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Bluebook 21st ed.

Harry M. Flechtner, *The U.N. Sales Convention (CISG) and MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, 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 (1999).

ALWD 7th ed.

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APA 7th ed.

Flechtner, H. M. (1999). The u.n. sales convention (cisg) and mcc-marble ceramic center, inc. v. ceramica nuova d'agostino, s.p.a.: the eleventh circuit weighs in on interpretation, subjective intent, procedural limits to the convention's scope, and the parol evidence rule. *Journal of Law and Commerce*, 18(2), 259-288.

Chicago 17th ed.

Harry M. Flechtner, "The U.N. Sales Convention (CISG) and MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.P.A.: The Eleventh Circuit Weighs in on Interpretation, Subjective Intent, Procedural Limits to the Convention's Scope, and the Parol Evidence Rule," *Journal of Law and Commerce* 18, no. 2 (1999): 259-288

McGill Guide 9th ed.

Harry M. Flechtner, "The U.N. Sales Convention (CISG) and MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.P.A.: The Eleventh Circuit Weighs in on Interpretation, Subjective Intent, Procedural Limits to the Convention's Scope, and the Parol Evidence Rule" (1999) 18:2 JL & Com 259.

AGLC 4th ed.

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MLA 9th ed.

Flechtner, Harry M. "The U.N. Sales Convention (CISG) and MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.P.A.: The Eleventh Circuit Weighs in on Interpretation, Subjective Intent, Procedural Limits to the Convention's Scope, and the Parol Evidence Rule." *Journal of Law and Commerce*, vol. 18, no. 2, 1999, pp. 259-288. HeinOnline.

OSCOLA 4th ed.

Harry M. Flechtner, "The U.N. Sales Convention (CISG) and MCC-Marble Ceramic Center,

ARTICLES

THE U.N. SALES CONVENTION (CISG) AND *MCC-MARBLE CERAMIC CENTER, INC. v. CERAMICA NUOVA D'AGOSTINO, S.P.A.*: THE ELEVENTH CIRCUIT WEIGHS IN ON INTERPRETATION, SUBJECTIVE INTENT, PROCEDURAL LIMITS TO THE CONVENTION'S SCOPE, AND THE PAROL EVIDENCE RULE

*Harry M. Flechtner**

INTRODUCTION

If the United Nations Convention on Contracts for the International Sale of Goods¹ is to fulfill its promise to “contribute to the removal of legal barriers in international trade and promote the development of international trade,”² the far-flung courts and arbitral panels that apply it must comply with the mandate of CISG Article 7(1): “In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application. . . .”³ In the United States, the first federal appeals court decision to focus on the Convention had disappointed by its failure to pay more than lip service to the need for uniformity and an international perspective in applying the CISG.⁴ The purpose of this commentary is to assess the success of a recent deci-

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1. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. No. 98-9 (1983), 19 I.L.M. 668 (1980) [hereinafter CISG or Convention] (entered into force on Jan. 1., 1988), available in 15 U.S.C.A. app. at 49 (West Supp. 1996); 52 Fed. Reg. 6262-80, 7737 (1987); U.N. Doc. A/Conf. 97/18 (1980).

2. CISG, *supra* note 1, pmb1.

3. *Id.* art. 7(1).

4. See V. Susanne Cook, *The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity*, 16 J.L. & COM. 257, 258-63 (1997) (discussing *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024 (2d Cir. 1995)).

sion by the Eleventh Circuit Court of Appeals, *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino*,⁵ in meeting the mandates of CISG Article 7(1).

Article 7(1) requires that courts develop a shared international methodology for interpreting the CISG as well as a sophisticated grasp of its provisions.⁶ Discharging the obligations imposed by Article 7(1) is particularly important in a case like *MCC-Marble*, which touches on subtle and difficult issues of interpretation, the scope of the Sales Convention, and the place of domestic law doctrines like the parol evidence rule in transactions governed by the CISG. The *MCC-Marble* opinion reveals a court striving to transcend its background in domestic U.S. law, energetic in pursuing an international perspective on the Convention's meaning, and informed, thoughtful and coherent in its grasp of CISG provisions and their implications. This constitutes genuine progress towards meeting the requirements of Article 7(1). The opinion, however, is not without flaws. Its imperfections highlight the U.S. legal community's ignorance of some of the resources available for understanding and interpreting the CISG, and the resulting difficulty in fully grasping some substantive implications of the Convention's text. Not surprisingly, the court's steps into the unfamiliar territory of international legal methodology are modest, tentative and cautious. On the whole, nevertheless, the Eleventh Circuit's analysis and approach represents an encouraging development in CISG jurisprudence in the United States.

THE *MCC-MARBLE* OPINION

Facts of the Case

The facts in *MCC-Marble* represent the kind of routine sales transaction that has given rise to many of the reported decisions applying the CISG.⁷ In October, 1990, the president of *MCC-Marble Ceramic, Inc.*

5. 144 F.3d 1384 (11th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3652 (U.S. Apr. 26, 1999) (No. 98-1253).

6. See *infra* text accompanying notes 70-73.

7. There are a number of resources that collect cases on the CISG. Professor Michael R. Will has produced books containing abstracts of CISG decisions. See, e.g., MICHAEL R. WILL, INTERNATIONAL SALES LAW UNDER CISG, THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980); THE FIRST 555 OR SO DECISIONS (1999). Several sites on the world wide web collect case law on the Convention: Pace University School of Law sponsors such a web site at (last modified April 6, 1999) <<http://www.cisg.law.pace.edu/cisg/text/caseschedule.html>>; UNCITRAL makes available its *Case Law on UNCITRAL Texts (CLOUT)* (last modified April 20, 1999) at <<http://www.un.or.at/uncitral/en-index.htm>>; the Institute of Foreign and International Private Law of the University of Frei-

("MCC"), a Florida retailer of ceramic tile, attended a trade show in Italy where he decided to purchase products of an Italian tile manufacturer, Ceramica Nuova D'Agostino ("D'Agostino").⁸ Although he spoke no Italian, MCC's president negotiated with the then-commercial director of D'Agostino through a translator who was also an agent of D'Agostino.⁹

After the parties agreed orally on price, quantity, and other key terms, MCC's president signed a pre-printed D'Agostino "order proposal" form written in Italian.¹⁰ MCC's president apparently did not ask for a translation of the form or an English description of its provisions before signing.¹¹ Numbered clauses on the back of the form required the buyer to give written notice of defects in the merchandise within 10 days after delivery, and expressly provided that default or delay in payment would permit the seller to cancel all contracts with the buyer.¹² Beneath the signature line appeared language stating, in Italian, that the buyer was aware of and approved the provisions on the reverse of the form, specifically including the numbered clauses just described.¹³ Several months later, MCC submitted another order on a D'Agostino order form.¹⁴

burg sponsors *CISG Online* <<http://www.jura.uni-freiburg.de/ipr1/cisg/>>; and Professor Claude Witz of the Centre Juridique Franco-Allemand posts *CISG-France* <http://www.jura.uni-sb.de/FB/L_S/Witz/cisg.htm>. Finally "UNILEX," a database available on computer diskette and in hard copy from the Centre for Comparative and Foreign Law Studies in Rome, includes the text of CISG cases in their original languages, accompanied, in many cases, by English abstracts.

