THE AFTERMATH OF *MCC-MARBLE*: IS THIS THE DEATH KNELL FOR THE PAROL EVIDENCE RULE?

PAOLO TORZILLI*

Cessante ratione, cessat ipsa lex—where the reason for the rule ceases, the rule also ceases.[1] Twentieth century American case law contains numerous court holdings that recognize the maxim that once society no longer embraces a particular public policy objective, the associated rule must be reworked or eliminated.[2] To sustain the vitality of our legal system, scholars

---

* J.D. Candidate, June 2001, St. John's University School of Law; B.B.A., George Washington School of Business & Public Management.

[1] *See* Dubois v. Hepburn, 35 U.S. 1, 7 (1836); Green v. Liter, 12 U.S. 229, 249 (1814); *In re* Trust Estate of Farrington, 42 Haw. 640, 649 (1958). This "old maxim" has been attributed to Chief Justice Coke. *See* Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 986 (1995); P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 89 (1987).

It is a well-settled rule that the law varies with the varying reasons on which it is founded. This is expressed by the maxim: *"Cessante ratione, cessat ipsa lex."* This means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself. If the reasons on which a law rests are overborne by opposing reasons, which, in the progress of society, gain a controlling force, the old law, though still good as an abstract principle and good in its application to some circumstances, must cease to apply as a controlling principle to the new circumstances. *See* Beardsley v. City of Hartford, 50 Conn. 529, 541–42 (1883); *see also* Funk v. United States, 290 U.S. 371, 385 (1933) (Sutherland, J.) (quoting with approval the Connecticut Supreme Court's interpretation of the maxim); Marshall v. Moseley, 21 N.Y. 280, 292 (1860) ("[W]hen the reason for the rule ceases, [judges] have the right to renounce it."). More recently, this precept was fortified by Justice Carro. *See* Thomas Crimmins Contracting Co. v. City of New York, 530 N.Y.S. 2d 779, 782 (1st Dep't. 1988) ("It should go without saying that when the reason for the rule ceases, the rule also ceases. . . .").

Similarly, another rule of law states that a law " 'should not be applied when there is no reason for it.' " United States Liab. Ins. Co. v. Superior Court, 60 Cal. Rptr. 723, 727 (Cal. Ct. App. 1967) (quoting *In re* Troy's Estate, 37 P.2d 471, 472 (Cal. Dist. Ct. App. 1934)).

[2] *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954). In rejecting the "separate but equal" doctrine, the Court referred to the existing doctrine as reflecting the "status of public education at that time." *Id.* at 489. The Court's rationale was based on the fact that *"these days*, it is doubtful that any child may

and judges must continually scrutinize legal doctrine and propose changes when public policy warrants it.[3] One prominent subject of such scrutiny has been the parol evidence rule.[4]

---

reasonably be expected to succeed in life if he is denied the opportunity of an education." *Id.* at 493 (emphasis added); *see also* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970). The *Javins* court overruled certain aspects of landlord-tenant law that had their source in feudal times. *See id.* at 1074. In so doing, Circuit Judge Skelly Wright wrote "[c]ourts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life—particularly old common law doctrines which the courts themselves created and developed." *Id.*

Judge Cardozo clearly recognized the need to reconcile the law with societal needs. For example, in the famous case of *MacPherson v. Buick Motor Company*, 111 N.E. 1050 (N.Y. 1916), he limited the caveat emptor doctrine in products liability law. In so doing he wrote:

> Precedents drawn from the days of travel by stage coach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.

Id. at 1053.

[3] *See* Lief H. Carter, *When Courts Should Make Policy: An Institutional Approach*, *in* PUBLIC LAW AND PUBLIC POLICY 141, 141–55 (John A. Gardiner ed., 1977) (highlighting the public policy objectives underlying various landmark Supreme Court rulings of the early 1970s); William T. Gossett, *Balances and Controls in Private Policy and Decision-Making*, *in* LAW IN A CHANGING AMERICA 26, 26–27 (1968). Gossett states:

> One's "vision of the law changes with the changing facts of life – the perceptions, fears and aspirations by which the consensus of the nation assigns priorities to the basic purposes of the law. . . . There is a silent consent . . . as to the direction in which they are moving, the uneasiness that they experience and the restraints that they feel; and these things are spelled out in law-making, decision-making, and rule-making. . . ."

Id.

Similarly, judges understand that the law must evolve. Numerous opinions reflect this understanding. Justice Jacobs wrote one of the most eloquent opinions in *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314 (N.J. 1965):

> The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected. . . .

Id. at 325; *see also* Whetzel v. Jess Fisher Management Co., 282 F.2d 943, 946 (D.C. Cir. 1960) ("[T]he continued vitality of the common law, . . . depends upon its ability to reflect contemporary community values and ethics."); Yeo v. Tweedy, 286 P. 970, 972 (N.M. 1929) ("[I]t is often said that our common law is adaptable; that, while its principles operate continuously, changed conditions modify its rules. . . .").

[4] *See* Zell v. American Seating Co., 138 F.2d 641, 643 (2d Cir. 1943), *rev'd*, 322 U.S. 709 (1944) (indicating that the parol evidece rule is "no rule at all"); Sherwood Concrete, Inc. v. Wick Building Systems, Inc., 1992 Wisc. App. LEXIS 1393, at *8 (Wis. Ct. App. 1992) ("[T]he parol evidence rule . . . is an exclusionary rule not

Generally, the parol evidence rule seeks to exclude testimony of negotiations occurring prior to, or contemporaneous with, the execution of a written instrument.[5] Numerous reasons for the parol evidence rule have been set forth.[6] Two of these policy reasons are universally accepted. First, jurors are generally considered to be extremely impressionable.[7] Second, there is a need for the integrity of a writing to be preserved.[8]

Although courts have embraced the reasons behind the parol evidence rule, the uniformity ends there. This lack of uniformity creates confusion for students, scholars, judges, and practitioners. The confusion regarding this rule is enhanced by

---

favored by the law.") (quoting Cobb State Bank v. Nelson, 413 N.W. 2d 644, 646 (Wis. Ct. App. 1987)); *see also* David R. Dow, *The Confused State of the Parol Evidence Rule in Texas*, 35 S. TEX. L. REV. 457, 458 (1994) ("The weight of modern authority, it is fair to say, urges a narrow construction, if not outright abandonment, of the Rule."); *Id.* at 458 n.8 (chronicling the scholarly and judicial castigation of the parol evidence rule); Justin Sweet, *Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule*, 53 CORNELL L. REV. 1036, 1060–68 (1968) (proposing improvements to the parol evidence rule).

[5] *See* O'Neill v. United States, 50 F.3d 677, 685 (9th Cir. 1995) ("[O]nce a contract is found to be unambiguous the parol evidence rule excludes statements offered to contradict a clear contract term in a final expression of agreement."); Radiation Sys. Inc. v. Amplicon, Inc., 882 F. Supp. 1101, 1103 (D.D.C. 1995) ("Generally, when parties have reduced their entire agreement to writing, the parol evidence rule excludes evidence of prior or contemporaneous oral agreements inconsistent with the express terms of the writing."); Cusimano v. First Maryland Sav. and Loan, Inc., 639 A.2d 553, 560 (D.C. 1994) (holding that the parol evidence rule prohibits the introduction of evidence to "add to, contradict, or explain" the terms of an unambiguous contract provision); *see also* CLAYTON P. GILLETTE & STEVEN D. WALT, SALES LAW: DOMESTIC & INTERNATIONAL 139 (1999) ("The parol evidence rule asks [the] question: Assuming that a party can enforce a contract, what evidence is admissible to prove its terms?").

[6] *See* Masterson v. Sine, 436 P.2d 561, 564 (Cal. 1968) ("In formulating the rule governing parol evidence, several policies must be accommodated."). For a good discussion of the policy reasons behind the parol evidence rule, see Judge Posner's decision in *Patton v. Mid-Continent Systems, Inc.*, 841 F.2d 742, 745–46 (7th Cir. 1988).

[7] *See* American Underwriting Corp. v. Rhode Island Hosp. Trust Co., 303 A.2d 121, 126 n.2 (1973) (concluding "that the parol evidence rule arose out of a fear of invention by witnesses and also to allow courts to prevent juries from making findings of fact based on their sympathies").

[8] *See* George I. Wallach, *The Declining "Sanctity" of Written Contracts – Impact of the Uniform Commercial Code on the Parol Evidence Rule*, 44 MO. L. REV. 651, 653 (1979) ("The parol evidence rule . . . sanctifies the writing at the expense of the parties by excluding other forms of evidence from the jury's consideration when they determine the agreement of the parties.").

the inconsistent application of the rule[9] and the limited precedential value provided by appellate decisions.[10] In addition, the semantics of the rule itself are paradoxical.[11] Finally, the rule is virtually engulfed by a plethora of exceptions.[12] Nevertheless, the parol evidence rule survives.[13]

---

[9] *See* Susan J. Martin-Davidson, *Yes, Judge Kozinski, There is a Parol Evidence Rule in California – The Lessons of a Pyrrhic Victory*, 25 SW. U. L. REV. 1, 71 (1995) (stating that "[a] rule which produces such mind-numbing manipulations cannot be justified as law or good policy").

[10] *See* ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 573 (1952) (indicating that appellate decisions often create the appearance that the court is making an assumption that a contract represents an accurate integration, but this appearance is often erroneous).

[11] The rule's application does not apply exclusively to parol (oral) terms. *See* Hawley v. Dresser Indus., Inc., 738 F. Supp. 243, 248 (S.D. Ohio 1990) ("[T]he 'parol evidence rule' is not limited to oral evidence."). It is a substantive rule, not a rule of evidence. *See* Electric Distrib., Inc. v. SFR, Inc., 166 F.3d 1074, 1082 n.3 (10th Cir. 1999); *see also In re* Continental Resources Corp., 799 F.2d 622, 626 (10th Cir. 1986) ("We begin by observing that the parol evidence rule is a rule of substantive law."); Baum v. Great W. Cities, Inc., 703 F.2d 1197, 1205 (10th Cir. 1983) ("The parol evidence rule is, of course, fundamentally a rule of substantive law, not the law of evidence .... Thus, *any* evidence offered to prove earlier conduct is irrelevant if offered to contradict unambiguous writing.") (emphasis added); Investors Royalty Co. v. Lewis, 91 P.2d 764, 766 (Okla. 1939) ("The parol evidence rule is a rule of substantive law.").

