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## CISG Advisory Council Opinion No. 3: Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG

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# OPINIONS

## CISG ADVISORY COUNCIL OPINION NO. 3<sup>†1</sup> PAROL EVIDENCE RULE, PLAIN MEANING RULE, CONTRACTUAL MERGER CLAUSE AND THE CISG<sup>2</sup>

### Opinion

1. The Parol Evidence Rule has not been incorporated into the CISG. The CISG governs the role and weight to be ascribed to contractual writing.

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† Editor's Note: While The Pace International Law Review adheres to The Bluebook Uniform System of Citation, the Law Review has deferred to the Advisory Council's chosen citation in the interest of the uniformity of their opinions.

<sup>1</sup> To be cited as: CISG-AC Opinion no 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, 23 October 2004. Rapporteur: Professor Richard Hyland, Rutgers Law School, Camden, NJ, USA.

Adopted by the CISG-AC on its 7th meeting in Madrid with no dissent. Reproduction of this opinion is authorized.

The opinion is dedicated to the memory of our dear friend, colleague, and teacher Allan Farnsworth who passed away on 31 January 2005.

PETER SCHLECHTRIEM, *Chair*

ERIC E. BERGSTEN, MICHAEL JOACHIM BONELL, ALEJANDRO M. GARRO, ROY M. GOODE, SERGEI N. LEBEDEV, PILAR PERALES VISCASILLAS, JAN RAMBERG, INGEBORG SCHWENZER, HIROO SONO, CLAUDE WITZ, *Members*

LOUKAS A. MISTELIS, *Secretary*

The CISG-AC is a private initiative supported by the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, University of London. The International Sales Convention Advisory Council (CISG-AC) is in place to support understanding of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the promotion and assistance in the uniform interpretation of the CISG.

At its formative meeting in Paris in June 2001, Prof. Peter Schlechtriem of Freiburg University, Germany, was elected Chair of the CISG-AC for a three-year term. Dr. Loukas A. Mistelis of the Centre for Commercial Studies, Queen Mary, University of London, was elected Secretary. The CISG-AC has consisted of: Prof.

2. In some common law jurisdictions, the Plain Meaning Rule prevents a court from considering evidence outside a seemingly unambiguous writing for purposes of contractual interpretation. The Plain Meaning Rule does not apply under the CISG.

3. A Merger Clause, also referred to as an Entire Agreement Clause, when in a contract governed by the CISG, derogates from norms of interpretation and evidence contained in the CISG. The effect may be to prevent a party from relying on evidence of statements or agreements not contained in the writing. Moreover, if the parties so intend, a Merger Clause may bar evidence of trade usages.

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Emeritus Eric E. Bergsten, Pace University; Prof. Michael Joachim Bonell, University of Rome La Sapienza; Prof. E. Allan Farnsworth, Columbia University School of Law; Prof. Alejandro M. Garro, Columbia University School of Law; Prof. Sir Roy M. Goode, Oxford; Prof. Sergei N. Lebedev, Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Russian Federation; Prof. Jan Ramberg, University of Stockholm, Faculty of Law; Prof. Peter Schlechtriem, Freiburg University; Prof. Hiroo Sono, Faculty of Law, Hokkaido University; Prof. Claude Witz, Universität des Saarlandes and Strasbourg University. Members of the Council are elected by the Council. At its meeting in Rome in June 2003, the CISG-AC elected as additional members, Prof. Pilar Perales Viscasillas, Universidad Carlos III de Madrid, and Prof. Ingeborg Schwenzer, University of Basel.

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<sup>2</sup> This opinion is a response to a request by the Association of the Bar of the City of New York Committee on Foreign and Comparative Law. The questions referred to the Council were:

1. By holding that the CISG permits a court to abandon the parol evidence rule, which generally bars 'evidence of any prior agreement' (UCC 2-202), the Eleventh Circuit has introduced what may be an unnecessary degree of uncertainty in the drafting of contracts. If the *MCC-Marble* rule prevails, there is no certainty that the provisions of even the most carefully negotiated and drafted contract will be determinative.

2. . . . Does the parol evidence rule apply under the CISG? Although the rule is regarded as substantive, not evidentiary, and thus within the scope of the CISG, it is arguable that the rule deals with a matter 'not expressly settled' in the CISG. The applicable law would then be the law of the jurisdiction whose law would 'be applicable by virtue of the rules of private international law' (CISG art. 7(2)), and if such jurisdiction were an American or other common law jurisdiction the parol evidence rule would apply.

. . .

