The Seventh Amendment and the CISG: Functional Factors in the Search for a Jury Trial Right

Mark A. Mintz *

I. INTRODUCTION

The United Nations Convention on Contracts for the International Sale of Goods ("CISG") governs the sale of goods between merchants in countries that are parties to the CISG.[1] When the United States became a party to the CISG in 1988, its provisions "became part of the 'law of the [American] Land'" under the Supremacy Clause of the United States Constitution.[2] This Article will discuss whether the Seventh Amendment right to a jury trial applies to actions that arise under the CISG. This Article traces the background of the relationship between treaties and Constitutional provisions. Next, this Article will discuss the history and development of Seventh Amendment jurisprudence, focusing on the Court's decisions in *Markman v. Westview Instruments, Inc.*[3] and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*[4] In both cases, the Supreme Court held that functional factors were determinative in deciding whether or not a jury trial right existed.[5] This Article will examine the applicability of the Court's analysis in *Markman*[6] and *Del Monte Dunes*[7] to actions that arise under the CISG. The Article concludes that regardless of the determination of any historical tests, there are strong legal and policy reasons to attach the Seventh Amendment right to a jury trial.

---

* J.D. Tulane Law School, 2007, B.A. Emory University, 2001. The author is currently a law clerk to the Hon. Carl J. Barbier, United States District Judge for the Eastern District of Louisiana. The author would like to thank Professor David V. Snyder for his guidance, and Jami Vibbert for her careful edits. The author would also like to thank Jennifer Kitner for her endless patience and tireless dedication.

1. United Nations Convention on Contracts for the International Sale of Goods, *opened for signature* Apr. 11, 1980, S. TREATY DOC. NO. 98-9, 1489 U.N.T.S. 3 [hereinafter CISG].

2. JOSEPH M. LOOKOFSKY, UNDERSTANDING THE CISG IN THE USA 2 (2d ed. 2004) (quoting U.S. CONST. art. VI, cl. 2).

3. 517 U.S. 370 (1996).

4. 526 U.S. 687 (1999).

5. *See Del Monte Dunes*, 526 U.S. at 720-21; *Markman*, 517 U.S. at 388-91.

6. 517 U.S. 370.

7. 526 U.S. 687.

II. BACKGROUND

A. *Treaty Power of the United States*

The Constitution of the United States vests the power to make treaties in the executive branch of the government.[8] The Court has interpreted that power to "extend to all proper subjects of negotiations between our government and other nations."[9] However, the Court has not defined exactly what it means by "the proper subjects of negotiation between nations."[10] While commentators have speculated on where the outer limit of the executive's treaty power may lie, the limits certainly include any matter of concern between nations, as contrasted to matters of purely domestic concern.[11] The CISG, which regulates the conduct of American business abroad, seems to fall within the purview of Congress and its power to regulate foreign commerce.[12] However, given that the agreement regulates contracts for the sale of goods between merchants in countries that are parties to the convention, it becomes clear this is a matter of concern between the nations and, therefore, is a proper subject for the executive's treaty making power.[13]

However, notwithstanding the broad power of the executive branch to make treaties, the Court has made it clear that treaties can neither violate the Constitution, nor give powers to any governmental branch beyond those limits prescribed in the Constitution.[14] Therefore, provisions and interpretations of the CISG cannot legally violate the Constitution. An analysis of whether a particular Constitutional provision is violated by a treaty involves the same analysis the Court would use

---

8. U.S. CONST. art. II, § 2, cl. 2.

9. Asakura v. City of Seattle, 265 U.S. 332, 341 (1924).

10. *See* United States v. Lue, 134 F.3d 79, 83 (2d Cir. 1998).

11. *See, e.g.,* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation,* 108 HARV. L. REV. 1221, 1261 n.133 (1995) (noting there are limits to how far a treaty can go in regulating and changing American law); *see also Lue*, 134 F.3d at 83-84 (holding that a treaty regulating the treatment of foreign nationals while abroad is "a matter of central concern among nations," and, therefore, is within the Executive's treaty making power).

12. *See* U.S. CONST. art. I, § 8, cl. 3.

13. For a more complete discussion of the relationship between Congressional and Presidential authority in the making of treaties, see Tribe, *supra* note 11, at 1261 n.133. This topic is beyond the scope of this Article.

14. Reid v. Covert, 354 U.S. 1, 16 (1957) ("[N]o agreement with a foreign nation can confer power on . . . any . . . branch of Government [sic], which is free from the restraints of the Constitution.").

to evaluate the constitutionality of a congressional or executive action.[15]

B. *The Seventh Amendment*

The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[16] In general, the purpose of civil juries is to be the fact-finding body in a trial.[17] In fact, courts have held that when there are no facts in dispute, no right to a jury trial exists at all.[18]

In the nineteenth century, when determining whether a jury trial was required for a particular action, the Court first determined what was meant by the term "common law."[19] In *Parsons*, Justice Story held the "common law" was distinguishable from actions that arose in equity or under admiralty jurisdiction.[20] Throughout the rest of the nineteenth century, other courts used the same test, simply distinguishing cases at common law from those in equity or admiralty.[21]

However, in 1935, the Court set forth a new test for determining what types of cases fell under the purview of the Seventh Amendment.[22] In what became known as the historical test, the Court, for the first time, focused on the preservation language of the amendment.[23] In *Redman*, the Court held that "[t]he right of trial by jury thus preserved is the right which existed under the English common law when the amendment was adopted."[24] Therefore, under *Redman*, a jury trial

15. *Cf. id.* at 21 (holding that a treaty could not abrogate the right to a jury trial for military dependents living overseas).

16. U.S. CONST. amend. VII.

17. *See* Coleman v. Comm'r, 791 F.2d 68, 71 (7th Cir. 1986) ("Even in ordinary litigation, the Seventh Amendment does not require a jury trial when there are no facts in dispute, and [the plaintiffs] put none in dispute."); Chisolm v. TransSouth Fin. Corp., 194 F.R.D. 538, 553 n.11 (E.D. Va. 2000).

