

January 2009

Beyond the Four Corners of a Written Contract: A Global Challenge to U.S. Contract Law

Chunlin Leonhard

Follow this and additional works at: <https://digitalcommons.pace.edu/pilr>

Recommended Citation

Chunlin Leonhard, *Beyond the Four Corners of a Written Contract: A Global Challenge to U.S. Contract Law*, 21 Pace Int'l L. Rev. 1 (2009)

DOI: <https://doi.org/10.58948/2331-3536.1033>

Available at: <https://digitalcommons.pace.edu/pilr/vol21/iss1/1>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace International Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

PACE UNIVERSITY
SCHOOL OF LAW

INTERNATIONAL LAW REVIEW

Volume XXI, Number I

Winter 2009

ARTICLES

**BEYOND THE FOUR CORNERS
OF A WRITTEN CONTRACT:
A GLOBAL CHALLENGE TO
U.S. CONTRACT LAW**

Chunlin Leonhard¹

“... [A] great deal of American contract law and scholarship now seems to proceed from a perspective of universalism. American universalism assumes, often tacitly, that domestic theories in contemporary American debate are valid not only across the world, but throughout time. In other words, the assumption is made that such theories are valid transculturally and objectively true.”²

¹ This article has benefited tremendously from discussions at the April 27, 2007 Conference of Asian Pacific American Law Faculty held at William Mitchell School of Law, including, without limitation, discussions with Professors Ilhyung Lee of University of Missouri and Nancy S. Kim of California Western School of Law. I am grateful to the faculty of Loyola University School of Law in Chicago for their support and encouragement. In particular, I want to thank Loyola University Professors Michael Kaufman, Cynthia Ho, Margaret Moses, Gregory Shaffer, and Spencer Waller for commenting on the earlier drafts of this paper. I am also grateful to Janice Collins, a law librarian at Sonnenschein, Nath & Rosenthal, LLP, for her generous research assistance. All mistakes are mine.

² Brooke Overby, *Contract in the Age of Sustainable Consumption*, 27 J. CORP. L. 603, 605 (2002).

"We should not only tolerate cultural differences (between ethnic groups, countries or religions), we should, in fact, welcome them."³

INTRODUCTION

U.S. contract law has developed on the basis of certain essential assumptions such as freedom of contract, autonomy and liberal individualism.⁴ A simplified summary of the basic assumptions underlying U.S. contract law is that rational and well informed parties will drive a hard bargain on their own behalf for their own best interests and the resulting agreement reflects the free will of the parties.⁵ Because of those basic assumptions, U.S. contract law primarily concerns itself with only protecting the resulting bargain reached by the parties.⁶ Relying on a set of well entrenched contract interpretation and construction principles, U.S. courts will generally refuse to look beyond the four corners of the written contract.⁷ U.S. contract law essentially casts a magic shield around the written contract as a true embodiment of the parties' intent.⁸ Hence, in a U.S.

³ The Power of Culture, *A Commitment to Pluralism: Introduction*, http://www.powerofculture.nl/uk/archive/report/chapter2_intro.html (last visited Feb. 24, 2009). By quoting this statement, I do not mean to suggest that all cultural values or differences are worth preserving or should be respected. However, it is fair to say that some cultural values may be worth preserving. This is certainly a very controversial topic. I simply mean to include cultural differences which have a positive impact on human life, leaving aside all the philosophical inquiries one can engage on that topic.

⁴ R. Korobkin & T.S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1061-69 (2000); Julian S. Lim, *Tongue-Tied in the Market: The Relevance of Contract Law to Racial-Language Minorities*, 91 CAL. L. REV. 579, 590 (2003); Melvin A. Eisenberg, *Why There is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 808 (2000); Blake D. Morant, *The Relevance of Race and Disparity in Discussion of Contract Law*, 31 NEW ENG. L. REV. 889, 897 (1997).

⁵ Korobkin & Ulen, *supra* note 4, at 1061-69; Larry A. DiMatteo, *Equity's Modification of Contract: An Analysis of the Twentieth Century's Equitable Reformation of Contract Law*, 33 NEW ENG. L. REV. 265, 329 (1999).

⁶ Lim, *supra* note 4, at 590-91.

⁷ Nancy S. Kim, *Evolving Business and Social Norms and Interpretation Rules: The Need for a Dynamic Approach to Contract Disputes*, 84 NEB. L. REV. 506, 508-09 (2005); *see also* Philip J. McConaughay, *Rethinking the Role of Law and Contracts in East-West Commercial Relationships*, 41 VA. J. INT'L L. 427 (2001).

⁸ As pointed out by many scholars, U.S. contract law has made some progress and evolved away from its rigid classical paradigm, to allow equitable considera-

court, a party is entitled to “enforce terms [of a written contract] to the letter.”⁹

U.S. contract law’s underlying assumptions reflect the core values of the Anglo-American traditions of the dominant western culture in the United States.¹⁰ They do not “travel well”¹¹ across cultures with drastically different traditions. In this age of globalization,¹² different cultures are interacting with each other economically and otherwise in unprecedented ways. The recent world financial market turmoil related to the subprime mortgage loan problems, which originated in the United States, is merely another reminder of how interdependent many countries have become.

This article uses the Chinese culture as an example to demonstrate the need for U.S. contract law to adapt to a global environment.¹³ This paper describes the cultural differences that impact contracting behavior in the commercial business context in cross border transactions between the United States

tions in certain limited situations. As discussed later in this paper, the limited progress is insufficient to remedy the inequities present in a cross cultural business to business context with which this paper is concerned. *See* discussion *infra* Part III.

⁹ *Cromeens, Holloman, Siber, Inc. v. AB Volvo*, 349 F.3d 376, 395-96 (7th Cir. 2004).

¹⁰ Kim, *supra* note 7, at 531-32.

¹¹ William Twining, *Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context*, 1 INT’L J. L. IN CONTEXT 5 (2005). I am borrowing this “traveling” concept from Professor William Twining, Quain Professor of Jurisprudence Emeritus, University College London. Professor Twining discussed concepts that “travel relatively well or badly” in his article. I use the phrase “traveling well” in this context to mean not only applicable, but also applicable equitably and efficiently. *Id.*

¹² A review of the globalization debate shows that the word “globalization” has become a term of art. Its definition varies depending on who is talking. In this article, I am using the word “globalization” neutrally to describe the reality of a shrinking globe as a result of the advent of high speed internet and other technologies and the ease of moving around globally both digitally and physically.

¹³ This paper focuses on the cultural differences between China and the U.S. because of the importance and increasing volume of China’s trade with the U.S. Business contacts between China and the United States have increased dramatically over the last two decades and will continue to do so. China has experienced spectacular growth of foreign trade. Mitchell Silk & Richard Malish, *Are Chinese Companies Taking Over the World?*, 7 CHI. J. INT’L L. 105, 106-07 (2006). The problems raised by this paper also face peoples from other countries and regions and among immigrant residents and citizens of the United States. Kim, *supra* note 7, at 532-36; *see generally* Lim, *supra* note 4 (examining this issue primarily from the language/race perspective).

and China. Extensive scholarly research has demonstrated that the Chinese do not share the same cultural values as Americans¹⁴ and they have different understandings regarding the significance of written contracts. As a result, written agreements between U.S. and Chinese parties do not often reflect the true intent of the parties. Therefore, interpreting written contracts through the colored lenses of U.S. contract law and enforcing those written contracts in total disregard of the parties' cultural differences may be unfairly detrimental to a party from a drastically different culture.

The following example illustrates the serious consequences of culturally induced misunderstandings on a Chinese company when it enters into a contractual relationship with a U.S. company. Driven by fierce global competition, a multinational U.S. company went to China to find a partner to manufacture and design consumer electronics products ("widgets") under the U.S. company's brand. The U.S. company wanted to avoid the initial extensive capital investment for the manufacturing and to take advantage of the low design costs in Asia. It chose a successful Chinese electronics widgets manufacturer which had a demonstrated design capacity. During the numerous meetings over the telephone and face to face, the U.S. company's representatives orally promised to be a long term business partner. It promised the Chinese company that the relationship would start with contract manufacturing as the first phase. Eventually, the U.S. company would also use the Chinese company to design the widgets for the U.S. company. The U.S. company also asked the Chinese company to manufacture the widgets exclusively for the U.S. company. In return for the Chinese company's exclusivity commitment, the U.S. company's representatives orally promised that it would purchase large quantities of the widgets over the long term from the Chinese company and eventually, it would buy widgets designed by the Chinese company.

¹⁴ The United States today has become a very pluralistic society. By using the phrase "American culture," I do not mean to ignore the cultural diversity in this country. For the sake of brevity, however, the term "American culture" as used in this article refers to dominant culture which derives from the Anglo-Saxon tradition.

The U.S. company presented the Chinese company with a 40 page, single spaced agreement in English drafted by the U.S. company's attorneys. The agreement stated that the Chinese company agreed to manufacture widgets exclusively for the U.S. company. The agreement specified that the contract term was three years and the U.S. company could terminate for any reason by providing six months notice. The agreement set forth the minimum quantity of widgets the U.S. company would purchase from the Chinese company. The agreement did not contain any terms about the design phase of the relationship. It contained a standard merger clause. In addition, the agreement stated that the parties were not partners and the relationship did not give rise to a fiduciary relationship between the parties. The agreement chose a U.S. state law as the governing law.

In their negotiation sessions the Chinese company pointed out that the terms as set forth in the agreement were not what they had orally agreed upon. The U.S. company's representatives told the Chinese company not to worry about those terms. They said that the agreement was required by their legal department and that it would be put away and promptly forgotten. Despite these inconsistencies, the Chinese company essentially signed the agreement as drafted by the U.S. company.

