most important of these are Articles 8 and 11.

2.2. Article 11 sentence 2 provides that a party may seek to prove that a statement has become a term of the contract by any means, including by the statements of witnesses. Article 8 concerns contract interpretation.[27] Article 8(1) provides that, in certain circumstances, contracts are to be interpreted according to actual intent. When the inquiry into subjective intent proves insufficient, Article 8(2) provides that statements and conduct are to be interpreted from the point of view of a reasonable person. This evaluation according to Article 8(3) takes into account all relevant circumstances of the case, including the negotiations, any course of conduct or performance between the parties, any relevant usages, and subsequent conduct of the parties. Thus Article 8 allows that extrinsic evidence may generally be considered when determining the meaning of a contractual term. In sum, the CISG indicates that a writing is one, but only one, of many circumstances to be considered when establishing and interpreting the terms of a contract.[28]

2.3. The Convention's legislative history is in accord. A version of the Parol Evidence Rule was proposed by the Canadian delegate in Vienna.[29] The proposal was justified as a means to limit admissible evidence in those cases in which the parties had chosen to reduce their agreement to writing.[30] The Austrian Representative indicated that his delegation opposed the amendment because it "was aimed at limiting the free appreciation of evidence" by the judge. To prevent a judge from reviewing all the evidence would violate a "fundamental principle of Austrian law."[31] The Representative from Japan also opposed the amendment, which he characterized as a "restatement of the rule on extrinsic evidence which prevailed in English-speaking common-law countries."[32] The only other nation to speak in support of the proposal was Iraq. The amendment received little support and was rejected.[33]

2.4. There were several practical reasons for not including a Parol Evidence Rule in the CISG.[34] First, most of the world's legal systems admit all relevant evidence in contract litigation. Secondly, the Parol Evidence Rule, especially as it operates in the United States, is characterized by great variation and extreme complexity.[35] It has also been the subject of constant criticism.[36]

2.5. Since the Convention has specifically resolved questions governed by the common law Parol Evidence Rule, there can be no question of a gap in the CISG, and no grounds for recourse to non-uniform domestic law.[37] The Parol Evidence Rule therefore does not apply when the CISG governs a contract.[38] US courts have so held.[39]

2.6. The leading US case is MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.[40] D'Agostino, the Italian seller, agreed to sell the buyer, MCC-Marble, a Florida company, the buyer's requirements in ceramic tile. After MCC-Marble refused to make certain monthly payments, D'Agostino refused to fill remaining orders. MCC-Marble sued for breach. D'Agostino defended on the basis of the payment default. D'Agostino pointed to pre-printed terms on the verso of the written contract which gave D'Agostino the right to cancel the agreement if MCC failed to make payment. At trial, MCC-Marble sought to introduce evidence from the parties' negotiations to prove that the agreement did not include the pre-printed terms. The trial court applied the Parol Evidence Rule and granted summary judgment for the seller. The Eleventh Circuit reversed, holding that the Parol Evidence Rule does not apply when a contract is governed by the CISG.

2.7. Though the Parol Evidence Rule does not apply to contracts governed by the CISG, similar policy considerations are incorporated into the CISG itself. The principal purpose of the Parol Evidence Rule is to respect the importance the parties may have accorded to their writing. Under the Convention as well, a writing constitutes an important fact of a transaction - it must be presumed to fulfill a function, otherwise it would not have been employed. One of the goals of contract interpretation is to determine the role the writing was designed to play. The commentators agree that a contractual writing will often receive special consideration under the CISG.[41]

2.8. The special role of a writing, however, must be construed in accordance with the general principles that govern the CISG. The parties' intent with regard to the role of their writing is due the same respect as any other element of their intent. The principles of Article 8 are to be used to

determine that intent. If the parties intended their writing as the sole manifestation of their obligations, prior negotiations and other extrinsic circumstances should not be considered during contract interpretation. However, Articles 8 and 11 express the general principle that writings are not to be presumed to be "integrations".[42]

3. PLAIN MEANING RULE

In some common law jurisdictions, the Plain Meaning Rule prevents a court from considering evidence outside a seemingly unambiguous writing for purposes of contractual interpretation. The Plain Meaning Rule does not apply under the CISG.