18. *See* cases cited *supra* note 17.

19. Parsons v. Bedford, 28 U.S. 433, 446-47 (1830).

20. *Id.* at 447. Interestingly, *Parsons* considered the question of whether a suit arising out of Louisiana's civil law system would be a suit at common law for Seventh Amendment purposes. *Id.* at 445. The majority rejected the dissent's textualistic approach to the case, which argued nothing in the Louisiana case structure resembled a suit at common law, and, therefore, the right to a jury trial under the Seventh amendment did not exist. *See id.* at 454-55 (M'Lean, J., dissenting).

21. Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 187 (2000); *see, e.g.*, Root v. Ry. Co., 105 U.S. 189, 206-07 (1881) (determining whether a patent claim is one at equity or common law and citing *Parsons* favorably).

22. Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654 (1935).

23. *Id.* at 656-57.

24. *Id.* at 657.

right only existed if it existed under the English common law in 1791.[25]

Since *Redman*, the Court has expanded and refined the historical test. In *Curtis v. Loether*, the Court expanded the jury trial right to statutory causes of action.[26] Citing *Parsons*, the Court determined that the Seventh Amendment applies "to actions enforcing statutory rights . . . if the statute creates legal rights and remedies, enforceable in an action for damages in . . . courts of law."[27] The Court's ruling in *Curtis* invited Seventh Amendment litigants to dig deep into the history of the common law to determine whether a statute created a right comparable to one at law. In *Curtis*, the question was whether a jury trial right existed for a private cause of action under Title VIII of the Civil Rights Act of 1968.[28] Justice Marshall, writing for the Court, determined that the action was one for damages, resembling a tort claim and similar to many tort actions available at common law.[29] The Court approved the appellate court's plunge into the history of the common law.[30] The appellate court analogized an action for refusing to rent to a person based on his or her race to one against an English innkeeper "who refused, without justification, to rent lodgings to a traveler," an action at common law that was tried before a jury.[31]

However, by 1987, the Court began to pull away from the search through historical tomes. In *Tull v. United States*, the Court considered whether a jury trial right existed for actions brought under the Clean Water Act.[32] In *Tull*, the United States, in opposing the jury trial right, analogized the suit as an abatement of a public nuisance, an action that was not tried before a jury in England.[33] On the other side, Tull

---

25. It is interesting the Court limited the right to that which existed in England in 1791 after refusing to do so in the nineteenth century. *See* Waring v. Clarke, 46 U.S. 441 (1847) (rejecting the use of English law to determine the extent of the admiralty jurisdiction of the United States). For a more complete discussion of this point, see Moses, *supra* note 21, at 191-92.

26. 415 U.S. 189, 194 (1974).

27. *Id.* (citing *Parsons*, 28 U.S. at 446).

28. *Id.* at 189-90. Title VIII of the Civil Rights Act of 1968 prohibits discrimination in housing. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 88 (codified in scattered sections of 18 U.S.C., 25 U.S.C., and 42 U.S.C.).

29. *Curtis*, 415 U.S. at 195.

30. *Id.* at 195 n.10 (citing Rogers v. Loether, 467 F.2d 1110, 1117 & n.22 (7th Cir. 1972), *aff'd sub nom.* Curtis v. Loether, 415 U.S. 189 (1974)).

31. *Rogers*, 467 F.2d at 1117 & n.22. The *Rogers* court cited *Davies Warehouse Co. v. Brown* for the proposition that English innkeepers who refused to rent without justification were liable at common law. *Id.* at 1117 n.22 (citing Davies Warehouse Co. v. Brown, 137 F.2d 201, 207 (Emer. Ct. App. 1943)). The *Davies* court in turn cited English cases from the mid-nineteenth century for support. *Davies*, 137 F.2d at 207 n.20.

32. 481 U.S. 412, 414 (1987).

33. *Id.* at 420.

argued that the action was more analogous to an action in debt and, therefore, required a jury trial under English common law.[34] The Court refused to determine which analogy was correct, holding, "[w]e need not rest our conclusion on what has been called an 'abstruse historical' search for the nearest 18th-century analog."[35] The Court continued, holding that the nature of relief sought was more important in determining the right to a jury trial than was finding an exact historical analog from eighteenth century England.[36]

Thus, after *Tull*, the Court followed a two-step process when determining when the Seventh Amendment preserved the right to a jury trial. First, the Court compared the action to common law actions at the time of the adoption of the amendment, and, second, the Court examined the remedy sought to determine whether it was legal or equitable in nature.[37] However, in *Tull*, the Court made clear the nature of the remedy sought was the more important aspect of the test.[38]

Just three years later, the Court's clear rule fell apart.[39] In *Terry*, the Court considered whether a union employee, in an action to receive lost wages and health benefits due to the union's breach of its duty of fair representation, was entitled to a jury trial under the Seventh Amendment.[40] Writing for the Court, Justice Marshall commanded a majority of the justices in determining the damages sought in the cases were legal in nature, as opposed to equitable in nature.[41] However, only three justices agreed with Justice Marshall's determination of which historical analogue of an action against an employer for breach of the union's duty of fair representation was correct.[42] After determining the historical analogues were inconclusive, Justice Marshall

34. *Id.* at 418-19.

35. *Id.* at 421.

36. *Id.*

37. *See* Moses, *supra* note 21, at 195.

38. *Tull*, 481 U.S. at 421 ("We reiterate our previously expressed view that characterizing the relief sought is '[m]ore important' that finding a precisely analogous common-law cause of action in determining whether the Seventh Amendment guarantees a jury trial.").

39. *See* Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558 (1990).

40. *Id.* at 562-63.

41. *Id.* at 570-73.

