

## NOTE

### **Beyond Partisan Policy: The Eleventh Circuit Lays Aside the Parol Evidence Rule in Pursuit of International Uniformity in Commercial Regulation**

#### **I. Introduction**

One of the most significant barriers to effective international trade has been the conflict of laws inherent to the existence of different national legal systems among commercial powers.<sup>1</sup> The growing international character of commerce has led to the interaction of companies whose parent countries differ in theories of contract interpretation.<sup>2</sup> The United Nations sought to lessen this uncertainty in international commercial agreements by unifying worldwide standards for interpreting contracts for the international sale of goods<sup>3</sup> with the enactment of the United Nations Convention on Contracts for the International Sale of Goods (Convention or CISG).<sup>4</sup>

The CISG sets out substantive law “to govern the formation of international sales contracts and the rights and obligations of the buyer and seller.”<sup>5</sup> The Convention’s goal is to adopt uniform

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<sup>1</sup> See FRITZ ENDERLEIN & DIETRICH MASKOW, *INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS* 1 (1992).

<sup>2</sup> See THOMAS R. VAN DERVORT, *INTERNATIONAL LAW AND ORGANIZATION: AN INTRODUCTION* 144-45 (1998) (“Some of the most serious . . . concerns of international risk management to business interests involve how to engage in contractual negotiations that stipulate the ground rules for settlement of disputes between contracting parties.”).

<sup>3</sup> See *id.* at 155.

<sup>4</sup> See *id.*; U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 347, 19 I.L.M. 671 (1980), *reprinted in* 15 U.S.C.A. app. 332 (1998) [hereinafter CISG with all references to specific page numbers of the CISG cited to 15 U.S.C.A. app.].

<sup>5</sup> CISG, *supra* note 4, at 332; see also Letter of Transmittal from Ronald Reagan, President of the United States, to United States Senate (Sept. 21, 1983), *reprinted in* 15

rules which “take into account the different social, economic and legal systems” of all signatories to the treaty.<sup>6</sup> Harmonizing the different theories of contract interpretation practiced by common law countries, such as the United States, with the civil code practices of continental Europe, is one of the major issues to be resolved by the CISG.<sup>7</sup> The method employed to achieve this uniformity requires a compromise among tribunals interpreting the CISG: common law judges, accustomed to following precedent when making a decision, are required to consider the international objectives of the CISG, while civil code justices, who normally rely upon legislative history and the general principles behind a treaty, are instructed to consider international case law.<sup>8</sup> To be successful, the CISG requires that its “rules and terms . . . be given

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U.S.C.A. app. at 362-63 (1998) [hereinafter Letter] (“The Convention would unify the law for international sales, as our Uniform Commercial Code in Article 2 unifies the law for domestic sales.”). However the CISG excludes:

consumer goods sold for personal, family, or household use; goods bought at auction; stocks, securities, negotiable instruments, or money; ships, vessels, or aircraft; electricity; assembly contracts for the supply of goods to be manufactured or produced; contracts for the supply of labor or other services; products liability; and contracts in which the parties choose to be bound by some other law.

VAN DERVORT, *supra* note 2, at 155; *see also* CISG, arts. 2-5, *supra* note 4 (containing enumerated exclusions from the treaty’s application). The text of Article 6 states that “[t]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.” CISG, art. 6, *supra* note 4. *See generally* ENDERLEIN & MASKOW, *supra* note 1, at 48-51 (discussing the opportunity for parties to exclude, vary, or derogate from the terms of the CISG through Article 6).

<sup>6</sup> CISG, *supra* note 4, at 334.

<sup>7</sup> *See* VAN DERVORT, *supra* note 2, at 155.

<sup>8</sup> *See* 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).

According to DiMatteo,

[i]t is common knowledge that common law judges seem traditionally less willing to take recourse to preparatory materials or to refer to the genesis of a statute. . . . [In contrast,] civil law judges are more willing to refer to the preparatory work or legal history of a text than their common law colleagues . . . Continental European judges are far less scrupulous about taking a functional approach than their English or American counterparts.

*Id.* at 133 n.142 (citing KAZUAKI SONO, *The Vienna Sales Convention: History and Perspective*, in *INTERNATIONAL SALE OF GOODS* 1, 7 (Petar Sercevic & Paul Volken eds., 1986)).

original interpretation; . . . [domestic] meanings taken from national legal systems are to be abandoned in favor of independent meanings consistent with the Convention's objectives."<sup>9</sup>

One major area of difficulty surrounding the application of the CISG is that no single body "has jurisdiction to make binding rulings interpreting the [Convention]."<sup>10</sup> Thus, the CISG mandate to abandon domestic precedent and rely upon international case law without providing a tribunal capable of making binding interpretations of CISG provisions has been described by one writer as being demonstrative of "acute legal schizophrenia."<sup>11</sup> Practitioners fear that inconsistent interpretations of the CISG by courts applying the domestic law of their national forum will undermine the Convention's goal of international uniformity, ultimately destroying the effectiveness of the treaty.<sup>12</sup>

A potential problem of interpretation arose in *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.*,<sup>13</sup> where the Court of Appeals for the Eleventh Circuit was faced with the question of whether the parol evidence rule applied in CISG cases.<sup>14</sup> The court found that it had little domestic or international precedent to rely upon in deciding the issue.<sup>15</sup> The issue was compounded by the Convention's international scope and its directive that the CISG's provisions be interpreted according to the observance of good faith in the promotion of international trade.<sup>16</sup>

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<sup>9</sup> DiMatteo, *supra* note 8, at 136.

<sup>10</sup> REED KATHREIN & DANIEL MAGRAW, *THE CONVENTION FOR THE INTERNATIONAL SALE OF GOODS: A HANDBOOK OF BASIC MATERIALS* 11 (1990).

<sup>11</sup> DiMatteo, *supra* note 8, at 136.

<sup>12</sup> *See* VAN DERVORT, *supra* note 2, at 156.