3.1. The majority jurisdictions in the United States retain some version of the Plain Meaning rule in their common law, though it has been rejected by other of the United States as well as by the Restatement (Second) of Contracts,[43] and the Uniform Commercial Code.[44] The Unidroit Principles of International Commercial Contracts also reject the Plain Meaning Rule, by providing that, even in the presence of a Merger Clause, prior statements or agreements may be used to interpret a writing.[45]

3.2. Article 8 specifies the Convention's method for contract interpretation. As a general rule, Article 8 mandates that all facts and circumstances of the case, including the parties' negotiations, are to be considered during the course of contract interpretation. The writing constitutes one of those factors, and though always important, it is not the exclusive factor. Words are almost never unambiguous.[46] Moreover, the application of the Plain Meaning Rule would impede one of the basic goals of contract interpretation under the CISG, which is to focus on the parties' actual intent. If contract terms are deemed to be unambiguous, the Plain Meaning Rule would prevent presentation of other proof of the parties' intent.[47]

3.3. Under the CISG, therefore, the fact that the meaning of the writing seems unambiguous does not bar recourse to extrinsic evidence to assist in ascertaining the parties' intent.

4. MERGER CLAUSE

A Merger Clause, also referred to as an Entire Agreement Clause, when in a contract governed by the CISG, derogates from norms of interpretation and evidence contained in the CISG. The effect may be to prevent a party from relying on evidence of statements or agreements not contained in the writing. Moreover, if the parties so intend, a Merger Clause may bar evidence of trade usages.

However, in determining the effect of such a Merger Clause, the parties' statements and negotiations, as well as all other relevant circumstances shall be taken into account.

4.1. When the parties agree to a Merger Clause,[48] its effect may be to derogate under Article 6 from norms of interpretation and evidence contained in the CISG. In this regard Merger Clauses have two objectives.[49] The first objective is to bar extrinsic evidence that would otherwise supplement or contradict the terms of the writing.[50] Such Merger Clauses mainly derogate from Article 11, which provides that a sales contract may be proved by any means, including

witnesses. The second objective is to prevent recourse to extrinsic evidence for the purpose of contract interpretation. This objective would constitute a derogation from the Convention's canons of interpretation incorporated in Article 8. Under the CISG the extent to which a Merger Clause accomplishes one or both of these purposes is a question of interpretation of this clause.

4.2. Several issues in relation to Merger Clauses are dealt with in international uniform law instruments, such as the UNIDROIT Principles[51] and the Principles of European Contract Law.[52]

4.3. The Unidroit Principles of International Commercial Contracts expressly recognize Merger Clauses. Under the Unidroit Principles, though prior statements and agreements may not be used to contradict or supplement a writing that contains a Merger Clause, such statements and agreements may be used for purposes of interpreting the contract.

4.4. Article 2:105 of the Principles of European Contract Law distinguishes between Merger Clauses that result from individual negotiation and those that do not. If the Merger Clause is individually negotiated, prior statements, undertakings or agreements that are not embodied in the writing do not form part of the contract. If it has not been individually negotiated, the Merger Clause merely establishes a presumption that the prior statements and agreements were not intended to become part of the contract. The presumption may be rebutted.[53] Furthermore, the European Principles provide that a party may, by its statements or conduct, be precluded from asserting a Merger Clause to the extent that the other party has reasonably relied on those statements or that conduct.

4.5. The CISG does not deal with Merger Clauses and therefore does not contain similar distinctions. Indeed, the dividing line may be blurred. Under the CISG there is authority for the proposition that a properly worded Merger Clause bars the consideration of extrinsic evidence.[54] However, extrinsic evidence should not be excluded, unless the parties actually intended the Merger Clause to have this effect. The question is to be resolved by reference to the criteria enunciated in Article 8, without reference to national law. Article 8 requires an examination of all relevant facts and circumstances when deciding whether the Merger Clause represents the parties' intent.