42. *Id.* at 565-70. The Union argued the action resembled "a suit brought to vacate an arbitration award because [the employee] seek[s] to set aside the result of the grievance process." *Id.* at 566. Justice Marshall rejected this analogy. *Id.* at 566-67. In the alternative, the Union argued the action resembled "an action by a trust beneficiary against a trustee for breach of fiduciary duty," which Justice Marshall accepted as an apt comparison. *Id.* at 567-68. The employees argued the action resembled a suit for attorney malpractice, a comparison with which Justice Marshall disagreed. *Id.* at 568-69. However, the Court did determine a breach of fair representation could resemble a breach of contract action. *Id.* at 569-70.

continued on to the examination of the remedies.[43] Although Justice Marshall did recognize the Court's precedent held the remedies test was more important than the historical analogue test, it appears Justice Marshall believed that the historical analogue portion of the test could sometimes outweigh the remedies portion of the test.[44]

In contradistinction to Justice Marshall, Justice Brennan wrote separately to propose eliminating the historical analogue test altogether.[45] Justice Brennan, the author of *Tull*,[46] proposed a test in line with that case, wherein the only factor to be considered would be whether the relief sought was legal or equitable in nature.[47] Finally, Justice Kennedy, joined by Justices O'Connor and Scalia, concluded that the historical analogue test should be determinative and *Tull* stood for the proposition that only when the historical analogues are in equipoise, as in *Tull*, should the court consider the remedies test.[48] Therefore, after *Terry*, the Court no longer had the consensus exhibited in *Tull* with regard to the proper test. It was now unclear the weight historical analogues would have under a Seventh Amendment analysis. The Supreme Court would add to this confusion in *Markman v. Westview Instruments, Inc.*[49]

Markman was a patent infringement case.[50] In the case, the plaintiff, Markman, alleged infringement of his patent on a system designed to inventory and track clothing through a dry cleaner's operation.[51] Markman claimed that Westview Instruments' process for tracking inventory infringed on his patent.[52] As in many patent infringement cases, the case turned on the meaning of the words used in the patent claim, that is, language delineating the limits of the inven-

43. *Id.* at 570. Justice Marshall noted that the historical analogues "[leave] us in equipoise as to whether respondents are entitled to a jury trial." *Id.*

44. *See Terry*, 494 U.S. at 570 ("Our determination under the first part of the Seventh Amendment analysis is only preliminary."). It is also possible Justice Marshall's analysis of the test was narrower, determining only when the remedy analysis is in equipoise should the historical analogue test be used. However, if that were the case, there would be no reason to have delved as deeply as Justice Marshall did into historical analogues, and he would be much more closely aligned with Justice Stevens' views than otherwise indicated. *See id.* at 581-84 (Stevens, J., concurring in part and concurring in judgment).

45. *Id.* at 574-81 (Brennan, J., concurring in part and concurring in judgment).

46. 481 U.S. 412, 414 (1987).

47. *Terry*, 494 U.S. at 574 (Brennan, J., concurring in part and concurring in judgment).

48. *See id.* at 592 (Kennedy, J., dissenting). Justice Kennedy found the closest historical analogue of this action was an action in trust. *Id.* at 585. Therefore, because the Court should not have been in equipoise over the historical analogue, the Court should not have considered whether the remedies were equitable or legal in nature. *See id.* at 584.

49. 517 U.S. 370 (1996).

50. *Id.* at 372.

51. *Id.* at 374-75.

52. *Id.*

tor's rights.[53] The question for the Court was whether the Seventh Amendment required a jury to properly interpret the words of the patent claim or whether a judge could determine its meaning as a matter of law.[54]

In *Markman*, Justice Souter, writing for a unanimous Court, started the analysis by stating the Court would use the now familiar historical test.[55] As in previous decisions, the first prong of the historical test asked whether the cause of action arose in law or in equity at the time of the adoption of the amendment.[56] However, the Court formulated a previously unknown version of the second prong of the test. Justice Souter wrote: "If the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791."[57] This was the first time the Court separated out the trial issue in determining whether a party had a jury trial right under English common law; also, the rule the Court announced was a marked difference from previous articulations of the historical test.[58]

Justice Souter easily determined patent actions descended from actions at common law in eighteenth century England.[59] The more difficult question arose in determining whether the claim construction question was one that came before English juries in 1791.[60] Justice Souter announced that, despite opinions describing a fact-law distinction, or even a distinction between substance and procedure, "the sounder course [would be] to classify a mongrel practice (like constru-

---

53. *Id.* at 372, 374. The Court explained:

> Characteristically, patent lawsuits . . . rest on allegations that the defendant without authority ma[de], use[d] or [sold the] patented invention . . . . Victory in an infringement suit requires a finding that the patent claim covers the alleged infringer's product or process, which in turn necessitates a determination of what the words in the claim mean.

Id. at 374 (internal quotes omitted).

54. *Id.* at 372. In general, the interpretation of written documents has been considered a question for the judge, and not for the jury. *See* Moses, *supra* note 21, at 218. For a more complete discussion of this point, and its relationship to contract law in general and the CISG in particular, see *infra* notes 99-101 and accompanying text.

55. *Markman*, 517 U.S. at 376.

56. *Id.*

57. *Id.*

58. Recall that under *Terry* and *Tull*, the second prong of the historical test consisted of a question of whether the remedies sought were legal in nature or equitable and the subsequent confusion over which part of the test controlled the inquiry. *See supra* notes 32-47 and accompanying text.

59. *Markman*, 517 U.S. at 377.

60. *Id.* at 378.

ing a term of art following receipt of evidence) by using the historical method."[61]

Thus, Justice Souter devoted a considerable portion of the opinion analyzing whether eighteenth century cases provided a jury trial right for patent claim construction.[62] This drawn out historical analysis sharply contrasted from earlier jurisprudence, which had held the Court was not as interested in "abstruse historical searches" in order to determine whether the right to a jury trial exists under the Seventh Amendment.[63] When the Court failed to find an appropriate historical analogue for the claim construction, it turned to "existing precedent[,] . . . the relative interpretive skills of judges and juries[,] and the statutory policies that ought to be furthered by the allocation."[64] The Court examined the American precedents and determined, despite cases to the contrary, precedent did not indicate that juries decided the meaning of claims in patent infringement cases.[65] The Court next turned to functional considerations to determine if a judge or a jury would be better suited to decide the issue.[66] First, it noted the highly technical nature of patents, making it more likely that a judge would correctly interpret the patents, rather than juries.[67] The Court also determined the jury's function of determining the credibility of experts who testify about the meaning of words is "subsumed within the necessarily sophisticated analysis of the whole document, required by the standard construction rule that a term can be defined only in a way that comports with the instrument as a whole."[68]

---

61. *Id.*

62. *Id.* at 378-84.