The Chinese company then substantially expanded its manufacturing capacity to comply with its understanding of the agreement with the U.S. company. It hired and trained thousands of employees and engineers to prepare for the manufacturing and the design of the widgets. Soon after the relationship began, the parties began having disputes. Barely two years after the relationship began, the U.S. company terminated the agreement by providing the contractually required six months notice. The Chinese company protested vehemently, but to no avail. After struggling for a few more years, the Chinese company went out of business. The Chinese company was financially healthy at the beginning of the relationship. It employed over 10,000 employees at its height. The Chinese company's downfall was due to the financial difficulties caused to a large extent by its extensive capital and human resources investment in the manufacturing facility for the U.S. company.

The Chinese company had hoped to recoup its initial investment through the promised long term partnership.

This paper explores the impact of cultural differences on Chinese contracting behavior. It argues that globalization has presented a new set of challenges that U.S. contract law should address. It proposes that, in light of the globalization phenomenon, the reverence afforded to written contracts by U.S. contract law may not be justified in cross-cultural context.¹⁵ Part I briefly discusses the major cultural, social and legal differences between China and United States and how those differences impact contracting behavior. Part II briefly discusses selected examples of major U.S. contract law doctrines and how their application to cross cultural contracts unfairly favors U.S. companies, typically the party with more bargaining power. Part III discusses certain existing contract doctrines which allow for equitable considerations in limited context and why they are insufficient to address the inequities in cross cultural business-to-business contracts.

Part IV sets forth some arguments in support of a need for the United States to adapt its domestic contract law in light of the globalization phenomenon. Part V briefly summarizes current academic discussions and proposals to accommodate cultural differences in contract law. Finally, as an attempt to generate continuing academic debate on this issue, Part V proposes a culturally differentiated approach to acknowledge the impact of cultural differences on contracting behavior. This approach calls for U.S. courts to permit introduction of cultural evidence as a threshold requirement, akin to a cultural defense in the criminal law context as an initial step. Once a party sustains the burden, the traditional contract doctrines of construction and interpretation such as the parol evidence rule would not apply and the party would be allowed to introduce all relevant evidence to prove the terms of its contract, as the parties truly intended.

¹⁵ This paper does not challenge the fundamental notion that promises should be kept, a belief shared by both Chinese and western cultures. Rather, it challenges the U.S. contract law doctrines used to ascertain *what* promises were made and should be enforced.

PART I. MAJOR DIFFERENCES BETWEEN CHINA AND THE
UNITED STATES AND WHY THEY MAKE A DIFFERENCE
WITH REGARD TO CONTRACTS

This section briefly reviews the major cultural and legal differences between China and the United States that are relevant to Chinese attitudes toward contracts. The Chinese culture has been developed over thousands of years. It has been primarily shaped by two major philosophers: Confucius and Lao Tzu.¹⁶ In addition, the Chinese communism ideology has strongly influenced the modern mainland Chinese thinking.¹⁷

Chinese contract law also has some major philosophical differences from U.S. contract law. The Chinese legal system is very different from the U.S. legal system. All of these differences combined create a context for Chinese contracting behavior that is significantly different from the context assumed by U.S. contract law.

Chinese Culture is Substantially Different from the Anglo American Culture.

Extensive research shows that Chinese and American cultural values are different. Researchers have classified American Anglo-saxon oriented culture “as a low-context culture and the Chinese as a high-context culture.”¹⁸ A high context culture places strong emphasis on social context and traditional values.¹⁹ The American culture is highly individualistic while the Chinese culture is collectivistic.²⁰ The American and the Chinese cultures practically lie at opposite ends of the individualism/collectivism spectrum.²¹ The Chinese focus on “maintaining long-term, harmonious personal relationships” while the Americans are more interested in “information, objec-

¹⁶ Patricia Pattison & Daniel Herron, *The Mountains Are High and the Emperor Is Far Away: Sanctity of Contract in China*, 40 AM. BUS. L.J. 459, 477 (2003).

¹⁷ John H. Matheson, *Convergence, Culture and Contract Law in China*, 15 MINN. J. INT'L L. 329, 373 (2006).

¹⁸ Kam-hon Lee et al., *Tension and Trust in International Business Negotiations: American Executives Negotiating with Chinese Executives*, 37 J. INT'L BUS. STUD. 623, 624 (2006).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

tivity, and competitiveness.”²² The Chinese culture therefore does not share the Anglo-American values of individuality, autonomy, freedom of association and equality among market participants, values upon which U.S. contract law principles are primarily based.²³

Confucius (551-479 B.C.E) “has the greatest impact on Chinese culture and business today.”²⁴ He has influenced the Chinese society since the second century, when his philosophy became the official state philosophy.²⁵ Confucius’ goals were to implement peace, order and stability into society. Confucius emphasized social harmony rather than justice.²⁶ “He promoted a philosophy of virtue, ethics, emphasizing . . . duty, loyalty, honor, filial piety, kindness, sincerity, and respect for age and seniority.”²⁷ These virtues established a complicated moral code which resulted in an autocratic and hierarchical social structure.²⁸ Moreover, the Confucian tradition created a society where each person’s role is relative and comparative to another’s role.²⁹ “When all people remain within their established roles . . . the rule of man is sufficient.”³⁰ The Confucius tradition thus has taught the Chinese that the rule of law becomes necessary only when individuals deviate from their roles.³¹

This rigid social hierarchy results in the basic notion that relationships are the foundation of a Chinese society.³² Relationships connect individuals, family groups, and friends to

²² *Id.*

²³ Robert M. LaKritz, Comment, *Taming a 5,000 Year-Old Dragon: Toward a Theory of Legal Development in Post Mao China*, 11 EMORY INT’L L. REV. 237, 265-66 (1997).

²⁴ Pattison & Herron, *supra* note 16, at 478; see also Joseph W. Dellapenna, *The Role of Legal Rhetoric in the Failure of Democratic Change in China*, 2 BUFF. J. INT’L L. 231, 235-37 (1996).

²⁵ Hayden Windrow, *Transitions in Chinese Law: A Short History of Law, Norms and Social Control in Imperial China*, 7 ASIAN-PAC. L. & POL’Y J. 244, 270 (2006); Ni Zhu, *A Case Study of Legal Transplant: The Possibility of Efficient Breach in China*, 36 GEO. J. INT’L L. 1145, 1153 (2005); Albert H.Y. Chen, *Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law*, 17 UCLA PAC. BASIN L. J. 125, 129-30 (1999/2000).

²⁶ *Id.* at 130.

²⁷ Pattison & Herron, *supra* note 16, at 478.

²⁸ *Id.*

²⁹ Chen, *supra* note 25, at 130; Zhu, *supra* note 25, at 1160.

³⁰ Pattison & Herron, *supra* note 16, at 478.

³¹ *Id.* at 479; see Windrow, *supra* note 25, at 254.

³² Pattison & Herron, *supra* note 16, at 479.

each other.³³ The group is more important than individuals.³⁴ Through these roles, this system internalizes the social code, creating a self-regulating society.³⁵

Lao Tzu, another Chinese philosopher, also had a profound influence on Chinese culture.³⁶ Lao Tzu's philosophy (Taoism) provides that the need for law arises when disorder develops when one has lost the way, integrity, humaneness, righteousness and etiquette.³⁷ Therefore, both Confucianism and Taoism view law negatively.³⁸

The mid-twentieth century saw China adopt the ideology of Karl Marx and communism. Ironically, despite its proclaimed rejection of everything which represents China's feudalistic traditions, the Chinese Communist Party continues the Confucian focus on the community.³⁹ Communism focuses on promoting the collective good.⁴⁰ When the Chinese Communist Party took over control of the country in 1949, it abolished private property ownership.⁴¹ As a result of Communism and the influence of the above philosophies, the Chinese continue to focus on group actions and roles rather than on individual achievement or personal ownership.⁴²

Legal Differences between China and the United States.

The Chinese legal system and its contract law approach in particular are also different from those in the United States. These differences in the Chinese contract law approach and its legal system have also affected Chinese contracting behavior.

³³ *Id.*

³⁴ Yujie Gu, *Entering the Chinese Legal Market: A Guide for American Lawyers Interested in Practicing Law in China*, 48 *DRAKE L. REV.* 173, 179 (1999).

³⁵ Zhu, *supra* note 25, at 1151-52.

³⁶ Pattison & Herron, *supra* note 16, at 479-82.

³⁷ *Id.* at 481.

³⁸ *Id.*

³⁹ Matheson, *supra* note 17, at 373.

⁴⁰ Robert Bejesky, *The Evolution and International Convergence of the Doctrine of Specific Performance in Three Types of States*, 13 *IND. INT'L & COMP. L. REV.* 353, 380 (2003).

⁴¹ MO ZHANG, *CHINESE CONTRACT LAW: THEORY AND PRACTICE* 43 (Martinus Nijhoff Publishers 2006) [hereinafter "CHINESE CONTRACT LAW"].

⁴² Pattison & Herron, *supra* note 16, at 486.