<sup>13</sup> 144 F.3d 1384 (11th Cir. 1998).

<sup>14</sup> *See id.* at 1388.

<sup>15</sup> *See id.* at 1390.

<sup>16</sup> *See id.* at 1390-91 n.18. Specifically, Article 7 of the CISG provides that:

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles

In *MCC-Marble* the Eleventh Circuit held that the Convention rejected the parol evidence rule.<sup>17</sup> In so ruling, the court established clear domestic precedent that upholds the international policy goals of the Convention: “[t]o provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party’s legal system might otherwise apply.”<sup>18</sup> The Eleventh Circuit’s decision to uphold the goal of uniformity in the regulation of international trade serves as an example not only to other U.S. courts applying the CISG but also to the tribunal of every nation that is party to the Convention.

Part II of this Note describes the facts and holdings of the Eleventh Circuit *MCC-Marble* decision.<sup>19</sup> Part III summarizes the relevant background law which provided the basis for the Eleventh Circuit’s reasoning in *MCC-Marble*.<sup>20</sup> Part IV discusses the significance of the decision in *MCC-Marble*,<sup>21</sup> and finally, Part V of this Note concludes that the Eleventh Circuit’s well-reasoned decision will serve to promote uniformity in the regulation of international trade and elevate the United States’ standing among the countries that are party to the Convention.<sup>22</sup>

## II. Statement of the Case

### A. Facts and Procedural History

MCC-Marble Ceramic Center, Inc. (MCC), a Florida corporation engaged in the sale of tiles, filed suit against Ceramica Nuova D’Agostino, S.p.A. (D’Agostino), an Italian tile manufacturer, in the United States District Court for the Southern

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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.

CISG, art. 7; *supra* note 4, at 336 [hereinafter Article 7].

<sup>17</sup> See *MCC-Marble*, 144 F.3d at 1390.

<sup>18</sup> *Id.* at 1391.

<sup>19</sup> See *infra* notes 23-60 and accompanying text.

<sup>20</sup> See *infra* notes 61-126 and accompanying text.

<sup>21</sup> See *infra* notes 127-46 and accompanying text.

<sup>22</sup> See *infra* notes 147-50 and accompanying text.

District of Florida.<sup>23</sup> In its complaint, MCC alleged breach of the contract for the sale of tiles.<sup>24</sup> D'Agostino responded that it had no obligation to perform under the contract because MCC had defaulted on payments for previous shipments.<sup>25</sup> In support of its assertion, D'Agostino relied upon terms found on the reverse side of the forms that the parties utilized to execute their agreement.<sup>26</sup> Directly below the signature of MCC president Juan Carlos Monzon (Monzon), the contract read,<sup>27</sup> "the buyer hereby states that he is aware of the sales conditions stated on the reverse and that he expressly approves of them with special reference to those numbered 1-2-3-4-5-6-7-8."<sup>28</sup> Clause 6(b) printed on the back of the form explicitly reserved D'Agostino the right to cancel any pending contracts with MCC if MCC defaulted on a payment.<sup>29</sup>

In addition to its defenses, D'Agostino filed counterclaims against MCC seeking damages for alleged nonpayment of previous deliveries.<sup>30</sup> MCC responded that those deliveries were of low quality, and, therefore, the CISG entitled MCC to a reduction in

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<sup>23</sup> See *MCC-Marble*, 144 F.3d at 1385.

<sup>24</sup> See *id.* On appeal MCC alleged that the parties entered into a requirements contract in February of 1991. See *id.* MCC received the benefit of that contention because it was the non-moving party on the motion for summary judgment. See *id.* at 1385 n.2.

<sup>25</sup> See *id.* at 1385 & n.2; see also *infra* note 29 and accompanying text (discussing right to cancellation of contract where there is a default of payment).

<sup>26</sup> See *MCC-Marble*, 144 F.3d at 1385.

<sup>27</sup> See *id.* at 1385-86. The form contract was drafted entirely in Italian, which Monzon did not speak. See *id.* at 1385. However, D'Agostino presented MCC with an English translation of the contract which MCC never challenged as inaccurate. See *id.* at 1386 n.3. The court refused to consider MCC's suggestion that the contract should not be enforced due to Monzon's inability to comprehend Italian, noting that "a person who is . . . unfamiliar with the language in which a contract is written and who has signed a document which was not read to him . . . is bound." *Id.* at 1387 n.9 (quoting *Samson Plastic Conduit & Pipe Corp. v. Battenfeld Extrusionstechnik GMBH*, 718 F. Supp. 886, 890 (M.D. Ala. 1989)).

<sup>28</sup> *Id.* at 1386.

<sup>29</sup> See *id.* ("[D]efault or delay in payment within the time agreed upon gives D'Agostino the right to . . . suspend or cancel the contract itself and to cancel possible other pending contracts. . .").

<sup>30</sup> See *id.*

price.<sup>31</sup> Although evidence existed that MCC complained about the defects to D'Agostino, MCC never submitted a written complaint to D'Agostino.<sup>32</sup> D'Agostino then referred to Clause 4 of the contract, also printed on the back of the form, which read: "Possible complaints for defects of the merchandise must be made in writing."<sup>33</sup>

MCC did not dispute D'Agostino's version of the facts but instead claimed that the parties never intended for the terms on the back of the forms to apply to their agreement.<sup>34</sup> In support of its position, MCC produced affidavits from MCC's President, Monzon, and from two of D'Agostino's representatives who negotiated the contract on D'Agostino's behalf.<sup>35</sup> All three affidavits asserted that MCC subjectively intended not to be bound by the terms on the reverse side of the contract forms and that D'Agostino was aware of MCC's subjective intent not to be bound by those terms.<sup>36</sup> The district court, however, ruled that the parol evidence rule applied.<sup>37</sup> Therefore, the court held that even if the affidavits were true, they did not raise an issue of material fact regarding the interpretation of the contract or the applicability of the terms printed on the reverse side of the form.<sup>38</sup> The district court then granted D'Agostino's motion for summary judgment, and MCC instituted its appeal.<sup>39</sup>

### *B. The Eleventh Circuit's Decision*

In its *de novo* review of the district court's grant of summary judgment for D'Agostino, the Eleventh Circuit Court of Appeals

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<sup>31</sup> *See id.*; *see also* CISG, art. 50, *supra* note 4, at 347 (entitling a buyer of non-conforming goods to a proportional discount in price). The parties agreed that the CISG governed this case since the parties to the dispute each have their place of business in a nation party to the Convention. *See MCC-Marble*, 144 F.3d at 1386.