[12] *See* RESTATEMENT (SECOND) OF CONTRACTS § 214. The Restatement provides that:

> Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish
>
> (a) that the writing is or is not an integrated agreement;
>
> (b) that the integrated agreement, if any, is completely or partially integrated;
>
> (c) the meaning of the writing, whether or not integrated;
>
> (d) illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause;
>
> (e) ground for granting or denying rescission, reformation, specific performance, or other remedy.

Id.

[13] Some jurisdictions have gone so far as to expand its exclusionary force. Alaska is one example. *Compare* Alaska Placer Co. v. Lee, 455 P.2d 218 (Alaska 1969) (adopting generous policy towards extrinsic evidence), *with* Alaska N. Dev., Inc. v. Alyeska Pipeline Serv. Co., 666 P.2d 33 (Alaska 1983) (limiting admissibility of extrinsic evidence). There has been abundant study of the rule in Alaska. *See* Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1148–50 (1995); Leonard Marinaccio III, Note, *Out on Parol? A Critical Examination of the Alaska Supreme Court's Application of the Parol Evidence Rule*, 11 ALASKA L. REV. 405, 405 (1994) (chronicling "the imprecision and confusion that has plagued the application of the parol evidence rule in Alaska"); *see also* Robert C. Erwin, *Parol Evidence or Not Parol Evidence*, 8 ALASKA L.J. 20 (1970).

The difficulties surrounding the rule have prompted some to call for its curtailment, or even its demise.[14] This position has gained new support in recent years. The judicial trend limiting the exclusionary force of the rule was advanced with the Eleventh Circuit Court of Appeal's holding in *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, SpA.*[15] The court held that cases governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG) may not apply the parol evidence rule to preclude parties from proffering extrinsic evidence.[16] The *MCC-Marble* decision leaves observers to question whether such a ruling will permeate contract cases governed by other law.[17]

This Note posits that the parol evidence rule, as a device to exclude extrinsic evidence of prior agreements, should be abandoned. Part I defines the parameters of the rule, its intended function, and judicial trends in this area of the law. Parts II and III review the CISG and its treatment of extrinsic evidence. Part IV analyzes relevant American case law. Part V of this Note discusses the public policy reasons for the rule and examines the extent to which those policy objectives are no longer embraced. Part VI identifies ramifications of the rule's abandonment. This Note ultimately concludes that the rule is an evolutionary relic. Contract law must adapt to modern business practices. The holding in *MCC-Marble* confirms that the interests of commerce and trade are best served without the parol evidence rule.

I. THE RULE'S FUNCTION AND CASE LAW TREND

The intention of this Note is to go beyond a discussion of doctrinal framework.[18] In order to conceptualize the elimination

---

[14] *See supra* note 4.

[15] 144 F.3d 1384 (11th Cir. 1998), *cert. denied*, 526 U.S. 1087 (1999).

[16] United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, *reprinted in* 15 U.S.C.A. app. 52, at 332 (West 1997) [hereinafter CISG].

[17] *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 213 (explaining the effect of the parol evidence rule); U.C.C. § 2-202 (1978) (explaining the effect of the parol evidence rule).

[18] Several comprehensive works have been published on the subject of the parol evidence rule. *See, e.g.*, E. ALLAN FARNSWORTH, CONTRACTS §§ 7.2–7.6 (2d ed. 1990) (explaining the rationale and the application of the parol evidence rule); CORBIN, *supra* note 10, §§ 573–96 (criticizing the rule); 9 J. WIGMORE, WIGMORE ON

of the rule, however, several important cases must be reviewed. This review is necessary because it is easier to accept abandonment of the rule when viewed in light of the trend supporting its abandonment.

A. *Case Law Trend: Narrow Interpretation of the Parol Evidence Rule*

Cases from the nineteenth century strictly applied the parol evidence rule.[19] In *Thompson v. Libbey*,[20] the parties agreed to a sale of logs.[21] The seller, Thompson, brought suit for the purchase price of the logs.[22] Libbey argued that the contract included a warranty that was breached, thereby discharging his duty to tender the purchase price of the goods.[23] Libbey claimed that, though such a term did not appear in the writing, the parties had orally agreed to it.[24] The court held that the trial court erred in failing to conclude that the parol evidence rule barred such extrinsic evidence from consideration by the jury.[25] Noting that the writing contained the entire agreement of the parties, the court declared that "[t]he only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself."[26] Such an

---

EVIDENCE § 2426 (3d ed. 1940) (chronicling the historical development of the rule); Helen Hadjiyannakis, *The Parol Evidence Rule and Implied Terms: The Sounds of Silence*, 54 FORDHAM L. REV. 35, 39–64 (1985) (reviewing the development and history of the rule).

[19] *See, e.g.*, Seitz v. Brewers' Refrigerating Mach. Co., 141 U.S. 510, 517–18 (1891) (holding extrinsic evidence offered to prove an alleged independent contract inadmissible).

[20] 26 N.W. 1 (Minn. 1885).

[21] *See id.* at 2; *see also* CHARLES L. KNAPP & NATHAN M. CRYSTAL, PROBLEMS IN CONTRACT LAW 454–61 (3d ed. 1993) (discussing the *Thompson* case and the parol evidence rule). The parties memorialized the agreement in a simple writing. *See Thompson*, 26 N.W. at 2.

[22] *See Thompson*, 26 N.W. at 2.

[23] *See id.*

[24] *See id.*

[25] *See id.* at 2–4.

[26] *Id.* at 2. One observer has noted that the *Thompson* ruling "is highly artificial." *See* Wallach, *supra* note 8, at 657.

Naturally, this case was decided before the adoption of the Uniform Commercial Code. Suppose *Thompson* had been decided under the Uniform Commercial Code? It seems likely that the extrinsic evidence would undoubtedly have been permitted. This is a very persuasive indicator of the liberalizing trend regarding the parol evidence rule. *See* U.C.C. § 2-202 (1978) (stating that certain types of evidence may

approach led one scholar to conclude that "the reins" were "still tightly held by the judges."[27]

B. Case Law Trend: Liberalization

Recent cases have applied the rule more broadly. The leading case of *Masterson v. Sine*[28] highlights this liberalization.[29] In *Masterson*, the defendants appealed the trial court's determination precluding the admission of extrinsic evidence that an option to purchase land included an oral term prohibiting assignment of the option.[30] The court held, in a 5-2 decision, that the extrinsic evidence should have been admitted even though it would have directly contradicted an implied-at-law term.[31] Chief Justice Traynor reasoned that excluding such evidence was proper only "when the fact finder was likely to be misled. The rule must therefore be based on the credibility of the evidence."[32] A comparison of the *Thompson* case with the more recent *Masterson* case illustrates the trend of courts

---

be offered to explain or supplement an otherwise final written agreement between parties).

[27] Charles T. McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 YALE L.J. 365, 370 (1932). McCormick criticized the principle that "[t]he writing is the 'sole criterion' of its own completeness . . . [as] too narrow to meet the actual need for recognition of reasonable and genuine oral agreements dealing with matters related to those covered by the written document, but not intended by the parties to be superceded by the writing . . . ." *Id.* at 369–70.

[28] 436 P.2d 561 (Cal. 1968).

[29] The *Masterson* decision still garners significant attention in the world of legal scholarship. *See, e.g.*, Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 562 n.47 (1998) (citing *Masterson* for its "liberal interpretation of the parol evidence rule"); Harry G. Prince, *Contract Interpretation in California: Plain Meaning, Parol Evidence and Use of the "Just Result" Principle*, 31 LOY. L.A. L. REV. 557, 598–604 (1998) (discussing the *Masterson* opinion thirty years after the case was decided); Madeleine Plasencia, *Who's Afraid of Humpty Dumpty: Deconstructionist References in Judicial Opinions*, 21 SEATTLE U. L. REV. 215, 241–42 (1997) (lauding the legacy of the *Masterson* line of cases).

[30] *See Masterson*, 436 P.2d at 562. This was vital to the outcome of the case because if the option was indeed not assignable, the trustee in Masterson's bankruptcy could not exercise it. *See id.* Under California law, such an option is impliedly assignable unless specified to the contrary in writing. *See id.* at 567 (Burke, J., dissenting).

[31] *See id.* at 565 ("The fact that there is a written memorandum, however, does not necessarily preclude parol evidence rebutting a term that the law would otherwise presume.").

[32] *Id.* at 564.

applying the parol evidence rule less rigorously.[33] The liberalization trend is a signal that courts recognize that the rule's exclusionary effect is often unworkable. This makes it easier to advocate the rule's demise.

II. THE CISG AND THE PAROL EVIDENCE RULE

After World War II, the United States was experiencing an economic boom and sought to build a national commercial network.[34] Toward that end, forty-nine states adopted Article 2 of the Uniform Commercial Code (UCC).[35] The obvious goal of such adoption was to provide uniformity of law throughout the country for contracts involving the sale of goods.[36] Article 2 of the UCC has been an unquestioned success.[37]

---

[33] *See* Posner, *supra* note 29, at 562 n.50 (1998) (observing California as a jurisdiction with a liberal approach to parol evidence).

[34] *See* James A. Rahl, *1983 Survey of Books Relating to the Law*, 81 MICH. L. REV. 1130 (1983) (reviewing JAMES R. ATWOOD & KINGMAN BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (2d ed. 1981)). Professor Rahl acknowledged "the great growth of the . . . post-World War II years." *Id.*

[35] *See* Flagg Bros. v. Brooks, 436 U.S. 149, 161–62 n.11 (indicating that the UCC is "the law in 49 States and the District of Columbia"); *see also* Glenn L. Norris, et. al., *Hedge to Arrive Contracts and the Commodity Exchange Act: A Textual Alternative*, 47 DRAKE L. REV. 319, 337 n.73 (1999); Boyd Allan Byers, Note, *Making a Case for Federal Regulation of Franchise Terminations—A Return-of-Equity Approach*, 19 IOWA J. CORP. L. 607, 641 (1994) (lauding the authors of Article 2 of the UCC). This commitment arguably took a great leap forward when United States Supreme Court decisions of the New Deal era greatly expanded Congress's power under the Commerce Clause. Much of the New Deal legislation had as its goal the creation of national economic systems. *See, e.g.*, Ann Althouse, *Theoretical and Constitutional Issues: Enforcing Federalism after* United States v. Lopez, 38 ARIZ. L. REV. 793, 812 (1996) ("[T]he work of [the] New Deal Congress [was to] struggl[e] with the nation's economic problems."); Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918, 919 (1992) ("The New Deal . . . repudiat[ed] the notion that the national government had limited powers over economic . . . development.") (reviewing BRUCE ACKERMAN, WE THE PEOPLE (1991)) (internal quotation omitted).

