

*MCC-Marble Ceramic Center: The Parol Evidence  
Rule and Other Domestic Law Under the  
Convention on Contracts for the International  
Sale of Goods\**

I. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods<sup>1</sup> (CISG or “Convention”) is considered one of the greatest achievements of modern legal history.<sup>2</sup> Even before its ratification by the United States Congress in 1987, it was widely hailed as an international Uniform Commercial Code capable of reducing international transaction costs and bringing unity to an extremely disorganized branch of law. Since Canada, Mexico, and most of the larger European nations have also adopted the CISG,<sup>3</sup> the Convention governs a majority of all foreign transactions conducted by the United States.<sup>4</sup> In addition, some countries have adopted the CISG as their domestic sales law,<sup>5</sup> and in the United States, the Permanent Editorial Board for the Uniform Commercial Code has used the Convention as a constructive model for reforming the UCC.<sup>6</sup> In

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1. United Nations Convention on Contracts for the International Sale of Goods, *opened for signature* April 11, 1980, S. TREATY DOC. NO. 9 (1983), 19 I.L.M. 671, *reprinted in* 15 U.S.C.A. app. at 333 (West 1997) [hereinafter CISG].

2. 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).

3. See Peter Winship, *Changing Contract Practices in the Light of the United Nations Sales Convention: A Guide for Practitioners*, 29 INT'L LAW. 525, 527 (1995).

4. See U.S. DEP'T OF COM., STATISTICAL ABSTRACT OF THE UNITED STATES 1997, at 803-06 (117th ed. 1997).

5. Norway has adopted the CISG wholesale; Finland and Sweden have altered their sales laws to conform with the CISG. 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).

6. See generally *id.*

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short, the Convention governs virtually all sales transactions “between parties whose places of business are in different” signatory States.<sup>7</sup>

Nevertheless, the CISG has largely been avoided or ignored by international attorneys in the United States for over a decade. Accordingly, federal courts in the United States have encountered “surprisingly few cases”<sup>8</sup> in which the CISG has even been referred to. One federal court notes “that there is little to no case law on the CISG in general.”<sup>9</sup> There is so little, in fact, that as of May 1998, only thirteen federal cases had even mentioned the Convention; of those thirteen, ten cited the Convention in only a single paragraph or footnote; just one of the remaining three devoted extended analysis to the Convention text.<sup>10</sup> In contrast, approximately 464 cases governed by the CISG have been decided in courts around the world. Of those 464, only 32 involved an American company as a party; of those 32 suits, only 11 were initiated by the party from the United States.<sup>11</sup> These statistics suggest that federal courts have not made a significant effort to interpret the CISG, even when presented with the opportunity to do so. As a result,

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7. CISG, *supra* note 1, art. 1, S. TREATY DOC. NO. 9 at 22, 19 I.L.M. at 672.

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

9. Helen Kaminski Pty., Ltd. v. Marketing Australian Prods., Inc., No. 97-8072A, 1997 WL 414137, at \*3 (S.D.N.Y. July 23, 1997).

10. The only case to discuss the CISG at length, other than the principal case, also was decided very recently: Calzaturificio Claudia s.n.c. v. Olivieri Footwear Ltd., No. 96 CIV. 8052(HB)(THK), 1998 WL 164824 (S.D.N.Y. Apr. 7, 1998). Two cases which discuss the Convention are Delchi Carrier SpA. v. Rotorex Corp., 71 F.3d 1024 (2d Cir. 1995); and Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229 (S.D.N.Y. 1992). Briefly citing the CISG (paragraph or footnote) are: Attorneys Trust v. Videotape Computer Prods., Inc., No. 95-55410, 1996 WL 473755, at \*2 (9th Cir. Aug. 20, 1996); Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr., Inc., 993 F.2d 1178, 1182-83 n.9 (5th Cir. 1993); Huntington Int'l Corp. v. Armstrong World Indus., 981 F. Supp. 134, 135-36 (E.D.N.Y. 1997); Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd., No. 95 CIV. 10506(DLC), 1997 WL 458785, at \*5 n.8 (S.D.N.Y. Aug. 11, 1997); Helen Kaminski Pty., Ltd. v. Marketing Australian Prods., Inc., No. 97-8072A, 1997 WL 414137 (S.D.N.Y. July 23, 1997); Graves Import Co. v. Chilewich Int'l Corp., No. 92 CIV. 3655 (JFK), 1994 WL 519996, at \*5 n.2 (S.D.N.Y. Sept. 22, 1994); S.V. Braun, Inc. v. Alitalia-Linee Aeree Italiane, S.p.A., No. 91 CIV. 8484 (LBS), 1994 WL 121680, at \*5 (S.D.N.Y. Apr. 6, 1994); Interag Co. v. Stafford Phase Corp., No. 89 CIV. 4950 CSH, 1990 WL 71478, at \*4 (S.D.N.Y. May 22, 1990); Orbisphere Corp. v. United States, 726 F. Supp. 1355 (Ct. Int'l Trade 1989).

11. See MICHAEL R. WILL, 1988-1997: 10 YEARS INTERNATIONAL SALES LAW UNDER CISG, THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980) 15-164 (7th ed. 1998).

many practitioners seem wary of making or enforcing agreements based on the laws of that Convention. It is of little wonder that many feel that “[t]he lack of judicial interpretation or construction of [the] CISG permits great leeway for anyone undertaking” the formation and enforcement of CISG agreements.<sup>12</sup>

In *MCC-Marble Ceramic Center v. Ceramica Nuova d’Agostino, S.p.A.*,<sup>13</sup> the Eleventh Circuit examined the CISG and attempted to interpret it as an independent source of law. The court addressed several issues important in advancing American jurisprudence on the Convention. Specifically, it discussed one of the more troubling aspects of the Convention for American practitioners—the CISG’s lack of a parol evidence rule. The court made important comments on the use of domestic law under the Convention and on avoiding parol evidence problems in the future. In so doing, the court specifically disagreed with the holding of the Second Circuit in *Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*,<sup>14</sup> the only other federal appellate court case discussing parol evidence under the CISG.

This Note will identify the progress made in understanding the CISG by examining the court’s holding and discussion in *MCC-Marble*. Part II of this Note points out a number of the CISG’s benefits and potential drawbacks, in addition to providing the pertinent factual background to *MCC-Marble*. Part III explains why the Court properly held that the CISG rejected the parol evidence rule, despite arguments in favor of harmonizing the rule with the Convention text. Part IV discusses two significant problems, which the court did not satisfactorily resolve: the possibility that one party may fabricate parol evidence for trial, and the potential ineffectiveness of a merger clause in avoiding parol evidence disputes. Part V stresses that while an independent interpretation of the Convention is crucial, a last resort to domestic law serves an essential gap-filling function

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12. John E. Murray, Jr., *An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 11, 50 (1988).

13. 144 F.3d 1384 (11th Cir. 1998).

14. 993 F.2d 1178 (5th Cir. 1993).

necessitated by the brevity of the Convention. Part VI concludes that a properly international and independent interpretation of the Convention requires rejection of the parol evidence rule, but not a complete rejection of domestic law. Parol evidence problems will continue to plague parties to agreements under the CISG, but the Convention's strong potential and the interpretive aid of the *MCC-Marble* court will enhance the CISG's long-term effectiveness as an international sales law.