3. Does the 'plain meaning rule' apply under the CISG?

4. Would a merger clause invoke the parol evidence rule under the CISG, regardless of whether the rule would otherwise be applicable?"

However, in determining the effect of such a Merger Clause, the parties' statements and negotiations, as well as all other relevant circumstances shall be taken into account.

## Comments

### 1. Introduction

#### 1.1. *Interpretation and Evidence under the CISG*

1.1.1. The CISG provides norms and principles for the interpretation and evidence of international sales transactions. These include Article 8, which generally permits all relevant circumstances to be considered in the course of contract interpretation, Article 9, which incorporates certain usages into the contract, and Article 11,<sup>3</sup> which indicates that a contract and its terms may be proved by any means, including by witnesses. These rules prevail over domestic rules on interpretation and evidence of contractual agreements. Since these are default rules, Article 6 permits the parties to derogate from them or vary their effect.

1.1.2. Article 6 permits the parties to derogate from them or vary their effect, e.g., by merger clauses. This Opinion considers some issues that arise when a court or tribunal is asked to determine whether the parties intended by a merger clause to derogate from the Convention's norms governing contract interpretation.

#### 1.2. *The Parol Evidence Rule*

1.2.1. The Parol Evidence Rule refers to the principles which common law courts have developed for the purpose of determining the role and weight to ascribe to contractual writings. The basic purpose of these principles is "to preserve the integrity of written contracts by refusing to allow the admission of [prior] oral statements or previous correspondence to contradict the written agreement."<sup>4</sup> In order to allow the intent of the writing to prevail, the judge may exclude what is known as extrinsic or

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<sup>3</sup> Unless a state has made a reservation under Article 96.

<sup>4</sup> Larry DIMATTEO, *The Law of International Contracting* 212 (2000).

parol evidence, particularly statements made during the negotiations. The Parol Evidence Rule applies to the general law of contracts, including the sale of goods law of common law jurisdictions.<sup>5</sup>

**1.2.2.** The Parol Evidence Rule is believed to have developed as a method for judges to prevent common law juries from ignoring credible and reliable written evidence of the contract.<sup>6</sup> The US legal system maintains the right to a jury trial in civil matters, and most civil jury trials take place in the United States.<sup>7</sup> As a result, the Parol Evidence Rule has become more important in US law than in other common law systems.

**1.2.3.** The Parol Evidence Rule comes into play when two circumstances meet. First, the agreement has been reduced to writing. Second, one of the parties seeks to present extrinsic or parol evidence to the fact finder. Extrinsic or parol evidence includes evidence of the negotiations or of agreements related to the contractual subject matter which was not incorporated into the written contract. A typical case involves representations made during the negotiations by Seller or Seller's representatives regarding the quality of the goods. Under the Parol Evidence Rule, Seller may ask the tribunal to bar introduction of evidence of any representations not incorporated into the written contract.

**1.2.4.** In English law, the Parol Evidence Rule involves a rebuttable presumption that the writing was intended to include

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<sup>5</sup> For example, the Parol Evidence Rule has been incorporated into the sales law of the US Uniform Commercial Code: "Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented (a) by course of performance, course of dealing, or usage of trade (Section 1-303), and (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement." UCC § 2-202.

<sup>6</sup> Charles MCCORMICK, *Handbook of the Law of Evidence* §§ 210-11 (1954).

<sup>7</sup> Edward J. IMWINKELRIED, "A Comparative Critique of the Interface between Hearsay and Expert Opinion in American Evidence Law, 33 *Boston College Law Review* 1 (1991) at 34.

all the terms of the contract.<sup>8</sup> English courts first examine the writing to determine whether it was meant to serve as a true record of the contract.<sup>9</sup> Thus, under English law, the party relying on a writing has the benefit that, when the writing appears to be complete, it is presumed to represent the complete contract, subject to the other party's right of rebuttal.<sup>10</sup>

**1.2.5.** In US law, the Parol Evidence Rule operates in two steps.<sup>11</sup> A US court asks first whether the writing was "integrated," meaning whether the writing was intended to represent the final expression of the terms it contains. The parties' notes, or a mere draft of the agreement, for example, would usually be deemed not to be integrated. A writing signed by the parties and containing detailed specifications will usually be found to be integrated. If the writing is integrated, neither party may introduce parol evidence to contradict the terms of the writing. If the writing is deemed to be integrated, the second step is to determine whether it is "completely integrated," namely whether it was intended to represent the complete expression of the parties' agreement. If the writing is completely integrated, parol evidence may not be introduced either to contradict or to supplement the writing's terms.