[36] *See* John Anecki, Note, *Selling in Cyberspace: Electronic Commerce and the Uniform Commercial Code*, 33 GONZAGA L. REV. 395, 396 (1997–98) ("The purpose of the UCC Article 2, when it was written in 1944, was to foster uniformity between states in resolving contractual disputes which concern the sale of goods. By 1972, every state had adopted the UCC except Louisiana.") (footnotes omitted).

[37] *See* Fred H. Miller, *The Future of Uniform Sales Legislation in the Private Law Area*, 79 MINN. L. REV. 861, 869 n.30 (1995) (discussing the general accomplishments of the UCC within the field of commercial law); Elizabeth Hayes Patterson, *UCC Section 2-612(3): Breach of an Installment Contract and a Hobson's Choice for the Aggrieved Party*, 48 OHIO ST. L.J. 177, 177 (1987) (refraining from "a discourse on the success of Article 2").

More recently, the United States has attempted to facilitate international trade.[38] One obstacle to international trade has been the different legal rules used by America's major trading partners.[39] The United Nations responded by creating the United Nations Convention on Contracts for the International Sale of Goods ("CISG").[40] The CISG is described as "constantly

---

[38] *See* 136 CONG. REC. H4140, H4145 (daily ed. June 26, 1990) (remarks of Rep. Rogers) (discussing the need to promote American enterprise abroad in the face of a trade war). Private organizations have been established to promote international trade. *See* Tom Hamburger & Greg Gordon, *Tobacco's Ally Groups Help Get the Word Out*, STAR TRIB. (Minneapolis, Minn.), June 21, 1998, at 1A (discussing the creation of the New York Society for International Affairs and America-European Community Association). Some states have made attempts to increase trade within their borders by creating international trade organization. For example, "Enterprise Florida, the state's economic development agency" teamed with the Central America-United States Chamber of Commerce to help promote trade with Latin American nations and the state of Florida. *See The Miami Herald Latin American Briefs Column*, MIAMI HERALD, June 17, 1998; *The Miami Herald Latin American Briefs Column*, MIAMI HERALD, June 1, 1998. The need for substantial international trade is not a goal exclusive to the United States. Professor Robert Hillman of Cornell Law School recognized an "increasingly global commercial community." Robert A. Hillman, *Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity, in* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 21 (Cornell International Law Journal ed., 1995).

[39] *See* FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS 1 (1992) ("[T]he existence of different national legal systems impedes the development of international economic relations with complicated problems arising from the conflict of laws."); Willibald Posch, *On the Law of International Sale of Goods: An Introduction, in* SURVEY OF THE INTERNATIONAL SALE OF GOODS 3 (Louis Lafili et al. eds., 1986) ("Many difficulties in the context of an international sale of goods occur as a consequence of the considerable differences in the national rules governing the law of sales."); Michael J. Kolosky, Note, *Beyond Partisan Policy: The Eleventh Circuit Lays Aside the Parol Evidence Rule in Pursuit of International Uniformity in Commercial Regulation*, 24 N.C. J. INT'L. L & COM. REG. 199, 199 (1998) (spotting the "conflict of laws" problem inherent in virtually all international commercial transactions).

[40] *See* CISG, *supra* note 16; *see also* Hillman, *supra* note 38, at 21 ("[T]he need to achieve predictability . . . precipitated the creation of the Convention.") (footnote omitted); Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 266–67 (1984). Some have recognized the creation of the CISG as a reflection of a worldwide objective to create a uniform international sales law. *See, e.g.*, Paul Volken, *The Vienna Convention: Scope, Interpretation, and Gap-Filling, in* INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 19, 46 (Petar Sarcevic & Paul Volken eds., 1986) [hereinafter DUBROVNIK LECTURES].

gaining more success as more countries choose to ratify it."[41] The CISG is currently in force in fifty two countries, and the trade activity of these countries accounts for over two-thirds of all world trade.[42]

---

[41] Camilla Baasch Andersen, *Furthering the Uniform Application of the CISG: Sources of Law on the Internet*, 10 PACE INT'L. L. REV. 403, 403 (1998) (footnote omitted).

[42] *See id.* The countries with the CISG in force are: Argentina, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Canada, Chile, China (PRC), Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Guinea, Hungary, Iraq, Italy, Lesotho, Lithuania, Luxembourg, Mexico, Moldova, Netherlands, New Zealand, Norway, Poland, Romania, Russian Federation, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States, Uzbekistan, Yugoslavia, Zambia, and the USSR (superseded). In 1999, the Convention will enter into force in Greece and Mongolia (January 1, 1999 and February 1, 1999, respectively). *Id.* at 403 n.2. "Eventually, the number of member countries is expected to surpass 100. It is worth noting, however, that two major trading countries have chosen not to adopt the convention to date: Britain and Japan." JBC International, *Think You Understand the Vienna Convention? Then Read This Sad Tale*, J. OF COM., June 24, 1998, at 11C ("Essentially, when a country adopts the convention, it finds itself with two sales laws: a domestic sales law and the CISG. In the United States, for example, the Uniform Commercial Code and the CISG are now both U.S. law.").

The CISG applies to contracts for the sale of goods if the contracting parties are located in different countries that have ratified the treaty.[43] For example, if an Italian manufacturer of motorcycles sold their product to a distributor in New Jersey, the general rule is that the contract would be governed by the CISG.[44] In addition, parties not otherwise subject to the CISG may agree to be governed by it.[45] The validity of such an agreement is based on the choice-of-law rules of the particular forum.[46] Moreover, parties can agree that the otherwise applicable CISG does not govern their agreement.[47]

The flexibility with which parties can agree to apply or avoid the treaty's law is an important consideration. Commercial buyers and sellers of the world have the applicable effect of this body of contract law in the palm of their hands. If they deemed the CISG unwieldy, every contract for the sale of goods could void its governing effect. This is especially noteworthy when one considers that the purpose of the CISG is to reconcile diverse bodies of contract law.[48] In other words, the world's

---

[43] *See* CISG, *supra* note 16, art. 1(1)(a); *see also* HENRY GABRIEL, PRACTITIONER'S GUIDE TO THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) AND THE UNIFORM COMMERCIAL CODE (UCC) 4 (1994); Peter Winship, *International Sales Contracts Under the 1980 Vienna Convention*, 17 UCC L.J. 55 (1984) (explaining the general provisions of this part of the CISG); Isaak I. Dore, *Choice of Law Under the International Sale Convention: A U.S. Perspective*, 77 AM. J. INT'L. L. 521, 522 (1983) ("The United Nations Secretariat was requested by the Commission to invite states to indicate whether they intended to accede to the 1964 Conventions.").

[44] *Cf.* Claudia v. Olivieri Footwear Ltd., No. 96 Civ. 8052, 1998 WL 164824, at *1 (S.D.N.Y. Apr. 7, 1998).

[45] *See* GABRIEL, *supra* note 43, at 5 ("The CISG may also apply to a transaction if the parties agree to be bound [by it]."); REED KATHREIN & DANIEL MAGRAW, *Introduction in* THE CONVENTION FOR THE INTERNATIONAL SALE OF GOODS: A HANDBOOK OF BASIC MATERIALS (Daniel Magraw & Reed Kathrein eds., 2d ed. 1990) ("It is also possible that parties to a contract will choose to specify that the law of the Convention applies even if it would not otherwise apply."). The Convention itself does not suggest the parties could agree to be bound by it, but choice-of-law rules support this notion. *See* KATHREIN & MAGRAW, *supra*, at 1–2; *see also* U.C.C. § 1-105 (1978); Dore, *supra* note 43, at 527 (discussing same).

[46] *See* GABRIEL, *supra* note 43, at 5 (suggesting a choice-of-law clause in a contract could be barred by "choice-of-law rules in the forum").

[47] *See* GILLETTE & WALT, *supra* note 5, at 32; Aleksandar Goldstajn, *Usages of Trade and other Autonomous Rules of International Trade According to the UN (1980) Sales Convention, in* DUBROVNIK LECTURES, *supra* note 40, at 95.

[48] *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, 351 (1999) (observing that the

businesspeople could thwart the United Nations' best attempt to homogenize international sales law. This has not been the case.

The absence of such avoidance suggests that businesspeople have embraced the CISG.[49] There are several differences between the CISG and the contract law that students learn in law school. For example, the CISG recognizes no statute of frauds.[50] The abandonment of the statute of frauds reflects an overwhelming rejection of the doctrine among the world's legal systems.[51] Similarly, the next section will discuss why the CISG does not provide for a parol evidence rule.

III. TREATMENT OF EXTRINSIC EVIDENCE BY THE CISG

The conclusion that the CISG contains no provision for the parol evidence rule is not determinable at a mere glance. The text itself does not explicitly state that there is no parol evidence

---

triumph of the treaty was "bringing unity to an extremely disorganized branch of law").

[49] On the other hand, it may also suggest they did not know the CISG could be opted out of, or that the parties were entirely unaware it even applied to a particular transaction. The evidence, however, leads one to conclude the CISG is lauded globally. *See* Michael P. Van Alstine, *Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law*, 37 VA. J. INT'L. L. 1, 6 (1996) (indicating that by 1988, 47 states adopted the CISG, accounting for over 60% of the world's trade); Andreason, *supra* note 48, at 351 (lauding it as "one of the greatest achievements of modern legal history").