63. *See* Tull v. U.S., 481 U.S. 412, 421 (1987); *see also*, Ross v. Bernhard, 396 U.S. 531, 536 n.10 (1970).

64. *Markman*, 517 U.S. at 384.

65. *Id.* at 388. The petitioner cited two cases in support of the proposition that juries determined the meaning of claims in infringement cases. *Id.* at 385. The Court distinguished both cases. *See id.* at 385-88.

66. *Id.* at 388. Because the Court determined that neither English nor American history required this particular trial decision to be determined by a jury, it is unclear whether the functional factors are necessary to the decision or mere dicta. It seems unnecessary to continue into the functional factors if the Court determined both American and English precedent point away from jury trials. *See infra* notes 95-96 and accompanying text. However, the Court continued its analysis stating "[w]here history and precedent provide no clear answers, functional considerations also play their part in the choice between judge and jury to define terms of art." *Markman*, 517 U.S. at 388.

67. *Markman*, 517 U.S. at 388-89 ("Patent construction in particular is a special occupation, requiring, like all others, special training and practice. The judge, from his training and discipline, is more likely to give a proper interpretation to such instruments than a jury; and . . . is . . . more likely to be right . . . than a jury can be expected to be." (citing Parker v. Hulme, 18 F. Cas. 1138, 1140 (C.C.E.D. Pa. 1849) (internal quotations omitted))).

68. *Id.* at 389.

Finally, the Court noted a demonstrable Congressional intent to promote uniformity in the interpretation of patents.[69] The Court observed the purpose of the Court of Appeals for the Federal Circuit was to "'strengthen the United States patent system in such a way as to foster technological growth and industrial innovation.'"[70]

Thus, after *Markman*, Supreme Court jurisprudence indicated that Seventh Amendment analysis required a court to ask (1) whether the cause of action was tried at law at the time of the founding, or is analogous to one that was; and (2) whether the particular trial decision falls to the jury in order to preserve the substance of the common law right as it existed in 1791.[71]

III. APPLICABILITY OF THE SEVENTH AMENDMENT TO THE CISG

A. *The Nature of the Suit Arising Under the CISG*

As a preliminary matter, while actions that arise in contracts are generally state law claims, actions that arise under the CISG are most likely to be heard in federal courts.[72] Thus, federal Seventh Amendment analysis is required for nearly all CISG cases.[73]

Of course, *Markman* applied to patent claims.[74] However, it is not that far of a leap from patent claim interpretation to contract interpretation. In fact, it seems one could easily substitute the word patent for

69. *Id.* at 390.

70. *Id.* (quoting H.R.REP. No. 97-312, at 20 (1981)).

71. *See id.* at 376.

72. Some state courts have indicated they have jurisdiction over CISG claims. *Cf.* Vision Sys., Inc. v. EMC Corp., No. 034305BLS, 2005 WL 705107 (Mass. Super. Ct. Feb. 28, 2005) (holding that CISG claims must be dismissed because the adverse parties were not from different countries, but otherwise implying the court would have entertained the CISG claims); KSTP-FM, L.L.C. v. Specialized Commc'ns, Inc., 602 N.W.2d 919, 922 (Minn. Ct. App. 1999) (noting the trial court's decision that the CISG does not confer rights on this particular plaintiff); GPL Treatment, Ltd., v. Louisiana-Pacific Corp., 894 P.2d 470, 477 n.4 (Or. Ct. App. 1995) (Lesson, J., dissenting) (indicating that the Oregon trial court could apply the CISG). Even if the action is brought in a state court whose long arm statute gives it personal jurisdiction over a foreign defendant, such defendant may remove the case. 28 U.S.C. § 1441 (2005). It is even colorable to argue that if a foreign plaintiff filed in state court against a forum defendant, the case may be removed under section 1441(b). *Id.* § 1441(b) (providing a case may be removed regardless of the citizenship of the defendant if the case arises under "the Constitution, treaties or laws of the United States"). Thus, it is not surprising that the vast majority of CISG cases have appeared in federal courts. *See* Pace Law School, Electronic Library on International Commercial Law and the CISG, http://www.cisg.law.pace.edu/cisg/text/casecit.html#us (last visited Oct. 10, 2007).

73. *See* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537-38 (1958) (holding cases decided by a federal court using state law will still use Federal Seventh Amendment analysis to determine if the cause of action would require a jury trial); Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359, 363-64 (1952) (holding a case arising under the Federal Employer Liability Act required a jury trial even when tried in state court).

74. Markman v. Westview Instruments, Inc., 517 U.S. 370, 372 (1996).

the word contract in *Markman*, and very few things would have to be changed in the analysis.[75] Therefore, in order to determine if and when the Seventh Amendment requires a jury trial for actions that arise under the CISG, it becomes necessary to understand the nature of those actions.

American courts tend to treat actions that arise under the CISG as analogous to actions under the Uniform Commercial Code ("UCC").[76] And thus, a jury trial will only be available under the Seventh Amendment if such a trial would be available to state law contract claims decided in a federal court. Continuing with the UCC analogy, commentators have noted that "[u]nder the historical test, UCC cases almost always have actual or close historical analogues at common law, as actions for damages or debt."[77] Additionally, the damages sought in contracts cases are often monetary.[78] This, coupled with the historical analogues of contracts actions, easily fulfills the two prongs of the classic historical test.[79] Thus, if the Court simply applied the historical test before *Markman*,[80] a CISG case, properly analogized to the UCC, would require a jury trial right.[81]

B. *Applying the* Markman *Test to the CISG*

The next questions are how the *Markman* decision would apply to cases that arise under the CISG and whether the Court would apply *Markman* in such an action. This Section will determine how *Markman* would apply to the CISG. Recall that *Markman* questioned

---

75. *See* Li-Hua Weng, *Preamble Interpretation: Clarifying the "Giving Life, Meaning and Vitality" Language*, 11 B.U. J. SCI. & TECH. L. 77, 84 n.59 (2005) (noting claim construction and contract interpretation have been analogized). The Federal Circuit has rejected the analogy. Markman v. Westview Instruments, Inc., 52 F.3d 967, 985 (Fed. Cir. 1995), *aff'd*, 517 U.S. 370 (1996). The Supreme Court did not address that issue in its *Markman* analysis and, in fact, specifically declined to do so. 517 U.S. at 383 n.9 ("We need not . . . consider here whether our conclusion . . . supports a similar result in other types of cases."). *See infra* note 109 and accompanying text.