<sup>32</sup> *See MCC-Marble*, 144 F.3d at 1386.

<sup>33</sup> *Id.*

<sup>34</sup> *See id.*

<sup>35</sup> *See id.*

<sup>36</sup> *See id.*

<sup>37</sup> *See id.* at 1387.

<sup>38</sup> *See id.* at 1386.

<sup>39</sup> *See id.*

considered: (1) whether the lower court improperly ignored MCC's affidavits, and (2) whether the parol evidence rule was improperly applied "in derogation of the CISG."<sup>40</sup>

The Eleventh Circuit determined that the CISG controlled the dispute,<sup>41</sup> particularly Article 8, which governs the interpretation of statements and conduct of parties to an international contract for the sale of goods.<sup>42</sup> The court found that, contrary to U.S. law,<sup>43</sup> Article 8(1) required the court to consider evidence of a party's subjective intent to contract when the other party to the contract was aware of that intent.<sup>44</sup> Thus, the Eleventh Circuit decided that Article 8(1) required the lower court to consider evidence of subjective intent to interpret both the statements and the conduct of the parties.<sup>45</sup> The court found that MCC's affidavits constituted evidence that D'Agostino was aware of MCC's subjective intent not to be bound by the terms on the back of the forms.<sup>46</sup> Therefore, the Eleventh Circuit held that the lower court was incorrect in

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<sup>40</sup> *Id.* at 1386-87.

<sup>41</sup> *See id.* (citing CISG, art. 1, *supra* note 4, at 334-35); *see also supra* note 31 (discussing the parties' agreement that the CISG governed this dispute).

<sup>42</sup> *See MCC-Marble*, 144 F.3d at 1386-87. Article 8 states:

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

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

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

CISG, art. 8, *supra* note 4, at 336 [hereinafter Article 8].

<sup>43</sup> *See MCC-Marble*, 144 F.3d at 1387 n.8. Citing various authorities, the Eleventh Circuit noted that U.S. legislatures, courts, and legal theorists expressed a preference for relying on objective evidence of a party's intent to contract. *See id.*

<sup>44</sup> *See id.* at 1387; *see also* Article 8(1), *supra* note 42 (enumerating the language of Article 8(1)).

<sup>45</sup> *See MCC-Marble*, 144 F.3d at 1388.

<sup>46</sup> *See id.*

refusing to consider MCC's evidence.<sup>47</sup>

The court then addressed the question of whether the parol evidence rule applied in CISG cases.<sup>48</sup> After noting that the question was one of first impression in the Eleventh Circuit, the court addressed the nature of the parol evidence rule.<sup>49</sup> The court observed that the parol evidence rule was a substantive rule of law and not a rule of evidence to be applied as a matter of procedure.<sup>50</sup> Considering the importance of parties' conduct under Article 8(1), the Eleventh Circuit read Article 8(3) as "a clear instruction to admit and consider parol evidence regarding the negotiations to the extent they reveal the parties' subjective intent."<sup>51</sup> Thus, the Eleventh Circuit found that the Convention rejected the parol evidence rule.<sup>52</sup> While the court noted that "surprisingly few cases have applied the Convention in the United States,"<sup>53</sup> it found that the "great weight of academic commentary" supported its opinion.<sup>54</sup>

Nevertheless, the Eleventh Circuit explained that the exclusion of the parol evidence rule by the CISG would not always prevent parties from obtaining summary judgment.<sup>55</sup> The court reasoned that most cases would not present the situation where both parties would testify to a subjective intent not to be bound by certain terms of their contract.<sup>56</sup> Thus, the court noted that Article 8(2) of the Convention, rather than Article 8(1), would govern the majority of cases and require objective proof of the party's subjective intent in order to sustain a motion for summary

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<sup>47</sup> *See id.*

<sup>48</sup> *See id.*

<sup>49</sup> *See id.*

<sup>50</sup> *See id.* at 1388-89 (citing 2 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.2, at 194 (1990)); *see also infra* note 86 and accompanying text (distinguishing substantive rules of law and rules of evidence).

<sup>51</sup> *MCC-Marble*, 144 F.3d at 1389; *see also* Article 8, *supra* note 42 (enumerating the language of Article 8(3)).

<sup>52</sup> *See MCC-Marble*, 144 F.3d at 1390.

<sup>53</sup> *Id.* at 1389.

<sup>54</sup> *Id.* at 1390-91.

<sup>55</sup> *See id.* at 1391.

<sup>56</sup> *See id.*

judgment.<sup>57</sup> The court also suggested that the inclusion of a standard merger clause would preclude the admissibility of parol evidence in contracts governed by the CISG.<sup>58</sup>

Ultimately, the Eleventh Circuit made clear that its ruling was rendered in order to “achieve the directives of good faith and uniformity in contracts under the CISG by interpreting and applying the plain language of Article 8(3) as written and obeying its directive to consider this type of parol evidence.”<sup>59</sup> Thus, the Eleventh Circuit reversed the lower court’s grant of summary judgment and remanded the case for further proceedings, reasoning that MCC’s evidence presented a genuine issue regarding the parties’ intent to be bound by the terms on the back of their contract.<sup>60</sup>

### III. Background Law

In *MCC-Marble*, the Eleventh Circuit was faced with interpreting the CISG despite a lack of precedent.<sup>61</sup> Ultimately, the court relied on the objectives of the CISG<sup>62</sup> and academic commentary in reaching its decision.<sup>63</sup>

#### A. CISG and Treaty Interpretation

The CISG governs contracts for the international sale of goods

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<sup>57</sup> See *id.* (citing JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION § 107, at 164-65 (2d ed. 1991)); see also Article 8(2), *supra* note 42 (enumerating the language of Article 8(2)).