## II. BACKGROUND: THE CISG AND *MCC-MARBLE CERAMIC CENTER*

Volumes have been written on the historical roots and the decades-long creation of the Convention.<sup>15</sup> This brief background is limited to the scope of the CISG, its considerable long-term advantages, and the initial problems it must face before achieving the success envisioned by its founders. A background to *MCC-Marble* will also help lay the foundation for the parol evidence discussions ahead.

### A. *The CISG: Considerable Potential, but Serious Doubts Continue*

After being adopted by sixty-two countries,<sup>16</sup> the CISG was ratified by Congress in 1986.<sup>17</sup> Upon ratification, the CISG became a "self-executing treaty with the preemptive force of federal law,"<sup>18</sup> applicable to all "contracts [for the] sale of goods between parties whose places of business are in different States . . . [w]hen the States are Contracting States."<sup>19</sup>

The Convention is the product of the domestic laws of many nations from many different legal systems: common law, civil law, and socialist. "As such, it is a unique hybrid of all three"<sup>20</sup>

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15. See, e.g., JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 47 (1982).

16. See WILL, *supra* note 11, at 9-11.

17. See 15 U.S.C.A. app. at 332 (West 1997).

18. Richard E. Speidel, *The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 NW. J. INT'L L. & BUS. 165, 166 (1995).

19. CISG, *supra* note 1, art. 1, S. TREATY DOC. NO. 98-9 at 22, 19 I.L.M. at 672.

20. Larry A. DiMatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 YALE J. INT'L L. 111, 133 (1997).

and often appears to “exhibit[] characteristics of acute legal schizophrenia.”<sup>21</sup> Many of its provisions were selected directly from particular domestic legal systems, while others were drawn from a combination of several systems.<sup>22</sup> As the world’s leading economic power, “[t]he U.S. played a significant role in the development of the CISG.”<sup>23</sup> Indeed, many provisions of the UCC had a substantial effect in the creation of the CISG. As one observer noted:

The job of the American jurist has been made easier in a number of ways. First, much of the Convention mimics the rules found in the Uniform Commercial Code. “The American lawyer will find the Convention . . . sufficiently akin [to the U.C.C.] so that experience with one will be readily translatable for use with the other.”<sup>24</sup>

Due to this similarity, the CISG has the potential to gain as much acceptance in the United States as it has with courts and contracting parties around the world.

### 1. *Advantages under the CISG*

There is considerable confidence that the Convention will greatly reduce the difficulties involved in international transactions by creating a unified norm for international trade.<sup>25</sup> Although increased complexity in the short term is inevitable, there is a widespread “hope of simplification and uniformity in the long term.”<sup>26</sup> Indeed, simplification is the essence of the Convention; its “essential characteristics are simplicity, practicality and clarity . . . free of legal short-hand, free of complicated legal theory and easy for businessmen to

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21. Larry A. DiMatteo, *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contractual Liability*, *L = (ii)*<sup>2</sup>, 23 SYRACUSE J. INT’L L. & COM. 67, 94 (1997).

22. *See id.*

23. Dennis J. Rhodes, Comment, *The United Nations Convention on Contracts for the International Sale of Goods: Encouraging the Use of Uniform International Law*, 5 TRANSNAT’L LAW. 387, 412 (1992).

24. DiMatteo, *supra* note 21, at 79 (quoting Richard D. Kearney, *Uniform Law for International Sales Under the 1980 United Nations Convention*, 78 AM. J. INT’L L. 289, 292 (1984) (book review)) (alteration in original).

25. *See* HONNOLD, *supra* note 15, at 47.

26. DiMatteo, *supra* note 20, at 141.

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understand.”<sup>27</sup> The uniform system created under the CISG greatly reduces the need for multiple documents and contract laws governing identical sales contracts. Perhaps most importantly, the CISG is excitingly close to a true *lex mercatoria*, or actual international sales law.

## 2. Disadvantages of the CISG

Nevertheless, there are potential drawbacks to using the CISG as a contract law. Perhaps the largest is the unpredictability of enforcing contracts under the infant contract law. There is practically no case law interpreting the CISG.<sup>28</sup> In addition, the Convention specifically gives contracting parties the option to exclude its application.<sup>29</sup> Thus parties may avoid uncertain results by “ignor[ing] [it] indefinitely and conduct[ing] business as usual.”<sup>30</sup> One practitioner has noted that “my own experience is that in any transaction as to which it might apply, the parties specifically opt out of it. Without exception.”<sup>31</sup>

In addition to unpredictability under the CISG, a real fear persists that domestic tribunals “will be subject to a natural tendency to read the international rules in light of the legal ideas that have been imbedded at the core of their intellectual formation.”<sup>32</sup> For American practitioners accustomed to the parol evidence rule under the UCC,<sup>33</sup> an especially unsettling aspect of the Convention is its more liberal use of parol

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27. DiMatteo, *supra* note 21, at 78 (quoting Kuzuki Sono, *The Vienna Sales Convention: History and Perspective*, in INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 7 (Peter Sarcevic & Paul Volken eds., 1986)).

28. *See* Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992).

29. *See* Anita C. Esslinger, *Contracting in the Global Marketplace: The UN Convention on Contracts for the International Sale of Goods and the Limitation Period in the International Sale of Goods*, SB04 A.L.I.-A.B.A. 37, 56 (1996).

30. Rhodes, *supra* note 23, at 404.

31. Robert A. Feldman, *District Court Slides U.N. Sales Convention onto Shoe Suit*, 8 CORP. LEGAL TIMES, June 1998, at 9.

32. Paul Amato, Recent Developments: CISG, *U.N. Convention on Contracts for the International Sale of Goods – The Open Price Term and Uniform Application: An Early Interpretation by the Hungarian Courts*, 13 J.L. & COM. 1, 4 (1993) (quoting JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 1 (1989)).

33. *See* U.C.C. § 2-202 (1977).

evidence in business litigation.<sup>34</sup> This creates unexpected “liability for representations made during the negotiation phase” and in business correspondence in general.<sup>35</sup> Since even simple international transactions are already “inherently more complex”<sup>36</sup> than their domestic counterparts, new uncertainties under the Convention have not been well received.

Ultimately, the fears surrounding the Convention can only be alleviated by the courts’ careful interpretation of the document in actual litigation. Therefore, courts and scholars should take advantage of any opportunity to enhance our understanding of the CISG through careful study and review. “Only the application of the CISG will reveal its strengths and flaws, its consistencies and inconsistencies.”<sup>37</sup> Such an opportunity arose for the Eleventh Circuit in June 1998.

#### B. Factual Background To MCC-Marble Ceramic Center

MCC-Marble Ceramic Center (“MCC”), a Florida corporation which sells ceramic tiles, decided to purchase tiles from Ceramica Nuova d’Agostino (“d’Agostino”), an Italian tile manufacturer.<sup>38</sup> After orally agreeing on the “crucial terms of price, quality, quantity, delivery and payment,”<sup>39</sup> the parties recorded their agreement on one of d’Agostino’s standard preprinted contract forms.<sup>40</sup>

The parties commenced performance under the contract, but MCC ultimately brought suit against d’Agostino, claiming that d’Agostino had breached by failing to satisfy orders for three different months. D’Agostino declared that it was not obligated

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34. Many commentators point out the particular surprises American practitioners may face. See generally Karen B. Giannuzzi, *The Convention on Contracts for the International Sale of Goods: Temporarily Out of “Service”?*, 28 LAW & POLY INT’L BUS. 991, 993 (1997) (complaining that the Convention “fails to account for the ever-increasing” number of service transactions intertwined with sales of goods); Amato, *supra* note 32, at 2 (warning of discrepancy in “the issue of the open price term”); Murray, *supra* note 12, at 20 (noting that “one can be an offeree before he knows of the offer”).