76. *See* Chi. Prime Packers, Inc. v. Northam Food Trading Co., 408 F.3d 894, 898 (7th Cir. 2005) (noting "because there is little case law under the CISG," courts look to the UCC when appropriate for interpretation).

77. Margaret L. Moses, *The Jury-Trial Right in the UCC: On a Slippery Slope*, 54 SMU L. REV. 561, 564 (2001).

78. *Id.*

79. Recall that before *Markman*, the Court asked (1) whether the action was analogous to actions brought in common law courts in England in 1791 and (2) whether the remedy sought is more legal or equitable in nature. *See supra* notes 23-45 and accompanying text.

80. There are several reasons to believe the Court will not apply the *Markman* analysis to actions that arise under the CISG. *See infra* Part III.B.

81. Recall from Part II that the Court has not made clear which part of the historical test controls the other. However, because both parts are satisfied in this case, there is no reason to question which piece is more important. *See supra* notes 36-45 and accompanying text.

not only whether the action had an historical analogue in eighteenth century England, but also whether the particular trial decision is one that must fall to the jury.[82] Of course, contract disputes exist on many different issues.[83] For simplicity, this Article focuses on a hypothetical dispute between parties regarding contract interpretation. Like *Markman*, the hypothetical action involves a disputed contract term, as well as the facts underlying that term.[84]

Under *Markman*, the first question is whether the cause of action is one that was tried at common law at the time of the adoption of the Seventh Amendment.[85] As noted earlier, it is likely a court would consider actions in contract to be analogous to actions that existed in common law at the time of the founding.[86] Therefore, as in *Markman*, a court is unlikely to have trouble determining whether contract actions have historical analogues.[87]

The next question under the *Markman* analysis is whether the particular trial decision is one that was historically allocated to the jury.[88] In *Markman*, the Court considered the historical evidence of whether a jury decided patent-claims construction.[89] Similarly, the Court would have to consider whether historically a jury decided questions of the proper interpretation of contract terms. While it may be unclear whether interpretations of contract provisions were sent to juries in England in 1791, the distinction may not matter as much as the Court indicates. In keeping with its prior precedent, despite its willingness to do so in *Markman*, the Court does not favor "abstruse historical" searches.[90] Nonetheless there is a little evidence to suggest juries did determine the meaning of contract documents, although this evidence is far from clear.[91]

---

82. Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996).

83. For example, contract disputes could arise on the issue of formation, consideration, or amount of damages, just to name a few.

84. This would be the closest dispute to the interpretation of patent claims as described in *Markman*. *See Markman*, 517 U.S. at 372.

85. *Id.* at 376.

86. Contract actions most often sound in an action for damages or debt. *See* Moses, *supra* note 77, at 564.

87. In *Markman*, the Court had relatively little trouble determining patent cases were tried before juries at common law. *Markman*, 517 U.S. at 377.

88. *Id.* at 376.

89. *Id.* at 377.

90. Tull v. United States, 481 U.S. 412, 421 (1987).

91. *See, e.g.*, Clinton W. Francis, *Practice, Strategy, and Institution: Debt Collection in the English Common-Law Courts, 1740-1840*, 80 NW. U. L. REV. 807, 811-12 (1986) (noting the vast majority of contracts cases presented to juries in eighteenth century England involved the issues of contract formation, as opposed to satisfaction).

Thus, like in *Markman*, when the evidence of practices in England at the time of the founding is unclear, the Court must look to "existing precedent" to determine if a jury trial is required.[92] On this point, contract interpretations differ sharply from the patent claim questions discussed in *Markman*. Despite the fact that American cases recognize written documents are left to the courts to interpret,[93] precedent has long held disputed issues of facts underlying a written document are the province of the jury.[94] Thus, it is also unclear whether the Court would determine its precedent requires a jury trial based on the underlying facts. In *Markman*, to prove precedential effect, the Court took great pains to distinguish the mid-nineteenth century cases Markman presented.[95] There, of course, is a possibility the Court would distinguish the long standing tradition in contract interpretation, but that seems unlikely.[96]

After determining that history and precedent provided no answer to whether a jury trial right must be preserved, the *Markman* Court next considered the functional factors.[97] Thus, there is a question of whether the functional considerations, as listed in *Markman*, are mere dicta in light of the Court's failure to find historical or precedential evidence that the underlying facts should be submitted to a jury.[98] It is possible that, under *Markman*, the historical analogies could trump any functional considerations, and the Court would conclude the historical analogies force a jury trial although the functional factors argue against one.[99]

---

92. *Markman*, 517 U.S. at 384.

93. *See, e.g., id.* at 388-89.

94. RESTATEMENT (SECOND) OF CONTRACTS § 212 (1981); *see also*, Moses, *supra* note 21, at 220 & n.273.

95. *Markman*, 517 U.S. at 385-88.

96. *See supra* note 90 and accompanying text. *But see* Moses, *supra* note 21, at 220 & n.272 (noting the Federal Circuit's precedent indicated the facts underlying claim construction were a question for the jury). There have not been any cases applying the CISG in the Supreme Court, and no circuit court cases have applied the jury trial issue in CISG cases. It may be a court would seize on the distinction between a contract claim and a CISG claim to deny precedential effect to cases that suggest a jury decides questions as to the underlying facts of document interpretation.