Many of the CISG cases described in these sources involve routine transactions of apparently modest value. See, e.g., OLG Düsseldorf (Germany), decision of February 10, 1994, cited in *WLL*, *supra*, at 69, and published in *CLOUT*, *supra*, no. 82, and *UNILEX*, *supra* (fabrics); *CNCom*. Sala C (Argentina), decision of October 31, 1995, published in *UNILEX* (dried mushrooms). Presumably, such ordinary course transactions are common among reported CISG cases not only because they account for most sales that actually occur but also because the parties to larger and less routine transactions are likely to be advised by lawyers who often urge that the CISG be displaced by more familiar domestic sales law. See John E. Murray, Jr., *The Neglect of CISG: A Workable Solution*, 17 *J.L. & COM.* 365, 371 (1998) ("CISG allows the parties to exclude its application entirely or derogate from or vary the effect of its provisions. Lack of familiarity with CISG may induce lawyers to avoid it because they fear the unknown and the attendant risks. . . . Substantial familiarity with the Convention may still suggest avoidance, because counsel may decide that domestic law is more desirable for a client. . . ."); V. Susanne Cook, *CISG: From the Perspective of the Practitioner*, 17 *J.L. & COM.* 343, 349 n.34 (1998) (concluding that, because most practitioners in the U.S. choose to opt out of the Convention in favor of the U.C.C., "most reported cases have arisen under CISG merely because the parties, or their counsel, failed to consider the application of CISG and arrived at litigating under CISG by default only.").

8. See 144 F.3d at 1385.

9. See *id.*; Brief for Appellant at 10, *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.P.A.*, 144 F.3d 1384 (11th Cir. 1998) (No. 97-4250).

10. See 144 F.3d at 1385.

11. See Appellant's Brief at 11, 13, 15.

12. See 144 F.3d at 1386.

13. See *id.*

14. See Brief for Appellee at 6, *MCC-Marble Ceramic Center, Inc.* (No. 97-4250) (describing a

Shortly thereafter, according to MCC, the parties entered into a requirements contract for tile.¹⁵ In the months that followed, MCC ordered several deliveries from D'Agostino using Italian order forms.¹⁶

D'Agostino made a number of deliveries pursuant to these orders; MCC allegedly complained orally about the quality of the tiles in some shipments—although it did not give written notice of any defects—and it withheld certain payments.¹⁷ D'Agostino then refused to ship further tile orders.¹⁸ By this time, D'Agostino had dismissed the commercial director who had negotiated with MCC.¹⁹ In addition, the translator through whom the negotiations were conducted had ceased acting as D'Agostino's agent.²⁰

Trial Court Proceedings

MCC sued D'Agostino in U.S. federal district court (Southern District of Florida) for alleged defects in tile shipments, and for breach of the requirements contract by failure to fill further orders.²¹ D'Agostino denied liability and counter-claimed for the balance due on tile deliveries it had made.²² MCC defended the counterclaim by arguing that non-conformities in the shipments entitled it to reduce the price under Article 50 of the CISG.²³

D'Agostino moved for summary judgment, arguing that, under the provisions on the reverse side of the "order proposal" forms MCC had signed, the buyer's failure to give written notice of defects within ten days of receiving the goods precluded it from claiming that the tile ship-

second order form dated January 15, 1991).

15. See 144 F.3d 1385; Appellant's Brief at 3.

16. See 144 F.3d at 1385 (stating that the buyer "completed a number of additional order forms"). According to MCC, these later orders were on forms that differed from the earlier D'Agostino forms executed by MCC. See Appellant's Brief at 38.

17. See 144 F.3d at 1386.

18. See *id.* at 1385.

19. See *id.* at 1392 n.20; Appellee's Brief at 11-12, 39.

20. See Appellee's Brief at 10, 37 (referring to the translator as "a purported former agent of D'Agostino").

21. See 144 F.3d at 1385, 1386; Appellant's Brief at 4.

22. See 144 F.3d at 1385-86.

23. See *id.* at 1386. CISG Article 50 states, in pertinent part:

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.

CISG, *supra* note 1, art. 50.

ments were non-conforming.²⁴ D'Agostino also argued that, under the provisions on the back of the forms, MCC's failure to pay for tile shipments relieved the seller of any obligation to make further deliveries.²⁵

In response, MCC submitted affidavits from its own president, from D'Agostino's former commercial director who had represented the seller in negotiations with MCC, and from the former D'Agostino agent who had acted as translator in the negotiations, all asserting that the parties did not intend to be bound by the provisions on the reverse of the October, 1990 order form signed by MCC.²⁶ The affidavits, however, did not indicate that the parties objectively manifested such intent at the time the form was executed.²⁷ MCC argued that, under Article 8(1) of the CISG, the parties shared subjective intent was binding even absent objective manifestation of that intent,²⁸ and that the affidavits therefore raised a genuine issue of material fact that precluded summary judgment.²⁹

The magistrate judge who heard the motion ruled that CISG Article 8(1) was inapplicable because it pertained only to the interpretation of the parties' statements, whereas MCC's evidence was an attempt to contradict rather than interpret the provisions of the order forms.³⁰ Thus, despite the affidavits suggesting a contrary subjective intent by both parties, the magistrate ruled that the provisions on the reverse of the forms applied.³¹ Because the buyer did not dispute that it had failed to give written notice of defects within ten days of delivery as required by those provisions, and because the buyer's failure to pay the full price for shipments triggered the clause giving the seller a right to cancel upon default in payment, the magistrate held that summary judgment was appro-

24. See 144 F.3d at 1386; Appellant's Brief at 6-7; Appellee's Brief at 6-8.

25. See 144 F.3d at 1385-86; Appellant's Brief at 6-7; Appellee's Brief at 7-8.

26. See 144 F.3d at 1386; Appellant's Brief at 9-15; Appellee's Brief at 9-12.

27. See 144 F.3d at 1386, 1387, 1388 n.11, 1391; Appellant's Brief at 9-15; Appellee's Brief at 9-12. On appeal to the Eleventh Circuit, however, MCC argued that the affidavits were consistent with the possibility that the parties had expressly indicated an intent not to be bound by terms on the reverse of the form. See Appellant's Brief at 35-37. While two of the affidavits addressed the parties' intent only with regard to the original October 1990 form, the affidavit of the former D'Agostino agent who had served as translator also asserted that the parties did not subjectively intend to be bound by the terms on D'Agostino's form when they allegedly entered into their requirements contract. See 144 F.3d at 1392; Appellant's Brief at 13-14.

28. CISG Article 8(1) provides that "statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was." CISG, *supra* note 1, art. 8(1).

29. See Appellant's Brief at 7.

30. See 144 F.3d at 1388; Appellant's Brief at 8; Appellee's Brief at 13.

31. See 144 F.3d at 1386; Appellant's Brief at 7-8; Appellee's Brief at 12.

priate.³² The district court accepted the magistrate's recommendation, and MCC appealed.³³

Arguments on Appeal

Before the Eleventh Circuit, MCC asserted that, although the parol evidence rule had not been mentioned by name in the lower court proceedings, the grant of summary judgment below had in fact been based on that rule.³⁴ The buyer then argued that the Convention rejected the parol evidence rule, citing the drafting history of the CISG as well as a variety of commentators on the topic (but repudiating the opposite view of one commentator and contrary dicta in one U.S. case).³⁵ MCC asserted that the Convention's rejection of the parol evidence rule, combined with the priority given the parties' shared subjective intent by Article 8(1), meant that its affidavits had raised a genuine issue of material fact as to whether the parties were bound by the provisions on the back of the order forms, thus precluding summary judgment.³⁶ If not bound by provisions on the back of the order forms, MCC argued, its oral notice of nonconforming deliveries was adequate and timely under CISG Articles 38 and 39,³⁷ and its failure to pay in full for such deliveries was justified