**1.2.6.** Different methods are used in US law to determine whether a writing is completely integrated.<sup>12</sup> Some courts engage in a conclusive presumption that a writing fully incorporates the contract. Other courts presume that the writing is completely integrated unless, by its terms, it refers to factors beyond its four corners. Still other courts allow evidence of extrinsic circumstances, though not of the preliminary negotiations, when considering whether the writing is integrated. Perhaps the most liberal method is that proposed by the Restatement (Second) of Contracts—all extrinsic evidence, including the negotiations, may be considered when determining whether the parties intended the writing to be the complete and

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<sup>8</sup> G. H. TREITEL, *The Law of Contract*, 192 (11th ed. 2003).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 193.

<sup>11</sup> See E. Allan FARNSWORTH, *Contracts*, § 7.3 (3rd ed. 1999).

<sup>12</sup> Peter LINZER, "The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule," 71 *Fordham L. Rev.* 799, 805-06 (2002).

final statement of their obligations.<sup>13</sup> US sales law has adopted a similarly liberal approach.<sup>14</sup>

**1.2.7.** The Parol Evidence Rule was designed to serve both an evidentiary and a channeling function, but its efficacy has often been challenged.<sup>15</sup> The evidentiary function serves to protect a contractual writing against perjured or unreliable testimony regarding parol terms. The channeling function excludes prior agreements that have been superseded or merged into the writing. Despite its name, the Parol Evidence Rule is a substantive rule of contract interpretation rather than a rule of evidence.<sup>16</sup> The Parol Evidence Rule therefore applies when the substantive law governing the contract contains a Parol Evidence Rule.

**1.2.8.** The civil law generally does not have jury trials in civil cases<sup>17</sup> and civilian jurisdictions usually do not place limits on the kind of evidence admissible to prove contracts between merchants. Though the French Civil Code, for example, incorporates a version of the Parol Evidence Rule for ordinary contracts,<sup>18</sup> all forms of proof are generally available against merchants.<sup>19</sup> In German law, no Parol Evidence Rule exists for either civil or commercial contracts, though German law presumes that a contractual writing is accurate and complete.<sup>20</sup>

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<sup>13</sup> Restatement (Second) of Contracts § 214 (1981).

<sup>14</sup> For example, the fact that a writing contains detailed specifications does not create a presumption that it is completely integrated. "This section definitely rejects . . . [a]ny assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon . . . ." UCC § 2-202 comment 1 (a).

<sup>15</sup> John CALAMARI & Joseph PERILLO, *Contracts* § 3.2 at 123 (4th ed. 1998).

<sup>16</sup> See *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.*, 114 F.3d 1384, 1388-89 (11th Cir. 1998); E Allan Farnsworth, *supra* note 11, § 7.2 at 428-30.

<sup>17</sup> Max RHEINSTEIN, "Comparative Law—Its Functions, Methods and Usages," 22 *Ark. L. Rev.* 415, 422 (1968).

<sup>18</sup> C.Civ. (Fr.) Art. 1341 (1). See also Italian Codice civile Art. 2722, but see also Art. 1350.

<sup>19</sup> See C.Comm. (Fr.) Art. L. 110-3.

<sup>20</sup> See Otto PALANDT (Helmut Heinrichs), *Bürgerliches Gesetzbuch*, § 125 BGB Rn. 15 (64th ed., Munich 2005).

This is also the case in other laws, e.g., Japanese law<sup>21</sup> and Scandinavian laws.

**1.2.9.** Statements, agreements, and conduct that arise after the conclusion of the writing are treated differently in the different common law systems. In US law, they are not considered parol evidence and are therefore not barred by the Parol Evidence Rule.<sup>22</sup> English law, on the contrary, attempts to avoid the situation in which a contract's meaning when concluded varies at a later date. Therefore, English law does not permit evidence of the parties' statements or conduct after the conclusion of the contract to impact the issue of contract interpretation.<sup>23</sup>

### **1.3. *The Plain Meaning Rule***

Even when the Parol Evidence Rule bars parol evidence for purposes of contradicting or supplementing a contract's terms, parol evidence is generally still admissible for the purpose of interpreting terms found in the writing. Nonetheless, a US law doctrine known as the Plain Meaning Rule, where adopted, bars extrinsic evidence, particularly evidence of prior negotiations, for the purposes of interpreting a contract, unless the term in question has first been found to be ambiguous. In contrast to the Parol Evidence Rule, the Plain Meaning Rule concerns only contract interpretation and does not purport to bar contradictory or supplementary terms. The Plain Meaning Rule is based on the proposition that, when language is sufficiently clear, its meaning can be conclusively determined without recourse to extrinsic evidence.<sup>24</sup> Under the Plain Meaning Rule, the preliminary analysis concerns whether the contract term in dispute is