97. *Markman*, 517 U.S. at 388. *See also* Moses, *supra* note 21, at 244.

98. *See Scope of Right to a Jury Trial–Patents*, 110 HARV. L. REV. 266, 276 & n.81 (1996). The article notes this reading is certainly possible, but argues it is a misinterpretation of the case. *Id.* Whether or not it is a misreading is irrelevant to the discussion that follows. *See also* Moses, *supra* note 21, at 238 (questioning whether Part III of the *Markman* decision was necessary for the Court's decision); Greg J. Michelson, *Did the Markman Court Ignore Fact, Substance, and the Spirit of the Constitution in Its Rush Toward Uniformity?*, 30 LOY. L.A. L. REV. 1749, 1763 (1997) (indicating that policy rationales provide support for the lower court's holding).

99. Of course, the opposite is true as well: that if the functional factors are required for any Seventh Amendment analysis of particular trial decisions, then functional factors could override historical and precedential considerations.

Regardless of the correct path, it is known that when the historical analogues are unclear, the Court will consider functional factors.[100] The functional factors considered in *Markman* included (1) the complexity of the information and (2) the need for uniformity in decision making.[101] We will apply each of these factors, in turn, to the CISG.

The *Markman* Court determined the "construction of written instruments is one of those things that judges often do and are likely to do better than jurors."[102] The Court noted patents are extraordinarily complex, and the jury's traditional function of evaluating credibility of witnesses can be handled by judges who seek to "evaluate . . . testimony in relation to the overall structure of the [document]."[103] Likewise, the determination of international sales contracts will be difficult and complex for juries; jurors will be asked to determine what terms mean in light of standards in the relevant market.[104] However, there is no reason to think international sales contracts would be any more difficult to understand than domestic sales contracts, for which juries have been employed for years.[105]

The second functional factor in *Markman* is the need for uniformity in decision making.[106] The *Markman* Court noted that Congress, in establishing the Court of Appeals for the Federal Circuit, sought to increase uniformity and strengthen the patent system.[107] Similarly, Congress evidenced an intention to create uniformity in the interpretation of contracts for sales between international parties when it adopted the CISG.[108] Congress intended the CISG to create a "uniform legal system to which each party to an international sales contract could refer."[109] Thus, just like with the establishment of the Federal Circuit, Congress evidenced an intention to have uniform rules and decisions made for international sales contracts. Further, a court could find a right under a treaty, such as the CISG, is more closely aligned to public rights under the patent system than private contract rights. While unlikely, such an interpretation would provide additional justification for a curtailment of the jury trial right in an

100. *Markman*, 517 U.S. at 388.

101. *Id.* at 388-90.

102. *Id.* at 388.

103. *Id.* at 390.

104. The relevant market may include foreign commercial practices and complex international business arrangements.

105. *See supra* note 90 and accompanying text.

106. *Markman*, 517 U.S. at 390.

107. *Id.*

108. *See International Sale of Goods: Hearing on Treaty Doc. No. 98-9 Before the S. Comm. on Foreign Relations*, 98th Cong. 1 (1984) (statement of Sen. Mathias).

109. *Id.* at 13 (statement of Sen. Dodd).

action like the one in question.[110] Hence, just like patent comparisons, if the Court was so inclined, *Markman* would provide ample precedent for curtailing the right to a jury trial for questions of fact underlying the construction of written documents arising under the CISG.

IV. WHY A JURY TRIAL RIGHT APPLIES TO THE CISG

A. *Supreme Court Jurisprudence*

While *Markman* gives support for the proposition that contract actions do not require a jury trial, there are strong reasons to believe, while *Markman's* analysis will be applied outside of the patent context, functional factors will force a court to determine a jury trial right applies. While some commentators contend *Markman* does not apply outside the patent context,[111] recent Supreme Court jurisprudence suggests otherwise.[112]

Professor Margaret Moses argues the *Markman* decision will not apply outside of patent law at all.[113] She argues "there are three main reasons why [*Markman*] is unlikely to have significant precedential value outside of the patent law area: (1) the specific limiting language of the decision, (2) inconsistency with the Court's Seventh Amendment jurisprudence outside the patent area, and (3) the unanimity of the decision."[114] First, Professor Moses notes that the Court specifically held it was not deciding whether its conclusion applied outside of the patent arena.[115] Thus, even though the Court limited its holding in *Markman*, the Court left open the possibility of expanding its analysis outside the patent area.[116]

Second, Professor Moses argues *Markman* is inconsistent with the Court's traditional Seventh Amendment jurisprudence.[117] She argues the Court was most concerned with a "deference to a congressional statutory scheme," creating a specialized forum for patent rights, which the Court considered to be closer to a public right than a private right under contract law.[118] Finally, Professor Moses also argues the unanimity of the decision in *Markman* belies a feeling by the Court that it was not significantly changing Seventh Amendment anal-

110. *Cf. Markman*, 517 U.S. at 373.
111. Moses, *supra* note 21, at 244-49.
112. *See supra* Part III.A.
113. Moses, *supra* note 21, at 244-49.
114. *Id.* at 244-45.
115. *Id.* at 245. "We need not . . . consider here whether our conclusion . . . supports a similar result in other types of cases." *Id.* (quoting *Markman*, 517 U.S.at 383 n.9 (1996)).
116. *Id.*
117. Moses, *supra* note 21, at 246.
118. *Id.*

ysis; she contrasts *Markman* with prior Supreme Court decisions in this area that were highly contentious among the justices.[119] Under Professor Moses's arguments, the Supreme Court never intended to apply the analysis in *Markman* to contract cases.[120]

Later Supreme Court cases gave some indication of the Court's temperament after *Markman*. One of the first significant cases after *Markman* was *Feltner v. Columbia Pictures Television, Inc.*[121] *Feltner* concerned whether a jury trial was required for a determination of statutory damages for copyright infringement.[122] After determining the statute itself did not provide a statutory right to a jury trial, Justice Thomas turned to a constitutional analysis.[123] Justice Thomas followed the familiar historical test enunciated in Court opinions prior to *Markman*.[124] First, the Court determined whether the action was analogous to those tried before courts of law in England in 1791.[125] Having found copyright actions were brought before common law courts in the late eighteenth century, the Court moved on to the question of whether the remedies sought were legal or equitable in nature.[126] Justice Thomas followed earlier cases in holding monetary relief was almost always legal in nature and a jury trial right included the right to a jury to determine the amount of the award.[127] The Court did not mention the *Markman* decision at all.