32. See 144 F.3d at 1388; Appellant's Brief at 6-8; Appellee's Brief at 13-14.

33. See 144 F.3d at 1386.

34. See Appellant's Brief at 20-21.

35. See *id.* at 21-27. Authorities cited for the proposition that CISG excludes the common law parol evidence rule include Ronald A. Brand & Harry M. Flechtner, *Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention*, 12 J.L. & COM. 239, 251 (1993); Harry M. Flechtner, *More U.S. Decisions on the U.N. Sales Convention: Scope, Parol Evidence, "Validity" and Reduction of Price Under Article 50*, 14 J.L. & COM. 153 (1995) [hereinafter Flechtner, *More U.S. Decisions*]; JOHN HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 170-71 (2d ed. 1991) [hereinafter HONNOLD TREATISE]; ALBERT KRITZER, *GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS*, Index at 28 (1994 Supp.) [hereinafter KRITZER, *GUIDE TO PRACTICAL APPLICATIONS*]; John E. Murray, Jr., *An Essay on the Formation of Contracts for the International Sale of Goods*, 8 J.L. & COM. 11 (1988) [hereinafter Murray, *Essay on the Formation of Contracts*]; Peter Winship, *Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention*, 37 LOY. L. REV. 43, 57 (1991). Contrary authority cited was David H. Moore, *The Parol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*, 1995 BYU L. REV. 1347, 1349. The case containing dicta rejected by the buyer was *Beijing Metals & Minerals Import/Export Corp. v. American Business Ctr., Inc.*, 993 F.2d 1178, 1181-83 n.9 (stating that the court need not resolve whether the CISG or Texas domestic law applied to transaction because "the parol evidence rule . . . applies regardless").

36. See Appellant's Brief at 22, 31.

37. See *id.* at 29-30. Article 38 requires a buyer to examine delivered goods "within as short a period as is practicable in the circumstances." CISG, *supra* note 1, art. 38. Article 39(1) provides that "[t]he buyer loses the right to rely on a lack of conformity" unless the buyer notifies the seller of the

under CISG Article 50.³⁸ It also argued that D'Agostino had not proven that the forms used after the initial October, 1990 order had in fact contained the provisions upon which D'Agostino relied.³⁹

In response, D'Agostino again asserted that Article 8(1) is limited to interpretation of sales contracts, and that it thus did not apply to MCC's attempt to contradict the terms of order forms it had signed.⁴⁰ Relying primarily on a statement in a footnote of a prior Fifth Circuit case and the arguments of one commentator, the seller also contended that the parol evidence rule applied under the CISG, and that the rule would exclude evidence contradicting the written order forms.⁴¹ In addition, D'Agostino asserted that, even if MCC was not bound by the form provision requiring written notice of defects in the goods within ten days of delivery, MCC had nevertheless failed to give timely and adequate notice of non-conformities as required by Article 39 of the Convention. Thus even assuming some tile deliveries were nonconforming, D'Agostino argued, MCC was not entitled to reduce the price under CISG Article 50.⁴²

The Eleventh Circuit Opinion

The Eleventh Circuit accepted the buyer's arguments and reversed. Characterizing the outcome as contrary to the result if the objective approach of U.S. domestic sales law had applied,⁴³ the court held that under Article 8(1) of the CISG the parties' shared subjective intent governed their contract, even absent objective manifestation of that intent.⁴⁴ The court reasoned that Article 8(1) is not limited to interpretation of the terms of a contract, but by its express terms encompasses interpretation of the parties' *conduct*. That would include, the court concluded, evi-

nonconformity "within a reasonable time after he has discovered it or ought to have discovered it." *Id.* art. 39(1).

38. See Appellant's Brief at 31.

39. See *id.* at 38.

40. See Appellee's Brief at 22-24.

41. See *id.* at 24-33. The Fifth Circuit case is *Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*, 993 F.2d 1178 (1993). Appellant MCC had rejected the statement in *Beijing Metals* suggesting that the parol evidence rule remained applicable under the CISG. See note 35 *supra* and accompanying text. The commentary cited by Appellee D'Agostino in support of its argument is Moore, *supra* note 35.

42. See Appellee's Brief at 45-49. According to the Eleventh Circuit opinion, D'Agostino also argued that MCC's affidavits did not address the parties' intent as to forms executed after the original October 1990 order, and thus summary judgment was appropriate at least as to deliveries made under those later forms. See 144 F.3d at 1392. No such argument appears in the brief that D'Agostino submitted to the court.

43. See 144 F.3d at 1387 n.8 & 1388 n.11.

44. See *id.* at 1387-88.

dence that the act of signing a writing was not intended to bind the parties to its terms.⁴⁵ The court did reject, in the strongest terms, any argument that MCC was not bound by the D'Agostino form merely because its representative did not understand the language in which it was written:

We find it nothing short of astounding that an individual, purportedly experienced in commercial matters, would sign a contract in a foreign language and expect not to be bound simply because he could not comprehend its terms. We find nothing in the CISG that might counsel this type of reckless behavior and nothing that signals any retreat from the proposition that parties who sign contracts will be bound by them regardless of whether they have read them or understood them.⁴⁶

The court also expressed doubt whether the evidence proffered by MCC would ultimately be found credible, noting that "[a] reasonable finder of fact . . . could disregard testimony that purportedly sophisticated international merchants signed a contract without intending to be bound as simply too incredible to believe. . . ."⁴⁷ The court nevertheless concluded that, because the affidavits offered evidence of a subjective intent by *both* the president of MCC *and* by the representatives of D'Agostino not to be bound by the provisions on the reverse of the D'Agostino form, the case fell "squarely within article 8(1) of the CISG, and therefore requires the court to consider MCC's evidence as it interprets the parties' conduct."⁴⁸

Because its interpretation of Article 8(1) of the Convention made evidence of the parties' shared subjective intent relevant, the court proceeded to "a question of first impression in this circuit: whether the parol evidence rule, which bars evidence of an earlier oral contract that contradicts or varies the terms of a subsequent or contemporaneous written contract, plays any role in cases involving the CISG."⁴⁹ Recognizing that the parol evidence rule is a matter of substantive law and not simply an evidentiary principle beyond the scope of the CISG,⁵⁰ and noting that the Convention "contains no express statement on the role of parol evidence,"⁵¹ the court reasoned that Article 8(3) of the Convention, which requires that the parties' intent be determined with "due consideration

45. *See id.* at 1388.

46. *Id.* at 1387-88 n.9.

47. *Id.* at 1391.

48. *Id.* at 1388.

49. *Id.* (footnote omitted).

50. *See id.* at 1388-89.

51. *Id.* at 1389

. . . to all relevant circumstances of the case including the negotiations . . .,” is a rejection of the parol evidence rule.⁵² After lamenting the “surprisingly” sparse U.S. case law on the CISG, the court discussed two U.S. cases that contained conflicting dicta on the parol evidence question but found no reason to change its conclusion.⁵³ It also commented in a footnote that “the parties have not cited us to any persuasive authority from the courts of other States Party to the CISG. Our own research uncovered a promising source for such decisions at <<http://www.cisg.law.pace.edu>>, but produced no cases that address the issue of parol evidence.”⁵⁴

In support of its holding that the CISG rejects the parol evidence rule, the court cited “the great weight of academic commentary on the issue.”⁵⁵ To support its assertion it quoted from the authoritative treatise of Professor John Honnold, the leading U.S. commentator on the Convention,⁵⁶ and cited in a footnote a variety of other commentary, including the English-language treatise of two prominent scholars trained in the legal traditions of continental Europe.⁵⁷ Finally, the court discussed the arguments of David Moore, who (in contrast to the authorities just mentioned) maintains that the parol evidence rule applies in transactions governed by the CISG.⁵⁸ It rebuffed those arguments in the following passage:

[A]lthough jurisdictions in the United States have found the parol evidence rule helpful to promote good faith and uniformity in contract, as well as an appropriate answer to the question of how much consideration to give parol evidence, a wide number of other States Party to the CISG have rejected the rule in their domestic jurisdictions. One of the primary factors motivating the negotiation and adoption of the CISG was to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party’s legal system might otherwise apply. Courts applying the CISG cannot, therefore, upset the parties’ reliance on the Convention by substituting familiar principles of do-

52. See *id.* at 1389, 1390.

53. See *id.* at 1389-90. The two cases are *Beijing Metals*, *supra* note 35, which contains dicta suggesting that the parol evidence rule applies under the CISG, and *Filanto S.p.A v. Chilewich Int’l Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992), which observes in passing that the CISG “essentially rejects . . . the parol evidence rule,” *id.* at 1238 n.7.