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<sup>21</sup> In Japanese law, no parol evidence rule exists for either civil or commercial contracts. Japanese law presumes that a contractual writing is accurate and complete. An authentic contractual writing has the evidentiary value of showing that a contract was concluded as written therein. See e.g., Makoto ITO, *Minjisoshoho [Law of Civil Procedure]* (3d ed.), 2004, p.266. (or any given commentary/treatise.)

<sup>22</sup> "[T]he course of actual performance by the parties is considered the best indication of what they intended the writing to mean." UCC § 2-202 comment 2.

<sup>23</sup> G. H. TREITEL, *supra* note 8, at 195-6.

<sup>24</sup> E. Allan FARNSWORTH, *supra* note 11, § 7.12 at 476.



clear. Only if the term is deemed ambiguous, may evidence of prior negotiations be admitted for purposes of clarification.<sup>25</sup>

#### 1.4. *Merger Clauses*

The parties may wish to assure themselves that reliance will not be placed on representations made prior to the execution of the writing. The Merger or Entire Agreement Clause (the "Merger Clause") has been developed to achieve certainty in this regard. The Merger Clause, which usually appears among the concluding terms of a written agreement, provides that the writing contains the entire agreement of the parties and that neither party may rely on representations made outside the writing.<sup>26</sup>

### 2. The Parol Evidence Rule

**The Parol Evidence Rule has not been incorporated into the CISG. The CISG governs the role and weight to be ascribed to contractual writing.**

**2.1.** The CISG includes no version of the Parol Evidence Rule. To the contrary, several CISG provisions provide that statements and other relevant circumstances are to be considered when determining the effect of a contract and its terms. The most important of these are Articles 8 and 11.

**2.2.** Article 11 sentence 2 provides that a party may seek to prove that a statement has become a term of the contract by any means, including by the statements of witnesses. Article 8 concerns contract interpretation.<sup>27</sup> Article 8(1) provides that, in

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<sup>25</sup> See *id.* § 7.12.

<sup>26</sup> A typical Merger Clause in a sales transaction reads as follows: Purchaser agrees that the Purchase Order and Sales Contract relating to this transaction include all of the terms and conditions of this Agreement and that this Agreement cancels and supersedes any prior agreement and as of the date hereof comprises the complete and exclusive statement of the terms of the Agreement relating to the subject matters covered hereby. Purchaser further understands that verbal promises by sales representatives are not valid and any promises or understandings not herein specified in writing are hereby expressly waived by the Purchaser.

<sup>27</sup> Most commentators agree that Article 8, which expressly covers the interpretation of a party's statements and conduct, should also be used, *mutatis mutandis*, to interpret the terms of the contract. John HONNOLD, *Uniform Law for*

certain circumstances, contracts are to be interpreted according to actual intent. When the inquiry into subjective intent proves insufficient, Article 8(2) provides that statements and conduct are to be interpreted from the point of view of a reasonable person. This evaluation according to Article 8(3) takes into account all relevant circumstances of the case, including the negotiations, any course of conduct or performance between the parties, any relevant usages, and subsequent conduct of the parties. Thus Article 8 allows that extrinsic evidence may generally be considered when determining the meaning of a contractual term. In sum, the CISG indicates that a writing is one, but only one, of many circumstances to be considered when establishing and interpreting the terms of a contract.<sup>28</sup>

**2.3.** The Convention's legislative history is in accord. A version of the Parol Evidence Rule was proposed by the Canadian delegate in Vienna.<sup>29</sup> The proposal was justified as a means to limit admissible evidence in those cases in which the parties had chosen to reduce their agreement to writing.<sup>30</sup> The Aus-

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*International Sales* § 105 (3rd ed. 1999). See also SCHLECHTRIEM & SCHWENZER (Schmidt-Kessel), *Kommentar zum Einheitlichen UN-Kaufrecht - CISG* -, 4. Auflage, München 2004, N 3, 4 and 32-34; English edition: SCHLECHTRIEM & SCHWENZER (Schlechtriem), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Art. 8 N 21 (2nd ed., Oxford 2005).

<sup>28</sup> J. von STAUDINGER (Ulrich Magnus), *Kommentar zum Bürgerlichen Gesetzbuch*, Art. 8 CISG Rn. 24 (Neubearbeitung 1999).