35. DiMatteo, *supra* note 21, at 104.

36. Giannuzzi, *supra* note 34, at 1004; see also *Filanto, S.p.A. v. Chilewich Int’l Corp.*, 789 F. Supp. 1229, 1230 (S.D.N.Y. 1992).

37. Rhodes, *supra* note 23, at 389.

38. See *MCC-Marble Ceramic Ctr. v. Ceramica Nuova d’Agostino, S.p.A.*, 144 F.3d 1384, 1385 (11th Cir. 1998).

39. *Id.*

40. See *id.*

to fill the orders because MCC had defaulted on the payments of previous orders.<sup>41</sup> MCC responded that the previous orders received were inferior in quality, and, pursuant to the CISG, MCC had thus reduced payment on those orders in proportion to the defects.<sup>42</sup>

D'Agostino pointed out that the preprinted form they had originally recorded required that all complaints as to product quality be made in writing.<sup>43</sup> MCC had submitted no written complaints. Nevertheless, MCC argued that the parties had orally agreed not to apply the terms on the preprinted form to their agreement.<sup>44</sup> MCC submitted affidavits from both MCC's president and d'Agostino's own employees declaring that intent.<sup>45</sup> The magistrate judge held those affidavits to be barred by the parol evidence rule, and the district court agreed.<sup>46</sup> MCC appealed.

### III. SHOULD A COURT CONSIDER PAROL EVIDENCE IN CISG LITIGATION?

On appeal, the main task of the court in *MCC-Marble* was to determine whether the parol evidence rule should be applied in cases governed by the CISG. In doing so, the court was confronted with at least three different questions. First, does the CISG contain a restriction on evidence similar to the parol evidence rule? Second, if not, does the parol evidence rule apply to limit the introduction of such evidence in United States federal courts regardless? Third, can the rule have any role in interpreting the CISG? In answering the first question, the court correctly determined that the parol evidence rule was rejected by the CISG. The court answered the second question by pointing out that the parol evidence rule, as a substantive rule of law, was superseded by the Convention text, despite a contrary decision by the Fifth Circuit. Finally, in response to its third main question, the court refuted the argument that the parol evidence rule may be harmonized with the CISG. The

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41. *See id.*

42. *See id.* at 1386.

43. *See id.*

44. *See id.* at 1387.

45. *See id.* at 1386.

46. *See id.* at 1387.



parol evidence rule strongly clashes with the text, purposes, and principles of the Convention.

*A. What Types of Evidence Does the CISG Allow?*

Since the parties and court agreed that the CISG governed the litigation, the court examined the Convention text to determine whether the CISG restricts evidence consistent with the parol evidence rule.<sup>47</sup> The court considered significant the fact that “[t]he CISG itself contains no express statement on the role of parol evidence.”<sup>48</sup> While this may be a helpful initial observation, Professor Honnold points out that the precise term was not included in the CISG mainly because it would “mystif[y] jurists from legal systems that have no such rule.”<sup>49</sup> In addition, since the CISG is written in six different official languages, each as valid as the other, an English legal idiom like “parol evidence” would be virtually meaningless in the other five official texts.<sup>50</sup> Thus, the failure to mention “parol evidence” in the text does little to indicate that there are no similar restrictions in the text under a different name. It does allow the observation, however, that in adopting the domestic rules of many countries in forming the CISG, a named “parol evidence rule” may not have been expressly approved. The court’s most productive analysis began with a look at the Convention text itself.

*1. CISG text rejection of the parol evidence rule*

Looking to article 8(1) of the CISG, the court noted that an inquiry into a party’s subjective intent is proper if the “other party knew or could not have been unaware what that intent was.”<sup>51</sup> If that section is not applicable, according to article 8(2), statements and conduct of a party will “be interpreted according to the understanding that a reasonable person of the

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47. *See id.* at 1386-92.

48. *Id.* at 1389.

49. HONNOLD, *supra* note 15, at 142.

50. Outside 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 contracts. *See Murray, supra* note 12, at 45 n.n.153-54.

51. CISG, *supra* note 1, art. 8(1), S. TREATY DOC. NO. 98-9 at 23, 19 I.L.M. at 673.

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same kind as the other party would have had in the same circumstances.”<sup>52</sup> In either instance, article 8(3) gives the most crucial instruction that “due consideration is to be given to *all relevant circumstances of the case including the negotiations*, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.”<sup>53</sup> Article 9 further emphasizes the importance of party practice and usage.<sup>54</sup> Thus, standing alone, the CISG text plainly requires the consideration of all relevant types of evidence to accommodate widely divergent languages and legal systems of evidence, even those that would be restricted under the parol evidence rule.

Given the fact that the Convention was intended to exemplify plainness and simplicity,<sup>55</sup> it is important that its text be interpreted according to its most simple meaning. The phrase “all relevant circumstances” is a clear statement, and courts of different nations should interpret it accordingly. The Convention’s overall tolerance for allowing a broad range of evidence is virtually undisputed<sup>56</sup> under a literal reading of its language. In addition, other provisions in the CISG show an even more specific intent to reject the parol evidence rule. For example, the Convention text specifically allows for the introduction of evidence regarding prior negotiations. Since negotiations are a type of evidence the parol evidence rule specifically prohibits, the Convention writers’ efforts to include prior negotiations demonstrates their clear desire to reject the parol evidence rule.

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52. *Id.* at 8(2).

53. *Id.* at 8(3) (emphasis added).

54. Article 9 states:

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

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

*Id.* at 9.

55. *See* DiMatteo, *supra* note 21, at 79.

56. *See id.* at 73.

2. *Practical reasons for rejecting the parol evidence rule in the CISG*

There are also a number of practical reasons for the CISG to reject the parol evidence rule. First, most of the world's legal systems allow all relevant evidence to be heard in contract litigation.<sup>57</sup> If only to appear democratic, the parol evidence rule should be refused in a broadly international agreement. In addition, most countries really have no need for such a rule. For example, few legal systems use juries, which are theoretically more likely to be misled by questionable or contradictory evidence. Furthermore, judges accustomed to hearing all of the evidence available would be confused by a process that appears to diminish their effectiveness and offended that their capability to weigh evidence is called into question.

Second, the added complexity of international transactions places an increased burden on the court that may best be alleviated by a more complete evidentiary record. Courts dealing with international contract disputes often need assistance in deciphering linguistic, customary, cultural, and regional issues. Oral agreements are extremely important in many cultures.<sup>58</sup> Variations in methods of contractual negotiation in different countries make applying a single system of filtering evidence artificial and inappropriate.

Third, evidence of "practices and usage" is accepted worldwide—even in countries that use some form of the parol evidence rule. "All legal systems look to commercial practice, trade usage, and custom to breathe meaning into contracts."<sup>59</sup> Custom and tradition have long been the foundations of international law, and the norms of business practice have been helpful for many courts in establishing legal responsibilities. It was entirely plausible for the CISG writers to find the acceptance of "relevant evidence" to be a logical extension of such traditional approaches to international law.

Fourth, the parol evidence rule has come under universal criticism from nations around the world.<sup>60</sup> The very nature of

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57. See HONNOLD, *supra* note 15, at 142-43.