<sup>58</sup> See *MCC-Marble*, 144 F.3d at 1391 n.19 (citing I. ALBERT KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 125 (1989)); see also Harry M. Flechtner, Symposium, *Ten Years of the United Nations Sales Convention: 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, 201-03 (1998) (discussing the usage of merger clauses in contracts governed by the CISG).

<sup>59</sup> *MCC-Marble*, 144 F.3d at 1391 n.19.

<sup>60</sup> See *id.* at 1392-93. The court explained that while the affidavits were sufficient for MCC to withstand D’Agostino’s motion for summary judgment, they were not conclusive of the parties’ intent. See *id.* at 1392. Therefore, the affiants’ credibility should be judged by the finder of fact. See *id.*

<sup>61</sup> See *id.* at 1389 n.14.

<sup>62</sup> See *infra* notes 71-73 and accompanying text.

<sup>63</sup> See *infra* notes 104-26 and accompanying text.

between parties whose places of business are in different signatory countries.<sup>64</sup> The Convention is the product of over fifty years of effort by various international organizations pursuing the goal of international uniformity in commercial regulation.<sup>65</sup> The United States and Italy, among other countries, ratified the Convention on December 11, 1986,<sup>66</sup> and the CISG became effective on January 1, 1988.<sup>67</sup> Pursuant to the U.S. Constitution, the treaty became binding on U.S. courts upon ratification.<sup>68</sup> Therefore, the “substantive international law of contract embodied in the [CISG]”<sup>69</sup> applied to the facts of *MCC-Marble*.<sup>70</sup>

The Convention’s objective was to adopt uniform rules to govern international trade that would “take into account the different social, economic and legal systems” of the parties to the Convention in order to promote the development of international trade.<sup>71</sup> The Convention sought to promote “equality and mutual benefit”<sup>72</sup> among its members through “enhancing legal certainty

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<sup>64</sup> See CISG, art. 1, *supra* note 4, at 335; *Filanto, S.p.A. v. Chilewich Int’l Corp.*, 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992) (“[T]he Convention governs . . . contracts between parties with places of business in different nations, so long as both nations are signatories of the Convention.”).

<sup>65</sup> See VAN DERVORT, *supra* note 2, at 155.

<sup>66</sup> See CISG, *supra* note 4, at 361-62 (listing signatory nations to the Convention). Neither Japan nor Great Britain are signatory countries. See *id.*; see also DiMatteo, *supra* note 8, at 113 n.9 (noting that the United Kingdom is not among the states party to the Convention).

<sup>67</sup> See CISG, *supra* note 4, at 332.

<sup>68</sup> See *Filanto*, 789 F. Supp. at 1237 n.5 (relying on *Havenstein v. Lynham*, 100 U.S. 483, 490 (1880)) (“[T]he Constitution, laws, and treaties of the United States are as much a part of the law of every state as its own local laws and Constitution.”); see also U.S. CONST. art. VI, cl. 2. The ratification of the CISG was the first time in U.S. history that a treaty had been used to enact a private law, a power normally reserved to the States. See VAN DERVORT, *supra* note 2, at 155.

<sup>69</sup> *Filanto*, 789 F. Supp. at 1237.

<sup>70</sup> See *MCC-Marble*, 144 F.3d 1384, 1385 (11th Cir. 1998) (noting that the parties to the dispute each have their place of business in a different signatory nation). A contract for the commercial sale of tiles is not among the convention’s exclusions. See *supra* note 5 (enumerating CISG exclusions).

<sup>71</sup> CISG, *supra* note 4, at 334.

<sup>72</sup> *Id.*

for international sales contracts.”<sup>73</sup>

Generally, there exist two primary sources to guide the interpretation of international law: (1) international agreements, and (2) customary international law.<sup>74</sup> Unfortunately, neither source proved useful to the Eleventh Circuit in its evaluation of *MCC-Marble*. The dominant international agreement addressing the interpretation of treaties is the Vienna Convention, Articles 31, 32, and 33.<sup>75</sup> The United States, however, is not a party to the Vienna Convention, and, therefore, the Eleventh Circuit was not bound by its guidelines.<sup>76</sup> Furthermore, the Eleventh Circuit noted the lack of international judicial decisions on point, leaving the court with little persuasive customary international law to assist in its interpretation of the Convention.<sup>77</sup>

The CISG itself, however, provides some guidance for the interpretation of its provisions. Article 7 of the CISG explicitly

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<sup>73</sup> Letter, *supra* note 5, at 363.

<sup>74</sup> See KATHREIN & MAGRAW, *supra* note 10, at 6. Domestic guidelines, however, did exist for treaty interpretation. Section 325 of the Revised Restatement of the Foreign Relations Law of the United States was modeled on portions of the Vienna Convention’s provisions regarding treaty interpretation. See RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 (tent. Final Draft 1985) [hereinafter Restatement]. Section 325 of the Restatement urges courts to interpret international treaties in accordance with the ordinary meaning of their terms and in light of the treaty’s object and purpose. See *id.* The Restatement also requires subsequent agreements or practice between the parties to be taken into account when interpreting the treaty. See *id.* While the Restatement calls for an objective approach when interpreting international agreements, the U.S. Supreme Court prefers a more subjective approach. See *id.*; see also KATHREIN & MAGRAW, *supra* note 10, at 6 (noting that the Restatement aims for an objective approach to treaty interpretation through directing courts to ascertain the meaning of treaty text and to give effect to that meaning). In *Air France v. Saks*, the U.S. Supreme Court explained that “[i]n interpreting a treaty, it is proper, of course, to refer to the records of its drafting and negotiation.” 470 U.S. 392, 400 (1985). The Supreme Court thus concluded that the intent of the framing parties should be considered when interpreting an international treaty. See *id.* But cf. *supra* note 8 and accompanying text (noting that common law systems do not usually consider legislative materials when interpreting treaties).