Praise for the achievement of the CISG is not limited to American observers. For example, German scholar Rolan Loewe wrote that the CISG "represented a milestone in legal history." Van Alstine, *supra*, at 7 (quoting ROLAN LOEWE, INTERNATIONALES KAUFRECHT 5 (1989)). In addition, Norway has embraced it as their domestic sales law, and Sweden and Finland have amended their commercial law to accommodate CISG provisions. *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); Andreason, *supra* note 48, at 351 n.5.

[50] *See* CISG, *supra* note 16, art. 11 ("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.").

[51] *See* JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 152 (2d ed. 1991) (indicting that there is no corollary to the UCC statute of frauds). The United States uses the statute of frauds for sales of goods in excess of $500. *See* U.C.C. § 2-201 (1978). Most other common law systems repealed their statute of frauds for sale of goods contracts. *See* HONNOLD, *supra* at 152. The same is true for civil law nations. *See id.*; *see also* Cigoz, *International Sales: Formation of Contracts*, 23 NETH. INT'L. L. REV. 257, 270–72 (1976) (surveying the statute of frauds equivalent for various legal systems).

rule.[52] Rather, to make such a determination, scholars have sought inferential evidence from the text of the document.[53] In addition, they have looked to the purpose of the treaty and by what means the purpose is best served.[54]

A. *A Textual Analysis*

Article 8 of the CISG relates to contractual construction.[55] More importantly, Article 8(3) states that "due consideration is to be given to all relevant circumstances of the case *including the negotiations.*"[56] Armed with such clear text, what is a fair construction of this clause? There is no guarantee that the drafters intended to exclude the parol evidence rule because there is nothing explicit in the text to support such a notion.[57] Furthermore, including negotiations does not further the quest

---

[52] The most popular rationale for the silence in the text on this issue was asserted by Professor Honnold. "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." HONNOLD, *supra* note 51, at 170.

[53] *See, e.g.*, HONNOLD, *supra* note 51, at 170–71 (recognizing a textual argument); 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, 282 (1997) ("[Article 8] allows open-ended reliance on parol evidence.").

[54] *See* Harry M. Fletchner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187, 187 (1988) (acknowledging the purpose of the treaty was to adopt "uniform rules"); *see generally* John E. 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. & COM. 11, 44–46 (1988) (discussing circumstances in which extrinsic evidence might be admitted).

Scholars are not alone in pursuing the theme of uniformity. The text of the treaty itself confirms the emphasis on homogeneous commercial law. *See* CISG, *supra* note 16, pmbl. ("[T]he adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.").

[55] *See* CISG, *supra* note 16, art. 8; *see also* Gyula Eorsi, *General Provisions, in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS § 2.05 (Nina M. Galson & Hans Smit eds., 1984) [hereinafter INTERNATIONAL SALES] (discussing Article 8 as the basis for governing the parties' conduct and the contract's construction).

[56] CISG, *supra* note 16, art. 8(3) (emphasis added).

[57] *See supra* note 52 and accompanying text (discussing the lack of explicit guidance by the drafters on the parol evidence rule issue).

to exclude the parol evidence rule from CISG cases because the UCC has already allowed parties to submit negotiations in court.[58] Therefore, it seems that if the language of the CISG is construed in parallel with UCC Article 2, the parol evidence rule was not abandoned.

One possible construction of this text supporting the abandonment argument is centered on the word "all," as used in Article 8(3) of the CISG.[59] "All" is a very encompassing choice of language.[60] It suggests courts use every possible indicia of party intent. This construction of CISG Article 8(3) goes further than section 2-202 of the UCC[61] and provides the underpinnings for the *MCC-Marble* decision.[62] Yet, there is an alternative textual construction. It is based on the phrase that "all *relevant* circumstances" be given "due consideration."[63] The word "relevant" was placed between "all" and "circumstances."[64] It seems clear that "relevant" is used to modify "all" to restrict its broad connotation. Assuming this is true—that the "circumstances" to be given "due consideration" are something less than "all"—what circumstances should be excluded?

The final clause of Article 8(3) provides some examples of relevant circumstances.[65] These include "the negotiations, any practices which the parties established between themselves, usages and any subsequent conduct of the parties."[66] The latter three examples mirror the course of dealings, custom/usage, and

---

[58] *See* U.C.C. § 2-202 (1978) ("Terms . . . included therein may not be contradicted by evidence of any prior agreement."). The language of the UCC prohibits previous agreements to "contradict;" previous understandings may be proffered for purposes other than contradiction. Therefore, the UCC already allowed consideration of the negotiations, and one possibility is that the CISG goes no further. *Id.*

[59] *See* CISG, *supra* note 16, art. 8(3) (indicating consideration be given to *all* circumstances).

[60] *See* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 29 (10th ed. 1993) (defining the term as "the whole amount or quantity of" and "as much as possible").

[61] *See* U.C.C. § 2-202 (1978). The UCC does not allow *all* prior agreements to be proffered to the court. It does not allow those understandings that contradict the final agreement. *See id.*

[62] *See* MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, SpA, 144 F.3d 1384, 1389 (1998) (quoting CISG Article 8(3)).

[63] *See* CISG, *supra* note 16, art. 8(3) (emphasis added).

[64] *Id.*

[65] *See id.*

[66] *Id.*

course of performance, respectively, that are expressed in section 1-205 of the UCC.[67] The "negotiations," however, presents difficulty with the interpretation because there are two interpretations of "negotiations" as used in this clause. Unfortunately, each leads to a different conclusion about whether the parol evidence rule should apply to CISG cases.[68]

One interpretation provides that all the negotiations are relevant. This is consistent with the other examples given. *Any* course of dealings, course of performance, and usage may be offered to the court. To conclude all negotiations are allowed before the trier of fact supports the assertion that the CISG has not provided for a parol evidence rule. A second interpretation provides that the word "relevant" limits the negotiations in some way. In addition, the lack of the use of "any" to modify "negotiations," could be construed as a restriction. If the negotiations are limited to those which are "relevant," how do we determine which negotiations fall into this category? For example, if relevant negotiations are limited to those tending "to explain or supplement,"[69] the exclusionary force of the CISG only goes so far as the UCC.[70] It seems that such a textual

---

[67] *See* UCC § 1-205(1) (1978) (discussing "[a] course of dealing."); *see also* UCC § 1-205(2), (3) (defining "a usage of trade" and "[a] course of dealing," respectively). Use of these examples lends support to the assertion that Article 8(3) be construed parallel with UCC § 2-202.

[68] Very little has been published on the issue of the CISG and its textual implications. There are three reasons for this. First, cases governed by the CISG are sparse. *See* MCC-Marble Ceramic, Inc. v. Ceramica Nuova D'Agostino, SpA, 144 F.3d 1384, 1389 (11th Cir.1998) ("Despite the CISG's broad scope, surprisingly few cases have applied the Convention in the United States . . . .") (citation omitted); Delchi Carrier, SpA v. Rotorex Corp., 71 F.3d 1024, 1027–28 (2d Cir. 1995) ("[T]here is virtually no case law under the Convention . . . ."). Second, the treaty is drafted in several unrelated languages, leading scholars and courts to rely much more on purpose construction than textual evidence, which can be subtly (or not so subtly) different in the various languages. *See generally* Steven Walt, *Novelty and the Risks of Uniform Sales Law*, 39 VA. J. INT'L. L. 671, 676 n.11 (1999) (acknowledging the difficulties in multiple language statutory construction even though "production of multiple language versions of treaties is common"); Dinah Shelton, *Reconcilable Differences? The Interpretation of Multilingual Treaties*, 20 HASTINGS INT'L. & COMP. L. REV. 611 (1997). Third, much of the language is broad in order to reconcile with the general purpose of the treaty, which is to incorporate various legal systems. *See* HONNOLD, *supra* note 51, at 136 ("To read the words of the Convention with regard for their 'international character' requires that they be projected against an international background.").

[69] U.C.C. § 2-202 cmt. n.1 (1978).

[70] The commentary is equally uninformative. *Id.* In fact, a persuasive argument

construction would not lead one to conclude that the CISG totally abandoned the parol evidence rule.

No matter what construction of the text one embraces, it is clear that a textual analysis of the CISG does not provide an answer to the parol evidence rule issue. One may go so far as to conclude that the words of Article 8(3) are vague. Therefore, the purpose of the treaty must be ascertained, and the problem of parol evidence should be resolved in favor of best serving the stated purpose.

B. Purpose Construction

Unlike analyzing the textual evidence in the CISG, analyzing the treaty's purpose is a much easier task. The preamble and Article 7 of the CISG give those attempting to construe the treaty ample material to do so.[71] An analysis of these provisions seems to lend itself to one clear conclusion—the CISG has no parol evidence rule provision. The preamble gives guidance on the purpose of the treaty.[72] It states two purposes.[73] First, the treaty as a uniform governing system is designed to "contribute to the removal of legal barriers in international trade."[74] Second, it was adopted to "promote the development of

---

exists that many CISG provisions should be construed as parallel with their related UCC Article 2 counterparts. *See* Andreason, *supra* note 48, at 355 ("[M]uch of the Convention mimics the rules found in the Uniform Commercial Code."); Larry A. DiMatteo, *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability, =(ii)²*, 23 SYRACUSE J. INT'L. L. & COM. 67, 79 (1997); John O. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, 78 AM. J. INT'L. L. 289, 292 (1984) ("[E]xperience with one will be readily translatable for use with the other.").

[71] *See* CISG, *supra* note 16, pmbl. & art. 7.

[72] *See id.* pmbl. This discussion of statutory construction in the treaty environment does not change the analytical approach. A treaty, much like a constitution, is merely another type of statute. Therefore, our well-worn rules of statutory construction are equally useful.