54. 144 F.3d at 1389 n.14.

55. *Id.* at 1390.

56. See *id.* (quoting from HONNOLD TREATISE, *supra* note 35, at 170-71).

57. See 144 F.3d at 1390 n.17 (citing, *inter alia*, HERBERT BERNSTEIN & JOSEPH LOOKOFKY, UNDERSTANDING THE CISG IN EUROPE 29 (1997) [hereinafter BERNSTEIN & LOOKOFKY, CISG IN EUROPE]).

58. See 144 F.3d at 1390-91 (discussing Moore, *supra* note 35).

mestic law when the Convention requires a different result. We may only achieve the directives of good faith and uniformity in contracts under the CISG by interpreting and applying the plain language of article 8(3) as written and obeying its directive to consider this type of parol evidence.⁵⁹

The court therefore concluded that MCC-Marble's affidavits raised an issue of material fact as to whether the parties subjectively intended not to be bound by the notice provisions on D'Agostino's forms, thus precluding summary judgment.⁶⁰

Clearly concerned about the effect of its decision on the reliability of written contracts,⁶¹ the court emphasized the unique facts of the case before it:

[M]ost cases will not present a situation (as exists in this case) in which both parties to the contract acknowledge a subjective intent not to be bound by the terms of a pre-printed writing. In most cases, therefore, article 8(2) of the CISG will apply,⁶² and objective evidence will provide the basis for the court's decision. Consequently, a party to a contract governed by the CISG will not be able to avoid the terms of a contract and force a jury trial simply by submitting an affidavit which states that he or she did not have the subjective intent to be bound by the contract's terms.⁶³

The court also noted that parties can provide for the exclusion of parol evidence by including a properly drafted merger clause in their agreement.⁶⁴

59. 144 F.3d at 1391. It is interesting that the court invokes a foundational concept of the common law approach to statutory interpretation—the “plain meaning rule”—to justify a construction of CISG Article 8(3) that the court sees as promoting an international perspective on the Convention and cross-border uniformity in its application.

60. See *id.* at 1391-92. The court observed that, if the notice provisions of the D'Agostino forms did not bind the parties, MCC-Marble's right to withhold payment as it did would depend upon whether the buyer had met the requirement of Article 39(1) to give notice of non-conformities in the goods within a reasonable time. *Id.* at 1392 n.21. This issue, the court concluded, raised factual questions that also could not be resolved on summary judgment. *Id.*

61. This consideration had been the basis for the decision below granting summary judgment to D'Agostino. The magistrate who recommended summary judgment had commented, “Article 8 cannot be read to give binding effect to a contracting party's intentions when they contradict the explicit and unambiguous terms of a signed contract. To do so would render terms of written contracts virtually meaningless and severely diminish the reliability of commercial contracts.” Magistrate's Report in *MCC-Marble Ceramic Center, Inc. v. Ceramic Nuova D'Agostino, S.p.A.*, 144 F.3d 1384 (11th Cir. 1998) (No. 97-4250), quoted in Appellee's Brief at 13.

62. [Article 8(2) of the Convention provides that, in the absence of a shared subjective intent between the parties, statements and conduct are to be interpreted “according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.” CISG, *supra* note 1, art. 8(2)—Author's footnote.]

63. 144 F.3d at 1391 (citations omitted).

64. See *id.* (citing Brand & Flechtner, *supra* note 35, at 252 and KRITZER, GUIDE TO PRACTICAL APPLICATIONS, *supra* note 35, at 125 (1989)).

DISCUSSION

The Court's Methodology

Establishing a uniform international sales law was the central aspiration of those who created the CISG.⁶⁵ The drafters did not, however, institute a separate system of international tribunals with jurisdiction over disputes arising under the CISG,⁶⁶ nor did they designate a final authority on the meaning of the treaty.⁶⁷ The tribunals that apply the Convention are national courts and arbitration boards whose members are drawn from various legal traditions. The diversity of background assumptions and jurisprudential approaches these decision-makers bring to the interpretation process poses a threat to uniform application of the CISG—a threat that the foremost U.S. authority on the Convention, Professor John Honnold, has labeled the “homeward trend.”⁶⁸ As a counterweight to the homeward trend, Article 7(1) of the Convention mandates that those interpreting the CISG have regard for “its international character and . . . the need to promote uniformity in its application”⁶⁹

The mandate of Article 7(1) requires that those applying the Convention transcend the modes of analysis they are accustomed to using for domestic legal questions.⁷⁰ Indeed, they must develop a new international legal methodology incorporating the approaches and techniques found in other legal traditions.⁷¹ For example, U.S. courts and tribunals from other

65. See, e.g., JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 1 (1989) [hereinafter DOCUMENTARY HISTORY]; Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations, and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187, 187-88 (1998) [hereinafter Flechtner, *Several Texts of the CISG*].

66. See John O. Honnold, *The Sales Convention: From Idea to Practice*, 17 J.L. & COM. 181, [182] (1998); Franco Ferrari, *CISG Case Law: A New Challenge for Interpreters*, 17 J.L. & COM. 245, 256 (1998).

67. See, e.g., Michael J. Kolosky, Note, *Beyond Partisan Policy: The Eleventh Circuit Lays Aside the Parol Evidence Rule in Pursuit of International Uniformity in Commercial Regulation*, 24 N.C. J. INT'L L. & COM. REG. 199, 201 (1998). For observations on the possibility of creating an authoritative interpretational body, see Honnold, *supra* note 66, at 185; Murray, *supra* note 7, *passim*.

68. DOCUMENTARY HISTORY, *supra* note 65, at 3. For further observations on this phenomenon, see John Honnold, *The Sales Convention in Action—Uniform International Words: Uniform Application?*, 8 J.L. & COM. 207 (1988).

69. CISG, *supra* note 1, art. 7(1).

70. See Ferrari, *supra* note 66, at 248. See also Kolosky, *supra* note 67, at 200.

71. See Vivian Grosswald Curran, Book Review, 15 J.L. & COM. 175, 176-77 (1995) (reviewing CLAUDE WITZ, *THE INTERPRETIVE CHALLENGE TO UNIFORMITY* (1995))

(. . . [A]n increase in uniformity may yield a hybrid global legal system from a methodological perspective: *i.e.*, that judges in civil law countries may come to approximate their common law

common law jurisdictions, recognizing the practices of their civil law brethren, should increase their reliance on scholarly commentators and *travaux préparatoires* in resolving issues under the CISG, whereas civil law courts should increasingly look to previously decided cases for guidance on the Convention.⁷² All decision makers should, if possible, seek the perspective of authority from legal traditions other than their own.⁷³

With respect to methodology, an earlier U.S. Court of Appeals decision applying the CISG, *Delchi Carrier SpA v. Rotorex Corporation*,⁷⁴ was disappointing.⁷⁵ After proclaiming its obligation to seek an international perspective when interpreting the Convention,⁷⁶ the court cited exclusively common law authority.⁷⁷ The only non-U.S. authority invoked was the classic British decision *Hadley v. Baxendale*,⁷⁸ which "has been an integral part of U.S. jurisprudence for many years."⁷⁹ The court even equated the quintessentially common law *Hadley* rule regarding foreseeable damages with the foreseeability principle of Article 74 of the CISG—a position that has been strongly criticized.⁸⁰

Compared to the approach taken by the court in *Delchi Carrier*, the methodology employed in *MCC-Marble* represents real progress. In addition to citing U.S. case law on the CISG, the Eleventh Circuit relied

counterparts in increasing their reliance on precedent as a source of binding authority, while judges in common law jurisdictions may come to approximate their civil law counterparts in seeking elucidation of relevant legal principles in the explanation and critique of scholarly writing on the CISG. . . . Thus one fascinating result of the substantive internationalization of the law of sales may be a concomitant unifying influence on the disparate methodological approaches of the Contracting States.);

Professor Dr. Volker Behr, *The Sales Convention in Europe: From Problems in Drafting to Problems in Practice*, 17 J.L. & Com. 263, 293 (1998) ("Thus, courts may, and eventually must, use methods of interpreting international conventions different from those used in purely domestic law.").