Professor Moses used *Feltner* to show the Court retreated from its Seventh Amendment analysis in *Markman* when it used the more traditional, historic test.[128] Although it is true the *Feltner* Court did

---

119. *Id.* at 247.

120. *See* Moses, *supra* note 77, at 586-89. *But see* Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L.J. 1125, 1171-76 (seeing a consistency in the *Markman* analysis when viewed in relation to later Supreme Court jurisprudence).

121. 523 U.S. 340 (1998).

122. *Id.* at 342. The Copyright Act of 1976 provides that in a suit for infringement, a copyright owner may elect to recover either statutory damages of an amount between seven hundred fifty dollars and thirty thousand dollars "as the court considers just," as opposed to actual damages and profits. 17 U.S.C. § 504 (2006).

123. *Feltner*, 523 U.S. at 347. The Court first determined whether the statutory right granted a jury trial right on its own in order to ascertain if the Court could avoid deciding the Constitutional question. *Id.* at 345 (citing Tull v. U.S., 481 U.S. 412, 417 n.3 (1987)). The Court held that it could not discern a congressionally designated right to a jury trial. *Id.* Likewise, the Court would have to search the CISG for a statutory right to a jury trial. However, there is no mention of juries in the CISG, and it is unlikely that the Court would find one.

124. *Id.* at 348.

125. *Id.*

126. *Id.* at 352.

127. *Id.* at 352-53 (citing Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 570 (1990)).

128. *See* Moses, *supra* note 21, at 248-50.

not follow the same analysis as the *Markman* Court, it is equally plausible the Court decided the issue without reference to the subsidiary trial issue in *Markman* simply because there was no subsidiary trial issue in *Feltner*. The issue in *Feltner* was whether a jury or a judge is the more appropriate decider of the amount of damages in a case; it did not involve whether a jury or a judge was the more appropriate decider of the underlying facts of a trial issue.[129] Thus, *Markman* remains consistent with *Feltner*: a consistency that is solidified by the below-discussed Supreme Court case.

In *Del Monte Dunes*, the Court returned to the *Markman* analysis.[130] In *Del Monte Dunes*, the Court considered whether a jury trial right was required for a section 1983 suit asserting a regulatory taking.[131] Like in *Markman*, the Court asked whether the action was analogous to one brought in common law courts in England before asking whether the particular trial decision is one that fell to the jury.[132] In answering the first question, the Court held section 1983 claims sounded in tort and were more properly associated with legal relief.[133] Thus, the Court determined such claims were sufficiently analogous to actions at common law.[134]

Having held this was an action at law, the Court then addressed the particular issue of whether liability was a decision more appropriate for the jury or for the judge.[135] As in *Markman*, the Court considered history, precedents and functional considerations to determine who decided the issue of liability.[136] The Court found neither history nor precedent provided a clear answer to the question and then addressed functionality.[137] However, the functional factors considered in *Del Monte Dunes* were markedly different than those considered in *Markman*. In *Markman*, the Court considered the complexity of the issue, as well as the need for uniformity in the decision-making process.[138] Yet, this time, the Court focused on a fact-law distinction, determining a regulatory taking case was dependent on the particular facts, and, thus, it was a question for the jury.[139]

129. *Feltner*, 523 U.S. at 342.
130. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 708 (1999).
131. *Id.* at 707.
132. *Id.* at 708.
133. *Id.* at 709.
134. *Id.* at 718.
135. *Del Monte Dunes*, 526 U.S. at 718.
136. *Id.*
137. *Id.*
138. *See supra* note 97 and accompanying text.
139. *Del Monte Dunes*, 526 U.S. at 718-720.

Professor Moses used the above cases to indicate the Supreme Court would limit the analysis in *Markman* to patent areas.[140] Moses's analysis of *Del Monte Dunes* leads her to conclude "the majority . . . while paying lip service to *Markman*, in fact applied a much more traditional approach to the Seventh Amendment."[141] Professor Moses noted Justice Kennedy, writing for a plurality in *Del Monte Dunes*, recited the *Markman* test, but subsumed the old historical test within the first prong of the *Markman* test.[142] Moses then distinguished the *Del Monte Dunes* functionality analysis from the one in *Markman*, and she ultimately concluded: "The majority in *Del Monte Dunes* made no effort to determine if judges or juries were better suited to determine particular issues. Rather, the majority noted that because the issues were factual, they should properly be submitted to the jury."[143] However, *Del Monte Dunes* stayed faithful to the *Markman* analysis in that *Markman* also subsumed the two steps of the historical test (nature of the action and nature of the remedy) into the first question.[144] Justice Souter did not need to determine if the monetary damages sought in *Markman* were legal or equitable in nature since there was "no dispute that infringement cases today must be tried to a jury, as their predecessors were more than two centuries ago."[145] Thus, there was never really any dispute in *Markman* about the historical nature of the patent suits, just the historical nature of jury decisions about the underlying facts related to claim construction. Moreover, Moses notes that the functionality considerations in *Del Monte Dunes* were different from the functionality considerations in *Markman*.[146] However, the *Markman* Court never held the complexity and uniformity factors were the only factors that a court should consider.[147] It was entirely consistent with *Markman* for the Court to consider a fact-law distinction as one of the functional factors, just as it did in *Del Monte Dunes*.[148]

Hence, contrary to Professor Moses's claim that cases after *Markman* indicate the Supreme Court would limit its analysis in

---

140. *See* Moses, *supra* note 21, at 256.

141. *Id.*

142. *Id.* at 253 ("[A]lthough he quoted the Markman version of the . . . test, Justice Kennedy applied traditional Seventh Amendment jurisprudence by considering both the nature of the action and the remedy sought.").