[73] *See id.*

[74] *Id.*; *see also* Franco Ferrari, *Uniform Application and Interest Rates Under the 1980 Vienna Sales Convention, in* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 3, 3–5 (CORNELL INT'L. L.J. eds., 1995) (identifying the obstacle of local law in international trade); 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, 409 (1992) ("International trade has been hindered by a myriad of distinct domestic laws . . . ."); James E. Joseph, *Contract Formation Under the*

international trade."[75] Article 7 of the treaty provides construction provisions.[76] Section 1 of Article 7 provides that one should take into account the treaty's "international character" and that construction must dovetail with "the need to promote uniformity in its application."[77] Section 2 of Article 7 states that cases "not expressly settled" by the CISG must be "settled in conformity with the general principles on which it is based."[78] It seems this provision is paramount for domestic courts to use in ruling on cases governed by the CISG. The message to courts is clear: construe the treaty in favor of its international flavor and disregard special domestic rules of commercial law.[79] Therefore, if one were to conclude that the parol evidence rule was unique to domestic law, it would have no application in cases governed by the CISG.[80]

United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code, 3 DICK. J. INT'L. L. 107 (1984).

[75] CISG, *supra* note 16, pmbl.

[76] *See id.* art. 7; *see also* INTERNATIONAL SALES, *supra* note 55, § 2.01–2.04 (reviewing construction provisions); Andersen, *supra* note 41, at 403 ("Uniformity applies throughout the Convention by way of Article 7(1).").

[77] CISG, *supra* note 16, art. 7(1); *see also* INTERNATIONAL SALES, *supra* note 55, § 2.03 ("[T]he elements of regard to the international character of the Convention and uniformity in its application were well chosen. The first, as we have seen, was devised to check the homeward trend, and the second is an admonition to follow precedents on the international plane.") (footnote omitted).

[78] CISG, *supra* note 16, art. 7(2); *see also* HONNOLD, *supra* note 51, at 148–49 (indicating this language is the gap filling provision of the CISG). It was already submitted that a review of the plain meaning is inconclusive. *See supra* Part III.A. Therefore, it would not be unreasonable to conclude that parol evidence questions are "not expressly settled," under the treaty. CISG, *supra* note 16, art. 7(2).

[79] *See* HONNOLD, *supra* note 51, at 148–49.

> [T]he domestic law would be foreign to one of the parties, and in most cases would be unsuited to the problems of international trade .... [R]eferring gap-filling to the diverse rules of domestic law would never lead to a uniform solution whereas recourse to the general principles of the Convention would develop common answers for the questions that arise within the scope of the law.

Id.

[80] The CISG does not provide for a parol evidence rule. *See* MCC-Marble Ceramic, Inc. v. Ceramica Nuova D'Agostino, SpA, 144 F.3d 1384, 1389 (11th Cir. 1998) ("[T]he CISG itself contains no express statement on the role of parol evidence."); *see also* Andreason, *supra* note 48, at 358–59 (concluding that there is no explicit parol evidence provision in the CISG); John E. 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. & COM. 11, 44 (1988) ("CISG rejects the parol evidence rule in the most frugal terms.").

Parties with a contract governed by the CISG have two options to protect their

IV. RELEVANT U.S. CASE LAW

Interestingly, despite the broad reach of the CISG, there is relatively little CISG case law.[81] Even more rare is a CISG case relating to the parol evidence rule.[82] Nevertheless, looking at the relevant cases is important to understanding how American courts view this issue.

The first reported case on the CISG and parol evidence was *Filanto, SpA v. Chilewich International Corp.*[83] In *Filanto*, the dispute involved other issues, such as the application of an arbitration provision.[84] Chief Judge Brient, however, dropped a footnote stating: "the Convention essentially rejects both the Statute of Frauds and the parol evidence rule."[85] This observation appears to be the first judicial acknowledgement that the CISG does not incorporate the parol evidence rule.

In *Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*,[86] the Fifth Circuit Court of Appeals discussed the issue of the CISG and the parol evidence rule in only the second reported case on that topic. The defendant corporation argued that two terms, orally agreed

---

written instrument. First, they may simply agree that the CISG does not apply to their agreement and specify the application of law from a jurisdiction where the rule is in effect. *See* GILLETTE & WALT, *supra* note 5, at 153. Second, the parties may even be able to create their own parol evidence rule through the use of a merger clause. *See id.* Only once have American courts mentioned the issue of merger clauses in connection with the CISG. *See MCC-Marble*, 144 F.3d at 1391 ("[T]o 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.") (footnote omitted); *see also* 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).

[81] *See MCC-Marble*, 144 F.3d at 1389 (recognizing that "surprisingly few cases have applied the Convention in the United States"); Delchi Carrier, SpA. v. Rotorex Corp., 71 F.3d 1024, 1028 (2d Cir. 1995) (acknowledging that "there is virtually no caselaw under the Convention"); *see also* Anthony S. Winer, *The CISG Convention and Thomas Franck's Theory of Legitimacy*, 19 J. INT'L. L. & BUS. 1, 3 n.20 (1998).

[82] *See MCC-Marble*, 144 F.3d at 1389 (noting that "only two reported decisions touch upon the parol evidence rule").

[83] 789 F. Supp. 1229 (S.D.N.Y. 1992), *appeal dismissed*, 984 F.2d 58 (2d Cir. 1993).

[84] *See Filanto*, 789 F. Supp at 1236 (framing the issue "of whether the parties agreed to arbitrate their disputes").

[85] *Id.* at 1238 n.7 (dictum).

[86] 993 F.2d 1178 (5th Cir. 1993).

upon, discharged its obligation under the contract.[87] The court held that the parol evidence rule barred the defendant from offering proof of the oral terms.[88] This holding was based on the application of Texas law.[89] More importantly, Judge Barksdale wrote that the parol evidence rule applied whether Texas law or the CISG governed.[90] The Fifth Circuit's decision to apply Texas law and not the CISG drew substantial criticism.[91] To determine whether a contract is governed by the CISG, a simple three-part test is applied.[92] First, the parties must be from different nations.[93] By all accounts, Beijing's principal place of business was the People's Republic of China,[94] and American Business Center was a Texas corporation.[95] Both countries were parties to

---

[87] *See id.* at 1182. ABC contended that the writing reflected only one part of their three-part agreement, in which ABC agreed to "adhere to a payment schedule." *Id.*

[88] *See id.* at 1184.

[89] *See id.* at 1182 n.9 ("We apply Texas law in this diversity action.").

[90] *See id.* ("We need not resolve this choice of law issue, because our discussion is limited to application of the parol evidence rule (which applies regardless).").

[91] *See* Harry M. Fletchner, *More U.S. Decisions on the U.N. Sales Convention: Scope, Parol Evidence, "Validity," and Reduction of Price Under Article 50*, 14 J.L. & COM. 153, 163 (1995) ("[T]here is substantial argument that the contract comes within the scope of CISG."); Kolosky, *supra* note 39, at 213 ("The dicta in *Beijing Metals* . . . soon sparked academic debate."); 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 B.Y.U. L. REV. 1347, 1356 (doubting "an accurate conclusion" was reached).

Professor Fletchner was the most prominent critic. He argues that "the approach to parol evidence questions taken by the Fifth Circuit in *Beijing Metals* is inconsistent with CISG, and that the result in the case might well have changed had the court applied the Convention." Fletchner, *supra* at 158.

[92] *See* CISG, *supra* note 16, art. 1–4, 6.

[93] *See id.* art. 1 ("This Convention applies to contracts . . . between parties whose places of business are in different . . . [s]tates.").

[94] *See* Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr., Inc., 993 F.2d 1178, 1179 n.1 (5th Cir. 1993) (noting that Beijing "is a company formed and existing under the laws of the People's Republic"); *see also* Moore, *supra* note 91, at 1356.

[95] *See* MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino, SpA, 144 F.3d 1384, 1390 n.15 (11th Cir. 1998) ("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.' ") (citations omitted). If American Business Center were not a United States Corporation, no diversity jurisdiction would attach to the case. *See* 28 U.S.C. § 1332 (1994).

the CISG for the relevant period.[96] Second, the "preponderant part" of the contract must have related to the sale of goods.[97] The parties' contract related to fitness equipment manufactured by Beijing Metals.[98] Third, the parties must not have agreed to avoid the application of the CISG.[99] There was no indication from Judge Barksdale's opinion that the parties attempted to avoid the CISG.[100] Since the three-part test was satisfied, criticism of the court's decision to apply Texas law appears well-founded. Subsequent cases dealing directly on this issue explicitly diverted from the seemingly flawed dicta of *Beijing Metals*.

American courts had not dealt directly with the CISG and the parol evidence rule until *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, SpA*.[101] In this case, the parties agreed to a requirements contract where D'Agostino would sell ceramic tile to MCC.[102] D'Agostino did not satisfy MCC's orders for April, May, and August of 1991.[103] MCC filed a suit for breach of contract and D'Agostino argued that MCC defaulted on payments for previous shipments.[104] D'Agostino pointed to "pre-printed terms" on the contract giving D'Agostino the right to cancel the agreement if MCC failed to deliver payment.[105] At trial, MCC sought to prove that the parties' agreement did not include the pre-printed terms by offering extrinsic evidence of

---

[96] *See supra* note 42 (listing nations who are parties to the treaty).

[97] CISG, *supra* note 16, art. 3; *see also id.* art. 2.

[98] *See Beijing Metals*, 993 F.2d at 1178–79 (stating that the parties entered into a business relationship "in order to cooperatively develop the fitness . . . equipment market in the U.S. and Canada").

[99] *See* CISG, *supra* note 16, art. 6 ("The parties may exclude the application of this Convention."); Filanto SpA v. Chilewich Int'l Corp., 789 F. Supp 1229, 1237 (S.D.N.Y. 1992); HONNOLD, *supra* note 51, at 125; *see also* Salve Regina College v. Russell, 499 U.S. 225 (1991).

[100] If the contract had included such a provision, it would have been unnecessary for the court to engage in their discussion of application of law; the CISG would certainly have been inapplicable. *See Beijing Metals*, 993 F.2d at 1182–83 n.9.

[101] 144 F.3d 1384, 1389–90 (11th Cir. 1998); *see also* 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 [CISG]").

[102] *See MCC-Marble*, 144 F.3d at 1385.