72. See Curran, *supra* note 71; Ferrari, *supra* note 66, at 259 ("[O]ne must agree that in order to obtain uniformity civil law judges should start to 'approximate their common law counterparts in increasing their reliance on [case law], and common law judges should increasingly take into account legal writing as well as legislative history. . . ." (citations omitted)); Kolosky, *supra* note 67, at 200.

73. See Ferrari, *supra* note 66, at 246-47, 254; Cook, *supra* note 4, at 263 ("U.S. courts interpreting the Convention must learn to embrace foreign commentaries and decisions as a welcome friend, to guide them, particularly when deciding difficult cases of first impression, towards rendering well-reasoned decisions that take account of the international character of the Convention and the need to adhere to uniformity in its application").

74. 71 F.3d 1024 (2d Cir. 1995).

75. See Cook, *supra* note 4, at 258, 262.

76. See 71 F.2d at 1027-28.

77. See Cook, *supra* note 4, at 261.

78. 156 Eng. Rep. 145 (1854).

79. Cook, *supra* note 4, at 261 n.18.

80. See Murray, *supra* note 7, at 370-71 (1998); Cook, *supra* note 4, at 259-60.

heavily on scholarly commentary.⁸¹ This is significant not only because it incorporates an aspect of civil law methodology, but also because the commentators that the court consulted presumably are at pains to bring an international perspective to their analysis of the Convention. In this regard it is significant that the *MCC-Marble* court cited a treatise by scholars whose training encompasses more than the Anglo-American legal tradition—*Understanding the CISG in Europe* by Professors Bernstein and Lookofsky.⁸² Consulting the analysis of those from outside the common law is particularly valuable for cultivating an international perspective. Since most such scholars do not normally write in English, language is a significant barrier to such research in the United States, where facility in another language is rare. The work of scholars trained in other traditions is, however, becoming increasingly available in English. In addition to the English-language works of Professors Bernstein and Lookofsky,⁸³ for example, the great commentary of the leading German CISG scholar, Peter Schlechtriem, is now available in an English translation.⁸⁴

The Eleventh Circuit also searched for guidance from foreign case law applying the Convention—a resource that commentators have identified as a particularly valuable tool for achieving a uniform interpretation of the CISG.⁸⁵ The problem, of course, was finding such case law, partic-

81. The court cited the following U.S. commentaries on the CISG: LOUIS F. DEL DUCA ET AL., *SALES UNDER THE UNIFORM COMMERCIAL CODE AND THE CONVENTION ON INTERNATIONAL SALE OF GOODS* (1993); HONNOLD TREATISE, *supra* note 35; KRITZER, *GUIDE TO PRACTICAL APPLICATIONS*, *supra* note 35; Brand & Flechtner, *supra* note 35; Flechtner, *More U.S. Decisions*, *supra* note 35; Henry D. Gabriel, *A Primer on the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code*, 7 *IND. INT'L & COMP. L. REV.* 279 (1997) [hereinafter *Primer on the United Nations Convention*]; Murray, *Essay on the Formation of Contracts*, *supra* note 35; Winship, *supra* note 35.

82. BERNSTEIN & LOOKOFSKY, *CISG IN EUROPE*, *supra* note 57. The authors are uniquely situated to bring a European perspective to a U.S. audience. Professor Lookofsky was born and educated in the U.S. and received his J.D. from New York University Law School. He then earned law degrees from the University of Copenhagen (Denmark), where he has been a member of the Law Faculty since 1982. Professor Bernstein was born and educated in Germany before earning his J.D. from the University of Michigan Law School. He has taught in both the U.S. and Germany, and he is now a member of the Duke University Law faculty.

83. Professor Lookofsky has also published, *inter alia*, the following English-language works on the CISG: *UNDERSTANDING THE CISG IN SCANDINAVIA* (1996); *UNDERSTANDING THE CISG IN THE USA* (1995); and *Loose Ends and Contorts in International Sales*, 39 *AM. J. COMP. L.* 403 (1991).

84. PETER SCHLECHTRIEM, *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)*, trans. by Geoffrey Thomas (2d ed. (in translation) 1998).

85. See HONNOLD TREATISE, *supra* note 35, §§ 92-93; Ferrari, *supra* note 66, at 247 & authorities cited in n.18, 254; V. Susanne Cook, Note: *The Need for Uniform Interpretation of the 1980 United Nations Convention of Contracts for the International Sale of Goods*, 50 *U. PITT. L. REV.* 197, *passim* (1988).

ularly in a language that would be accessible to the court. The court made a valiant effort, even venturing onto the Internet in hopes of finding relevant decisions from other jurisdictions, but it located nothing helpful.⁸⁶ The court's efforts in this area deserve applause, not only because its search for guidance from foreign CISG decisions serves as a precedent, but also because its opinion will alert lawyers to a very valuable research resource mentioned by the court—the web site devoted to the CISG that is maintained by the Pace University Institute of International Commercial Law, containing (inter alia) English summaries of foreign CISG cases.⁸⁷ Unfortunately, the court apparently was not aware of several other valuable resources for researching foreign CISG case law. These include, in addition to French and German CISG web sites similar to the one maintained by Pace, the “Case Law on UNCITRAL Texts” (CLOUTs) published by UNCITRAL (containing abstracts of CISG decisions in the official languages of the United Nations),⁸⁸ Professor Michael Will's books compiling citations to CISG decisions, and the UNILEX database published by the Centre for Comparative and Foreign Law Studies in Rome.⁸⁹ The court might well have found relevant non-U.S. decisions through these resources, although such case law is likely only to have reinforced the court's decision.⁹⁰

In sum, the Eleventh Circuit's methods in *MCC-Marble* represents a thoughtful and fairly (but not completely) successful attempt to implement the mandate of CISG Article 7(1) to interpret the Convention with regard for “its international character and . . . the need to promote uniformity in its application.”⁹¹ The decision forms a solid foundation upon

86. See 144 F.3d at 1389 n.14 (“Moreover, the parties have not cited us to any persuasive authority from the courts of other States Party to the CISG. Our own research uncovered a promising source for such decisions at <http://www.cisg.law.pace.edu>, but produced no cases that address the issue of parol evidence.”). The court apparently is by no means alone in its inability to locate relevant foreign cases. Despite commentators' emphasis on the importance of consulting foreign case law, Professor Franco Ferrari could discover only one CISG decision—an Italian case—that cited case law from a foreign jurisdiction. See Ferrari, *supra* note 66, at 254-55.

87. See <<http://www.cisg.law.pace.edu/cisg/text/caseschedule.html>>.

88. For a description of CLOUTs see Ferrari, *supra* note 66, at 255-56.

89. These resources are described in more detail in note 7 *supra*. For further discussion of resources for CISG research, see Claire M. Germain, *The United Nations Convention on Contracts for the International Sale of Goods: Guide to Research and Literature*, in CORNELL REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 117 (1995); Albert H. Kritzer, *The Convention on Contracts for the International Sale of Goods: Scope, Interpretations and Resources*, in *id.* at 147.