4.6. Under the CISG, a Merger Clause does not generally have the effect of excluding extrinsic evidence for purposes of contract interpretation. However, the Merger Clause may prevent recourse to extrinsic evidence for this purpose if specific wording, together with all other relevant factors, make clear the parties' intent to derogate from Article 8 for purposes of contract interpretation.[55]

4.7. Article 9 requires a court or tribunal to consider a number of factors when determining whether usages have been agreed or trade practices have been established between the parties. A Merger Clause generally will not be held to exclude trade usages relevant under Article 9(1) or established practices concerning the implicit background of the transaction unless those usages and practices are specifically mentioned.

FOOTNOTES

1. The CISG-AC is a private initiative supported by the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, University of London. The International Sales Convention Advisory Council (CISG-AC) is in place to support understanding of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the promotion and assistance in the uniform interpretation of the CISG.

At its formative meeting in Paris in June 2001, Prof. Peter Schlechtriem of Freiburg University, Germany, was elected Chair of the CISG-AC for a three-year term. Dr. Loukas A. Mistelis of the Centre for Commercial Studies, Queen Mary, University of London, was elected Secretary. The CISG-AC has consisted of: Prof. Emeritus Eric E. Bergsten, Pace University; Prof. Michael Joachim Bonell, University of Rome La Sapienza; Prof. E. Allan Farnsworth, Columbia University School of Law; Prof. Alejandro M. Garro, Columbia University School of Law; Prof. Sir Roy M. Goode, Oxford; Prof. Sergei N. Lebedev, Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Russian Federation; Prof. Jan Ramberg, University of Stockholm, Faculty of Law; Prof. Peter Schlechtriem, Freiburg University; Prof. Hiroo Sono, Faculty of Law, Hokkaido University; Prof. Claude Witz, Universität des Saarlandes and Strasbourg University. Members of the Council are elected by the Council. At its meeting in Rome in June 2003, the CISG-AC elected as additional members, Prof. Pilar Perales Viscasillas, Universidad Carlos III de Madrid, and Prof. Ingeborg Schwenzer, University of Basel.

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2. This opinion is a response to a request by the Association of the Bar of the City of New York Committee on Foreign and Comparative Law. The questions referred to the Council were:

"1. By holding that the CISG permits a court to abandon the parol evidence rule, which generally bars 'evidence of any prior agreement' (UCC 2-202), the Eleventh Circuit has introduced what may be an unnecessary degree of uncertainty in the drafting of contracts. If the MCC-Marble rule prevails, there is no certainty that the provisions of even the most carefully negotiated and drafted contract will be determinative.

2. ... Does the parol evidence rule apply under the CISG? Although the rule is regarded as substantive, not evidentiary, and thus within the scope of the CISG, it is arguable that the rule deals with a matter 'not expressly settled' in the CISG. The applicable law would then be the law of the jurisdiction whose law would 'be applicable by virtue of the rules of private international law' (CISG art. 7(2)), and if such jurisdiction were an American or other common law jurisdiction the parol evidence rule would apply. ...

3. Does the 'plain meaning rule' apply under the CISG?

4. Would a merger clause invoke the parol evidence rule under the CISG, regardless of whether the rule would otherwise be applicable?"

3. Unless a state has made a reservation under Article 96.

4. Larry DiMatteo, The Law of International Contracting 212 (2000).

5. For example, the Parol Evidence Rule has been incorporated into the sales law of the US Uniform Commercial Code: "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 performance, course of dealing, or usage of trade (Section 1-303), 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 agreement." UCC § 2-202.

6. Charles McCormick, Handbook of the Law of Evidence §§ 210-11 (1954).

7. Edward J Imwinkelried, "A Comparative Critique of the Interface between Hearsay and Expert Opinion in American Evidence Law, 33 Boston College Law Review 1 (1991) at 34.