[103] *See id.*

[104] *See id.*

[105] *See id.* at 1385–86.

the negotiations.[106] The district court applied the parol evidence rule and granted summary judgment in favor of D'Agostino.[107] The Eleventh Circuit reversed, holding contracts governed by the CISG were not subject to the parol evidence rule.[108]

In its analysis, the court announced that the case was governed by the CISG.[109] Then, the court determined that the CISG had no express provision for the parol evidence rule.[110] After reviewing the reported opinions concerning the issue, the court realized that the persuasive value of these previous decisions was negligible.[111] The Eleventh Circuit, therefore, carved a clean slate onto which *MCC-Marble* could be decided.[112]

The court certainly could have circumvented the issue of the applicability of the parol evidence rule to CISG cases. It is well established that extrinsic evidence of negotiations is always admissible to prove that a writing is not an integration.[113]

---

[106] *See id* at 1386. The evidence included an affidavit from Juan Carlos Monzon, president of MCC. *See id.* More importantly, "MCC also filed affidavits from Silingardi and Copelli, D'Agostino's representatives at the trade fair, [where the parties consummated their agreement] which supports Monzon's claim that the parties subjectively intended not to be bound by the terms on the reverse side of the order form." *Id.* The pre-printed terms in dispute in this case were on the reverse of the order form. *See id.* at 1385.

[107] *See id.* at 1387; Andreason, *supra* note 48, at 358 ("The magistrate judge held those affidavits to be barred by the parol evidence rule, and the district court agreed.") (footnote omitted); CISG, *supra* note 16, art. 8.

[108] *See MCC-Marble*, 144 F.3d at 1388–89 (addressing in detail the question of whether the parol evidence rule plays any role in cases involving the CISG).

[109] *See id.* at 1386–87. In fact, the parties themselves agreed that the CISG is the governing law in the case. *See id.* at 1386–87. Therefore, application of the three-part test was not needed. More importantly, the problem for which *Beijing Metals* was so castigated, failure to apply the CISG, was avoided in *MCC-Marble*.

[110] *See id.* at 1389 ("The CISG itself contains no express statement on the role of parol evidence."); HONNOLD, *supra* note 51, at 170. *Compare* CISG, *supra* note 16, art. 11 (stating that a contract of sale need not be concluded or evidenced in writing) *with* U.C.C. § 2-201 (1978) (precluding the enforcement of oral contracts for the sale of goods involving more than $500). The court also disposed of the issue of whether the parol evidence rule applied to the case anyway on grounds that it was a rule of substantive law. *See MCC-Marble*, 144 F.3d at 1388–89; *see also* FARNSWORTH, *supra* note 18, at 194. If it were a rule of evidence, it seemingly would be applied without regard to the fact that the CISG governed the dispute.

[111] *See MCC-Marble*, 144 F.3d at 1390. The court implicitly embraced the same criticism of the *Beijing Metals* opinion as Professor Fletchner. *See supra* note 91 and accompanying text.

[112] *See MCC-Marble*, 144 F.3d at 1388 (referring to "a question of first impression in this circuit"); *see also* U.C.C. § 2-202 (1978).

[113] *See* RESTATEMENT (SECOND) OF CONTRACTS § 214(a) (1981) ("Agreements

Instead, the court chose to base its decision on broader, more ubiquitous grounds. The Eleventh Circuit rested its decision on two propositions. First, the court looked at the CISG textual reference in Article 8(3) to the "negotiations."[114] Resting a decision on a treaty's textual embodiment, especially when the document is drafted in multiple languages, is a tenuous proposition.[115] Fortunately, the Eleventh Circuit went further. The court acknowledged that American jurisdictions found the rule useful to control breach of contract cases when a party offered extrinsic evidence.[116] They also recognized that uniformity of international commercial law was "[o]ne of the primary factors motivating the negotiations and adoption of the CISG."[117] In order to facilitate the main purposes of the CISG,[118] the court reviewed the treatment of extrinsic evidence by other member nations and concluded that "a wide number of other States Party to the CISG have rejected the rule in their domestic jurisdictions."[119] Therefore, in the interest of promoting uniform

---

and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish that the writing is or is not an integrated agreement."). This would allow MCC to offer the affidavits of the three individuals to prove that the printed form did not embody the parties' final agreement. In this case, application of the common law (UCC) would seemingly have provided the same result.

[114] *MCC-Marble*, 144 F.3d at 1389. The court readily embraced the phrase "including the negotiations," and confirmed the CISG commitment to the use of oral contracts and terms by referring to the treaty's failure to include a statute of frauds provision. *See id.*

[115] *See supra* note 68.

[116] *See MCC-Marble*, 144 F.3d at 1390–91 (discussing the flexibility needed in applying the parol evidence rule).

[117] *Id.* at 1391.

[118] *See supra* notes 71–80 and accompanying text (discussing the policy objectives of the treaty).

[119] *MCC-Marble*, 144 F.3d at 1391. The court did not survey various legal systems, but referred to the proposition as "in accordance with the great weight of academic commentary on the issue." *Id.* at 1390. Several scholars have indicated that the parol evidence rule barely existed in civil law systems. *See* DiMatteo, *supra* note 70, at 104 ("[T]he CISG applies the view of many of the civil law countries that a writing is not a required formality to the finding of a contract."). The court itself acknowledged, albeit in a footnote, that "[o]utside of Europe and North America, the parol evidence rule is nonexistent. Even in Europe, it is rare; Germany has no parol evidence rule, and France's version of the rule does not apply to commercial transactions." Andreason, *supra* note 48, at 359 n.50; *see also* Murray, *supra* note 54, at 45 ("Civil law countries have often managed without it, or have been willing to apply it sparingly.") (footnotes omitted). Even countries with legal systems similar to the United States have little confidence in the rule. *See* Andreason, *supra*

application of the CISG among the member nations, the court held that the rule did not apply and therefore MCC could offer the affidavits for consideration by the trier of fact.[120]

Similarly, in *Claudia v. Oliveri Footwear Ltd.*,[121] the court refused to grant summary judgment[122] and held that "contracts governed by the CISG are freed from the limits of the parol evidence rule and [that] there is a wider spectrum of admissible evidence to consider in construing the terms of the parties' agreement."[123] In *Mitchell Aircraft Spares Inc. v. European Aircraft Service AB*,[124] the court indicated that "it must consider any evidence concerning any negotiations, agreements, or statements made prior to the issuance of the purchase order."[125] These rulings suggest American law is settled on the abandonment of the parol evidence rule for cases governed by the CISG.[126]

---

note 48, at 359 n.50 (referring to Canada and England). Many countries make virtually all oral contracts and oral terms enforceable, assuming a demonstration of mutual assent. The thrust of much of the foreign disdain for the statute of frauds and the parol evidence rule is cultural. They favor oral dealings out of a sense of trust. *See* WILLIAM F. FOX, JR., INTERNATIONAL COMMERCIAL AGREEMENTS: A PRIMER ON DRAFTING, NEGOTIATING AND RESOLVING DISPUTES 5 (3d ed. 1998).

120 *See MCC-Marble*, 144 F.3d at 1391 (holding that the parol evidence rule did not apply because MCC's affidavits evidenced a subjective intent for MCC not to be bound to the conditions on the reverse side of the form).

121 No. 96 Civ. 8025, 1998 WL 164824 (S.D.N.Y. Apr. 7, 1998). Since the *MCC-Marble* case was not decided until June 29, 1998, the *Claudia* court derived their ruling without the persuasive authority of *MCC-Marble*.

Claudia currently has no further reported developments. Since this issue is in its appellate infancy, it will be interesting to see if and how the Second Circuit Court of Appeals deals with this issue.

122 *See id.* at *11.

123 *Id.* at *5; *see also* Larry A. DiMatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 YALE J. INT'L. L. 111, 127 (1997) (indicating that courts are "freed from the limitations of the parol evidence rule"); John E. Murray, *Different Laws Might Apply to Foreign Buys Under the United Nations Convention for the International Sale of Goods*, PURCHASING, Oct. 19, 1995, at 30 ("[A]ny relevant statements made in negotiations prior to the signing of the contract are admissible into evidence.").

124 23 F. Supp. 2d 915 (N.D. Ill. 1998).

125 *Id.* at 920. The defendant argued that the CISG applied; the plaintiff did not contest this assertion. *See id.* at 918. Nevertheless, after holding that evidence of the negotiations was admissible, the court mentioned that the evidence would still be admissible even if Illinois law were applied. *See id.* at 921. *Compare id.*, *with* Beijing Metals & Minerals v. American Bus. Ctr., 993 F.2d 1178, 1179 n.9 (5th Cir. 1993) (applying Texas law).

126 This Part illustrated how every court dealing with the parol evidence rule

V. DETERIORATION OF THE PURPOSE BEHIND THE RULE

The cases beginning with *Thompson* and culminating with *MCC-Marble* suggest a clear change in the way courts are willing to permit evidence of the negotiations. Further deterioration culminating in abandonment of the rule's force can be further supported. To do so, exploration to the core of the rule is required. At the rule's epicenter is its purpose. If the underlying objectives are identified and it is concluded that these objectives are no longer embraced, abandonment is appropriate.

A. *Trusting the Trier*

One policy underlying the parol evidence rule is the traditional notion that the trier of fact is impressionable and must be protected from the perjury often associated with parol evidence.[127] It seems greater trust is held in the trier of fact today, which would support the assertion that the associated doctrinal framework should be dismantled. To accurately assess the policy shortcomings of the parol evidence rule, the environment in which commercial litigation takes place must be looked at. Specifically, in the American court system, two types of trials exist—bench trials and jury trials.

1. Bench Trials

Assume for a moment that there is significant concern that the fact finder is often persuaded by perjurious testimony.[128] It

---

issue has directly held that it did not apply. In addition, every court which has addressed the issue has rejected (implicitly or explicitly) the dicta in *Beijing Metals*. *See supra* notes 86–100 and accompanying text (discussing *Beijing Metals*). *But see* Rebecca Amthor, Note, *Eleventh Circuit: Survey of Recent Decision: International Law*, 29 CUMB. L. REV. 265, 268 (1998–99) ("Whether other circuits take a similar position with regard to contracts governed by the CISG remains to be seen.").

[127] *See* CORBIN, *supra* note 10, at 522 ("[T]he rule is supported by the public policy of preventing frauds and perjuries by limiting evidence of facts that contradict a valid contract."); Note, *The Parol Evidence Rule: Is it Necessary?*, 44 N.Y.U. L. REV. 972, 982 (1969) (indicating "that to allow extrinsic evidence to vary . . . terms would open the door to perjury"); *see also* Richard D. Dreyfus, *The Effect of* Masterson v. Sine *on California's Parol Evidence Rule*, 43 L.A. BAR BULL. 411 (1968).