China has a civil law system and its judicial decisions do not have precedential value.⁴³ The Chinese Communist Party currently controls all aspects of China.⁴⁴ There is no separation of the judicial, legislative or executive powers.⁴⁵

Historically, China did not have a well developed commercial law system due to its cultural bias against law. For a few thousand years, China was mostly ruled by one man, the Emperor, who had the "heavenly mandate."⁴⁶ China's traditional focus on agriculture and the restrictions on the development of commercial activities hindered the development of private law concepts and civil law tradition.⁴⁷ Throughout its history, China developed little or no civil law; Chinese law was primarily administrative and penal.⁴⁸ Although ancient Chinese law recognized private contracts, application of law to contract disputes was influenced by Confucian ethics and contract disputes were often resolved in accordance with ethical considerations at the expense of legal principles.⁴⁹ The Chinese resolved their disputes through compromise and community functionalism.⁵⁰ Because of Chinese cultural "emphasis on social harmony and the fulfillment of moral obligations," Chinese culture "discouraged civil suits to pursue individuals' private monetary or proprietary interests."⁵¹ Chinese consider reliance on the written law as evidence that the individuals had failed to resolve a dispute honorably.⁵²

In 1911, the last Chinese dynasty, the Qing Dynasty, was overthrown. The Chinese Nationalist Party established the Republic of China ("ROC"). The Chinese Nationalist government

⁴³ Matheson, *supra* note 17, at 376. In his article, *Culture and Contract Law*, Professor Matheson provided a detailed discussion on the evolution of Chinese contract law.

⁴⁴ See DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA* 70 (Thomson West 2003).

⁴⁵ See *id.* at 68-69.

⁴⁶ Gu, *supra* note 34, at 179; CHOW, *supra* note 44, at 43-44.

⁴⁷ BING LING, *CONTRACT LAW IN CHINA* 8-9 (Sweet & Maxwell Asia 2002).

⁴⁸ See *id.*; see also Wanhong Zhang, *The Orphan of China: Law and Literature in Contemporary China*, 26 CARDOZO L. REV. 2497, 2499 (2005).

⁴⁹ See generally *id.*

⁵⁰ LaKritz, *supra* note 23, at 244; Gu, *supra* note 34, at 179-80.

⁵¹ Pattison & Herron, *supra* note 16, at 506.

⁵² Neil Boyden Tanner, Note and Comment, *The Yin and Yang of Foreign Economic Contract Law in the People's Republic of China - A Legalistic and Realistic Perspective*, 16 J.L. & COM. 155, 165 (1996); McConaughay, *supra* note 7, at 442.

instituted a “civil law system modeled after . . . European codes.”⁵³ However, the Communist Revolution in 1949 dramatically changed whatever rule of law that had previously existed in China and the “Communist Party [abolished] the ROC Civil Code . . . together with all other Nationalist laws.”⁵⁴ The law became an instrument of politics.⁵⁵ The Communist Party had absolute control over the creation of law and ruled more by decree than by law. The Communist Party frequently used shame as punishment for disrupting the good working order of society; obligations owed to family, friends and other relationships in the collective social order are given higher priority than individualistic notions of rights.⁵⁶

During that time, Chinese contract law development came to a standstill. When the Communist Party eliminated private property ownership, there was no need for contract law because the government owned all of the property.⁵⁷ Private individuals could not engage in any independent economic activities.⁵⁸ The concept of “contracts” was imported from the Soviet Union and used to guide industrialization in China.⁵⁹ All “contracts” established were output quotas and input orders according to the state plan.⁶⁰ They were “made and executed according to the state plan” to facilitate the exchange of commodities among the various governmental units.⁶¹

The Cultural Revolution which began in 1966 interrupted any economic development of the country as well.⁶² The Cultural Revolution practically shut down all the law schools in the country. The number of lawyers in China shrunk dramatically. Whatever resemblance of a legal system which had previously existed was decimated during that time.⁶³ The Cultural Revolution ended in 1976.

⁵³ LING, *supra* note 47, at 10.

⁵⁴ *Id.* at 11.

⁵⁵ See CHOW, *supra* note 44, at 70.

⁵⁶ Bejesky, *supra* note 40, at 382.

⁵⁷ CHINESE CONTRACT LAW, *supra* note 41, at 43.

⁵⁸ *Id.* at 7.

⁵⁹ LaKritz, *supra* note 23, at 255.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² LING, *supra* note 47, at 11.

⁶³ *Id.*

Chinese contract law which exists today began its development in the late 1970s in connection with the Chinese government's desire to develop a more decentralized, market-oriented economy.⁶⁴ After the Cultural Revolution ended in 1976, China began opening up to the outside world. In the 1980s, China sought to establish a modern legal system as China moved from a planned economy into a more market-oriented economy.⁶⁵ China enacted a series of contract laws in a significant move towards a "more decentralized, market-oriented, and incentive-based economy."⁶⁶

In 1999, China enacted the Contract Law of the People's Republic of China in an attempt to harmonize its previous contract laws and regulations ("Contract Law"). For the first time in Communist China's history, private individuals had the right to enter into general contracts on their own behalf.⁶⁷ Despite its adoption of certain familiar western terms such as "freedom of contract," the Contract Law has some substantive differences from U.S. contract law. For example, the Contract Law appears very paternalistic in nature. The Contract Law requires that a legal contract "may not disrupt social-economic order nor impair social or public interests."⁶⁸ Contracting "conduct that violates social morals and public order [may] include those that damage national interest . . . restrict economic or business activities, violate fair competition [or] . . . infringe [upon] consumer interests."⁶⁹ This reflects the Chinese legislature's notion of what is good for the parties regardless of the parties' desire. This approach is fundamentally different from U.S. contract law's *laissez faire* approach.⁷⁰

⁶⁴ CHINESE CONTRACT LAW, *supra* note 41, at 43-44; Feng Chen, *The New Era of Chinese Contract Law: History, Development and a Comparative Analysis*, 27 BROOK. J. INT'L L. 153, 155-57 (2001) [hereinafter Feng].

⁶⁵ See Pattison & Herron, *supra* note 16, at 499-500; see also Fang Shen, *Are You Prepared for This Legal Maze, How to Serve Legal Documents, Obtain Evidence, and Enforce Judgments in China*, 72 UMKC L. REV. 215, 217 (2003).

⁶⁶ Feng, *supra* note 64, at 155.

⁶⁷ CHINESE CONTRACT LAW, *supra* note 41, at 52-53. Private individuals in China were permitted for the first time to make technology contracts under the Technology Contract Law adopted by China in 1987. *Id.* at 8.

⁶⁸ *Id.* at 80.

⁶⁹ *Id.* at 82-83.

⁷⁰ It is beyond the scope of this paper to make a comprehensive comparison of the major differences between U.S. and China contract law principles. Professors

In addition to the differences in substantive laws, China's legal system suffers from other serious problems.⁷¹ The contract laws and regulations suffer from lack of transparency, contradictions, redundancies and other problems.⁷² There is a grave shortage of well trained legal professionals.⁷³ "It is estimated that [China has] fewer than 200,000 lawyers now, with plans to increase the number to 300,000 by 2010."⁷⁴ China's legal development also suffers from a lack of active legal academic debates. During the Cultural Revolution, there was no active legal academic scholarship. It would have been politically hazardous to express an opinion contrary to the official Communist Party position. The shutting down of practically all of the law schools during the Cultural Revolution also interrupted the training of qualified legal professionals.

Chinese lawyers also play a significantly different role from those in U.S. society. Chinese lawyers lack political independence.⁷⁵ They are obligated to be loyal to the cause of the Chinese Communist Party. The attorney-client relationship, as the American legal system contemplates, does not exist in China. On the whole, Chinese lawyers have not played any significant role in business contexts, unlike their counterparts in the United States.

In addition, Chinese judges are not well trained.⁷⁶ Many of them are retired military officials. The judges lack judicial independence and depend on the "local government . . . for their wages, promotions and bonuses."⁷⁷ Because of cultural influences and Chinese legal traditions, many Chinese judges focus on preserving the relationship between the parties, as opposed

Matheson, Pattison and Herron provided a more in depth analyses of the two contract law approaches. *See supra* notes 16 & 17.

⁷¹ Pattison & Herron, *supra* note 16, at 505-08; Matheson, *supra* note 17, at 375-81.

⁷² Shen, *supra* note 65, at 217-18; Matheson, *supra* note 17, at 379-80. Part of the reasons why Chinese law is plagued with problems could be attributable to the fact that in its haste to establish a legal system to foster its unprecedented economic growth, China transplanted a lot of western legal concepts. Zhu, *supra* note 25, at 1168.

⁷³ Shen, *supra* note 65, at 217.

⁷⁴ Pattison & Herron, *supra* note 16, at 507.

⁷⁵ Shen, *supra* note 65, at 238.

⁷⁶ *Id.* at 217; Zhang, *supra* note 48, at 2503.

⁷⁷ LaKritz, *supra* note 23, at 262.

to enforcing contracts pursuant to the "letter of the law."⁷⁸ Finally, even if a judgment is rendered, the disputing parties are often unable "to execute judgments rendered by judicial bodies."⁷⁹

In sum, China has had less than three decades to develop a legal system geared towards a free market economy in an environment with inherent tensions between the political ideology and free market economy.⁸⁰ China's vast size and the conflicts between the central and local governments also present some special challenges. These factors result in an unstable legal environment plagued with problems.

As a result of the problems with the Chinese legal system and its negative cultural view toward the rule of law, the Chinese do not count on the law to resolve their disputes. "In civil and economic cases, less than one fourth of the litigants are represented by legal counsel and fewer than four percent of businesses in China have regular legal advisors."⁸¹ Therefore, it is not at all surprising that Chinese companies typically do not have any lawyers, let alone U.S. trained lawyers, advising them on legal issues.

In contrast, the United States follows a common law system which is derived from a long line of British common law traditions. Although the United States has had its own struggles, its legal system has developed uninterrupted. The United States has a relatively well functioning legal system despite its share of problems. There is also a long tradition of legal scholarship with active academic debates. The United States also boasts close to one million employed lawyers and judges, even though its population is one fourth of China's.⁸²

⁷⁸ See LING, *supra* note 47, at 9; see also Zhu, *supra* note 25, at 1163-64.