<sup>29</sup> "Between the parties to a contract of sale evidenced by a written document, evidence by witnesses shall be inadmissible for the purposes of confuting or altering its terms, unless there is prima facie evidence resulting from a written document from the opposing party, from his evidence or from a fact the existence of which has been clearly demonstrated. However, evidence by witnesses shall be admissible for purposes of interpreting the written document." United Nations Conference on Contracts for the International Sale of Goods, Official Records, U.N. Doc. A/Conf./97/19, U.N. Sales No. E.81.IV.3, at 90 (1981) [hereinafter UNCISG Official Records], reprinted in John HONNOLD, *Documentary History of the Uniform Law for International Sales*, 662 (1989). For a summary of the legislative history, see Note, "The Inapplicability of the Parol Evidence Rule to the United Nations Convention on Contracts for the International Sale of Goods," 28 *Hofstra L. Rev.* 799, 823-26 (2000).

<sup>30</sup> "Mr. SAMSON (Canada), introducing [this] amendment . . . said that the aim was to introduce a limitation on admissible evidence in cases where contracting parties had freely chosen to have a written contract. In the international context, it was important to ensure a minimum of protection for parties who had made such a choice. The amendment sought to exclude evidence by witnesses unless it was supported by other evidence resulting from a written document from the opposing party or circumstantial evidence. The amendment called for some

trian Representative indicated that his delegation opposed the amendment because it "was aimed at limiting the free appreciation of evidence" by the judge. To prevent a judge from reviewing all the evidence would violate a "fundamental principle of Austrian law."<sup>31</sup> The Representative from Japan also opposed the amendment, which he characterized as a "restatement of the rule on extrinsic evidence which prevailed in English-speaking common-law countries."<sup>32</sup> The only other nation to speak in support of the proposal was Iraq. The amendment received little support and was rejected.<sup>33</sup>

**2.4.** There were several practical reasons for not including a Parol Evidence Rule in the CISG.<sup>34</sup> First, most of the world's legal systems admit all relevant evidence in contract litigation. Secondly, the Parol Evidence Rule, especially as it operates in the United States, is characterized by great variation and extreme complexity.<sup>35</sup> It has also been the subject of constant criticism.<sup>36</sup>

**2.5.** Since the Convention has specifically resolved questions governed by the common law Parol Evidence Rule, there can be no question of a gap in the CISG, and no grounds for recourse to non-uniform domestic law.<sup>37</sup> The Parol Evidence Rule therefore

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degree of certainty as to facts which could be used to establish a prima facie case: for example, a clearly established material fact could be adduced as evidence of the existence of an agreement." UNCISG Official Records, *supra* note 28, at 270, reprinted in John HONNOLD, *Documentary History*, *supra* note 29, at 491.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

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

<sup>34</sup> See Note, "MCC-Marble Ceramic Center: The Parol Evidence Rule and Other Domestic Law Under the Convention on Contracts for the International Sale of Goods," 1999 *B.Y.U. L. Rev.* 351, 360-62.

<sup>35</sup> "Few things are darker than this, or fuller of subtle difficulties. . . . [A] mass of incongruous matter is here grouped together, and then looked at in a wrong focus." James THAYER, "The 'Parol Evidence' Rule," 6 *Harv. L. Rev.* 325, 325 (1893).

<sup>36</sup> "The truth is that the [Parol Evidence Rule] does but little to achieve the ends it supposedly serves." *Zell v. American Seating Co.*, 138 F.2d 641, 644 (2d Cir. 1943) (Frank, J.).

<sup>37</sup> Since the Parol Evidence Rule does not apply when the CISG governs the contract, there is nothing to be gained, as some scholars have attempted, by deciding which of the various aspects of the Parol Evidence Rule comport with the basic principles of the CISG. See, e.g., Harry FLECHTNER, "The U.N. Sales Convention (CISG) and MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino,

does not apply when the CISG governs a contract.<sup>38</sup> US courts have so held.<sup>39</sup>

**2.6.** The leading US case is *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.*<sup>40</sup> D'Agostino, the Italian seller, agreed to sell the buyer, MCC-Marble, a Florida company, the buyer's requirements in ceramic tile. After MCC-Marble refused to make certain monthly payments, D'Agostino

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S.p.A.: The Eleventh Circuit Weighs in on Interpretation, Subjective Intent, Procedural Limits to the Convention's Scope, and the Parol Evidence Rule," 18 *J. L. & Com.* 259, 284 (1999) ("Some aspects of the parol evidence rule . . . appear to remain valid under the Convention"); Note, "The Parol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.," 1995 *B.Y.U. L. Rev.* 1347 (1995). Instead, the particular interpretive method of the CISG must be developed from the text and purposes of the CISG itself.