58. For a comparative review of several contract law systems, see DiMatteo, *supra* note 20, at 114-42.

59. DiMatteo, *supra* note 21, at 97.

60. See HONNOLD, *supra* note 15, at 143.

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the rule is antithetical to many judicial systems, as discussed above. The parol evidence rule is likely unpopular enough that its insertion in the CISG text may have prevented international acceptance of the Convention. Vigorous pursuit by the United States of some form of the parol evidence rule may have scuttled the entire conference.

Fifth, worldwide concerns are reinforced by the fact that no country with a parol evidence rule seems able to succinctly define it. Canada continues to debate the definition of the rule under its own jurisprudence.<sup>61</sup> Great Britain nearly abolished the rule, then only recently reconsidered.<sup>62</sup> The multilayered decision-making process required in the United States has still failed to reach consistent results.<sup>63</sup> As problematic as the rule has been in domestic systems, enforcing it in an international setting could be lethal to the functioning of the law.

Sixth, since the parol evidence rule is so unstable, United States delegates to the Convention may not only have seen the wisdom of giving it up in order to obtain an acceptable document, but may have also used its release as a bargaining chip in obtaining other helpful or familiar provisions. Much of what is contained in the CISG mirrors the UCC; giving up the fight for the unwieldy parol evidence rule may have made possible the inclusion of other, more practical, provisions.

Ultimately, there may be no other way to be internationally "uniform" without making the range of admissible evidence as broad and plain as possible.<sup>64</sup> The parol evidence rule is a poor fit for the judicial systems of other nations. It is objectionable to most and unstable for those few who do espouse it. In forming a law that would allow different countries to meet eye to eye on contracts law, the parol evidence rule could not be allowed.

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61. Canada's rule is not consistently defined, but commentators cite Corbin and add their own case law variations. See Arnie Herschorn, *The Admissibility of Parol Evidence to Prove Misrepresentation and Collateral Agreement*, 7 *ADVOC. Q.* 156, 157-59 (1986-87).

62. A 1976 proposal to abolish the rule in England was later abandoned. See S.M. Waddams, *Do We Need a Parol Evidence Rule?*, 19 *CANADIAN BUS. L.J.* 385, 393 (1991). Canada's version is similar to England's.

63. See generally Harold Greenberg, *Oral Warranties and Written Disclaimers in Consumer Transactions: Indiana's End Run Around the U.C.C. Parol Evidence Rule*, 23 *IND. L. REV.* 199 (1990).

64. The "all relevant circumstances" clause is much easier to evaluate by courts in different nations than the parol evidence rule.

Thus, the *MCC-Marble* court correctly found that the CISG abandoned the parol evidence rule.

*B. Parol Evidence Rule: Evidentiary or Substantive Rule of Law?*

Having concluded that the CISG directly conflicts with the parol evidence rule, the court then sought to answer its second question: whether the parol evidence rule should apply in federal courts regardless of the substantive law applied. The Fifth Circuit had previously applied the parol evidence rule in a case governed by the CISG, despite the Convention's broad acceptance of all relevant evidence. The *MCC-Marble* court first examined the opinion of the Fifth Circuit and found its reasoning unpersuasive. It then proceeded to discuss the nature of the parol evidence rule as used by the federal courts. Ultimately, the *MCC-Marble* court held the parol evidence rule to be a substantive rule of law, replaced by the governing text of the CISG.

*1. The Beijing Metals interpretation of the role of parol evidence*

In determining the nature of the parol evidence rule under the CISG, the *MCC-Marble* court considered the opinion of the Fifth Circuit in *Beijing Metals v. American Business Center*,<sup>65</sup> which dealt with the parol evidence rule in a similar CISG case. In *Beijing Metals*, a Chinese equipment manufacturer (Beijing) signed an agreement with American Business Center (ABC), stating that ABC would pay according to a schedule for overdue payments on Beijing's prior shipments.<sup>66</sup> ABC declared that they had also orally agreed that Beijing's defective shipments would have corresponding price reductions.<sup>67</sup> Beijing sued under the agreement, and the Fifth Circuit held that evidence of the oral agreement would be barred under Texas law.<sup>68</sup> After noting ABC's appeal to CISG law, the Fifth Circuit stated that "[w]e need not resolve this choice of law issue, because our discussion is limited to application of the parol evidence rule

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65. 993 F.2d 1178 (5th Cir. 1993).

66. *See id.* at 1180.

67. *See id.*

68. *See id.* at 1182-83.

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(which applies regardless).<sup>69</sup> The court then went on to apply the Texas version of the parol evidence rule, thus rejecting ABC's claim of oral modification.<sup>70</sup>

### 2. *The MCC-Marble interpretation*

The *MCC-Marble* court found the *Beijing Metals* opinion "not particularly persuasive on this point."<sup>71</sup> Although the Federal Rules of Evidence apply in federal courts regardless of the substantive law applied, the court pointed out that the parol evidence rule "is a substantive rule of law, not a rule of evidence."<sup>72</sup> It does not exclude any particular evidence as an "untrustworthy or undesirable" way of proving a fact; it prevents one "from attempting to show the fact itself."<sup>73</sup> As such, the parol evidence rule may be superseded by the substantive rule of law that a court applies in a given case. On this basis, the court held that it was not bound to apply the parol evidence rule in all litigation in the federal courts.

### 3. *MCC-Marble's interpretation is more probative and is clearly correct*

The great weight of case law and scholarly evidence supports the *MCC-Marble* court's conclusion. Although the parol evidence rule appears to be a procedural, evidentiary rule, it clearly is based on substantive law.<sup>74</sup> "[T]here is a varied collection of state law rules that, because their application results in the exclusion of evidence, sometimes are considered rules of evidence, but in fact serve substantive state policies and are characterized more properly as rules of substantive law within the meaning of the Erie doctrine."<sup>75</sup> The *MCC-Marble*

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69. *Id.* at 1182-83 n.9.

70. *See id.* at 1183-84.

71. *MCC-Marble Ceramic Ctr. v. Ceramica Nuova d'Agostino, S.p.A.*, 144 F.3d 1384, 1390 (11th Cir. 1998).

72. *Id.* at 1388-89 (quoting 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.2, at 194 (1990)). The parol evidence rule does not exclude any particular evidence "as an 'untrustworthy or undesirable' way of proving a fact"; it prevents one "from attempting to show the fact itself." *Id.*

73. *Id.*

74. *See CMI-Trading, Inc. v. Quantum Air, Inc.*, 98 F.3d 887, 891 (6th Cir. 1996) (citing *American Anodco, Inc. v. Reynolds Metals Co.*, 743 F.2d 417, 422 (6th Cir. 1984)).

75. 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4512,

court properly concluded that the parol evidence rule was a substantive, rather than a procedural requirement in federal courts.

In *Beijing Metals*, the Fifth Circuit avoided a probative analysis of the substantive law on which the case was based—the Convention on the International Sale of Goods. Ultimately, the court rendered a poorly reasoned decision because it not only misconstrued the nature of the parol evidence rule; it also displayed the laziness in CISG interpretation that causes many to worry that a uniform international interpretation may be nearly impossible.<sup>76</sup> It thus only diminished the effort to create workable CISG jurisprudence. *Beijing Metals* has been called a “strange decision . . . universally criticized in recent literature on CISG.”<sup>77</sup> In fact, its reasoning seems to follow the description of one CISG critic who predicted that “[c]ourts will in turn make fictitious distinctions, manipulate facts to reach what appear to be sensible solutions, fail to analyze correctly the facts, and even fail to apply the CISG at all.”<sup>78</sup> In contrast, the *MCC-Marble* court is to be commended for attempting a more thoughtful and probative look at the CISG.