90. See note 127 *infra*.

91. CISG, *supra* note 1, art. 7(1). See Kolosky, *supra* note 67, at 216, 217 (describing the decision as “a carefully reasoned complete analysis of the issue [that considers] the international interests at stake,” and opining that “[t]he Eleventh Circuit paid strict attention to its international responsibility

which U.S. courts can build the kind of international legal methodology demanded by the CISG. As the next section of this article demonstrates, the underlying validity of the Eleventh Circuit's approach to interpreting the Convention also led it to proper substantive results.

The Parol Evidence Rule and the CISG

The *MCC-Marble* court found that, under Article 8(1) of the Convention, a subjective intent shared by the parties to a contract for sale is binding even if the parties did not objectively manifest that intent at the time of contracting.⁹² As a result, the court was confronted with the question whether the buyer's evidence of such an intent—affidavits from representatives of both parties asserting that they did not intend to be bound by terms on the reverse of the form that the buyer signed, was blocked by that ancient pillar of common law tradition, the parol evidence rule. The parol evidence rule provides that, where parties have embodied the terms of their contract in a writing that they intend to be the final or operative statement of the agreement (an "integration"), evidence of terms allegedly agreed to before (and perhaps even contemporaneously with) the integration but not appearing in the writing cannot be admitted, as long as those terms are within the subject matter or "scope" of the integration.⁹³ The logic of the rule is that evidence of terms that the parties intended to render ineffective by omitting them from a final writing is legally irrelevant, and thus should be barred,⁹⁴ because even if the prof-

in its interpretation of the CISG through emphasizing the importance of setting aside familiar domestic law in order to further international uniformity" (citations omitted)).

92. See 144 F.3d 1387-88.

93. See RESTATEMENT (SECOND) OF CONTRACTS §§ 209-213 (1981); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 82A, at 375-76 (1990) [hereinafter MURRAY ON CONTRACTS]. A "partial integration" is a writing intended to be the final statement of those terms found therein, but not necessarily all terms of the entire contract. See RESTATEMENT (SECOND) OF CONTRACTS, *supra*, § 210(2); MURRAY ON CONTRACTS, *supra*, § 83E, at 381. Only alleged prior terms that contradict a partial integration are within its scope, and thus a partial integration only precludes proof of such contradictory terms. See RESTATEMENT (SECOND) OF CONTRACTS, *supra*, § 215; MURRAY ON CONTRACTS, *supra*, § 83E, at 381-82. A "complete integration" is a writing intended to embody the entire agreement between the parties, and all alleged prior terms that are part of the same transaction as the one in the writing are within its scope; a complete integration thus bars evidence of even consistent additional terms not found in the writing. See RESTATEMENT (SECOND) OF CONTRACTS, *supra*, §§ 210(1), 213(2) & 216(1); MURRAY ON CONTRACTS, *supra*, §§ 83D & 83E, at 381-82.

94.

First and foremost, *the [parol evidence] rule is in no sense a rule of evidence*, but a rule of substantive law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidence some fact to be proved. . . . What the rule does is to declare that certain kinds of fact are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at

ferred evidence established that the parties had agreed on the term in question, failing to include the term in a later integration shows a superceding intent to discharge the prior agreement.⁹⁵ The linchpin of the rule's applicability is determining that a writing from which a prior term was omitted was intended to be the final, operative integration of at least some (if not all) aspects of the contract. Applied to the facts of *MCC-Marble*, the parol evidence rule might bar the admission of evidence that the parties did not intend the buyer to be bound by the forms it signed, because that intent was not expressed in (indeed, it might even contradict) the written evidence of the contract.

To the Eleventh Circuit, the issue came down to the question whether the CISG rejects the parol evidence rule. This question has now arisen in at least four U.S. cases⁹⁶ and has been mentioned (in *dicta*) in another.⁹⁷ Given the small number of decisions U.S. courts have rendered on the Convention,⁹⁸ this is a rather remarkable focus on a single issue. It might well be that the question whether the parol evidence rule applies in transactions governed by the Convention is at the moment the dominant issue in CISG jurisprudence in the United States. In *MCC-Marble*, the Eleventh Circuit held that the Convention displaces the parol evidence rule. It relied on CISG Article 8(3), which provides that courts should consider "the negotiations" when determining the intent of the parties, and on the weight of scholarly commentary.⁹⁹ While there is ambiguous *dicta* to the contrary in an earlier Fifth Circuit case¹⁰⁰ and a contrary

all. . . .

9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2400 at 4 (Chadborn Revision 1981) (emphasis in original; citations omitted).

95. See MURRAY ON CONTRACTS, *supra* note 93, § 82C, at 378.

96. See, in addition to the *MCC-Marble* opinion, *Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*, 993 F.2d 1178, 1183 n.9 (5th Cir. 1993); *Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB*, 23 F. Supp. 2d 915, 919-21 (N.D. Ill. 1998); *Calzaturificio Claudia s.n.c. v. Olivieri Footwear Ltd.*, 1998 WL 164824 at *4-5 (S.D.N.Y.).

97. See *Filanto v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1238 n.7 (S.D.N.Y. 1992), commented on in *Brand & Flechtner*, *supra* note 35, at 250-52.

98. See 144 F.3d at 1389.

99. In support of its decision, the court cited the following commentaries: BERNSTEIN & LOOKOPSKY, CISG IN EUROPE, *supra* note 57, at 29; DEL DUCA ET AL., SALES UNDER THE UNIFORM COMMERCIAL CODE AND THE CONVENTION, *supra* note 81, 173-74; Flechtner, *More U.S. Decisions*, *supra* note 35, at 157; *Primer on the United Nations Convention*, *supra* note 81, at 281; HONNOLD TREATISE, *supra* note 35, § 110, at 170-71; Murray, *Essay on the Formation of Contracts*, *supra* note 35, at 12; Winship, *supra* note 35, at 57. See 144 F.3d at 1390 & n.17.

100. See *Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*, 993 F.2d 1178, 1183 n.9 (5th Cir. 1993), discussed in *Flechtner, More U.S. Decisions*, *supra* note 35, at 156-61.

opinion by one commentator,¹⁰¹ two district court opinions issued since the *MCC-Marble* decision agree with the Eleventh Circuit.¹⁰²

Although the results in cases that reject the parol evidence rule in transactions governed by the CISG appear proper,¹⁰³ the method of framing the issue employed in the extant case law is misleading and unhelpful. The reported decisions to date have treated the parol evidence rule as a single monolithic doctrine that the CISG must have either rejected or accepted as a whole. The parol evidence rule, however, is a complex and ill-defined combination of rules and tests. The term itself is ambiguous—so much so that even U.S. lawyers may not be sure exactly what the Eleventh Circuit meant when it referred to the “parol evidence rule.” There are in fact several separate and distinct aspects of the rule, each of which calls for a separate analysis to see whether it continues to apply in transactions governed by the Convention. The analysis, furthermore, yields different results with respect to different aspects.

One distinguishable aspect of the parol evidence rule is its substantive core—the idea that, if the parties intend to discharge prior agreements that are omitted from a writing, courts should honor that intention. This facet of the parol evidence rule is merely a specific application of the most fundamental doctrine of contract law, that the intentions of the parties govern their contract. Clearly, the CISG validates rather than overrules the idea that the parties’ intentions bind them,¹⁰⁴ and just as clearly, the Convention does not reject the idea that the parties can discharge terms by excluding them from a later writing, if they so intend. Suppose, for instance, the parties execute a written agreement containing a properly drafted and consented-to merger clause stating that the writing contains the entire agreement of the parties and supercedes prior agreements and understandings. Almost all authorities agree that the merger clause makes prior terms not appearing in the writing irrelevant in trans-

101. See Moore, *supra* note 35.

102. See *Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB*, 23 F. Supp. 2d 915, 919-21 (N.D. Ill. 1998); *Calzaturificio Claudia s.n.c. v. Olivieri Footwear Ltd.*, 1998 WL 164824 at *4-*5 (S.D.N.Y.). Dicta in an earlier case also stated that the CISG rejects the parol evidence rule. See *Filanto v. Chilewich Int’l Corp.*, 789 F. Supp. 1229, 1238 n.7 (S.D.N.Y. 1992).