⁷⁹ LaKritz, *supra* note 23, at 262; see Zhu, *supra* note 25, at 1163.

⁸⁰ See Chen, *supra* note 25, at 162-63.

⁸¹ Pattison & Herron, *supra* note 16, at 507.

⁸² The U.S. Census Bureau notes that the U.S. population as of 2008 is approximately 303 million. *United States IDB Country Summary*, U.S. CENSUS BUREAU, available at <http://www.census.gov/ipc/www/idb/country/usportal.html>. China's population stands currently at 1.3 billion. *China IDB Country Summary*, U.S. CENSUS BUREAU, available at <http://www.census.gov/ipc/www/idb/country/chportal.html>.

The Impact of Chinese Differences on Contracting Behavior.

As a result of its legal, cultural and political traditions, the foundations of the rules of Chinese society are relationships, reciprocity and respect (not the commonly understood American notions of law).⁸³ As discussed in the previous section, the most fundamental difference between the Chinese and Western cultures is the role an individual plays in society. The Chinese identity is “not formed based on a concept of self,” unlike the Western identity which is focused on the individual.⁸⁴

The Chinese cultural attitude influences Chinese contracting behavior in multiple ways. When a Chinese citizen engages in an economic relationship with another party, profit and self interest may not be the paramount goals. These goals may be “subordinated to a larger group-based or common good” goal.⁸⁵ Because of the focus on collective good, a Chinese manager will retain “[u]nproductive employees . . . and unprofitable companies may continue to exist.”⁸⁶ Chinese philosophies encourage individuals to subordinate themselves to the good of the family and society in order to achieve balance and harmony. This is directly contrary to the U.S. contract law’s assumption that parties to a contract will negotiate at arms’ length and drive a hard bargain on behalf of their own best interests.⁸⁷

Because of their cultural focus on relationships, the Chinese are more sensitive to the relationship aspect of negotiations.⁸⁸ The Chinese tend to establish contractual relationships based on trust and honor without any reliance on the enforcement powers of law. “A contract is considered unnecessary, sometimes offensive, when rules of loyalty and mutual obliga-

⁸³ Chen, *supra* note 25, at 130.

⁸⁴ Pattison & Herron, *supra* note 16, at 479, 486.

⁸⁵ *Id.* at 486. The following anecdotal exchange is very informative on this point. When a U.S. business man visited a big city in China, he noted that many Chinese people (part of the city’s sanitation crew) were sweeping the streets with old fashioned brooms. The U.S. business man turned to his Chinese host, a government official, and offered to sell street sweeping machines that can clean the streets a lot faster and better. The government official looked at the U.S. business man and asked: “Then, what would I do with the 10,000 people that the City has employed as sanitation workers?”

⁸⁶ *Id.* at 488.

⁸⁷ See K. M. Sharma, *From “Sanctity” to “Fairness”: An Uneasy Transition in the Law of Contracts?*, 18 N.Y. L. SCH. J. INT’L & COMP. L. 95, 110 (1999).

⁸⁸ Lee et al., *supra* note 18, at 624.

tion structure the business environment.”⁸⁹ The Chinese will frequently ignore the written contract and treat it as a mere formality.⁹⁰

Chinese culture values patience and long term perspectives. The Chinese have learned to take a holistic time perspective and focus on long-term viewpoints.⁹¹ The Chinese will spend time cultivating relationships for long term benefit. The “Chinese may prefer to leave timing and planning open” in contract negotiations.⁹² Therefore, even if a contract is ultimately signed, a signed contract means the beginning of a relationship, not the “be all and end all” document which controls the parties’ economic relationship, as in the eyes of U.S. contract law.⁹³ Pattison and Herron point out that “[m]any westerners make their biggest mistake when they assume that the communication is completed when a contract is signed.”⁹⁴ Because a signed contract only represents the existence of a relationship, the Chinese tend to treat it as changeable and renegotiable throughout the relationship.⁹⁵

Because of the Chinese cultural emphasis on reaching agreements through cooperation and collaboration, they “will look for the mutual benefit of both parties rather than ‘winning.’”⁹⁶ The strong desire to maintain harmony also means that the Chinese are averse to conflict.⁹⁷ The Chinese will go to great lengths to avoid conflict and criticism.⁹⁸ Hence, in contract negotiations, the Chinese are unlikely to engage in confrontational negotiations.

The Chinese cultural aversion to conflict and their negative view of law also mean that they do not expect to resort to courts for contract enforcement. In the United States, on the other hand, it is the specter of litigation and the force of law that provide much of the impetus for contract enforceability.

⁸⁹ Pattison & Herron, *supra* note 16, at 487-88.

⁹⁰ *Id.* at 487.

⁹¹ *Id.* at 488.

⁹² *Id.* at 489.

⁹³ *Id.* at 491.

⁹⁴ *Id.*

⁹⁵ Pattison & Herron, *supra* note 16, at 491.

⁹⁶ Tanner, *supra* note 52, at 161.

⁹⁷ Pattison & Herron, *supra* note 16, at 488.

⁹⁸ *Id.*

All of these differences contribute to extensive misunderstandings when a Chinese company contracts with a U.S. company. These misunderstandings sometimes result in disastrous consequences for the Chinese, as shown in the above case example.

For an American well-versed in Anglo-American thinking, it is difficult to understand how the Chinese company in the above case example could have signed the contract under the circumstances. It would appear that the Chinese company, a relatively sophisticated company, may have knowingly assumed the business risk and made a bad business decision. Yet, when put in the Chinese cultural context, the Chinese company behaved entirely consistently with the Chinese cultural norms. It is not surprising that the Chinese company signed the agreement with the U.S. company, despite the inconsistencies between the written version and the oral promises. Being relationship oriented, the managers of the Chinese company trusted the U.S. company and their oral promises. The U.S. company's assurance that the agreement would not be enforced is consistent with the Chinese cultural bias against law.

The Chinese company's nonchalant attitude toward the inconsistencies between the written contract and the verbal representations is consistent with the Chinese view that a written contract merely signifies the existence of a relationship. Despite the fact that the agreement specified a three year term with the right to terminate for any reason upon six month's written notice, the Chinese company apparently believed that the relationship was long term. To the Chinese, the relationship was intended to be long term, because the manufacturing facility required intensive initial capital investment and it would not be possible to recoup the investment in three years in a manufacturing operation.

PART II. CERTAIN EXAMPLES OF U.S. CLASSIC CONTRACT LAW DOCTRINES AND THEIR APPLICATION TO U.S.-CHINESE CONTRACTS

This section provides a brief overview of the assumptions behind classic contract law. It focuses on certain examples of U.S. contract interpretative principles or canons of construction. This section shows how those contract principles, based on

classical contract law assumptions as applied, may be unfair to the party from a different cultural perspective.

The core value of U.S. contract law is the ideal of freedom of contract.⁹⁹ The classic contract law assumes that the parties to a contract will exercise their free will and watch out for their own self interests and bargain diligently on their own behalf.¹⁰⁰ This theory assumes that the resulting written contract accurately reflects the terms agreed upon as a result of the arms length negotiations, a figurative meeting of the minds, measured by the objective manifestation of intent by both parties to form the contract.¹⁰¹ Thus, it is only natural that the U.S. contract law's role is merely to enforce the written terms of the agreement which presumably embodies the parties' promises and to protect the fruits of their bargaining.¹⁰²

The classical contract law interpretative principles, such as the parol evidence rule, and the U.S. courts' general unwillingness to look beyond the four corners of the contract are justified based on those core assumptions. Under those theories, the Chinese company in the above case example is unlikely to recover for its damages in a contract enforcement action in a U.S. court. The U.S. court's singular focus on the written contract will likely preclude any attempt by the Chinese company to introduce evidence of oral representations or oral terms that are inconsistent with the explicit terms of the agreement. The agreement signed by the Chinese company and the U.S. company would most likely determine the outcome under current U.S. contract law paradigm.

Several current contract interpretation/construction principles are especially problematic in cross cultural context. For example, the four corners doctrine instructs a U.S. judge to stay within the four corners of the contract when interpreting a written contract to ascertain the intent of the parties.¹⁰³ The only way a U.S. court will look beyond the corners of the written agreement is for a party to demonstrate that the contract terms

⁹⁹ Lim, *supra* note 4, at 590.

¹⁰⁰ Sharma, *supra* note 87, at 110.

¹⁰¹ Huges v. Overly, 445 F. Supp. 946, 949 (W.D. Pa. 1978); *see also* Caporale v. Mar Les, Inc., 656 F.2d 242, 244 (7th Cir. 1981).

¹⁰² Lim, *supra* note 4, at 590.

¹⁰³ *See, e.g.*, Shell Rocky Mt. Prod. v. Ultra Res., Inc., 415 F.3d 1158, 1165 (10th Cir. 2005).

are ambiguous. However, U.S. courts will not necessarily consider the terms of a contract to be ambiguous simply because the parties disagree regarding the proper interpretation of the terms.¹⁰⁴

Another related doctrine, the plain meaning rule, requires a U.S. court to interpret the written contract in accordance with its plain meaning if the terms of a contract are clear and unambiguous.¹⁰⁵ Again, U.S. courts focus on the written language in a contract. Although this rule makes sense when the core assumptions hold true, the rule does not work when the written contract does not reflect the terms of the parties' agreement as a result of substantive cultural differences.