8. G. H. Treitel, The Law of Contract, 192 (11th ed. 2003).

9. Id.

10. Id. at 193.

11. See E. Allan Farnsworth, Contracts, § 7.3 (3rd ed. 1999).

12. Peter Linzer, "The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule," 71 Fordham L. Rev. 799, 805-06 (2002).

13. Restatement (Second) of Contracts § 214 (1981).

14. For example, the fact that a writing contains detailed specifications does not create a presumption that it is completely integrated. "This 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 . . . ." UCC § 2-202 comment 1 (a).

15. John Calamari & Joseph Perillo, Contracts § 3.2 at 123 (4th ed. 1998).

16. See MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A., 114 F.3d 1384, 1388-89 (11th Cir. 1998); E Allan Farnsworth, supra note 11, § 7.2 at 428-30.

17. Max Rheinstein, "Comparative Law--Its Functions, Methods and Usages," 22 Ark. L. Rev. 415, 422 (1968).

18. C.Civ. (Fr.) Art. 1341 (1). See also Italian Codice civile Art. 2722, but see also Art. 1350.

19. See C.Comm. (Fr.) Art. L. 110-3.

20. See Otto Palandt (Helmut Heinrichs), Bürgerliches Gesetzbuch, § 125 BGB Rn. 15 (64th ed., Munich 2005).

21. In Japanese law, no parol evidence rule exists for either civil or commercial contracts. Japanese law presumes that a contractual writing is accurate and complete. An authentic contractual writing has the evidentiary value of showing that a contract was concluded as written therein. See e.g, Makoto Ito, Minjisoshoho [Law of Civil Procedure] (3d ed.), 2004, p.266. (or any given commentary/treatise.)]

22. "[T]he course of actual performance by the parties is considered the best indication of what they intended the writing to mean." UCC § 2-202 comment 2.

23. G. H. Treitel, supra note 8, at 195-6.

24. E. Allan Farnsworth, supra note 11, § 7.12 at 476.

25. See id. § 7.12.

26. A typical Merger Clause in a sales transaction reads as follows:

Purchaser agrees that the Purchase Order and Sales Contract relating to this transaction include all of the terms and conditions of this Agreement and that this Agreement cancels and supersedes any prior agreement and as of the date hereof comprises the complete and exclusive statement of the terms of the Agreement relating to the subject matters covered hereby. Purchaser further understands that verbal promises by sales representatives are not valid and any promises or understandings not herein specified in writing are hereby expressly waived by the Purchaser.

27. Most commentators agree that Article 8, which expressly covers the interpretation of a party's statements and conduct, should also be used, mutatis mutandis, to interpret the terms of the contract. John Honnold, Uniform Law for International Sales § 105 (3rd ed. 1999). See also Schlechtriem & Schwenzer (Schmidt-Kessel), Kommentar zum Einheitlichen UN-Kaufrecht - CISG -, 4. Auflage, München 2004, N 3, 4 and 32-34; English edition: Schlechtriem & Schwenzer (Schlechtriem), Commentary on the UN Convention on the International Sale of Goods (CISG), Art. 8 N 21 (2nd ed., Oxford 2005).

28. J. von Staudinger (Ulrich Magnus), Kommentar zum Bürgerlichen Gesetzbuch, Art. 8 CISG Rn. 24 (Neubearbeitung 1999).

29. "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." United Nations Conference on Contracts for the International Sale of Goods, Official Records,

U.N. Doc. A/Conf./97/19, U.N. Sales No. E.81.IV.3, at 90 (1981) [hereinafter UNCISG Official Records], reprinted in John Honnold, Documentary History of the Uniform Law for International Sales, 662 (1989). For a summary of the legislative history, see Note, "The Inapplicability of the Parol Evidence Rule to the United Nations Convention on Contracts for the International Sale of Goods," 28 Hofstra L. Rev. 799, 823-26 (2000).