Clearly, the *MCC-Marble* court took a significant step in clarifying the error made by the Fifth Circuit. By properly comprehending the role of the parol evidence rule and “transcend[ing] the purely domestic sales law concepts with which [it is] familiar,”<sup>79</sup> the *MCC-Marble* court was able to declare that the substantive law of the CISG superseded the parol evidence rule. The court thus contributed to the body of law surrounding the CISG, providing an incentive for future parties to allow their international commercial agreements to be governed by its provisions.

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at 422 (2d ed. 1996).

76. See cases citing the CISG in *supra* note 10 and *infra* section IV.A.

77. Esslinger, *supra* note 29, at 53.

78. Giannuzzi, *supra* note 34, at 1004.

79. Harry M. Flechtner, *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. 127, 176 (1995).

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*C. Can the Parol Evidence Rule be Reconciled with the CISG?*



The third question the *MCC-Marble* court addressed was whether the parol evidence rule could be reconciled with the Convention's principles in order to justify the *Beijing Metals* decision. In an essay on this issue, David Moore argued that "the parol evidence rule is essentially an expression of CISG article 8 and serves the international uniformity goal of article 7."<sup>80</sup> While the author strains at times to make the strictly United States rule "international" and "uniform," some points in the article are worth noting. Moore notes that a prior draft of article 8 included consideration of "any applicable legal rules for contracts of sale."<sup>81</sup> That clause was deleted "because it was deemed 'unnecessary.'"<sup>82</sup> Moore construes "unnecessary" to mean that the use of applicable legal rules was considered by the working group so obvious as not to require inclusion in the text, and that the UCC version of the parol evidence rule is essentially that type of "applicable" legal rule. Indeed, the clause may have been redundant to the text, which defers to "private international law" consistent with Convention principles when the express provisions of the CISG fail.<sup>83</sup> But the parol evidence rule "is not *per se* applicable" in CISG disputes,<sup>84</sup> and the UCC is not considered applicable in matters in which the two differ. In addition, it is doubtful whether the UCC, unless invoked in the contract, fits the definition of "private international law."<sup>85</sup> Ultimately, whether the parol evidence rule can be reconciled with the CISG depends on

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80. David H. Moore, Note, *The Parol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*, 1995 BYU L. REV. 1347, 1351.

81. *Id.* at 1360 (quoting *Report of the Working Group on the International Sale of Goods on the Work in its Eighth Session*, [1977] 8 U.N. Comm'n Int'l Trade L. Y.B. ¶ 155, at 86, U.N. Doc. A/CN.9/SER.A/1977, in HONNOLD, *supra* note 32, at 287 (quoting a draft text of article 14(4) of the 1964 Hague Uniform Law on the Formation of Contracts for the International Sale of Goods, which was under revision)).

82. Moore, *supra* note 80, at 1361 (quoting *Report of the Working Group on the International Sale of Goods on the Work of Its Eighth Session*, [1977] 8 U.N. Comm'n Int'l Trade L. Y.B. ¶ 166, at 87, U.N. Doc. A/CN.9/SER.A/1977, in HONNOLD, *supra* note 32, at 288).

83. *See* Moore, *supra* note 80, at 1361.

84. *Orbisphere Corp. v. United States*, 726 F. Supp. 1344, 1355 (1989).

85. CISG, *supra* note 1, art. 7(2), S. TREATY DOC. NO. 98-9 at 23, 19 I.L.M. at 673.

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whether the rule conforms with the principles of the CISG.<sup>86</sup> Perhaps recognizing this, Moore attempts just such an argument.

Moore asserts that both the CISG and the parol evidence rule require the parties' intent to be the controlling factor, while extrinsic evidence is given only "due consideration."<sup>87</sup> In the definition of "due consideration," he argues, there is a gap that may be appropriately filled by the parol evidence rule, as long as it conforms to the principles of the CISG.<sup>88</sup> Moore then evaluates many of the principles of the CISG and shows how the parol evidence rule supports them.<sup>89</sup> For example, the predictability encouraged by the parol evidence rule is a strong state interest, and the CISG has evidenced a willingness to accommodate individual state interests by allowing them to make reservations in many parts of the Convention, including requiring all contracts to be in writing.<sup>90</sup> In addition, the rule may well assist in "the observance of good faith in international trade" by preventing fraudulent or inconsistent evidence in determining the parties' intent.<sup>91</sup> Finally, Moore suggests that the CISG principle of supporting party autonomy is also upheld by the parol evidence rule, since the rule better safeguards the parties' intent.<sup>92</sup>

Moore is correct in pointing out that domestic law may be needed to fill the gaps in the CISG text. But while the specific process whereby "due consideration" may be applied is a potential gap in the CISG's implementation that may need supplementation by domestic law, the parol evidence rule—at least in its current form—will not likely be the solution because it fails to comport with the main principles of the CISG. Specifically, article 7(1) declares that "[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its

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86. *Id.*

87. Moore, *supra* note 80, at 1363.

88. *Id.* (quoting CISG, *supra* note 1, art. 7(3), S. TREATY DOC. NO. 98-9 at 23, 19 I.L.M. at 673).

89. *See id.* at 1366-76.

90. *See id.* at 1374.

91. *Id.* at 1369-70 (quoting CISG, *supra* note 1, art. 7(1), S. TREATY DOC. NO. 98-9 at 23, 19 I.L.M. at 673).

92. *See id.* at 1371-72.

application and the observance of good faith in international trade.”<sup>93</sup>

Moore’s only justification for the proposition that the parol evidence rule supports the “international character” or uniformity of the Convention is the fact that the parol evidence rule may, at least initially, require judges rather than juries to first evaluate extrinsic evidence.<sup>94</sup> Since judges will be more likely to look to the international character of the CISG, and thus render more uniform decisions, the reasoning goes, the parol evidence rule satisfies these principles.<sup>95</sup>

While helpful, this limited potential gain in the outcome would still result in a net loss. Both procedure and result would be adversely affected by superimposing one of the United States’ more complicated domestic laws on a relatively simple international set of rules. As pointed out by Professor Flechtner, the “bizarre and abstruse” methodology we call the parol evidence rule is anything but international in character.<sup>96</sup> The rule is an exclusively common law concept, applied by each common law country in a unique way; therefore, the results it brings about simply do not match up on a consistent, “uniform” basis with those occurring under the CISG. For example, under the Restatement (Second) of Contracts, if a contract’s completeness makes the agreement look complete, no contradictory terms in prior or contemporaneous agreements will even be considered.<sup>97</sup> Furthermore, all inconsistent prior agreements are “discharged.”<sup>98</sup> Even if additional terms are consistent with the writing, a court finding the agreement completely integrated will reject them.<sup>99</sup> Only a brief review of the Restatement (Second) of Contracts shows that application of the United States version of the “due consideration” of extrinsic evidence will not approach an internationally uniform result. This difficulty makes the United States parol evidence in CISG litigation unworkable. Professor Flechtner explained:

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93. CISG, *supra* note 1, art. 7(1), S. TREATY DOC. NO. 98-9 at 23, 19 I.L.M. at 673.

94. *See* Moore, *supra* note 80, at 1364-66.

95. *See id.* at 1366.

96. Flechtner, *supra* note 79, at 160.

97. *See* RESTATEMENT (SECOND) OF CONTRACTS § 215 (1978).