The parol evidence rule is another well established contract principle which bars introduction into evidence of any prior or contemporaneous written or oral agreements to vary the terms of the written contract.¹⁰⁶ To invoke the protection of this doctrine, many U.S. contracts typically contain a standard merger or integration clause that expressly states that the written contract is the final expression of the parties' intent and that it merges all prior or contemporaneous agreements between the parties. The agreement prepared by the U.S. company's in-house counsel in the above example contained such a merger clause. Under the parol evidence rule, this clause will usually bar the introduction of any oral promises prior to the formation of the contract that contradict the "terms of the written contract which is valid on its face."¹⁰⁷ Although parol evidence can be admitted under certain circumstances (to show fraud, to supplement contract terms or to explain ambiguities), the threshold requirement for admission in a business-to-business context is high. This doctrine is particularly prejudicial against the non-U.S. party in a cross cultural contractual relationship.

In light of these well established contract doctrines, a Chinese company in a similar situation as the Chinese company in the above example, may be severely prejudiced in an action to

¹⁰⁴ *Alack v. Vic Tanny Int'l of Mo., Inc.*, 923 S.W.2d 330, 343 (Mo. 1996).

¹⁰⁵ *See Knudsen v. Transp. Leasing/Contract, Inc.*, 672 N.W.2d 221, 223 (Minn. Ct. App. 2003).

¹⁰⁶ *See HCB Contractors v. Liberty Place Hotel Assocs.*, 652 A.2d 1278, 1279 (Pa. 1995).

¹⁰⁷ *Parrish v. Jackson W. Jones, P.C.*, 629 S.E.2d 468, 471 (Ga. Ct. App. 2006).

enforce the terms of a written contract in a U.S. court. Since the Chinese culture considers a written contract to merely symbolize the existence of a relationship, Chinese companies will readily sign a contract without understanding its terms or they will underestimate the significance of those terms. That is precisely what the Chinese company in the case example did. A U.S. court's refusal to look beyond the four corners of the contract will prevent the Chinese company from demonstrating that the parties have agreed on terms different from those set forth in the written contract.

Furthermore, because a written agreement drafted by a U.S. company will generally include a merger clause, similar to the agreement in the above case example, it would be extremely difficult, if not impossible, for a Chinese company to introduce evidence of the oral promises the U.S. company made to the Chinese company in a U.S. court. Yet, the parties' economic relationship was based on oral promises and representations.

PART III. EXISTING CONTRACT LAW DOCTRINES ARE INSUFFICIENT TO ADDRESS THE INEQUITIES IN CROSS CULTURAL CONTRACT RELATIONSHIPS

U.S. contract law has evolved away from its classic paradigm to address equitable issues primarily in consumer protection context.¹⁰⁸ It has recognized equitable issues raised by a modern society within the domestic context.¹⁰⁹ Those limited doctrines are insufficient to address the inequities raised by the above case example. Some scholars have pointed out that modern U.S. contract law has not gone far enough away from its classic model because it continues to evaluate fairness issues within the confines of the classic contract principles.¹¹⁰ U.S. courts still begin their analyses of contract problems with the

¹⁰⁸ DiMatteo, *supra* note 5, *passim*.

¹⁰⁹ See DiMatteo, *supra* note 5, *passim*. See also Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 101 (2006). Professor Schmitz noted that numerous federal and state legislations have also enacted various statutes (consumer protection, insurance, consumer lending, etc.) in an attempt to counter the inequitable results from strict applications of the classic contract law principles in various consumer contexts. *Id.* Those statutes are designed to protect U.S. consumers and will not be able to remedy inequities in cross cultural business to business context. *Id.*

¹¹⁰ Lim, *supra* note 4, at 590.

core assumptions of freedom and autonomy of contracts.¹¹¹ As a result, modern contract law continues to limit its engagement with social-fairness issues.¹¹² The focus is on the language in the written agreement.¹¹³ As explained below, these contract principles based on equitable considerations cannot adequately remedy the inequity present in cross cultural contracts.

Recognizing the harsh results of applying classic contract principles in certain situations, U.S. courts have sometimes resorted to the use of the doctrine of fraud or misrepresentation to void certain contract terms.¹¹⁴ Courts have typically invoked the doctrine of fraud or misrepresentation in a situation which involves outright fraud or misrepresentation and where it would be patently unfair to enforce the contract as written. This doctrine is rarely invoked in business-to-business context with sophisticated businesses that regularly engage in these types of economic transactions.¹¹⁵

The Chinese company in the case example is therefore unlikely to win a claim based on fraud or misrepresentation related to the negotiations prior to the signing of the written agreement. Based on the current U.S. contract law paradigm, the Chinese company should have protected its own interest by bargaining zealously on its own behalf. The Chinese company certainly had the financial resources to hire an attorney to assist with contract negotiations. The Chinese company could have informed itself better.¹¹⁶ Hence, there was no inequality

¹¹¹ See, e.g., *Freightliner of Knoxville, Inc. v. DaimlerChrysler Vans, LLC*, 484 F.3d 865, 870 (6th Cir. 2007) (relying on the parol evidence rule and the merger clauses in the written agreement and rejecting plaintiff's claims based on extrinsic representations); see also *Whitebox Convertible Arbitrage Partners, L.P. v. IVAX Corp.*, 482 F.3d 1018, 1021 (8th Cir. 2007) (dismissing a breach of contract claim by relying on the plain meaning rule under New York law).

¹¹² Lim, *supra* note 4, at 582.

¹¹³ See *supra* notes 104-08.

¹¹⁴ *Cordry v. Vanderbilt Mortg. & Fin.*, 445 F.3d 1106, 1110 (8th Cir. 2007) (stating that “[p]arties are generally free to contract as they wish, and courts will enforce contracts according to their plain meaning, unless induced by fraud, duress, or undue influence.” (quoting *Util. Serv. & Maint., Inc. v. Noranda Aluminum, Inc.*, 163 S.W.3d 910, 913 (Mo. 2005))).

¹¹⁵ See, e.g., *Format Corp. v. Widewaters Prop. Dev. Corp.*, 162 F. App'x 168, 170 (3rd Cir. 2006).

¹¹⁶ I agree wholeheartedly with the notion that Chinese companies should learn not to sign written agreements without understanding their significance or seeking sound legal advice. But the reality is that this has happened and will happen and U.S. contract law is stacked against the Chinese companies and other

in bargaining positions from the financial perspective. A U.S. judge steeped in the classical contract law tradition would see no reason to rescue a Chinese company which seemingly had assumed the business risk of entering into this contract. This classic contract mentality, however, ignores the cultural dynamics of the relationship between the Chinese company and the U.S. company. The doctrine of fraud/misrepresentation is therefore unlikely to remedy the inequities in the cross cultural context.

The unconscionability doctrine is another doctrine associated with U.S. contract law's attempt to address fairness concerns.¹¹⁷ Under this doctrine, a party who wishes to avoid enforcement of a contract generally must show that the agreement is both substantively and procedurally unconscionable. "Procedural unconscionability focuses on whether the bargaining process . . . was adhesive or unduly one-sided, whereas substantive unconscionability focuses on whether the contract terms are unduly oppressive or otherwise unfair."¹¹⁸ "Most [U.S.] courts . . . require that the conditions of unconscionability exist at the time the contract was made."¹¹⁹ Therefore, the unconscionability doctrine does not apply when the unfair circumstances did not exist at the time the contract was entered into.

U.S. courts have applied the unconscionability test in a rigid fashion.¹²⁰ The unconscionability test is very difficult to satisfy in a business-to-business context.¹²¹ U.S. courts have only found an agreement unconscionable where it offended notions of "decency," or had grossly unfair results – all viewed in the context of the dominant western cultural values.¹²² The doctrine of unconscionability is further limited because it is only available as a defense to contract enforcement, and not as a

parties from different cultural backgrounds. The question this paper seeks to address is what steps the United States can undertake from a contract law perspective to level the playing field.

¹¹⁷ Schmitz, *supra* note 109, at 74 (discussing in depth the development of the unconscionability doctrine).

¹¹⁸ *Id.* at 75.

¹¹⁹ Kim, *supra* note 7, at 553.

¹²⁰ Schmitz, *supra* note 109, at 75.

¹²¹ Kim, *supra* note 7, at 551-52.

¹²² *Id.*

source of affirmative relief.¹²³ Thus, it cannot be used as a mechanism for seeking damages in a U.S. court.

Because U.S. courts have sought to address fairness issues within the confines of the U.S. classic contract paradigm, the unconscionability doctrine cannot adequately address fairness concerns in cross cultural business to business context. It is unlikely that a U.S. judge will consider the agreement in the above case example between two businesses rise to the level of unconscionability.

Furthermore, because the unconscionability doctrine cannot be used as a vehicle to recover damages, it will not remedy the inequities where the other party has suffered damages. In the above case example, the Chinese company was unable to reap the benefits of its extensive investment in manufacturing equipment and facilities because of the U.S. company's early termination of the contract. The Chinese company suffered heavy financial losses and ultimately had to shut down its operations because of the losses it suffered. The Chinese company would be more interested in seeking damages for the U.S. company's breach of the agreement instead of attempting to avoid its enforcement.

Another example of an equitable doctrine which may provide some limited relief in certain situations is the doctrine of promissory estoppel.

In order to recover under a promissory estoppel theory . . . a plaintiff must show: 1) a clear and unambiguous promise; 2) reasonable and foreseeable reliance by the party to whom the promise is made; and 3) an injury sustained by the party asserting the estoppel by reason of his reliance.¹²⁴

However, even if a plaintiff is able to establish promissory estoppel, courts have restricted the application of the theory to a limited class of cases in which "the circumstances are such as to render it unconscionable" to refuse to enforce the promise upon which the promisee has relied.¹²⁵

¹²³ Lim, *supra* note 4, at 607; Kim, *supra* note 7, at 552.