<sup>38</sup> Most commentators are in accord. See, e.g., Larry DiMatteo, *supra* note 4, at 21; John HONNOLD, *Uniform Law*, *supra* note 27, § 110; SCHLECHTRIEM & SCHWENZER (Peter Schlechtriem), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Art. 11 N 13 (2nd ed., Oxford 2005) – (German edition, 4th edition 2004, Art. 11 N 13); Albert KRITZER, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* 94 (1994); Bernard AUDIT, *La vente internationale de marchandises* 43 n. 3 (1990); Note, *supra* note 33, 1999 *B.Y.U. L. Rev.* at 359; Peter WINSHIP, "Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention," 37 *Loyola L. Rev.* 43, 57 (1991); John MURRAY, "An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods," 8 *J. L. & Comm.* 11, 44 (1988) ("CISG rejects the parol evidence rule in the most frugal terms"). For the contrary view, see Note, *supra* note 36, 1995 *B.Y.U. L. Rev.* at 1351.

<sup>39</sup> See *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.*, *supra* note 16, 114 F.3d at 1392-93 ("The CISG . . . precludes the application of the parol evidence rule, which would otherwise bar the consideration of evidence concerning a prior or contemporaneously negotiated oral agreement"); *Shuttle Packaging Systems, LLC v. Tsonakis*, 2001 WL 34046276 (W.D.Mich. 2001) ("international sales agreements under the Convention are not subject to the parol evidence rule"); *Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB*, 23 F.Supp.2d 915, 919-21 (N.D.Ill. 1998); *Claudia v. Olivieri Footwear Ltd.*, 1998 WL 164824 \*5-6 (S.D.N.Y.) ("contracts governed by the CISG are freed from the limits of the parol evidence rule and there is a wider spectrum of admissible evidence to consider in construing the terms of the parties' agreement"); *Filanto S.p.A. v. Chilewich International Corp.*, 789 F.Supp. 1229, 1238 n. 7 (S.D.N.Y. 1992), *app. dismissed*, 984 F.2d 58 (2nd Cir. 1993) ("the Convention essentially rejects . . . the parol evidence rule"). *Contra: Beijing Metals & Minerals Import/Export Corp. v. US Business Center, Inc.*, 993 F.2d 1178, 1183 n. 9 (5th Cir. 1993) (in dictum (the court applied Texas law)).

<sup>40</sup> *Supra*, note 16.

refused to fill remaining orders. MCC-Marble sued for breach. D'Agostino defended on the basis of the payment default. D'Agostino pointed to pre-printed terms on the verso of the written contract which gave D'Agostino the right to cancel the agreement if MCC failed to make payment. At trial, MCC-Marble sought to introduce evidence from the parties' negotiations to prove that the agreement did not include the pre-printed terms. The trial court applied the Parol Evidence Rule and granted summary judgment for the seller. The Eleventh Circuit reversed, holding that the Parol Evidence Rule does not apply when a contract is governed by the CISG.

**2.7.** Though the Parol Evidence Rule does not apply to contracts governed by the CISG, similar policy considerations are incorporated into the CISG itself. The principal purpose of the Parol Evidence Rule is to respect the importance the parties may have accorded to their writing. Under the Convention as well, a writing constitutes an important fact of a transaction – it must be presumed to fulfill a function, otherwise it would not have been employed. One of the goals of contract interpretation is to determine the role the writing was designed to play. The commentators agree that a contractual writing will often receive special consideration under the CISG.<sup>41</sup>

**2.8.** The special role of a writing, however, must be construed in accordance with the general principles that govern the CISG. The parties' intent with regard to the role of their writing is due the same respect as any other element of their intent. The principles of Article 8 are to be used to determine that intent. If the parties intended their writing as the sole manifestation of their obligations, prior negotiations and other extrinsic circumstances should not be considered during contract interpretation.

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<sup>41</sup> See SCHLECHTRIEM & SCHWENZER (Schlechtriem), *Kommentar zum Einheitlichen UN-Kaufrecht - CISG*, 4. Auflage, München 2004, Art. 11 N 13; English edition: SCHLECHTRIEM & SCHWENZER (Schlechtriem), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Art. 11 N 13 (2nd ed., Oxford 2005). ("that does not preclude the existence of a 'preference' for evidence of declarations in written form"); John HONNOLD, *Uniform Law*, supra note 27, § 110 ("Jurists interpreting agreements subject to the Convention can be expected to continue to give special and, in most cases, controlling effect to detailed written agreements").