[128] Scholars and courts are perpetually concerned with witness testimony misleading the jurors. *See, e.g.*, Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 194 (1990) ("Some

makes little sense that such a rule extends to bench trials. At bench trials, the judge acts as the decision-making authority on the law and trier of fact.[129] If society lacks confidence in trial judges' ability to detect perjurious testimony, it suggests a fundamental problem running to the heart of our system of justice.[130] Also, at bench trials, the judge is assessing the evidence twice. The judge must first determine whether the proffered extrinsic evidence may become part of the trial record. If the judge concludes the evidence is worthy of admission, he or she may consider it in the role as trier of fact.[131] Therefore, it seems that an attempt to shield the fact finder from certain evidence would be unworkable in the context of a bench trial.

2. Jury Trials

It appears likely that an attempt to deceive the fact finder by one of the parties would be more effective in a jury trial. Avoiding the jury in such cases prompted the rise of contract law as independent from tort law.[132] As the twenty first century

---

courts have also been concerned that [psychological] testimony could prove costly, prolong a trial, and still mislead the jury by presenting 'extraneous information having an aura of scientific credibility.' "); Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401, 417 (1990) (indicating that judges may even mislead jurors); J. Alexander Tanford, *A Political-choice Approach to Limiting Prejudicial Evidence*, 64 IND. L.J. 831, 845–46 (1989) (stating that prejudice can occur when "jurors draw unwarranted inferences from the evidence, ignore undisputed facts, overlook gaps in one side's case, or otherwise become unable to keep the evidence in its proper perspective").

[129] *See, e.g.*, Carson v. Burke, 178 F.3d 434, 435 (6th Cir. 1999); Lyles v. State, 472 S.E.2d 132, 134 (Ga. 1996).

[130] *Cf.* HON. H. LEE SAROKIN, A SPEECH AT WHITTIER LAW SCHOOL TO COMMEMORATE LAW DAY (1998), *reprinted in* 20 WHITTIER L. REV. 171, 173 (1998) (acknowledging that judges are the guardians of the judicial system); Jonathan P. Nase, *Why Judges Leave the Bench: Pennsylvania 1978-1993*, 68 TEMP. L. REV. 739, 751 (1995) ("Judges are a crucial asset in any judicial system."); Philip M. Pro & Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, 44 AM. U. L. REV. 1503, 1511 (1995) (noting the increased importance of magistrate judges).

[131] *See* People v. True, 272 N.E.2d 24, 26 (Ill. App. Ct. 1971). Interestingly, the case often referred to as the beacon of contemporary parol evidence rule jurisprudence, *Masterson v. Sine*, based its holding, in part, on this "trusting the trier" concept. Masterson v. Sine, 436 P.2d 561, 564 (Cal. 1968) (concluding that "evidence of oral collateral agreements should be excluded only when the factfinder is likely to be mislead").

[132] *See* GRANT GILMORE, THE DEATH OF CONTRACT 107–09 (2d ed. 1995)

begins, such notions should be rejected for two reasons. First, "[o]ur system allocates to the jury the function of determining credibility of witnesses."[133] There is nothing to suggest that "their normal credibility-determining function" is ineffective, or even less effective in breach of contract cases "than construction accidents, consumer injuries or gift tax cases."[134] Second, the idea that juries favor the underdog is unfounded.[135]

(suggesting distrust of the jury "played some role" in the creation of a schism between contract law and tort law). "To the extent contract litigation can be phrased as questions of law for the court, the vagaries of juries can be controlled." *Id.* Other legal systems have discarded trial by jury in contract law cases. For example, the English have "virtual[ly] aboli[shed] . . . the jury system in civil cases." Justin Sweet, *Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule*, 53 CORNELL L. REV. 1036, 1055 (1968); *see also* Campbell Discount Co. v. Gall, 1 Q.B. 431, 439 (C.A. 1961).

[133] Sweet, *supra* note 132, at 1055; *see also* Jay Sterling Silver, *Truth, Justice and the American Way: The Case Against the Client Perjury Rules*, 47 VAND. L. REV. 339, 405–06 (1994) (discussing the jury's duty to examine witnesses' credibility).

[134] Sweet, *supra* note 132, at 1055; Note, *supra* note 127, at 988 ("The same issues of credibility arise in other areas of the law where the jury is faced with evidence from witnesses who may have a claim on its sympathy or evidence which seems inherently suspect."). These scholars suggest that juries can deal with personal injury cases, where the plaintiff walks into court with a neck brace, feigning an injury, as well as they can deal with a party recounting an oral contract term. It seems such a proposition does not violate the public's sense of justice.

[135] *See* Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 327–28 (1998) (arguing that civil jurors are not anti-business but are largely supportive of the aims of American business and are concerned about the negative effects of excessive litigation on business corporations); Laura Gaston Dooley, Essay, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 327–41 (1995) (discussing the 20th century history of civil juries). Juries have had a "bipolar presence" in modern times. On one hand, the jury represents true democracy and is a respected icon in American culture. On the other hand, recent controversial jury verdicts have intensified the debate about the effectiveness of the jury as the decision-maker in the court system. *Id.; see also* Phoebe C. Ellsworth, *Jury Reform at the End of the Century: Real Agreement, Real Changes*, 32 U. MICH. J. L. REFORM 213 (1999) (stating that "social science research provides no support for the public's perception that this failure is due to the inclusion of jurors who are biased or unfit" and that the greatest weakness of jurors is their lack of understanding of the law). Professor Hans used "public opinion poll data and archival research" to conclude that "there is no evidence that Americans generally hold heated anti-business attitudes," and "the evidence for a defendant's wealth effect is weak." Richard Lempert, *Why Do Juries Get a Bum Rap? Reflections on the Work of Valerie Hans*, 48 DEPAUL L. REV. 453, 453 (1998). The University of Chicago Jury Project, the first major jury survey study in the United States, studied verdicts "in over four thousand civil trials that occurred during the 1950s." Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 853 (1998). Juries have been labeled as "incompetent, capricious,

3. Protecting the Writing

A second reason behind the parol evidence rule is to encourage written contracts by protecting them from oral attack.[136] The parol evidence rule seeks to give greatest effect to contract terms memorialized in writing. In so doing, the belief is that parties take greater care to make the written instrument a total integration.[137] There is no indication this higher regard for writings has influenced the practice of contract formation. In fact, disputes involving the parol evidence rule are among the most heavily litigated issues in American courts.[138] In this

---

unreliable, biased, ..." *Id.* at 849. However, the data revealed that the judge and the jury agreed on the issue of liability 78% of the time. In cases of disagreement, the judge still found the jury verdict reasonable. *See id.* at 853; *see also* Note, *supra* note 127, at 985; HARRY KALVERN & HANS ZEISEL, THE AMERICAN JURY 63 (1966); Harry Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964) (discussing the acumen of the civil jury in the United States). This compatibility suggests that either jurors do not favor the underdog or both judges *and* jurors favor the underdog.

Traditionally, however, authorities have argued that juries need to be controlled in such cases. *See* Nicholas R. Weiskopf, *Supplementing Written Agreements: Restating the Parol Evidence Rule in Terms of Credibility and Relative Fault*, 34 EMORY L.J. 93, 95 (1985) (discussing preference for the " 'little guy,' in the transaction at hand"); Michael B. Metzger, *The Parol Evidence Rule: Promissory Estoppel's Next Conquest?*, 36 VAND. L. REV. 1383, 1387 (1983) (stating that "[l]eft to their own devices, jurors may favor underdogs by relying upon alleged oral terms thereby deciding the case in a manner calculated to avoid a perceived injustice"); McCormick, *supra* note 27, at 366 ("The average jury will, other things being equal, lean strongly in favor of the side which is threatened with possible injustice and certain hardship by the enforcement of the writing."); Michael A. Lawrence, Comment, *The Parol Evidence Rule in Wisconsin: Status in the Law of Contract, Revisited*, 1991 WIS. L. REV. 1071, 1075 (indicating that jurors' lack of sophistication may favor the party without deep pockets).

[136] *See* Martin-Davidson, *supra* note 9, at 12 (explaining that the "parol evidence rule provides greater protection for written agreements" and should be applied because written evidence is more accurate than human memory); Wallach, *supra* note 8, at 653 ("Written contracts have long enjoyed a preferred status in the law over oral contracts as a result of their tendency to be more accurate and detailed.").

[137] *See* Mooney, *supra* note 13, at 1147 ("The assumption that most parties in fact reduce their entire agreement to a single, perfectly accurate writing seems [to modern scholars and judges] increasingly unrealistic. Worse, judging by reported decisions at least, the parol evidence rule seemed actually to assist more dissemblers than it thwarted."); Sweet, *supra* note 132, at 1047 ("Some of the parol evidence rule's adverse effect on counseling and litigation might be excusable if the rule caused contracting parties to put their entire agreement in the writing. But the rule has not had this effect.").

[138] *See* Sweet, *supra* note 132, at 1047 (suggesting that the "volume" of cases on the issue indicates that there are many part-written and part-oral contracts); *see*

respect, it seems the parol evidence rule has failed. In addition, the "slippery memory" rationale for protection is less necessary.[139] Business transactions are now conducted electronically as often as face-to-face.[140] Until electronic media garnered widespread acceptance in the business world, a party's extrinsic evidence was often substantiated or refuted only by another's oral testimony.[141] Today, it is common to refute or

---

also Edith Resnick Warkentine, *Article 2 Revisions: An Opportunity to Protect Consumers and "Merchant/Consumers" Through Default Provisions*, 30 J. MARSHALL L. REV. 39, 42 (1996) (indicating that a "large volume of consumer cases" arise under the parol evidence rule).