¹²⁴ Tri-County Motors, Inc. v. Am. Suzuki Motor Corp., 494 F. Supp. 2d 161, 173 (E.D.N.Y. 2007); Cyberchron Corp. v. Calldata Sys. Dev., Inc., 47 F.3d 39, 44 (2d Cir. 1995).

¹²⁵ Philo Smith & Co., Inc. v. USLIFE Corp., 554 F.2d 34, 36 (2d Cir. 1977); see Lynch v. Sease, 2007 F. App'x 0297N (6th Cir. 2007).

By definition, a promise is a representation as to future intent, not a past or present fact.¹²⁶ Promissory estoppel comes into play in situations where actual consideration is not present. It generally does not apply in situations where a contract exists since a necessary element of a valid contract is consideration.¹²⁷ Therefore, if a valid, enforceable contract exists between the parties as to a certain issue, their rights and obligations are governed solely by the contract terms.¹²⁸

In the above case example, the Chinese company signed a written contract with the U.S. company. The promissory estoppel doctrine would most likely not apply. In addition, the doctrine requires that the Chinese company “reasonably” relied on the promises. Without proper cultural context, the Chinese company’s reliance on oral promises despite written terms of the contract to the contrary would most likely be viewed as unreasonable from a U.S. contract law perspective. Hence, the promissory estoppel doctrine would not be able to help the Chinese company in the case example.

Furthermore, even if the Chinese company could successfully assert the promissory estoppel doctrine, it would have only allowed the Chinese company to recover damages suffered in reasonable reliance of the oral promises made by the U.S. company. Those damages would most likely include only the amount of money that the Chinese company invested in its manufacturing equipment in reasonable reliance on the long term relationship promise. Therefore, even if the Chinese company could successfully invoke the doctrine of promissory estoppel, it would not be able to recover any damages in the form of expected profits.

¹²⁶ 28 AM. JUR. 2D *Estoppel and Waiver* § 55 (2008) (noting that promissory estoppel is “predicated on promises or assurances as to future conduct”); see RESTATEMENT (SECOND) OF CONTRACTS § 2 (1981).

¹²⁷ *White v. Roche Biomedical Lab., Inc.*, 807 F. Supp. 1212, 1217 (D.S.C. 1992).

¹²⁸ See *Charleston County Sch. Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 559 S.E.2d 362, 364 (S.C. Ct. App. 2001) (dismissing promissory estoppel counterclaim because counterplaintiff admitted a contract that specifically governed the issue); see also *Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co., Inc.*, 386 F.3d 581, 599 (4th Cir. 2004) (“[I]n South Carolina, equitable relief is precluded under a theory of promissory estoppel if the estoppel claim is in direct conflict with a specific contract term.”).

Another U.S. contract principle which can provide some limited relief is the doctrine of the implied covenant of good faith and fair dealing.¹²⁹ U.S. courts generally hold that every contract contains an implied promise of good faith and fair dealing between the contracting parties.¹³⁰ The covenant requires a party vested with broad discretion to act reasonably and not arbitrarily or in a manner inconsistent with the reasonable expectations of the parties. U.S. courts generally use the covenant to determine the intent of the parties where a contract is susceptible to two conflicting constructions. A U.S. court is unlikely to rely on an implied covenant of good faith to overrule or modify the express terms of a contract in a business-to-business context.¹³¹

It is unlikely that this doctrine could help the Chinese company in the case example. This doctrine, as it is currently formulated and applied, cannot be used to contradict the express terms of a written contract. A U.S. court would most likely defer to the agreement between the two parties in this case.

PART IV. GLOBALIZATION AND THE NEED FOR U.S. CONTRACT LAW TO ADAPT

The central theme of this paper readily begs the following questions: Why is there any need for the United States to adapt its domestic contract law theory to accommodate different cultures globally? Why can't Chinese companies hire competent U.S. trained attorneys if they want to do business with U.S. companies? For example, the Chinese company in the above case example can certainly afford to hire competent lawyers. In any event, why don't Chinese companies (or companies around the globe) learn how to do business the American way?

This paper argues that globalization renders it necessary for U.S. contract law to adapt. The Global Village¹³² phenome-

¹²⁹ RESTATEMENT (SECOND) OF CONTRACTS, § 205 (1981).

¹³⁰ See e.g., *Cromeens, Holloman, Sibert, Inc. v. AB Volvo*, 349 F.3d 376, 395 (7th Cir. 2004).

¹³¹ *Id.*

¹³² Old Messengers, New Media, *The Legacy of Innes and McLuhan: McLuhan, The Global Village*, <http://www.collectionscanada.gc.ca/innis-mcluhan/002033-2060-e.html> (last visited October 13, 2008). Herbert Marshall McLuhan coined this term in the 1960s. McLuhan (July 21, 1911 – Dec. 31, 1980) was a Canadian educator, philosopher, and scholar. I am borrowing the concept of Global Village

non has brought to the forefront the need for this adaptation.¹³³ The “flattening” of the world has brought global companies together.¹³⁴ The Internet and other modern technology has reduced the significance of physical geographical boundaries. An increasing number of companies from different countries have begun doing business with U.S. companies. China is only one of the many with substantially different cultures. It is undeniable that increased interaction results in increased interdependency.¹³⁵

Professor Overby has sagely pointed out the “potential clash between the local and the global that will call into question the current state of American contract law and undercut Western universalist tendencies in the upcoming years.”¹³⁶ Scholars from across the disciplines have recognized that globalization presents a challenge to “black box theories” which treat nation states, geographically bounded societies, or legal systems as discrete entities.¹³⁷ While some legal principles may

here to refer to the fact that internet, ease of transportation and other technological advances have shortened the geographical distances and eliminated the physical borders of countries. As a result, the world has figuratively shrunk into a small village.

¹³³ Overby, *supra* note 2, at 606; see David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1289 (2008).

¹³⁴ THOMAS L. FRIEDMAN, *THE WORLD IS FLAT* (Farrar, Straus and Giroux, 2005); Pattison & Herron, *supra* note 16, at 477 (noting that “[w]ith the advent of a truly globalized world, it is not only markets but entire cultures that are coming into contact.”) (internal citation and quotations omitted).

¹³⁵ The interaction between the local and the global has been attracting extensive contemporary social science research. Bruce G. Carruthers & Terence C. Halliday, *Law Between the Global and the Local: Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes*, 31 LAW & SOC. INQUIRY 521, 522 (2006). Carruthers & Halliday point out that there has been extensive interdisciplinary scholarship on law and globalization in the areas of voting rights, immigration, women’s rights, environmental policies, and citizenship. *Id.* However, questions of whether or the extent to which the local law should adapt to the global in the commercial law context in light of globalization has been under researched. *Id.* at 523.

¹³⁶ Overby, *supra* note 2, at 606.

¹³⁷ WILLIAM TWINING, *GLOBALISATION & LEGAL THEORY* 9 (Butterworths 2000); see also TRANSNATIONAL LEGAL PROCESSES, GLOBALISATION AND POWER DISPARITIES 327 (Michael Likosky, ed., Butterworths 2002) (wherein Professor Koh pointed out the need to study transnational legal process: “the theory and practice of how public and private actors . . . interact in a variety of public and private, domestic and international fora to make, interpret, enforce and ultimately, INTERNALISE rules of transnational law.”); Fabio Morosini, *Globalization & Law: Beyond Traditional Methodology of Comparative Legal Studies and an Example From Private Interna-*

have arguably served their function “in a world of relatively impermeable borders and immobile factors of production,” they may not function so well “in a world of relatively porous borders and relentless mobility.”¹³⁸ U.S. contract law is a classic example of such “black box theories.” The globalization phenomenon has presented a set of different challenges or exacerbated existing challenges to U.S. contract law.

U.S. contract law has been widely criticized for its flawed assumptions.¹³⁹ Numerous legal scholars have criticized U.S. contract law for having assumptions that are rooted in the classic contract law model and detached from the reality of human behavior in the domestic context.¹⁴⁰ Professor Ian McNeil has long recognized the complex relational nature of contractual relationships and devoted a career to developing his relational contract theory. He has argued that “effective analysis of any transaction requires recognition and consideration of all essential elements of its enveloping relations that might affect the transaction significantly.”¹⁴¹ Professor Eisenberg has pointed out that contract law should be “more individualized rather than standardized, subjective rather than objective, complex rather than binary, and dynamic rather than static.”¹⁴²

tional Law, 13 CARDOZO J. INT’L & COMP. L. 541, 542 (2005) (pointing out that “if individuals and businesses continue to delocalize at an increasing rate, nations must develop mechanisms and provide new tools to understand foreign individuals, systems, and institutions.”).

¹³⁸ Law, *supra* note 133, at 1288.

¹³⁹ Sharma, *supra* note 87, at 116 (commenting that “academic criticism of contract law has been harsh, with one leading critic labeling it “dead” and another calling contract theory “a mess.”) (internal citations omitted).

¹⁴⁰ Korobkin & Ulen, *supra* note 4, at 1069-70; Lim, *supra* note 4, at 592; Eisenberg, *supra* note 4, at 808-11; Morant, *supra* note 4, at 897.

¹⁴¹ Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 881 (2000).