30. "Mr. Samson (Canada), introducing [this] amendment . . . said that the aim was to introduce a limitation on admissible evidence in cases where contracting parties had freely chosen to have a written contract. In the international context, it was important to ensure a minimum of protection for parties who had made such a choice. The amendment sought to exclude evidence by witnesses unless it was supported by other evidence resulting from a written document from the opposing party or circumstantial evidence. The amendment called for some degree of certainty as to facts which could be used to establish a prima facie case: for example, a clearly established material fact could be adduced as evidence of the existence of an agreement." UNCISG Official Records, supra note 29, at 270, reprinted in John Honnold, Documentary History, supra note 29, at 491.

31. Id.

32. Id.

33. Id.

34. See 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 B.Y.U. L. Rev. 351, 360-62.

35. "Few things are darker than this, or fuller of subtle difficulties. ... [A] mass of incongruous matter is here grouped together, and then looked at in a wrong focus." James Thayer, "The 'Parol Evidence' Rule," 6 Harv. L. Rev. 325, 325 (1893).

36. "The truth is that the [Parol Evidence Rule] does but little to achieve the ends it supposedly serves." Zell v. American Seating Co., 138 F.2d 641, 644 (2d Cir. 1943) (Frank, J.).

37. Since the Parol Evidence Rule does not apply when the CISG governs the contract, there is nothing to be gained, as some scholars have attempted, by deciding which of the various aspects of the Parol Evidence Rule comport with the basic principles of the CISG. See, e.g., Harry Flechtner, "The U.N. Sales Convention (CISG) and MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.: The Eleventh Circuit Weighs in on Interpretation, Subjective Intent, Procedural Limits to the Convention's Scope, and the Parol Evidence Rule," 18 J. L. & Com. 259, 284 (1999) ("Some aspects of the parol evidence rule ... appear to remain valid under the Convention"); Note, "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 B.Y.U. L. Rev. 1347 (1995). Instead, the particular interpretive method of the CISG must be developed from the text and purposes of the CISG itself.

38. Most commentators are in accord. See, e.g., Larry DiMatteo, supra note 4, at 21; John Honnold, Uniform Law, supra note 27, § 110; Schlechtriem & Schwenzer (Peter Schlechtriem), Commentary on the UN Convention on the International Sale of Goods (CISG), Art. 11 N 13 (2nd ed., Oxford 2005) - (German edition, 4th edition 2004, Art. 11 N 13); Albert Kritzer, Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods 94 (1994) ; Bernard Audit, La vente internationale de marchandises 43 n. 3 (1990); Note, supra note 34, 1999 B.Y.U. L. Rev. at 359; Peter Winship, "Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention," 37 Loyola L. Rev. 43, 57 (1991); John Murray, "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. & Comm. 11, 44 (1988) ("CISG rejects the parol evidence rule in the most frugal terms"). For the contrary view, see Note, supra note 37, 1995 B.Y.U. L. Rev. at 1351.

39. See MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A., supra note 16, 114 F.3d at 1392-93 ("The CISG ... precludes the application of the parol evidence rule, which would otherwise bar the consideration of evidence concerning a prior or contemporaneously negotiated oral agreement"); Shuttle Packaging Systems, LLC v. Tsonakis, 2001 WL 34046276 (W.D.Mich. 2001) ("international sales agreements under the Convention are not subject to the parol evidence rule"); Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB, 23 F.Supp.2d 915, 919-21 (N.D.Ill. 1998); Claudia v. Olivieri Footwear Ltd., 1998 WL 164824 *5-6 (S.D.N.Y.) ("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"); Filanto S.p.A. v. Chilewich International Corp., 789 F.Supp. 1229, 1238 n. 7 (S.D.N.Y. 1992), app. dismissed, 984 F.2d 58 (2nd Cir. 1993) ("the Convention essentially rejects ... the parol evidence rule"). Contra: Beijing Metals & Minerals Import/Export Corp. v. US Business Center, Inc., 993 F.2d 1178, 1183 n. 9 (5th Cir. 1993) (in dictum (the court applied Texas law)).

40. supra, note 16.