<sup>75</sup> See KATHREIN & MAGRAW, *supra* note 10, at 6.

<sup>76</sup> See *id.* at 6-7.

<sup>77</sup> See *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D’Agostino, S.p.A.*, 144 F.3d 1384, 1390 n.14 (11th Cir. 1998); see also KATHREIN & MAGRAW, *supra* note 10, at 6-7 (noting that, despite some argument to the contrary, the Vienna Convention should not be considered reflective of customary international law).

calls for a teleological approach when interpreting the Convention.<sup>78</sup> Article 7 requires that courts give “regard . . . to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.”<sup>79</sup> Article 7 also makes clear that “[q]uestions 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.”<sup>80</sup> Thus, the CISG urges that any interpretation of its provisions be made according to the Convention’s overall purpose of uniformity in international commercial regulation.<sup>81</sup>

### *B. The Parol Evidence Rule and the CISG*

In the United States, the parol evidence rule exists as a common law principle<sup>82</sup> and as a statutory provision of the UCC.<sup>83</sup> The rule bars extrinsic evidence used to contradict the written terms of an agreement.<sup>84</sup> Additionally, the rule may bar the use of extrinsic evidence to supplement the terms of an agreement.<sup>85</sup> However, the parol “evidence” rule is somewhat of a misnomer, as the rule is one of substantive law and not a procedural rule of evidence.<sup>86</sup>

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<sup>78</sup> See Article 7(1), *supra* note 16; see generally KATHREIN & MAGRAW, *supra* note 10, at 6-11 (noting that the subjective, objective, and teleological methods of treaty interpretation are not mutually exclusive).

<sup>79</sup> Article 7(1), *supra* note 16.

<sup>80</sup> Article 7(2), *supra* note 16.

<sup>81</sup> See *id.*; *MCC-Marble*, 144 F.3d at 1387.

<sup>82</sup> See *Cipriano v. Triad Mechanical, Inc.*, 925 P.2d 918, 922 (Or. Ct. App. 1996); *Gianni v. R. Russell & Co.*, 125 A. 791, 792 (Pa. 1924); see also *United States v. Service Engineering Co.*, No. C-93-2591-VRW, No. C-94-0271-VRW, 1994 U.S. Dist. LEXIS 13596, at \*19-22 (N.D. Cal. Sept. 15, 1994) (summarizing cases that apply the federal common law of the parol evidence rule).

<sup>83</sup> See UNIFORM COMMERCIAL CODE § 2-202 (1997).

<sup>84</sup> See FARNSWORTH, *supra* note 50, at 192.

<sup>85</sup> See *id.*

<sup>86</sup> See *MCC-Marble*, 144 F.3d at 1388-89 (11th Cir. 1998). The distinction between substantive law and an evidentiary rule is crucial because if the parol evidence rule was an evidentiary rule, it would be applicable as a Federal Rule of Evidence in a U.S. district court. See *id.* at 1389 (citing FARNSWORTH, *supra* note 50, at 196). However, since the rule is substantive in nature, the Eleventh Circuit needed to

The rule has suffered heavy criticism, and some academic authority celebrated the CISG for discarding the “embarrassment” of the rule’s application.<sup>87</sup> Professor John Honnold,<sup>88</sup> who has written extensively on the CISG, concluded that the parol evidence rule does not apply to contracts governed by the Convention.<sup>89</sup> Professor Honnold reasoned that the language of Article 8(3), which reads that “due consideration is to be given to all relevant circumstances of the case,” is sufficient to bar the application of the parol evidence rule under the CISG.<sup>90</sup>

While the parol evidence rule is applicable in many domestic contract cases,<sup>91</sup> U.S. courts have been uncertain whether the parol evidence rule applies under the CISG.<sup>92</sup> The issue was raised in dicta for the first time by the Southern District of New York in *Filanto, S.p.A. v. Chilewich Int’l Corp.*<sup>93</sup> In deciding an issue of offer and acceptance in a case governed by the Convention, the court noted that Article 8(3) of the CISG “essentially rejects both the Statute of Frauds and the parol evidence rule.”<sup>94</sup> *Filanto* briefly mentioned its interpretation of Article 8(3) as excluding the parol evidence rule only to illustrate its contention that “[the CISG] varies from the UCC in many significant ways.”<sup>95</sup> *Filanto*

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determine whether it was applicable under the CISG as the controlling law of the case. *See id.* at 1388-89.

<sup>87</sup> *See* HONNOLD, *supra* note 57, at 171.

<sup>88</sup> John Honnold’s credentials include Schnader Professor of Commercial Law at the University of Pennsylvania and Goodhart Professor of the Science of Law at the University of Cambridge. *See id.* at 3.

<sup>89</sup> *See id.* at 171.

<sup>90</sup> *Id.* at 170-71 (citing Article 8(3), *supra* note 42).

<sup>91</sup> *See supra* notes 82-83 and accompanying text.

<sup>92</sup> *See* Article 8, *supra* note 42 (making no explicit reference to the parol evidence rule); *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D’Agostino, S.p.A.*, 144 F.3d 1384, 1389 (11th Cir. 1998) (“The CISG itself contains no express statement on the role of parol evidence.”); HONNOLD, *supra* note 57, at 170 (“Article 8 does not directly address the parol evidence rule.”).