98. *Id.* at § 213.

99. *See id.* at § 216.

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The parol evidence rule in U.S. domestic law is, in essence, merely a special method for determining the parties' intent as to certain questions. Specifically, the rule establishes a distinct set of tests and procedures for ascertaining whether the parties intended to discharge prior and contemporaneous terms that were omitted from a document embodying the contract. It is clear that the Convention rejects any special methodology for determining the parties' intent as to the effect of a writing.

...  
... The use of a test so firmly tied to our domestic law traditions without clear authorization in the text of CISG would do violence to the directives of Article 7(1).<sup>100</sup>

Moreover, there is a danger in Moore's assertion that the parol evidence rule will promote "good faith in international trade" by weeding out "perjured or otherwise unreliable testimony"<sup>101</sup> and that the rule better "safeguards the parties' intent."<sup>102</sup> Oral negotiations are still the foundation of most contracts worldwide. There would be considerably less "good faith" flowing if foreign nationals, given a document which plainly allows consideration of such agreements, were told that an American procedural rule rejects such evidence because Americans consider it "less reliable."

Moore's essay is at least the most direct attempt to address the parol evidence rule in CISG litigation, and many of his observations are not without merit. Nevertheless, the plain language of the text is difficult for him to overcome. Ultimately, he suggests no sufficient method of harmonizing the parol evidence rule with the principles of the CISG, and thus, the overall attempt to harmonize the parol evidence rule with the Convention falls short.

IV. PAROL EVIDENCE PROBLEMS UNDER THE CISG MINIMIZED  
BY THE *MCC-MARBLE* COURT

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100. Flechtner, *supra* note 79, at 158, 160.

101. Moore, *supra* note 80, at 1355 (quoting James D. Gordon III, *Teaching Parol Evidence*, 1990 BYU L. REV. 647, 647 (1990) (citing J. Calamari & J. Perillo, *THE LAW OF CONTRACTS* 137 (3d ed. 1987))).

102. Moore, *supra* note 80, at 1372.

Though much of the *MCC-Marble* decision is commendable, the court concludes by improperly discarding at least two serious problems inherent in the free use of extrinsic evidence under the CISG: the possibility that a single party may fabricate evidence for use at trial, and the uncertain utility of “merger clauses” used in contracts to declare the written agreement to be the only and final agreement concluded between the parties.

*A. Potential Problem: Evidence Fabricated by One Party*

The Court in *MCC-Marble* felt that parol evidence problems under the CISG would be rare. It hypothesized that conflicts arise only when, as here, both sides submit parol evidence on the same issue. In this case, d’Agostino employees submitted affidavits concurring with MCC-Marble’s version of their oral agreement. “Without this crucial acknowledgment, we would interpret the contract and the parties’ actions according to article 8(2), which directs courts to rely on objective evidence of the parties’ intent.”<sup>103</sup> Another commentator similarly observed that situations when one party knows the other party’s intent “will be rare. . . . [Thus] the general standard of interpretation will be ‘the understanding that a reasonable person . . . would have had in the same circumstances.’”<sup>104</sup>

Nevertheless, evidence which forces courts to question the parties’ intent may be created by only one party. It is very simple to fabricate credible looking evidence to make it appear as if the parties’ intentions were known to be clearly different than what the other party later declares. The technology is certainly available to easily generate false affidavits, meeting notes, electronic mail, and faxes. In addition, computers allow one to alter the date and contents of pertinent contract documents. “[A] disgruntled plaintiff who also happens to be highly skilled in the use of computers could ostensibly generate his own evidence of noncontradictory additional terms, let alone of an entire deal.”<sup>105</sup>

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103. *MCC-Marble Ceramic Ctr. v. Ceramica Nuova d’Agostino, S.p.A.*, 144 F.3d 1384, 1388 n.11 (11th Cir. 1998).

104. Murray, *supra* note 12, at 48 (quoting CISG, *supra* note 1, art. 8(2), S. TREATY DOC. NO. 98-9 at 23, 19 I.L.M. at 673).

105. Jeffrey Kagan, *The Indelibility of Invisible Ink: A Critical Survey of the*

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The CISG allows consideration of "all relevant circumstances,"<sup>106</sup> which takes in a wide array of possible evidence. Without the restraint of some type of parol evidence rule, courts will be forced to take even highly questionable evidence into account at trial. Although the credibility of all evidence will certainly be weighed by the court, the existence of such evidence creates a real difficulty in CISG litigation and can defeat a motion for summary judgment. Such evidence may even affect the outcome of the trial.

The problem of unreliable evidence is more difficult to deal with and more likely to occur than the *MCC-Marble* court supposed, as illustrated by a decision rendered by the District Court for the Southern District of New York just two months before *MCC-Marble*. In *Calzaturificio Claudia v. Olivieri Footwear Ltd.*, the Italian plaintiff, Claudia, sued for payments on shoes it manufactured for a New York retail seller, Olivieri.<sup>107</sup> Olivieri counterclaimed for breach of contract, declaring, in part, that Claudia had failed to deliver some of the shoes. Claudia stated that, according to the terms of its invoices, it had made the shoes available for pickup at its factory. Olivieri claimed it had never agreed to an "ex works" delivery and, as evidence, submitted several faxes, "all of which plaintiff contends are not authentic and were never received by plaintiff."<sup>108</sup> Nevertheless, the court observed, the CISG "allows all relevant information into evidence even if it contradicts the written documentation."<sup>109</sup> The court then determined that a summary judgment motion could not be ruled upon without further inquiry into the parties' intentions, despite the fact that "the Court seriously questions the validity of the faxes."<sup>110</sup> A few weeks later, the court in *MCC-Marble* speculated specifically that such a situation would likely not prevent a motion for summary judgment. It is obvious, therefore, that the

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*Enforcement of Oral Contracts Without the Statute of Frauds Under the U.C.C.*, 19 WHITTIER L. REV. 423, 448 (1997).

106. CISG, *supra* note 1, art. 8(3), S. TREATY DOC. NO. 98-9 at 23, 19 I.L.M. at 673.

107. *See Calzaturificio Claudia, s.n.c. v. Olivieri Footwear Ltd.*, No. 96 Civ. 8052(HB)(THK), 1998 WL 164824, at \*1 (S.D.N.Y. April 7, 1998).

108. *Id.* at \*2.

109. *Id.* at \*5 (quoting DiMatteo, *supra* note 20, at 127).

110. *Claudia*, 1998 WL 164824, at \*7 n.6.

effect of the *MCC-Marble* holding is not as limited as the court suggested.

Parties to a contract are not without options to avoid the type of situation involved in *Claudia*. They may stipulate that particular writings or negotiations are to be excluded from their contract considerations. In addition, they may vary the CISG evidence provisions by contract or opt out of the Convention completely. But parties to a contract under the Convention will not be automatically saved from the problems of evidence fabrication, as the *MCC-Marble* court suggested.

It is entirely possible that evidence fabrication, seemingly encouraged by the flexibility of the CISG, may become increasingly more sophisticated, and thus even more persuasive, in future litigation. The potential for one party to fabricate evidence is a real problem that will need to be addressed by future courts.