41. See Schlechtriem & Schwenzer (Schlechtriem), Kommentar zum Einheitlichen UN-Kaufrecht - CISG -, 4. Auflage, München 2004, Art. 11 N 13; English edition: Schlechtriem & Schwenzer (Schlechtriem), Commentary on the UN Convention on the International Sale of Goods (CISG), Art. 11 N 13 (2nd ed., Oxford 2005). ("that does not preclude the existence of a 'preference' for evidence of declarations in written form"); John Honnold, Uniform Law, supra note 27, § 110 ("Jurists interpreting agreements subject to the Convention can be expected to continue to give special and, in most cases, controlling effect to detailed written agreements").

42. Harry Flechtner, supra note 37, 18 J. L. & Comm. at 278-79 ("the question whether the parties intended a writing to be an integration must be resolved like any other question of intent under the CISG, and without benefit of a presumption that the writing is an integration").

43. "It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. ... Any determination of meaning or

ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties. ... But after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention." Restatement (Second) of Contracts § 212 comment b (1981).

44. "This section definitely rejects ... [t]he premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used ... ." UCC § 2-202 comment 1 (b).

45. Unidroit Principles of International Commercial Contracts Art. 2.1.17 (2nd sentence).

46. One can never preclude the possibility that, by agreement of the parties ,usages of trade or commercial sense, ordinary words are given a special meaning. For the same reason there cannot be any such thing as a wholly unambiguous contract term, despite the supposed rule that reference may be made to extrinsic evidence only where there is ambiguity. Among bakers, apparently, a dozen means thirteen. More significantly, the House of Lords in The Antaios [1985] AC 191 upheld an arbitral award which construed "breach" as meaning "fundamental breach" to give commercial sense to the contract, even though "breach" is wholly unambiguous.

47. "When a contract is unambiguous, the court must ... give effect to the contract as written, the duty of the court being to declare the meaning of what was written in the instrument, not what was intended to be written." Vol 11 Samuel Williston, A Treatise on the Law of Contracts § 30:6 at 80-83 (Richard Lord ed., 4th ed. 1999). For a critique of the Plain Meaning Rule, see Vol 5 Arthur Corbin (Margaret Kniffen), Contracts § 24.7 (rev. ed. 1998).

48. For an example see note 27 supra.

49. See, e.g., C. M. Bianca & M. J. Bonell (E. Allan Farnsworth), Commentary on the International Sales Law Art. 8 § 3.3 at 102 (1987).

50. For "writing" see CISG-AC Opinion no 1 - http://www.cisg.law.pace.edu/cisg/CISG-AC-op1.html

51. See Unidroit Principles of International Commercial Contracts Article 2.1.17

52. See Article 2:105.

53. "It often happens that parties use standard form contracts containing a merger clause to which they pay no attention. A rule under which such a clause would always prevent a party from invoking prior statements or undertakings would be too rigid and often lead to results which were contrary to good faith." Principles of European Contract Law Article 2:105 Comment.

54. See, e.g., MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A., supra note 16, 114 F.3d at 1391 ("to the extent parties wish to avoid parol evidence problems they can do so by including a merger clause in their agreement that extinguishes any and all prior agreements and understandings not expressed in the writing"); John Honnold, Uniform Law, supra note 27, § 110 (1) ("contract terms (often called 'integration clauses') that any contemporaneous or prior agreement shall be without effect would be supported by Article 6"); Bernard Audit, supra note 38, at 43 n. 3 (1990) ("la clause relativement fréquente selon laquelle seul l'écrit souscrit par les parties doit tre pris en considération l'exclusion de tout autre élément . . . devrait recevoir effet en vertu de l'art. 6"); Larry DiMatteo, supra note 4, at 215-16.

55. See John Murray, supra note 38, 8 J. L. & Comm. at 45 ("the typical merger clause familiar to American lawyers may be insufficient for this purpose. At least some explicit reference to the parties' intention to derogate from Article 8(3) through Article 6 would provide a safer course").

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