[139] Richard J. Ross, *The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter, and Identity, 1560-1640*, 10 YALE J.L. & HUMAN. 229, 273 (1998) (arguing that to commit something to memory after reading it without anything else is no way to remember it); *see also* Raoul Berger, *On Civil Rights and Civil Liberties: "Original Intention" in Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 900 (1985) (stating that the common law was not concerned with the subjective intent of the parties, but the contracting parties were presumed to have put their exact intentions in writing and to have been aware of the law's canons of interpretation). One should be encouraged to " 'commit . . . to writing, and not to trust slippery memory.' " Ross, *supra* at 273 (quoting WILLIAM PHILLIPS, STUDII LEGALIS RATIO 155–56 (1662)). "Slippery" is used in the sense that parties' recollection will fade and become altered. It is not intended to refer to the perjurious intent of parties. *Id.*

[140] *See* Carl Pacini & David Sinason, *Auditor Liability for Electronic Commerce Transaction Assurance: The CPA/CA Webtrust*, 36 AM. BUS. L.J. 479, 480 (1999) (indicating that increased customer confidence in electronic commerce leads to increased business opportunities); Patrick Weston, *First Amendment Internet Crime Statutes: Fraud:* American Civil Liberties Union of Ga. v. Miller, 14 BERKELEY TECH. L.J. 403, 411 (1999) (discussing the commercial advantage for "consumers to find information and conduct business transactions almost instantaneously"); Amelia H. Boss, *Is the UCC Dead, or Alive and Well? An Introduction to the Practitioners' Perspectives*, 28 LOY. L.A. L. REV. 89, 98 (1994) (acknowledging the "increased use of electronic technologies in the conduct" of business dealings); Jenine Elco Graves, Comment, *Physical in Cyberspace: As Electronic Commerce Takes Off, Does Quill Leave Local Merchants in the Dust?*, 37 DUQ. L. REV. 261, 264 (1999) ("The Web has had a dramatic affect on both business-to-business and business-to-consumer transactions.").

"The huge development of electronic commerce necessitates many other changes such as the use of electronic records and electronic or digitized signatures. More than forty states have either enacted or are enacting new legislation to allow the use of such electronic forms in place of standard documents and signatures." Dr. John Murray, Jr., *Big Changes are Due in Laws Governing U.S. Commerce*, PURCHASING, July 15, 1999, at 59.

[141] *Cf.* Jonathan Bick, *The Electric Commerce Landscape*, N.J. L.J., June 28, 1999, at 36 (stating that electronic commerce is a huge, growing business and experts estimate that online spending could reach thirty billion dollars by the year 2000); Francis Dummer Fisher, *1984 Survey of Books Relating to the Law*, 82 MICH.

support an understanding between parties by producing e-mails, voice mail recordings, faxes, or other electronic media as evidence.[142] In addition, today's fast-paced business environment frequently does not allow for thoroughly drafted, well-planned written contracts.[143] Boiler plate contracts and oral agreements drive the modern world of commerce in many respects.[144] Therefore, rules of exclusion are unnecessarily cumbersome and obtrusive.[145]

L. REV. 981, 983 (1984) (reviewing JOHN TYDEMAN ET AL., TELETEXT AND VIDEOTEXT IN THE UNITED STATES: MARKET POTENTIAL, TECHNOLOGY, PUBLIC POLICY ISSUES (1982)) (realizing business negotiated electronically will eclipse "face-to-face" bargaining); Jeffrey Kagan, Note, *The Indelibility of Invisible Ink: A Critical Survey of the Enforcement of Oral Contracts without the Statute of Frauds Under the U.C.C.*, 19 WHITTIER L. REV. 423, 425–26 (1997) (discussing the statute of frauds and recommending the repeal of its formal writing requirement).

142 Such records are deemed reliable in other legal context. *See, e.g.*, Deborah L. Wilkerson, *Electronic Commerce Under the U.C.C. Section 2-201 Statute of Frauds: Are Electronic Messages Enforceable?*, 41 KAN. L. REV. 403, 425 (1992) (discussing the enforceability of electronic messages under the UCC statute of frauds and ways to enhance the integrity of modern computerized records); Egon Guttman, *Federal Regulation of Transfer Agents*, 34 AM. U. L. REV. 281, 317 (1985) (referring to the necessity of telephone records for regulation of transfer agents); Lee A. Watson, Note, *Communication, Honesty, and Contract: Three Buzzwords for Maintaining Ethical Hourly Billing*, 11 GEO. J. LEGAL ETHICS 189, 195 (1998) (identifying such records as vital to proper client billing). These sources suggest that electronic communications can also be used to prove contract terms not reflected in the final writing. In commercial law, revisions to UCC Article 2 have attempted to address this issue. Article 2 now allows electronic forms and signatures to facilitate the development of electronic commerce. *See* Murray, *supra* note 140, at 59.

143 In fact, today's business world often does not afford people time to do much of anything. *See, e.g.*, Thomas R. Marton, *Child-Centered Child Care: An Argument for a Class Integrated Approach*, 1993 U. CHI. L. SCH. ROUNDTABLE 313, 350 (1993) (indicating businesspeople often sacrifice time with their family); Anthony Kruglinski, *Going into a Deal, What You Think is True Probably Isn't*, RAILWAY AGE, Aug. 1, 1999, at 10 (indicating the greater value of communication in an era where time is precious); *Thinking Like an Agent*, AGENCY SALES MAG., Feb. 1998, at 4 (pointing out businesspeople's need for planning).

144 *See* Corneill A. Stephens, *On Ending the Battle of the Forms: Problems with Solutions*, 80 KY. L.J. 815, 836 (1992) (concluding boiler plate provisions are used to conserve time); Robert J. MacPherson, *Advice to Lawyers: Don't Limit ADR as Option*, N.J. LAW., Feb. 23, 1998, at 6 (discussing boiler plate arbitration clauses).

145 This is especially true when the rule of exclusion frustrates the ascertainment of actual party intent. *See* Mark K. Glasser & Keith A. Rowley, *On Parol: The Construction and Interpretation of Written Agreements and the Role of Extrinsic Evidence in Contract Litigation*, 49 BAYLOR L. REV. 657, 702 (1997) (discussing party intent in light of the parol evidence rule and the fact that the court determines the parties' intentions and rights under an agreement).

VI. RAMIFICATIONS OF THE RULE'S ABANDONMENT

The refusal to apply the parol evidence rule beyond CISG cases is an admittedly aggressive proposition.[146] Yet, there is support for the idea that provisions of the CISG may influence the UCC.[147] Even though the CISG is derived from the laws of many jurisdictions,[148] the United States is the most influential member nation and it is therefore reasonable to conclude that some of the UCC was ultimately incorporated in the CISG.[149] Therefore, it is possible that the approach to the parol evidence rule by the CISG may influence the approach to the parol evidence rule of the UCC.[150]

Similarly, abandonment of the parol evidence rule in breach of contract cases produces disadvantages. Consider the effect of the aforementioned proposition upon litigation strategy. The court will allow a party to admit extrinsic evidence of an additional term. The trier of fact must then make a credibility assessment and determine if the proffered term is part of the final agreement. Therefore, the court is effectively precluded from granting summary judgement in these cases because an

---

[146] It is not, however, a position unknown to the world of legal scholarship. *See* Sweet, *supra* note 132; Note, *supra* note 127.

[147] *See* Winship, *supra* note 49, at 45–50 (recommending areas of the UCC that should be reconciled with the CISG). *But see* 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 (1998) (suggesting that the CISG might be a good source for "selective borrowing" for Article 2 because it reflects current transactions in a different manner than Article 2); 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, 171–78 (1995) (offering reasons the CISG is inappropriate for an entire Article 2 revision, but suggesting that it might be appropriate for "selective borrowing"). Professor Gabriel conceded that recently revised Article 2 provisions reflect similar provisions in the CISG. *See* Gabriel, *supra*, at 2014 nn.89–92. Yet, he argues that the amendments to Article 2 are merely consistent with the CISG, updated to reflect contemporary views of commercial law. *See id.* at 2014. Professor Gabriel suggests the CISG did not *influence* the UCC revisions. *See id.*

[148] *See* DiMatteo, *supra* note 123, at 133 ("[T]he CISG was forged from the world's different national legal systems.").

[149] *See* DiMatteo, *supra* note 123, at 133; Richard D. Kearney, Book Review, 78 AM. J. INT'L. L. 289, 292 (1984) (regarding CISG laws "sufficiently akin to Article 2 of the UCC so that experience with one will be readily translatable for use with the other").

[150] *See* Gabriel, *supra* note 147, at 2014 (comparing the revised UCC Article 2 provisions with parallel CISG terms).

issue of material fact will *always* exist.[151] In jurisdictions where judicial economy is an especially important consideration, abandonment of the parol evidence rule may be discouraged.[152]

CONCLUSION

The parol evidence rule, as a device to exclude evidence of agreements made prior to the adoption of a final written instrument, should be abandoned. First, the trend in the case law highlights an increasingly lenient application of the rule, suggesting that courts are comfortable admitting extrinsic evidence. Second, the CISG, which governs a significant amount of the commercial transactions occurring in the United States every day,[153] does not recognize a parol evidence rule. The rule is castigated, or even non-existent, in virtually every jurisdiction outside the United States. No authority has suggested a uniquely American legal precept as a basis for the rule's existence in American courts and other provisions of UCC Article 2 have been reworked to parallel similar CISG terms. Third, the rule's underlying policy objectives are no longer readily embraced by society or the legal community. More importantly, those goals do not accurately reflect the commercial environment of the twenty first century. Many judges and scholars have long called for the demise of the parol evidence rule. The *MCC-Marble* decision provides critics of the parol evidence rule an impetus to renew the debate.

---

[151] *See* FED. R. CIV. P. 56(c) (stating that a motion for summary judgment will be granted if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the afidavits, if any, show that there is no genuine issue as to any material fact . . . .").

[152] There is no indication that foreign legal systems feel that an expansion of the parol evidence rule's application would solve their problems with backlogged cases.

[153] *See* Michael G. Davies, *International Sale of Goods: Do Not Ignore United Nations Convention*, N.Y. L.J., Sept. 20, 1999, at S1. Davies writes:

> [There are] billions of dollars of foreign trade between the U.S. and the CISG's other signatory nations and although there is virtually no U.S. case law interpreting CISG, this will change in the future because CISG governs all contracts between parties with places of business in different nations, provided both nations are signatories to the Convention.

Id.