103. See *infra* text accompanying notes 127-30.

104. See CISG, *supra* note 1, art. 8 (containing detailed rules for determining the intent of the parties) & art. 6 (allowing the parties to exclude application of the CISG entirely, or to vary or derogate from any of its provisions); Franco Ferrari, *General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions on International Factoring and Leasing*, 10 PACE INT’L L. REV. 157, 172 (1998) (among the general principles of the CISG is “the principle of party autonomy, which some commentators have even defined as the Convention’s most important general principle” (citing HONNOLD TREATISE, *supra* note 35, at 47)).

actions governed by the CISG.¹⁰⁵ In other words, the parties remain free to agree to discharge prior terms by omitting them from a writing. A merger clause declares such intention and (if necessary) acts as a derogation from Article 8(3) and any other mandate in the Convention to consult prior terms not found in the writing.¹⁰⁶ It is worth noting, however, that nothing in the CISG requires the parties to declare this intention through a merger clause.

A second aspect of the U.S. parol evidence rule is entirely procedural: although the substantive questions generated by the rule, in particular the question whether the parties intended a writing to be an integration, would appear to be factual issues of the type that, in the U.S. system, juries normally determine, the parol evidence rule allocates responsibility for these questions to the judge.¹⁰⁷ The CISG clearly does not overrule this aspect of the parol evidence rule because procedural matters like the proper allocation of decision-making responsibility among components of a domestic court system are beyond the scope the CISG.¹⁰⁸ This derives from the general principle that the Convention deals with substantive sales law, not judicial procedure—a distinction discussed in more detail in the next section of this article.¹⁰⁹

105. See HONNOLD TREATISE, *supra* note 35, § 110(1); KRITZER, GUIDE TO PRACTICAL APPLICATIONS, *supra* note 35, at 125; MURRAY ON CONTRACTS, *supra* note 93, § 152D(3) & (4), at 890-91; Winship, *supra* note 35, at 57. Also see BERNSTEIN & LOOKOFSKY, CISG IN EUROPE, *supra* note 57, § 7-3, at 132 (warning that courts should "scrutinize carefully" attempts by the seller "to hide behind a non-negotiated merger clause in his own standard terms"). Cf. UNIDROIT (INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW), PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS art. 2.17 (1994) [hereinafter UNIDROIT PRINCIPLES] (providing, in a document in the nature of a restatement of international contract principles, as follows: "A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements."). *But see* Paul C. Blodgett, *The United Nations Convention on the Sale of Goods and the "Battle of the Forms,"* 18 COLO. LAW. 421-24 (1989) (implying that evidence of negotiations is admissible under the CISG even if the parties had integrated their transaction into a writing "intended as a final, complete and exclusive expression of [their] agreement"); Stephen E. Camisci, Comment, *From Moscow to Moscow: Primary Contractual Considerations for the International Sale of Goods,* 27 IDAHO L. REV. 347, 351 (1990-91) ("When the writing is intended as a 'final expression' of the parties' agreement, the U.C.C. would exclude factors such as the negotiations which CISG allows." (citation omitted)).

106. Such a derogation from the Convention is permitted by Article 6. See CISG, *supra* note 1, art. 6.

107. See MURRAY ON CONTRACTS, *supra* note 93, § 82B, at 376-77.

108. See HONNOLD TREATISE, *supra* note 35, § 110(1); Winship, *supra* note 35, at 57.

109. See *infra* text accompanying notes 133-46. As I point out in that discussion, it can at times be difficult to distinguish between substantive issues governed by the CISG and procedural questions beyond its scope. One could even make out an argument that, because the Convention contains a general principle against according undue status to written agreements, the aspect of the parol evidence rule allocating decision-making authority on certain questions to judges *only* when those questions arise in the context of a written contract violates the Convention. That argument, however, seems an unjusti-

A third aspect of the parol evidence rule involves the myriad of tests that U.S. courts and commentators have developed for answering the questions posed when the parol evidence rule applies. For example, there are the "appearance test,"¹¹⁰ the "Wigmore Aid,"¹¹¹ the "naturally and normally" test (associated with Professor Williston)¹¹² along with its U.C.C. variant, the "would certainly" test.¹¹³ It has been suggested that these tests were developed to obscure the fact that judges were making factual determinations normally reserved for the jury, and to disguise the factual inquiries in the garb of issues of law.¹¹⁴ Be that as it may, these tests for applying the parol evidence rule have become a confusing jumble.

Part of the problem is that the individual tests appear to go to particular sub-issues arising under the rule, whereas courts treat them as if each were a complete and exhaustive test for *all* issues raised by the rule. Thus, the Wigmore aid, Williston's "naturally and normally" test and the U.C.C. "would certainly" test all seem to have little or no relevance to the question of whether the parties intended a particular writing

fied stretch, particularly in light of the Convention's failure to include any provisions expressly dealing with such procedural matters.

110. "Thus, if the judge simply examines the writing and, from its appearance alone, determines that it is 'complete,' he will refuse to admit any evidence of prior understandings." MURRAY ON CONTRACTS, *supra* note 93, § 84C(1), at 385.

111.

In deciding [whether the parties intended to embody a particular subject of negotiation in a writing], the chief and most satisfactory index for the judge is found in the circumstance whether or not the *particular element of the alleged extrinsic negotiation is dealt with at all* in the writing. If it is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element; if it is not, then probably the writing was not intended to embody that element of the negotiation.

WIGMORE ON EVIDENCE, *supra* note 94, § 2430(3), at 99 (emphasis in original).

112. "Williston believe [*sic*] that the test had to focus *not* on whether the extrinsic agreement had, in fact, been made, but *whether reasonable parties, situated as were the parties to this contract, would have naturally and normally included the extrinsic matter in the writing.* If parties might naturally form a separate agreement as to such extrinsic matter, the writing was not integrated as to that matter." MURRAY ON CONTRACTS, *supra* note 93, § 84C(3), at 389.

113. "If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact." U.C.C. § 2-202 cmt. 3.

114.

Thus, this question of fact was reserved to the courts. The experience of judges could be trusted in this matter. Yet, this mean an invasion of the traditional province of the jury, to wit, a question of fact would now be decided by the court. The courts were unwilling to clearly indicate what they were doing. Thus, they cloaked their fact-finding with "rules" which sounded very much like rules of evidence.

to be an integration. Instead, each appears to address the question whether parol terms that one party is trying to introduce are part of the same transaction as the one covered by a writing. In other words, these tests should apply only if it has already been found that a writing constitutes a complete integration, and they address the issue whether parol terms are within the scope of that integration. The so-called "appearance test," in contrast, seems to go to the question whether the parties intended a particular writing to be an integration (or a complete integration),¹¹⁵ and to have no relevance to the issue of whether particular terms are part of the same transaction as the one in the writing (i.e., whether they are within the scope of a complete integration). Courts, however, tend to use the tests as if each provided a complete answer to all issues that arise in applying the parol evidence rule.¹¹⁶

Clearly, the CISG does not directly adopt the tests found in domestic U.S. law for determining whether the parties intended to discharge prior terms by omitting them from a writing: the whole purpose of the Convention is to provide international rules as an alternative to the domestic law that would otherwise apply to international sales transactions. The fact that U.S. courts have been confused and inconsistent in applying their own parol evidence tests further supports the argument against importing them into CISG jurisprudence. Of course, the individual tests may represent mere rules of logical inference. The "Wigmore aid," for example, appears to be based on the sensible proposition that matters touched upon in a writing are likely to be within the "scope" of that writing. If this test were used properly—i.e., if it were applied only after it had been separately determined that the parties intended a writing to be a complete integration and if the test were used only to determine whether particular alleged prior terms were within the scope of the integration—it might have a proper place in CISG jurisprudence. The various U.S. tests for applying the parol evidence rule, however, carry huge amounts of domestic law history and baggage that would certainly influence a U.S. court in applying them. Thus, the internationality requirement of Article 7(1) may require that these tests be avoided even when they constitute mere rules for drawing logical inferences from facts.