However, Articles 8 and 11 express the general principle that writings are not to be presumed to be “integrations”.<sup>42</sup>

### 3. Plain Meaning Rule

**In some common law jurisdictions, the Plain Meaning Rule prevents a court from considering evidence outside a seemingly unambiguous writing for purposes of contractual interpretation. The Plain Meaning Rule does not apply under the CISG.**

**3.1.** The majority jurisdictions in the United States retain some version of the Plain Meaning rule in their common law, though it has been rejected by other of the United States as well as by the Restatement (Second) of Contracts,<sup>43</sup> and the Uniform Commercial Code.<sup>44</sup> The UNIDROIT Principles of International Commercial Contracts also reject the Plain Meaning Rule, by providing that, even in the presence of a Merger Clause, prior statements or agreements may be used to interpret a writing.<sup>45</sup>

**3.2.** Article 8 specifies the Convention’s method for contract interpretation. As a general rule, Article 8 mandates that all facts and circumstances of the case, including the parties’ negotiations, are to be considered during the course of contract interpretation. The writing constitutes one of those factors, and though always important, it is not the exclusive factor. Words

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<sup>42</sup> Harry FLECHTNER, *supra* note 37, 18 *J. L. & Comm.* at 278-79 (“the question whether the parties intended a writing to be an integration must be resolved like any other question of intent under the CISG, and without benefit of a presumption that the writing is an integration”).

<sup>43</sup> “It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. . . . Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties. . . . But after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention.” Restatement (Second) of Contracts § 212 comment b (1981).

<sup>44</sup> “This section definitely rejects . . . [t]he premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used . . . .” UCC § 2-202 comment 1 (b).

<sup>45</sup> Unidroit Principles of International Commercial Contracts Art. 2.1.17 (2nd sentence).

are almost never unambiguous.<sup>46</sup> Moreover, the application of the Plain Meaning Rule would impede one of the basic goals of contract interpretation under the CISG, which is to focus on the parties' actual intent. If contract terms are deemed to be unambiguous, the Plain Meaning Rule would prevent presentation of other proof of the parties' intent.<sup>47</sup>

**3.3.** Under the CISG, therefore, the fact that the meaning of the writing seems unambiguous does not bar recourse to extrinsic evidence to assist in ascertaining the parties' intent.

#### **4. Merger Clause**

**A Merger Clause, also referred to as an Entire Agreement Clause, when in a contract governed by the CISG, derogates from norms of interpretation and evidence contained in the CISG. The effect may be to prevent a party from relying on evidence of statements or agreements not contained in the writing. Moreover, if the parties so intend, a Merger Clause may bar evidence of trade usages.**

**However, in determining the effect of such a Merger Clause, the parties' statements and negotiations, as well as all other relevant circumstances shall be taken into account.**

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<sup>46</sup> One can never preclude the possibility that, by agreement of the parties, usages of trade or commercial sense, ordinary words are given a special meaning. For the same reason there cannot be any such thing as a wholly unambiguous contract term, despite the supposed rule that reference may be made to extrinsic evidence only where there is ambiguity. Among bakers, apparently, a dozen means thirteen. More significantly, the House of Lords in *The Antaios* [1985] AC 191 upheld an arbitral award which construed "breach" as meaning "fundamental breach" to give commercial sense to the contract, even though "breach" is wholly unambiguous.

<sup>47</sup> "When a contract is unambiguous, the court must . . . give effect to the contract as written, the duty of the court being to declare the meaning of what was written in the instrument, not what was intended to be written." Vol 11 Samuel WILLISTON, *A Treatise on the Law of Contracts* § 30:6 at 80-83 (Richard Lord ed., 4th ed. 1999). For a critique of the Plain Meaning Rule, see Vol 5 Arthur CORBIN (Margaret Kniffen), *Contracts* § 24.7 (rev. ed. 1998).

**4.1.** When the parties agree to a Merger Clause,<sup>48</sup> its effect may be to derogate under Article 6 from norms of interpretation and evidence contained in the CISG. In this regard Merger Clauses have two objectives.<sup>49</sup> The first objective is to bar extrinsic evidence that would otherwise supplement or contradict the terms of the writing.<sup>50</sup> Such Merger Clauses mainly derogate from Article 11, which provides that a sales contract may be proved by any means, including witnesses. The second objective is to prevent recourse to extrinsic evidence for the purpose of contract interpretation. This objective would constitute a derogation from the Convention's canons of interpretation incorporated in Article 8. Under the CISG the extent to which a Merger Clause accomplishes one or both of these purposes is a question of interpretation of this clause.