*B. Potential Problem: The Questionable Reliability of Merger Clauses in the CISG Context*

The court in *MCC-Marble* also suggests that those seeking to avoid parol evidence problems “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.”<sup>111</sup> Many commentators agree. “[M]ost believe that a well-drafted ‘merger clause’ declaring that the parties intend a writing to be the final and complete statement of their agreement will trump Article 8(3) (as permitted by Article 6) and bar evidence of negotiations not embodied in the writing.”<sup>112</sup> One commentator even felt that, although exclusions to trade usage in addition to negotiations may be important, “[c]ontract merger clauses used in domestic contracts should be easily adaptable to an international sales contract.”<sup>113</sup>

That confidence, however, is at best premature. Merger clauses are more commonly a United States sales law concept,

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111. *MCC-Marble Ceramic Ctr. v. Ceramica Nu ova d’Agostino, S.p.A.*, 144 F.3d 1384, 1391 (11th Cir. 1998).

112. Flechtner, *supra* note 79, at 157.

113. Winship, *supra* note 3, at 542.

though not as unique as the parol evidence rule. The attempt to avoid the domestic sales laws of even dominant countries, like the United States, was a primary reason for creating the CISG. If United States courts enforced such clauses, the CISG could be given widely different interpretations based on the chosen forum and hence considerably less credence as a governing law in general. Many countries are unwilling to use merger clauses, and still others simply ignore them.<sup>114</sup>

Most importantly, however, no case law has yet shown the effect of merger clauses under the CISG, and not all are in agreement as to their true effectiveness.<sup>115</sup> As with the parol evidence rule, courts in the future may find merger clauses similarly rejected by the "all relevant circumstances" clause of the CISG. Since the CISG makes no mention of a contractual item even similar to a merger clause, the court may well find such in conflict with the Convention text, as well as antithetical to the principles upon which the Convention is based.

A party may better insulate itself against additional liability by clearly showing how such a clause is based on the intent of both parties. A one-sentence recitation that "this contract constitutes the final and complete agreement between these two parties" will probably be insufficient. The more that a party can show that such a statement is necessary to the validity of the contract or functioning of the relationship, the better the chance of having that clause accepted in courts of the United States, let alone in other countries.

For now, the valid use of merger clauses under the CISG is an unclear point. The traditional clause should not be relied upon, and even a detailed revision of it may be found contrary to the Convention text. Since case law on the subject is still unavailable, practitioners will have to assume it may be a problem and ignore the *MCC-Marble* court's reference to

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114. Even in the United States, "merger clauses in standard, printed forms are so often ignored." John E. Murray, Jr., *The Emerging Article 2: The Latest Iteration*, 35 DUQ. L. REV. 535, 548 (1997).

115. See Esslinger, *supra* note 29, at 53 (stating that "[g]iven the possibility of a court under CISG adding terms to an agreement, merger clauses in standard forms must be reviewed to determine their force and effect"); see also Murray, *supra* note 12, at 45-46 (noting that "the typical merger clause familiar to American lawyers may be insufficient for this purpose").



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merger clauses as a catch-all solution to evidentiary problems under the CISG.

#### V. USE OF DOMESTIC LAW GENERALLY IN CISG INTERPRETATION

Clearly, the parol evidence rule is not to be used under the CISG. Merger clauses may also be incompatible with a uniform, independent, and international approach to CISG interpretation. But while these conclusions suggest that domestic law should be avoided whenever possible, it should not be completely excluded from CISG litigation. The *MCC-Marble* court was careful to avoid stating that domestic law is entirely precluded under the CISG. It asserted that “[c]ourts applying the CISG cannot . . . upset the parties’ reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result.”<sup>116</sup> Thus, the *MCC-Marble* decision implies that while domestic law in contradiction with the Convention should not be used, domestic law not in contradiction with the CISG’s text or principles may have an application. Nevertheless, by not explicitly clarifying this point, the court lost a rare opportunity to instruct other courts on the infrequent but important use of domestic law in CISG litigation.<sup>117</sup>

Certainly, the mechanical application of domestic laws, such as the parol evidence rule, in preference to the Convention text was a chief fear of the CISG writers. United States practitioners likewise fear the effect of domestic bias in CISG litigation in foreign courts. Nevertheless, the Convention is not an elaborate code, and gaps in the text are readily apparent. The CISG is an independent text and must be the focus of CISG litigation. But ultimately, avoiding all recourse to domestic law is not only a practical impossibility, but it is also in opposition to the instruction of the Convention text itself.

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116. *MCC-Marble*, 144 F.3d at 1391 (emphasis added).

117. Naturally, such a reference would have been merely dicta. But since CISG interpretation has been so sparse in the United States, some commentary on the use of domestic law under the Convention would have provided useful guidance to practitioners.

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A. *Fears Surrounding the Use of Domestic Law in CISG Interpretation*

One of the most serious concerns surrounding the CISG is the probability that “national courts [would] plac[e] a ‘domestic gloss’ on [CISG] cases,”<sup>118</sup> preventing uniform application of the CISG. This fear appears to be completely justified. Courts like the one in *Beijing Metals* have repeatedly resorted to “legal idioms that have divergent local meanings,”<sup>119</sup> both in the creation and interpretation of the CISG. In particular, providing independent interpretation to doctrines, which a country already espouses in its own domestic law, is a serious problem for courts worldwide.<sup>120</sup> Judges see issues through the legal lenses they have created within their own systems; thus some type of “homeward trend” is likely to emerge as national courts “resort to domestic law or rules of interpretation in the Convention’s application.”<sup>121</sup> The *Beijing Metals* decision shows that such a tendency is a problem that can occur as easily in the United States as in other jurisdictions.

The problem appears to stem from at least two sources. First, reading the CISG as an independent legal text is more difficult than applying more familiar local law. While the principles of the CISG are plainly expressed, they are nonetheless expressed in a document entirely new to many of the court systems around the world. Interpreting the Convention as an independent document thus requires courts to do more work than usual; not only must they decipher the provisions relevant to the document, they often must examine the entire document for analogous provisions or overarching principles. Doing so often requires courts to comprehend and utilize different systems of legal thinking under the hybrid document. Certainly, almost every country interpreting the Convention will recognize parts of the text that come from its own laws. Most provisions, however, will be relatively new. The

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118. DiMatteo, *supra* note 21, at 96 (quoting Amato, *supra* note 32, at 26).

119. HONNOLD, *supra* note 15, at 60.

120. See DiMatteo, *supra* note 21, at 93-94 (noting that “[i]n its application, it is intended to divorce itself from the idiosyncratic meanings of the legal systems from which it came”).

121. Timothy N. Tuggey, Note, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will a Homeward Trend Emerge?*, 21 TEX. INT’L L.J. 540, 542 (1986); see also Flechtner, *supra* note 79, at 154.

precise wording of the provisions should be entirely new. Thus, judges interpreting the Convention in any country bear a substantial initial burden.

Second, help from other tribunals around the world who may have developed some expertise in a given situation is not readily forthcoming. To date, only a fraction of those cases decided under the CISG have been rendered with a written explanation for the decision.<sup>122</sup> Worse yet, those judges who have expounded their reasoning may not have their statements published. Even published documents which could be helpful may not be adequately translated for other countries seeking judicial guidance.<sup>123</sup> Furthermore, civil law countries unaccustomed to seeking interpretive advice are even less adept at receiving and utilizing judicial opinions. The CISG is a substantial body of law, which should be interpreted independently of other jurisdictions. Nevertheless, “[t]he most apparent problem with the unification of commercial law is that it has to be applied through a nonunified court system.”<sup>124</sup>

An international effort is necessary to make such an exchange work. An ongoing “working group” similar to that reviewing the Uniform Commercial Code may be a helpful international step, possibly under the United Nations rubric. Such a group could encourage courts to give explanations, which future courts could draw on. Collecting these decisions, translating them, and making them available would be essential. Such a group would help unify the growing body of CISG law and make it less apt to fall prey to domestic legal tendencies.