¹⁴² Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743, 1744 (2000). Professor Eisenberg posits that the classic contract law has been largely overthrown. *Id.* at 1813. However, other scholars have pointed out that although courts have rejected application of classical contract principles in certain instances, much of the U.S. modern contract law continues to be driven by the classic contract premise of the freedom of contract. Lim, *supra* note 4, at 590. Whether or not the modern contract law has evolved to the point at which one can conclude that the classic contract law reasoning and rules have been overthrown is beyond the scope of this paper. As discussed later in this article, certain modern contract law principles which are intended to remedy the harshness of the classic contract law approach cannot remedy the inequities in the cross cultural business-to-business context with which this article is concerned.

Following the dynamic reasoning of Professor Eisenberg, Professor Kim has argued that “rapid societal changes require a theory of contract that is capable of evolving with them.”¹⁴³ In her article, *Evolving Business and Social Norms and Interpretation Rules: the Need for a Dynamic Approach to Contract Disputes*, she pointed out that “[c]ultural and linguistic differences abound in international transactions as well as in transactions between and among residents of the United States.”¹⁴⁴ Professor Kim examined in depth the fairness of applying U.S. classic contract law principles to cross cultural contracts in the context involving cross border and domestic consumer transactions. She argued that application of U.S. contract interpretation rules undermines U.S. contract law objectives and advocated for a dynamic contract approach which focuses on ascertaining the true intent of the parties.¹⁴⁵ Professor McConnaughay has also noted the fundamental differences in the role of law between the East and the West.¹⁴⁶ He urged a rethinking of the role of law and contracts in East-West commercial relationships.¹⁴⁷

In view of the changing global landscape and acknowledged flawed assumptions in U.S. contract law, what are the consequences of U.S. contract law’s failure to adapt? One can argue that the legitimacy and relevancy of U.S. contract law is at stake. For U.S. contract law principles to be legitimate in the global business community, they need to take into consideration the cultural differences of the parties from other countries.¹⁴⁸ Professor Thomas Franck has argued that, to be legitimate, governmental acts depend on the consent of the governed.¹⁴⁹ Therefore, a “government must ascertain the opinions and desires of the people, including outsiders, before designing and enforcing government actions.”¹⁵⁰ Some international scholars

¹⁴³ Kim, *supra* note 7, at 507.

¹⁴⁴ *Id.* at 537.

¹⁴⁵ *Id.* at 528-30.

¹⁴⁶ McConnaughay, *supra* note 7, at 478-79.

¹⁴⁷ *Id.*

¹⁴⁸ Even within the domestic context, the United States has become a pluralistic society which mirrors the global community. See Lim, *supra* note 4, at 586-87.

¹⁴⁹ Thomas Franck, *The Emerging Rights to Democratic Governance*, 86 AM J. INT’L L. 46, 48 (1992).

¹⁵⁰ Berta Esperanza Hernandez-Truyol, *Building Bridges IV: Of Cultures, Colors, and Clashes - Capturing the International in Delgado’s Chronicles*, 4 HARV. LATINO L. REV. 115, 150 (2000).

have pointed out that “domestic law must be reviewed to remain in step with best practices.”¹⁵¹ Contract law principles that clearly favor domestic parties cannot be legitimate in the international business community.

There is anecdotal evidence that numerous Chinese companies are now insisting on alternative dispute resolution clauses in their contracts with U.S. companies instead of submitting themselves to the U.S. law.¹⁵² If the U.S. contract law persists in “my way or the highway,” it will risk becoming irrelevant in the global community.¹⁵³

Furthermore, U.S. contract law, with its Anglo-American bias, can potentially interfere with the economic development of the United States. Scholarly research has shown that investors are sensitive to legal differences and prefer countries which have favorable laws to them.¹⁵⁴ Investors with highly mobile capital can move around the globe and select jurisdictions friendly to them.¹⁵⁵ Some studies also suggest that the “quality and characteristics of a country’s legal infrastructure . . . affect its prospects for economic prosperity.”¹⁵⁶ The Chinese government has been encouraging Chinese companies to go global.¹⁵⁷ There is anecdotal evidence that Chinese companies are hesitating to invest in the United States because they consider the legal environment of the United States unfriendly.

¹⁵¹ Bruno Zeller, *The Parol Evidence Rule and the CISG - A Comparative Analysis*, 36 COMP. L.J. S. AFR. (2003), available at <http://www.cisg.law.pace.edu/cisg/biblio/zeller6.html>.

¹⁵² Sharma, *supra* note 87, at 130. However, it is not clear if alternative dispute resolution mechanism provides a more appropriate forum for cross border commercial business-to-business disputes between people from drastically different cultures. Compare Hernandez-Truyol, *supra* note 150, at 147. Some scholars have suggested that informal alternative dispute resolution mechanisms disadvantage subordinate groups, notwithstanding arguments that the alternative dispute resolution mechanism’s lower costs and relaxed venues have a leveling effect on power differentials. *Id.*

¹⁵³ Morosini, *supra* note 137, at 552.

¹⁵⁴ Carruthers & Halliday, *supra* note 135, at 524.

¹⁵⁵ *Id.*

¹⁵⁶ Law, *supra* note 133, at 1287 n. 33.

¹⁵⁷ IBM Institute for Business Value, *Going Global: Prospects and Challenges for Chinese Companies on the World Stage*, IBM BUS. CONSULTING SERVS. (IBM Global Servs., Somers, N.Y.), Mar. 2006, at 5, available at <http://www-935.ibm.com/services/us/imc/pdf/g510-6269-going-global.pdf>.

In addition, as pointed out by Professor Kim and some other scholars, U.S. contract law is unfair to people with different cultural values, because this can perpetuate the existing inequities between the U.S. companies and companies from other countries with different cultures.¹⁵⁸ Armed with its team of U.S. trained lawyers, a U.S. company will be at a clear advantage when entering into a contract with a Chinese company, as demonstrated by the case example. This problem is exacerbated by the high, sometimes prohibitive, costs to hire equivalently trained and experienced U.S. lawyers.¹⁵⁹

One may arguably justify maintaining the fiction of “freedom of contract or individual autonomy” perpetuated by U.S. contract law in domestic contexts for the sake of stability, reliance and predictability.¹⁶⁰ As Professor Kim pointed out, attempting to maintain such a fiction in cross cultural contexts would perpetuate the “status quo in favor of those with more resources or greater bargaining power.”¹⁶¹ U.S. contract law legitimizes the inequity by maintaining this fiction.¹⁶² U.S. contract law should not avoid its responsibility for fairness either domestically or globally.¹⁶³

In addition to being unfair, the current U.S. contract law’s focus on the written contract also undermines U.S. contract law’s ultimate goal to ascertain the intent of the parties to the contract. As Professor Kim pointed out, certain “[f]ormalistic evidentiary rules, such as the parol evidence rule and the four corners rule,” can be easily manipulated by the party who has better access to lawyers and more resources.¹⁶⁴ The resulting written agreement is sometimes more of an attempt to manipu-

¹⁵⁸ Kim, *supra* note 7, at 530; Lim, *supra* note 4, at 603.

¹⁵⁹ Keith Maurer, *The Truth About Arbitration: Enforcing Consumers' and Employees' Legal Rights*, 82 MICH. BUS. L.J. 20, 21 (May 2003) (pointing out an American Bar Association report that “100 million Americans are effectively barred from seeking justice by the high cost of lawyers and the lawsuit system.”), available at <http://www.michbar.org/journal/pdf/pdf4article564.pdf>.

¹⁶⁰ Eisenberg, *supra* note 4, at 808; Lim, *supra* note 4, at 591.

¹⁶¹ Kim, *supra* note 7, at 530.

¹⁶² Michael H. Davis & Dana Neacsu, *Legitimacy, Globally: The Incoherence of Free Trade Practice, Global Economics and Their Governing Principles of Political Economy*, 69 UMKC L. REV. 733, 743-45 (2001).

¹⁶³ See Schmitz, *supra* note 109, at 74; Lim, *supra* note 4, at 619.

¹⁶⁴ Kim, *supra* note 7, at 567.

late the predictable contract rules as opposed to a reflection of the parties' true intent.

One may also question the assumption that the Chinese (or peoples from other different cultures) will "learn how to do business the American way." Some scholars have questioned the feasibility or the desirability of "complete westernization of all international commercial practices."¹⁶⁵ Professor McConaughay points out that the "Western legal traditions and values" have not been adopted wholesale by Asian societies.¹⁶⁶ Japan, for example, has had "over one hundred years of experience with Western civil law," but traditional cultural values "continue to play a significant role in shaping Japanese behavior" in commercial relationships.¹⁶⁷ China has had only two decades of experience trying to set up a functioning legal system. Although China has adopted extensive legislation with some legal concepts borrowed from the western civil law and common law traditions, it is an entirely open question whether those transplanted concepts are compatible with the Chinese cultural values, let alone whether they can supplant deep rooted cultural values. Moreover, there is also the question of the desirability of transplanting legal concepts.¹⁶⁸

Some may argue that the U.S. contract law paradigm seeks to promote transactional autonomy.¹⁶⁹ This position assumes that transactional autonomy is necessary to promote healthy economic growth. Some scholars have questioned that assumption.¹⁷⁰ Professor LaKritz has pointed out that "nothing suggests that market equality and transactional autonomy vis-à-vis government institutions are more valuable than more traditional Chinese transactional norms."¹⁷¹ Professor Donald Clarke has also questioned whether "a legal order offering stable and predictable rights of property and contract [characteristics] . . . of the legal systems of the developed countries of the West" (what he refers to as the Rights Hypothesis) is necessa-

¹⁶⁵ McConaughay, *supra* note 7, at 429-31.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at p. 431 nn. 19-22.

¹⁶⁸ One can argue that the numerous problems that the Chinese legal system have with implementation and enforceability are symptoms of incompatibility.