<sup>93</sup> 789 F. Supp. 1229, 1238 n.7 (S.D.N.Y. 1992).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1238. *Filanto* held that the CISG reversed the offer and acceptance rule of the UCC and applied the common law rule instead. *See id.* In support of this holding, the court remarked, in dicta, that the CISG also rejected the Statute of Frauds and the parol evidence rule. *See id.* at n.7.

made no analytical attempt to reconcile Article 8 with the parol evidence rule, or to further explain its opinion that Article 8(3) operated as a rejection of the rule.<sup>96</sup>

The question of whether the parol evidence rule applied to CISG cases re-emerged in the Fifth Circuit case *Beijing Metals & Minerals Import/Export Corp. v. American Business Center*.<sup>97</sup> In *Beijing Metals*, MMB, an exercise equipment manufacturer located in China,<sup>98</sup> won its motion for summary judgment on a claim for breach of contract against ABC, a Texas corporation.<sup>99</sup> On appeal ABC sought to introduce parol evidence of two previous oral agreements as a defense to its obligations under the contract.<sup>100</sup> ABC argued that the lower court should not have applied the parol evidence rule since the case was governed by the CISG.<sup>101</sup> However, without explaining its reasoning, the Fifth Circuit decided that Texas law, and not the CISG, applied to the case.<sup>102</sup> The court went on to indicate that the parol evidence rule would have applied "regardless" of which law governed.<sup>103</sup>

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<sup>96</sup> *See id.*

<sup>97</sup> 993 F.2d 1178, 1182 n.9 (5th Cir. 1993).

<sup>98</sup> China is a signatory country to the CISG. *See CISG, supra* note 4, at 361-62.

<sup>99</sup> *See id.*; *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino, S.p.A.*, 144 F.3d 1384, 1389 n.14 (11th Cir. 1998) (noting that the exact location of ABC's business is not explicitly clear, but inferred through the text). The United States and China are both nations party to the Convention and are therefore subject to the CISG. *See CISG, supra* note 4, at 361-62.

<sup>100</sup> *See Beijing Metals*, 993 F.2d at 1182. In addition to arguing a misapplication of the parol evidence rule, ABC raised the defenses of duress and fraud. *See id.* at 1184-85.

<sup>101</sup> *See id.* at 1182 n.9.

<sup>102</sup> *See id.* Nothing in the opinion suggests that the parties had a choice of law clause to displace the CISG. *See id.*

<sup>103</sup> *See id.* The Fifth Circuit also found that the disputed contract was not for the sale of goods. *See id.* at 1183 n.10 (finding that the contract resembles a settlement agreement). This finding was crucial in that the CISG only applies to international contracts for the sale of goods. *See supra* note 5 and accompanying text. Thus, the Fifth Circuit suggested that the contract in *Beijing Metals* might have fallen outside the scope of the CISG despite the court's choice of law decision. *See Beijing Metals*, 993 F.2d at 1183 n.10. *But see* Harry M. Flechtner, *Recent Developments: CISG. More U.S. Decisions on the U.N. Sales Convention: Scope, Parol Evidence, "Validity" and Reduction of Price under Article 50*, 14 J.L. & COM. 153, 163-65 (1995) (arguing that the contract in *Beijing Metals* would have come within the scope of the CISG even if it were a settlement agreement).

### C. Academic Commentary

The dicta in *Beijing Metals*, which construed the CISG and the parol evidence rule as consistent,<sup>104</sup> soon sparked academic debate. While Harry M. Flechtner, Professor of Law at the University of Pittsburgh, acknowledged that “the approach to parol evidence questions taken by the Fifth Circuit in *Beijing Metals* is inconsistent with CISG,”<sup>105</sup> he argued that “the extent to which CISG preempts the parol evidence rule is very limited indeed.”<sup>106</sup> Professor Flechtner contended that “while the parol evidence rule may preclude evidence of distinct *terms* omitted from a writing, modern formulations of the rule do not bar evidence of prior negotiations introduced to aid in interpreting the writing.”<sup>107</sup> Essentially, Professor Flechtner proposed that Article 8’s use of prior negotiations as evidence of a party’s intent in contracting “addresses interpretive matters generally beyond the preclusive scope of the parol evidence rule.”<sup>108</sup> However, Professor Flechtner found error in the Fifth Circuit’s consideration of “special procedures and tests” of the parol evidence rule unique to the U.S. common law.<sup>109</sup> Professor Flechtner thus condemned the *Beijing Metals* court’s application of a rule “encrusted by purely domestic precedent” as violative of the international uniformity sought for by the CISG.<sup>110</sup>

A recent academic writer disagreed with Professor Flechtner’s analysis and attempted to reconcile the CISG with the parol

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<sup>104</sup> See 993 F.2d at 1182 n.9 (“We need not resolve this choice of law issue, because our discussion is limited to application of the parol evidence rule (which applies regardless) . . .”).

<sup>105</sup> Flechtner, *supra* note 103, at 158.

<sup>106</sup> *Id.* at 157.

<sup>107</sup> *Id.* at 158 (citations omitted).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 159. Professor Flechtner cites the “special procedures and tests” that arose unique to U.S. common law as: (1) a presumption that a writing is an integration of the parties’ agreement, and (2) the “normally and naturally” test (whether the collateral agreement was of the sort which would “normally and naturally” be reduced to writing). *Id.*

<sup>110</sup> *Id.* at 160.

evidence rule.<sup>111</sup> David H. Moore argued that the parol evidence rule operates initially as “a mere application of Article 8.”<sup>112</sup> He suggested that an application of the parol evidence rule is consistent with Article 8’s instruction to give “due consideration . . . to all relevant circumstances” regarding the parties’ intent to fully integrate their agreement.<sup>113</sup> Mr. Moore theorized that both the parol evidence rule and Article 8 operate to exclude evidence not relating to the parties’ intent to fully integrate their agreement.<sup>114</sup>

Mr. Moore continued with a two-fold argument wherein he construed the parol evidence rule as consistent with the international uniformity called for in Article 7 of the CISG.<sup>115</sup> First, he argued that most states party to the Convention assign the task of contract interpretation to judges rather than to juries.<sup>116</sup> Therefore, the application of the parol evidence rule requiring judges to interpret parties’ intent would bring “U.S. courts into greater procedural harmony with courts of other nations in applying the Convention.”<sup>117</sup> Second, noting that the Convention does not address the parol evidence rule,<sup>118</sup> the author proposed that Article 7(2) of the Convention allows courts to apply their forum’s domestic law to matters not expressly settled within the CISG.<sup>119</sup> The author suggested that as long as the domestic law was (1) “in conformity with ‘the Convention’s underlying principles,’” and (2) in accordance with the uniformity directive of

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<sup>111</sup> See David H. Moore, Note, *The Parol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*, 1995 BYU L. REV. 1347, 1358 (1995). Mr. Moore appears to be the only writer to have made an attempt to reconcile the CISG with the parol evidence rule. See *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D’Agostino, S.p.A.*, 144 F.3d 1384, 1390 (11th Cir. 1998).