#### *B. Last Resort to Domestic Law Under the CISG*

Although courts interpreting the CISG should generally avoid reliance on domestic law, such law should not be absolutely banned from CISG litigation. While the parol evidence rule does not comport with the Convention text, other domestic sales laws play a needed gap-filling role in CISG

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122. See WILL, *supra* note 11, at 15-164.

123. See Harry M. Flechtner, *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, 189-93 (1998).

124. *Id.* at 93.

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litigation. The CISG is certainly not a detailed sales code; rather, its "rules play a supporting role, supplying answers to problems that the parties have failed to solve by contract."<sup>125</sup> It is difficult to formulate even a simple domestic code that accounts for most contractual problems; the added complexity of international agreements makes the task even more daunting. Even states that have created such codes maintain them only by frequent amendment and revision. Such a luxury is unavailable to CISG members. The treaty ratification process often takes several years and necessitates a rare and inadequate means of amendment. Moreover, international agreement on a detailed code would be almost unfathomable. Even the relatively brief CISG text took fifty years to produce.

As a result, "[g]aps in the Convention"<sup>126</sup> necessarily arise. Consequently, some "transactions attorney[s] will not always find CISG's provisions entirely clear"<sup>127</sup> simply because they have become accustomed to more detail. Prior to the CISG, attorneys utilized more developed domestic systems, selecting the sales codes of one of the contracting parties, a neutral country, or a widely used domestic sales law. Now, under the CISG, attorneys who do not opt out of the Convention may feel as if they are taking a considerable leap of faith.

Such attorneys can take comfort in knowing that, even given the international character of the Convention, transactions governed by the CISG can be supplemented by a more complete, and familiar, domestic law. Aside from totally avoiding the CISG, contracting parties are given the option to accept the Convention while "derogat[ing] from or vary[ing] the effect of any of its provisions."<sup>128</sup> Parties may express their desire by contract that a specific portion of their agreement will be governed according to another set of sales laws. They may invoke provisions under other codes in response to specific needs under their agreement. Almost complete freedom is available for individual variation, while preserving the overall form of the widely accepted international text.

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125. HONNOLD, *supra* note 15, at 48.

126. Winship, *supra* note 3, at 540.

127. Amato, *supra* note 32, at 21.

128. CISG, *supra* note 1, art. 6, S. TREATY DOC. NO. 98-9 at 23, 19 I.L.M. at 673.

A more difficult situation arises in CISG contracts where the CISG is silent and no other law is specified. Such a problem is certainly more contentious, but not one ignored by the Convention writers. Article 7 of the Convention spells out the hierarchy of authorities by which parties can decide disputes governed by the CISG. It states:

Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.<sup>129</sup>

Thus, it appears that when the express provisions of the CISG fail, and the general principles do not spell out a clear alternative, the court must look to “the law applicable by virtue of the rules of private international law.”<sup>130</sup> While “domestic law” is not synonymous with “private international law,” domestic law is decidedly one of its subsets. Domestic sales laws, up until the formation of the CISG, have commonly been used in private international agreements. In fact, they are still widely used. The Convention writers likely realized that there were instances in which the Convention could not clarify the responsibilities parties had to each other, and where even its stated principles would be inadequate. In such circumstances, domestic laws are one type of private international law that may supplement the Convention text.

Even John O. Honnold, United States delegate to the Convention and strong advocate of an independent interpretation of the CISG, realized that resort to domestic law is sometimes necessary. He exhorts initial adherence to the CISG provisions, and then “a measured response to the Convention’s invitation to consider its ‘general principles’ before turning to *domestic law*.”<sup>131</sup> Beyond that, however, Honnold anticipates specific events in which “the tribunal must seek (via the rules of private international law) some rule of *domestic*

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129. *Id.* at art. 7(2).

130. *Id.*

131. HONNOLD, *supra* note 15, at 133 (emphasis added).

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law dealing with” the issue at hand.<sup>132</sup> Hence, domestic law will sometimes serve an essential function in litigation under the CISG.

Indeed, practical necessity requires a set of laws established as a backup system for the CISG.<sup>133</sup> Without reference to a gap-filling law, practitioners may find themselves without any concrete basis on which to either properly perform under a contract or to make a claim for its breach.<sup>134</sup> In addition, courts attempting to enjoin performance or establish remedies may be at a loss for simple calculation of damages or lost profits.<sup>135</sup> Ultimately, the CISG itself may be rejected as a viable instrument for international transactions if it is unable to permit some variations in its use under significantly differing cases.<sup>136</sup>

It is clear that domestic law does have a place in interpreting the Convention. Certainly, the CISG text itself must be the focal point of analysis. Its principles should govern any other application, and resort to domestic laws cannot minimize actual provisions of the CISG or ignore its principles. But when these two sources are inadequate, practical necessity and the text of the CISG itself approve a last resort to domestic law.

## VI. CONCLUSION

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132. *Id.* at 129 (emphasis added).

133. *See* Winship, *supra* note 3, at 540 (suggesting that “[g]aps in the Convention may be filled by reference to applicable domestic law”). Specifically regarding the UCC, one court noted that “[c]aselaw interpreting analogous provisions of Article 2 of the [UCC] may also inform a court where the language of the relevant CISG provisions tracks that of the UCC.” *Delchi Carrier SpA. v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2d Cir. 1995).

134. *See* Amato, *supra* note 32, at 22 (quoting INTERNATIONAL CONTRACT MANUAL: GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AT DETAILED ANALYSIS 139 (Albert H. Kritzer ed., 1992) (stating that “the contract drafter should designate a ‘receptive domestic sales law’ as the gap-filling law”).

135. *See Delchi Carrier*, 71 F.3d at 1030 (noting that the CISG had not explicitly defined the calculation of lost profits, and holding that “[i]n the absence of a specific provision in the CISG . . . the district court was correct to use the standard formula employed by most American courts”).

136. *See* Tuggey, *supra* note 121, at 544 (“[O]ne true test of the CISG’s success as a uniform law will be the extent to which it may *implicitly* permit national variations in its application. The CISG trade usage provisions . . . appear to permit these variations.”).

The Convention on the International Sale of Goods has great potential to reduce confusion and litigation in international sales transactions. It is the culmination of over fifty years of unusual international cooperation. In creating a specifically international sales law, its founders hoped that domestic bias would be set aside in promoting uniformity and good faith abroad. Essential to that uniformity is the development of consistent case law that promotes the Convention in harmony with its text and principles.

In *MCC-Marble*, the Eleventh Circuit made great strides both in setting aside a particularly domestic law—the parol evidence rule—and in promoting an international interpretation under the Convention. In so doing, the court set an important precedent in developing CISG jurisprudence in the United States. However, the court minimized problems with fabricated evidence and untested merger clauses, both of which will likely emerge in future CISG litigation. In addition, the court was silent on the use of domestic law as a last resort and failed to acknowledge the clear set of hierarchies spelled out in the Convention text. However, “[e]ven proponents of the Convention concede the inevitability of uncertainties and that these uncertainties will persist at least until the development of a large body of case law and the publication of doctrinal commentaries.”<sup>137</sup> In spite of its shortcomings, *MCC Marble* takes the most significant step in that process to date.

*Rod N. Andreason*

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137. Winship, *supra* note 3, at 531.