143. *Id.* at 255.

144. *Compare Del Monte Dunes*, 526 U.S. at 718-720, *with* Markman v. Westview Instruments, Inc., 517 U.S. 370, 377 (1996).

145. *Markman*, 517 U.S. at 377.

146. *See* Moses, *supra* note 21, at 255.

147. *Markman*, 517 U.S. at 388-90.

148. *Del Monte Dunes*, 526 U.S. at 718-19.

Markman to the patent area, it appears the Court considered *Markman* to be valid precedent in areas outside patent law.

Lower courts have used *Markman* outside of the patent context as well. In *Entergy Arkansas, Inc. v. Nebraska*, the State of Nebraska was accused of not carrying out its duties and acting without good faith under a nuclear energy compact of which it was a member.[149] The State of Nebraska appealed the district court finding, claiming, *inter alia*, that the district court erred in denying the state a jury trial.[150] The appellate court had to determine whether the action resembled a common law contract action or whether it was a dispute between sovereigns.[151] The appellate court used the *Markman* decision as precedent for looking into the historical record, recognizing it as valid precedent outside of a patent context.[152]

It is likely the Court would use the *Markman* analysis on an issue arising under the CISG, but additional functional considerations should force the Court to decide in favor of a jury trial right.

B. *Parol Evidence Rule*

Regardless of whether a court determines history and precedent require a jury to examine underlying facts to interpret a written document,[153] there are significant functional factors, in addition to the ones cited in *Markman*[154] and *Del Monte Dunes*,[155] that should cause a court to find a jury trial right. Article 8 of the CISG prohibits the application of the parol evidence rule in the interpretation of contracts made under the authority of the CISG.[156] In United States courts, the parol evidence rule prohibits the introduction of evidence of prior agreements that would contradict terms in an integrated agreement.[157] For example, the Eleventh Circuit Court of Appeals considered a case where a Florida tile dealer agreed to buy ceramic

149. Entergy Ark., Inc. v. Nebraska, 358 F.3d 528, 533-34 (8th Cir. 2004).

150. *Id.* at 534.

151. *Id.* at 542-43.

152. *Id.* at 534. Bankruptcy courts even used *Markman* to determine whether a jury trial right applies to a challenge of a Chapter Eleven confirmation plan. *See In re* A.P.I. Inc., 324 B.R. 761, 767-69 (Bankr. D. Minn. 2005).

153. *See supra* notes 83-92 and accompanying text.

154. *See supra* note 97 and accompanying text.

155. *See supra* notes 130-33 and accompanying text.

156. CISG, *supra* note 1, at art. 8. Article 8(3) provides that a court shall give "due consideration [to] all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties." *Id.*

157. RESTATEMENT (SECOND) OF CONTRACTS § 213 (1981); *see also* U.C.C. § 2-202 (1977).

tile from a manufacturer in Italy.[158] MCC Marble brought suit against D'Agostino claiming the defendant did not satisfy orders during the spring and summer of 1991.[159] The defendant responded MCC-Marble had defaulted on the contract by not paying for earlier shipments.[160] Defendant claimed a term found on the reverse side of the contract allowed it to suspend future deliveries if payment had not been received.[161] MCC-Marble argued it never intended to be bound by the terms on the back of the document.[162]

Both parties submitted affidavits acknowledging they subjectively did not intend to be bound by terms located on the reverse side of the contract.[163] However, the defendant contended the parol evidence rule prevented a previous statement from being used to contradict an integrated, written contract.[164] The court determined the parol evidence rule did not apply to contracts governed under the CISG.[165] Because the affidavits indicated both parties were aware of the other side's subjective intent, the court remanded the action to the trial court to find the subjective intent of the parties.[166]

Since the interpretation of a written contract may be based on the previous statements and subjective intent of the parties involved, history and precedent suggests a jury would be better suited to determine this information. Even under *Markman*'s complexity-of-the-information functional consideration, needing to find the subjective intent of the parties would necessitate a jury trial.[167] In *Markman*, the Court held judges are better suited to determine the credibility of expert witness testimony because the "credibility determination [would] be subsumed within the necessarily sophisticated analysis of the whole document, required by the standard construction rule that a term can be defined only in a way that comports with the instrument as a whole."[168] Therefore, the judge would have to determine the subjective intent of the parties involved in addition to determining the credibility of the information presented, a task far removed from simple document interpretation. Moreover, under the functional considera-

158. MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino, S.P.A., 144 F.3d 1384, 1385 (11th Cir. 1998).
159. *Id.*
160. *Id.*
161. *Id.* at 1385-86.
162. *Id.* at 1386.
163. *MCC-Marble Ceramic*, 144 F.3d at 1386.
164. *Id.* at 1388.
165. *Id.* at 1391.
166. *Id.* at 1392.
167. *See* Markman v. Westview Instruments, Inc., 517 U.S. 370, 389 (1996).
168. *Id.*

tion in *Del Monte Dunes*, the fact-law distinction in a case such as this would also be dispositive.[169] In this case, the factual determination of the parties' subjective intent is a question better suited for a jury. Once the judge finds the parol evidence rule does not apply, it becomes a question of fact as to: 1) the subjective intent of the parties prior to signing the agreement and 2) the extent to which the parties knew the other parties' intent. Therefore, regardless of a court's determination on the way history and precedent treated contract disputes, functional considerations, such as those stated in *Markman*[170] and *Del Monte Dunes*,[171] would require contractual provisions under the CISG to be interpreted by a jury pursuant to Seventh Amendment jurisprudence.

V. CONCLUSION

There is no consensus over the status of the Supreme Court's Seventh Amendment jurisprudence. However, it is clear that whether the Court uses a historical test or a more complicated one involving functional considerations, there are strong reasons to afford the right to a jury trial for actions arising under the CISG.

169. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 718-20 (1999).
170. *Markman*, 517 U.S. at 391.
171. *Del Monte Dunes*, 526 U.S. at 723.