<sup>112</sup> Moore, *supra* note 111, at 1361 (citations omitted).

<sup>113</sup> *Id.* at 1363 (citing Article 8(3), *supra* note 42).

<sup>114</sup> See *id.*

<sup>115</sup> See *id.* at 1364-65; Article 7, *supra* note 16; *supra* notes 79-81 and accompanying text.

<sup>116</sup> See Moore, *supra* note 111, at 1365.

<sup>117</sup> *Id.* at 1366.

<sup>118</sup> See *id.*

<sup>119</sup> See *id.* at 1368; see also Article 7(2), *supra* note 16.

Article 7(1), the CISG would allow its application to resolve unsettled issues.<sup>120</sup> Mr. Moore considered the parol evidence rule to be a domestic law meeting these criteria, and, thus, in conformity with the CISG.<sup>121</sup>

The inconsistencies of the United States' judicial interpretations of the CISG have also been recognized by the international community. For example, a renowned German academic commentary on the CISG<sup>122</sup> recently suggested that the Fifth Circuit misapplied the Convention in *Beijing Metals*. The German criticism emphasized that "[d]omestic rules of interpretation are . . . overridden in so far as they recognize only written declarations and do not permit proof that something else was agreed orally or some other meaning intended."<sup>123</sup> The German commentary further noted that, while there existed a preference for written evidence of a party's contractual intent, the parol evidence rule<sup>124</sup> could not restrict evidence of intent found in conduct or oral representations.<sup>125</sup> Therefore, the dicta in *Beijing Metals* which construed the parol evidence rule and the CISG as consistent is considered "doubtful" by the German authority.<sup>126</sup>

#### IV. Significance of the Case

The Eleventh Circuit, in holding that the parol evidence rule does not apply to cases governed by the CISG, did not have the

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<sup>120</sup> Moore, *supra* note 111, at 1368 (citing Article 7(2), *supra* note 16).

<sup>121</sup> *See id.*

<sup>122</sup> *Foreward COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)* (Peter Schlechtriem ed. & Geoffrey Thomas trans., Clarendon Press 2d ed. 1998) [hereinafter *Commentary*] (noting the purpose of the English translation is to provide English readers with an understanding of how German jurists apply the CISG). *See* Claire M. Germain, *The United Nations Convention on Contracts for the International Sale of Goods: Guide to Research and Literature*, in *CORNELL REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 117, 124 (1995) (noting that the German Commentary was written by a member of the then-West German delegation to the CISG Conference).

<sup>123</sup> *Commentary*, Art. 11 § 13.

<sup>124</sup> Uniform Commercial Code § 2-202 is cited as an example of the parol evidence rule. *See id.*

<sup>125</sup> *See id.*

<sup>126</sup> *See* *Commentary*, Art. 11 § 13 n.35, *supra* note 122.

benefit of international precedent to serve as a guide.<sup>127</sup> Instead, the court was faced with the burden of settling an issue of first impression which would have ramifications on commercial law at the international level.<sup>128</sup> As a result, the Eleventh Circuit underwent a carefully reasoned, complete analysis of the issue while considering the international interests at stake.<sup>129</sup> Although it is likely, as the Eleventh Circuit noted, that most cases will be governed by Article 8(2),<sup>130</sup> *MCC-Marble* will add an element of certainty to the application of the CISG in the United States.

Furthermore, the Eleventh Circuit's decision will serve to facilitate international commercial transactions governed by the CISG. By abandoning substantive domestic law in pursuit of international uniformity, the Eleventh Circuit will make U.S. case law more consistent with the Convention's goals.<sup>131</sup> The final result of the Eleventh Circuit's analysis in *MCC-Marble* will have two important effects: (1) the holding will serve as an important precedent for U.S. federal courts when applying the CISG, and (2) the decision will promote international trade through serving the Convention's goal of international uniformity in commercial regulation.

U.S. federal courts faced with the task of applying the CISG tend to refer to familiar domestic law, particularly the UCC, to aid in interpreting the provisions of the Convention.<sup>132</sup> While the UCC

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<sup>127</sup> See *supra* note 77 and accompanying text.

<sup>128</sup> See *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino, S.p.A.*, 144 F.3d 1384, 1388 (11th Cir. 1998).

<sup>129</sup> See *id.* at 1388-93.

<sup>130</sup> See *supra* notes 56-57 and accompanying text.

<sup>131</sup> See *supra* notes 41-47, 71-73 and accompanying text.

<sup>132</sup> See *Delchi Carrier, S.p.A. v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2d Cir. 1995) (noting that case law interpreting analogous provisions of the Uniform Commercial Code (UCC) may inform a court where the language of the CISG is similar but that such case law is not per se applicable); *Calzaturificio Claudia v. Olivieri Footwear, Ltd.*, No. 96-C8052, 1998 U.S. Dist. LEXIS 4586, at \*14 (S.D.N.Y. Apr. 7, 1998) (citing *Delchi Carrier* when noting that the UCC may sometimes aid in interpreting the CISG). The reasoning in *Claudia* is nearly identical to that of *MCC-Marble*. The notable distinction between the cases is that the *Claudia* analysis includes mention of the UCC's usefulness when interpreting the CISG, where *MCC-Marble* does not. Compare *Claudia*, 1998 U.S. Dist. LEXIS, at \*14 with *MCC-Marble*, 144 F.3d 1384.