¹⁶⁹ See Sharma, *supra* note 87, at 109-10.

¹⁷⁰ LaKritz, *supra* note 23, at 240, 265.

¹⁷¹ *Id.*

rily required to achieve significant economic growth or the only mechanism to provide effective enforcement of contract rights.¹⁷²

Finally, the U.S. government and academic communities have long criticized China's human rights record. China has been urged to adopt rules which reflect the Anglo-American values such as freedom of the press and separation of powers. Clearly, the United States is urging China to adapt China's domestic laws to western values.¹⁷³ There has also been extensive discussion about a "Rule of Law Initiative" to help China reform its laws and legal institutions.¹⁷⁴ Therefore, to be morally consistent, the United States should be willing to adapt its own domestic laws to address the concerns from other cultures in this increasingly global environment.

PART V. TOWARD A MORE EQUITABLE U.S. CONTRACT LAW FOR CROSS CULTURAL CONTRACTS

How should U.S. contract law acknowledge the impact of cultural differences on contracting behavior? This is a difficult question without an easy answer.¹⁷⁵

¹⁷² Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89, 91-92, 110-11 (2003); see LaKritz, *supra* note 23, at 265.

¹⁷³ This comparison is not intended to criticize the worldwide efforts to urge China to improve its human rights record. Rather, it is meant to support the need for critical self examination of domestic laws to nurture a more harmonious global environment for all countries which share this planet with us.

¹⁷⁴ Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S. Sponsored Rule of Law Reform Projects in the People's Republic of China*, 18 UCLA PAC. BASIN L.J. 64, 66-70 (2000).

¹⁷⁵ This paper focuses on the adaptation of U.S. domestic contract law to acknowledge cultural differences. One question is whether this issue should be resolved at the global level. At the global level, there has been extensive activity and academic debates about the desirability and feasibility of harmonizing contract law. In 1980, the U.N. Convention on Contracts for the International Sales of Goods ("CISG") was adopted in a diplomatic conference organized by United Nations Commission for International Trade Law ("UNCITRAL"). See generally Ole Lando, *CISG and its Followers: A Proposal to Adopt Some International Principles of Contract Law*, 53 AM. J. COMP. L. 379, 380 (2005). The CISG only applies to a subset of cross cultural contracts. *Id.* Nonetheless, it represented the first step. *Id.* Whether or not the CISG rules equitably address issues related to cross cultural contracts or whether the U.S. courts are applying CISG equitably is beyond the scope of this paper. In 2004, the Governing Council of UNIDROIT adopted the new edition of the UNIDROIT Principles of International Commercial Contracts. *Id.* at 381. Some of the topics for the UNICTRAL 2007 Congress, held in July

Recognizing the social changes brought on by increased cross border transactions and the use of standard form agreements,¹⁷⁶ Professor Kim proposed, among others, that the traditional formalistic contract principles “such as the parol evidence rule and the four corners rule” be abandoned.¹⁷⁷ She argued that these rules “ignore the significance of preexisting relationships and nonverbal communication and wrongly assume linguistic certainty.”¹⁷⁸ Under Professor Kim’s “dynamic approach,” the focus is on ascertaining the true intent of the parties.¹⁷⁹ Professor Kim suggested that contracting parties be allowed to present evidence of prior negotiations and the surrounding circumstances to prove the true intent of the parties.¹⁸⁰

This paper proposes a differentiated approach toward cross cultural contracts. U.S. contract law should treat cross cultural contracts as a separate category of contracts. Although it may be highly desirable and convenient to have one set of contract law principles to apply universally to all contracts, universality may need to be compromised where “universality is inconsistent with sophistication and realism.”¹⁸¹ As Professors Korobkin and Ulen suggest, “legal policymakers are better off foregoing universality and, instead, creating a collection of situation-spe-

2007, dealt with *The Future of Contract Law Harmonization; Uniform Contract Law in Practice; Carriage of Goods in the 21st Century; Electronic Commerce: Beyond Functional Equivalence*. Some scholars have raised the issue of creating a Global Commercial Code. Michael Joachim Bonell, *10th Biennial Conference of the International Academy of Commercial and Consumer Law: Creating International Legislation for the Twenty-First Century: Do We Need a Global Commercial Code?* 106 DICK. L. REV. 87 (2001). See also Wayne R. Barnes, *Contemplating a Civil Law Paradigm for a Future International Commercial Code*, 65 LA. L. REV. 677, 734-53 (2005) (discussing the international efforts on contract law). It is beyond the scope of this paper to examine the pros and cons of global harmonization of contract law and whether there exists a set of international contract principles which accommodate different cultural values. In any event, global practices do not absolve the United States of fashioning a more equitable approach domestically.

¹⁷⁶ Kim, *supra* note 7, at 507-08, 565-68 (providing in detail a set of guidelines for a dynamic approach to contract interpretation).

¹⁷⁷ *Id.* at 567.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Korobkin & Ulen, *supra* note 4, at 1073.

cific minitheories useful in the analysis of discrete legal problems.”¹⁸²

This culturally differentiated contract approach consists of two steps. First, U.S. courts should allow parties to proffer evidence of cultural differences to demonstrate the existence of cultural differences. Scholars have “urged the adoption of a . . . cultural defense” — the use of evidence of minority cultures — in the criminal law context for the “twin goals of cultural pluralism and individualized justice.”¹⁸³ Some U.S. courts have allowed criminal defendants to assert culture as a defense, although the results for criminal defendants in general have varied greatly.¹⁸⁴ In the contract law context, instead of mitigating, excusing or justifying a crime, cultural evidence would be used as a sword to pierce the magic shield the current U.S. contract law has cast over a written contract.

Once a party demonstrates the existence of cultural differences, then the traditional contract interpretation and construction doctrines would not apply.¹⁸⁵ The party would be permitted to introduce evidence of all relevant negotiations in order to ascertain the true intent of the parties. Numerous scholars have proposed that the parol evidence rule be abandoned because it has outlived its reason for existence.¹⁸⁶

This two phased approach would allow U.S. courts to consider cultural differences when those cultural differences have impacted the parties’ contracting behavior. It would serve U.S. contract law’s ultimate goal of ascertaining the parties’ intent

¹⁸² *Id.*

¹⁸³ Elaine M. Chiu, *Culture as Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317, 1320 (2006) (providing a detailed discussion about the use of evidence of minority cultures in the criminal law context).

¹⁸⁴ *Id.* at 1321.

¹⁸⁵ A CISG advisory opinion states that the Parol Evidence Rule and the Plain Meaning Rule do not apply to contracts under the CISG. CISG-AC Opinion No. 3, *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG*, October 23, 2004. Rapporteur: Professor Richard Hyland, Rutgers Law School, Camden, N.J. U.S.A. On its face, it appears that the CISG would allow consideration of cultural differences in contracting behavior in a subset of contracts involving cross border transactions. Can the CISG effectively address the Chinese challenge? This topic is beyond the scope of this article.

¹⁸⁶ For a more lengthy discussion of the parol evidence rule and why it should be abandoned, see generally Paolo Torzilli, *The Aftermath of MCC-Marble: Is This the Death Knell for the Parol Evidence Rule?*, 74 ST. JOHN’S L. REV. 843 (2000) (discussing the parol evidence rule and providing reasons for abandoning it).

more faithfully than the current approach, which favors a party who shares the Anglo American values and who is well equipped to manipulate contract law principles to the detriment of parties from other cultures.

This differentiated approach has precedent in the existing U.S. contract law framework. For example, with the advent and increased use of form agreements, U.S. courts have adapted by adopting the “contract of adhesion” concept and developing special rules in addressing those “contracts of adhesion.”¹⁸⁷ Unlike the dynamic approach of Professor Kim, a differentiated approach toward cross cultural contracts leaves the existing U.S. contract law framework intact. It affects only the subsets of the written contracts where cultural differences matter.

Admittedly, this differentiated approach would allow evidentiary proof to show that the parties intended to reach terms different from those in the written agreement. This can reduce the predictability in a U.S. court, one of the factors always cited in support of the classic contract interpretative principles. However, predictability in the case of cross cultural contracts comes at the expense of fairness. Perhaps, a better balance is to reduce predictability to a limited extent for the sake of fairness.

As the above case example demonstrates, the predictability sustained by U.S. contract law was easily manipulated by a legally sophisticated U.S. company at the expense of the Chinese party. If U.S. contract law refuses to take into consideration cultural values and their impact on contracting behavior in cross cultural contexts, the only predictable result is that the party from another culture will get the short end of the stick where U.S. contract law is concerned. This conflicts with the fundamental notion of fairness. It is time for U.S. contract law to search for a proper balance between predictability and fairness that includes peoples from other cultures.

CONCLUSION

In conclusion, globalization has brought many changes and challenges. Different peoples and remote cultures have come

¹⁸⁷ J.W. Looney & Anita K. Poole, *Adhesion Contracts, Bad Faith, and Economically Faulty Contracts*, 4 *DRAKE J. AGRIC. L.* 177 (1999) (tracing the development and history of adhesion contracts doctrine).

closely together in an unprecedented manner. As a result, we have become more interdependent. The interdependence requires more vigilance in formulating domestic rules and principles that are equitable across cultures and/or borders.

U.S. contract law in its current form is inadequate in the age of globalization. Its underlying assumptions reflect the values of an Anglo American society. It does not apply to other cultures with different values and priorities. Therefore, applying U.S. contract law to cross cultural contracts can be unfair and may undermine the U.S. contract law's ultimate goal of enforcing the intent of the contractual parties. A differentiated contract law approach that considers substantial cultural differences may be able to remedy the unfairness without threatening the entire framework of U.S. contract law.