**4.2.** Several issues in relation to Merger Clauses are dealt with in international uniform law instruments, such as the UNIDROIT Principles<sup>51</sup> and the Principles of European Contract Law.<sup>52</sup>

**4.3.** The UNIDROIT Principles of International Commercial Contracts expressly recognize Merger Clauses. Under the UNIDROIT Principles, though prior statements and agreements may not be used to contradict or supplement a writing that contains a Merger Clause, such statements and agreements may be used for purposes of interpreting the contract.

**4.4.** Article 2:105 of the Principles of European Contract Law distinguishes between Merger Clauses that result from individual negotiation and those that do not. If the Merger Clause is individually negotiated, prior statements, undertakings or agreements that are not embodied in the writing do not form part of the contract. If it has not been individually negotiated, the Merger Clause merely establishes a presumption that the

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<sup>48</sup> For an example see note 27 supra.

<sup>49</sup> See, e.g., C. M. BIANCA & M. J. BONELL (E. Allan Farnsworth), *Commentary on the International Sales Law* Art. 8 § 3.3 at 102 (1987).

<sup>50</sup> For "writing" see *CISG-AC Opinion no 1* - <http://www.cisg.law.pace.edu/cisg/CISG-AC-op1.html>

<sup>51</sup> See Unidroit Principles of International Commercial Contracts Article 2.1.17

<sup>52</sup> See Article 2:105.



prior statements and agreements were not intended to become part of the contract. The presumption may be rebutted.<sup>53</sup> Furthermore, the European Principles provide that a party may, by its statements or conduct, be precluded from asserting a Merger Clause to the extent that the other party has reasonably relied on those statements or that conduct.

**4.5.** The CISG does not deal with Merger Clauses and therefore does not contain similar distinctions. Indeed, the dividing line may be blurred. Under the CISG there is authority for the proposition that a properly worded Merger Clause bars the consideration of extrinsic evidence.<sup>54</sup> However, extrinsic evidence should not be excluded, unless the parties actually intended the Merger Clause to have this effect. The question is to be resolved by reference to the criteria enunciated in Article 8, without reference to national law. Article 8 requires an examination of all relevant facts and circumstances when deciding whether the Merger Clause represents the parties' intent.

**4.6.** Under the CISG, a Merger Clause does not generally have the effect of excluding extrinsic evidence for purposes of contract interpretation. However, the Merger Clause may prevent recourse to extrinsic evidence for this purpose if specific wording, together with all other relevant factors, make clear the parties' intent to derogate from Article 8 for purposes of contract interpretation.<sup>55</sup>

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<sup>53</sup> "It often happens that parties use standard form contracts containing a merger clause to which they pay no attention. A rule under which such a clause would always prevent a party from invoking prior statements or undertakings would be too rigid and often lead to results which were contrary to good faith." Principles of European Contract Law Article 2:105 Comment.

<sup>54</sup> See, e.g., *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.*, supra note 16, 114 F.3d at 1391 ("to the extent parties wish to avoid parol evidence problems they can do so by including a merger clause in their agreement that extinguishes any and all prior agreements and understandings not expressed in the writing"); John HONNOLD, *Uniform Law*, supra note 27, § 110 (1) ("contract terms (often called 'integration clauses') that any contemporaneous or prior agreement shall be without effect would be supported by Article 6"); Bernard AUDIT, supra note 38, at 43 n. 3 (1990) ("la clause relativement fréquente selon laquelle seul l'écrit souscrit par les parties doit être pris en considération à l'exclusion de tout autre élément . . . devrait recevoir effet en vertu de l'art. 6"); Larry DIMATTEO, supra note 4, at 215-16.

<sup>55</sup> See John MURRAY, supra note 38, 8 *J. L. & Comm.* at 45 ("the typical merger clause familiar to American lawyers may be insufficient for this purpose.

**4.7.** Article 9 requires a court or tribunal to consider a number of factors when determining whether usages have been agreed or trade practices have been established between the parties. A Merger Clause generally will not be held to exclude trade usages relevant under Article 9(1) or established practices concerning the implicit background of the transaction unless those usages and practices are specifically mentioned.

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At least some explicit reference to the parties' intention to derogate from Article 8(3) through Article 6 would provide a safer course").