may be a tempting guide to federal judges unfamiliar with international commercial law, it is not *per se* applicable to CISG cases.<sup>133</sup> Not only is there a constitutional basis for the CISG's displacement of the UCC in the area of international commercial law,<sup>134</sup> but the United States also agreed to pursue uniformity in the application of the CISG by virtue of its becoming a party to the Convention.<sup>135</sup> In pursuing international uniformity in the application of the CISG, it is incumbent upon all of its member countries to "reduce the incidence of inconsistent interpretations of the Convention"<sup>136</sup> through taking "into account the different social, economic, and legal systems"<sup>137</sup> of other States that are party to the Convention. Prior to *MCC-Marble*, the cases that addressed the issue of the parol evidence rule within the CISG left behind only inconsistency and confusion.<sup>138</sup>

The Eleventh Circuit paid strict attention to its international responsibility in its interpretation of the CISG<sup>139</sup> through emphasizing the importance of setting aside familiar domestic law in order to further international uniformity.<sup>140</sup> Instead of categorizing the rejection of the parol evidence rule as a blunder,<sup>141</sup> the Eleventh Circuit suggested that the Convention was a

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<sup>133</sup> See *Orbisphere Corp. v. United States*, 726 F. Supp. 1344, 1355 (Ct. Int'l Trade 1989) ("[T]he . . . UCC is not *per se* applicable [to a CISG case], and certainly not in the abstract binding, on this Court.").

<sup>134</sup> See *supra* note 68 and accompanying text.

<sup>135</sup> See CISG, *supra* note 4, at 334.

<sup>136</sup> KATHREIN & MAGRAW, *supra* note 10, at 11.

<sup>137</sup> CISG, *supra* note 4, at 334.

<sup>138</sup> See *supra* notes 92-121 (discussing the inconsistencies of *Filanto* and *Beijing Metals* regarding the parol evidence issue). But see *Calzaturificio Claudia v. Olivieri Footwear, Ltd.*, No. 96-C8052, 1998 U.S. Dist. LEXIS 4586, at \*14-18 (S.D.N.Y. Apr. 7, 1998) (holding that the parol evidence rule did not apply to facts similar to those of *MCC-Marble*).

<sup>139</sup> See *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino, S.p.A.*, 144 F.3d 1384, 1387 (11th Cir. 1998).

<sup>140</sup> See *id.* at 1390.

<sup>141</sup> See *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1238 (S.D.N.Y. 1992) ("[T]he [UCC], as previously noted does not apply to this case, because the State Department undertook to fix something that was not broken by helping to create the [CISG] which varies from the [UCC] in many significant ways.").

progressive model for modern legislation. The court did this by suggesting that the parol evidence rule was an “embarrassment for the administration of modern transactions”<sup>142</sup> and noting that many “States Party to the CISG have rejected the rule in their domestic jurisdictions.”<sup>143</sup> Thus, the Eleventh Circuit paid deference to the CISG and furthered its goal of promoting international trade by ruling that the parol evidence rule did not apply to cases governed by the Convention.<sup>144</sup>

*MCC-Marble*'s holding will serve as precedent for U.S. courts<sup>145</sup> faced with applying the CISG, particularly to cases falling within the scope of Article 8(1) of the Convention.<sup>146</sup>

## V. Conclusion

The Eleventh Circuit's deferential interpretation of the CISG<sup>147</sup> will lead to increased U.S. attention on the international goals of the Convention and a decreased concern about its departure from U.S. substantive law.<sup>148</sup> The holding in *MCC-Marble* will also reduce the reliance U.S. courts have on domestic law when interpreting the provisions of the Convention.<sup>149</sup> These will be the results of the Eleventh Circuit's recognition that the provisions of the CISG can effectively operate without need for intrusive

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<sup>142</sup> *MCC-Marble*, 144 F.3d at 1390 (quoting HONNOLD, *supra* note 57, at 170-71).

<sup>143</sup> *Id.* at 1391.

<sup>144</sup> *See id.* The court employed a teleological approach to treaty interpretation and reasoned that the parol evidence rule was inconsistent with the international uniformity called for in Article 7 of the Convention. *See id.*; *see also supra* notes 78-81 and accompanying text (discussing the basis for a teleological approach to treaty interpretation).

<sup>145</sup> *See* KATHREIN & MAGRAW, *supra* note 10, at 10 (noting that one country's interpretation of the CISG will not necessarily bind the courts of another country faced with interpreting the Convention).

<sup>146</sup> *See MCC-Marble*, 144 F.3d at 1391 (stating that most cases will be governed by Article 8(2) which requires objective evidence of a party's intent).

<sup>147</sup> *See id.* (noting that the Convention requires the courts of signatory states to set aside familiar principles of domestic law in order to achieve its directives of good faith and uniformity in international commercial regulation).

<sup>148</sup> *See supra* notes 95 and 141 and accompanying text.

<sup>149</sup> *See supra* notes 132-33 and accompanying text.

application of U.S. domestic law.<sup>150</sup>

Perhaps even more important will be *MCC-Marble*'s effect on international uniformity in the application of the CISG. Although the Eleventh Circuit's decision will not have binding effect on the courts of other states party to the Convention, the *MCC-Marble* decision will certainly be recognized by other members of the international community. The Eleventh Circuit's deference to the international goal of the CISG will serve to heighten American standing in the world of international trade and reinforce the stability of international commercial contracts under the Convention.

MICHAEL J. KOLOSKY

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<sup>150</sup> See DiMatteo, *supra* note 8, at 138 (emphasizing the need for courts to use the CISG as a fully integrated statute, rather than relying upon the domestic law of their own forum, in order to achieve international uniformity); see also HONNOLD, *supra* note 57, at 171 (noting that the Convention, in excluding the parol evidence rule, does not interfere with the allocation of authority between the judge and jury, and would not interfere with the decision to exclude from a jury evidence of prior or contemporaneous agreements if the court finds that the agreement was fully integrated).