115. See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 93, § 209(3) (creating a rebuttable presumption of an integration if a writing "reasonably appears to be a complete agreement").

116. For an example of such an approach, in which the court trots out virtually every conceivable parol evidence test without distinguishing what aspect of the parol evidence rule the test goes to, see *Traudi v. Nebraska Public Power District*, 251 N.W.2d 148 (Neb. 1977).

One further aspect of the U.S. parol evidence rule appears clearly inconsistent with, and thus inapplicable under, the Convention. Although they seldom articulate what they are doing, many U.S. courts presume that a writing containing the terms of a contract—at least when the writing is a formal contract document signed by the parties—constitutes an integration,¹¹⁷ and a complete integration at that.¹¹⁸ That is (in practical effect) the result when courts invoke the “Wigmore aid,” the “naturally and normally” test, or the U.C.C. “would certainly” test without first analyzing whether the parties intended a writing to be a complete integration. The tests just mentioned are only relevant to the question of whether particular prior terms are part of the same transaction as the one in a writing (i.e., whether the terms are within the scope of the writing). That question arises only if you have already determined that the writing is a complete integration meant to encompass all the terms of the transaction and to discharge previously agreed-upon terms excluded from the writing. Many courts, however, invoke these tests without first asking whether the parties intended a writing to be a final statement of their entire agreement. In this fashion (and others) U.S. courts frequently indulge an unexpressed presumption that particular writings are complete integrations.

The presumption that contract documents (particularly formally executed ones) constitute complete integrations that discharge terms omitted therefrom is contrary to the text of the Convention, the general principles on which it is founded, and the mandate in Article 7(1) that the CISG be interpreted with regard to its international character. The Convention, which *does* provide general rules for determining the parties' intentions (Article 8), does *not* provide any special rule for determining whether the parties intended a writing to be a final statement of their agreement (an integration). Thus, the question whether the parties intended a writing to be an integration must be resolved like any other question of intent under

117. See, e.g., MURRAY ON CONTRACTS, *supra* note 93, § 83B, at 380 (“Absent countervailing evidence, the first possibility—that the parties did not intend their writing to eclipse any prior manifestations of agreement—is unlikely. If the parties have taken the time and trouble to express themselves in writing, certainly evidence of prior *contradictory* agreements would appear to be less credible than the subsequent written agreement.”).

118. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 93, § 210 cmt. b (“That a writing was or was not adopted as a completely integrated agreement may be proved by any relevant evidence. A document in the form of a written contract, signed by both parties and apparently complete on its face, may be decisive of the issue in the absence of credible contrary evidence.”). On the other hand, both the Restatement and the U.C.C. reject the idea (apparently accepted by some courts) that, just because a writing has been shown to be an integration, it should be presumed to be a complete integration. See *id.* cmt. a; U.C.C. § 2-202 cmt. 1(a).

the CISG, and without benefit of a presumption that the writing is an integration.

Of course one could argue that the CISG does not expressly state whether contract documents are to be presumed to be complete and final statements of the parties' agreement, and thus there is a "gap" in the Convention's rules on this point. Under Article 7(2) of the CISG, however, matters not expressly settled by the Convention must first be resolved by reference to the general principles on which the Convention is based. At several points, the CISG makes clear that contract documents do not enjoy any special status of the kind suggested by the presumption of integration. Article 11, for example, states: "A contract of sale need not be concluded in or evidenced by a writing. . . . It may be proved by any means, including witnesses."¹¹⁹ Similarly, Article 8(3) valorizes a variety of non-written evidence—including "the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties"—in determining a party's intent or reasonable understanding. Although I have argued that the interpretation rules articulated in Article 8(3) do not directly abrogate the parol evidence rule because questions of interpretation are beyond the scope of the rule,¹²⁰ Articles 8(3) and 11 together establish a general principle that under the CISG written evidence of contracts does not enjoy any special status beyond the inherent credibility advantages of writings.¹²¹ A pre-

119. Under Article 96, Contracting States can reserve out of the effects of Article 11. CISG, *supra* note 1, art. 96. See also *id.* art. 12. Although the Article 96 reservation is the most popular of the reservations permitted by the Convention, see Flechtner, *Several Texts of the CISG*, *supra* note 65, at 196, the United States has not made the reservation.

120. See Flechtner, *More U.S. Decisions*, *supra* note 35, at 157-58; Brand & Flechtner, *supra* note 35, at 251-52. As applied to the interpretation of a written contract, it is difficult to see any real difference between CISG Article 8(3), which requires reference to "the negotiations" in "determining the intent of a party or the understanding a reasonable person would have had," and Section 214(c) of the Restatement (Second) of Contracts, which provides that "[a]greements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish . . . the meaning of the writing, whether or not integrated. . . ."

121. See Ferrari, *supra* note 104, at 173 (citing the "principle of informality" as one of the general principles of the CISG). Writings, of course, may be more credible than witness testimony as to oral agreements because, e.g., writings are not subject to self-serving recollection. There is nothing in the Convention to suggest that fact-finders cannot take these credibility advantages into account. See BERNSTEIN & LOOKOFSKY, *CISG IN EUROPE*, *supra* note 57, § 4-5, at 56 ("[T]he fact that the CISG has removed the 'parol evidence' hurdle does not mean that every pre-contractual statement will be given contractual effect. Courts and arbitrators may still entertain a *presumption* in favor of the completeness and correctness of a writing, and after hearing witnesses the fact-finder may conclude that this presumption has not been overcome."). My point is that it is clear writings do not enjoy any special status under the CISG beyond the increased evidentiary weight suggested by their inherent characteristics.

suspicion that contract documents (even formally-executed ones) constitute complete integrations would conflict with that general principle.

The presumption of integration that underlies the way some U.S. courts apply the parol evidence rule also seems to address peculiarly common law concerns arising out of our jury system, and it may reflect a narrow vision of contracting as a fundamentally adversarial process—a vision not shared by other legal systems.¹²² Incorporating such parochial concerns and values into CISG jurisprudence would violate the requirement of Article 7(1) that the Convention be interpreted with regard to its international character. In other words, the common law idea that the execution of contract documents should almost always preclude the parties from being allowed to prove prior agreements or understandings is not so universally accepted that it should prevail in CISG jurisprudence.¹²³

Thus, a careful analysis of the question of whether the CISG abrogates the parol evidence rule yields the following result: when parol evidence issues arise in transactions governed by the CISG, courts should permit proof that the parties intended to discharge a term when they omitted it from (or contradicted it in) a writing; the party seeking to block the evidence, however, must prove that the writing was intended to be the final (and, where the proffered evidence goes to terms that do not contradict the writing, the *complete*) statement of the agreement without benefit of a presumption that the writing was an integration. Despite a statement to the contrary in a comment to the UNIDROIT Principles of International Commercial Contracts, the absence of a merger clause in the writing should not necessarily be fatal to the required proof¹²⁴ be-

122. See Flechtner, *Several Texts of the CISG*, *supra* note 65, at 200-04.

123.

[A]lthough jurisdictions in the United States have found the parol evidence rule helpful to promote good faith and uniformity in contract, as well as an appropriate answer to the question of how much consideration to give parol evidence, a wide number of other States Party to the CISG have rejected the rule in their domestic jurisdictions. One of the primary factors motivating the negotiation and adoption of the CISG was to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party's legal system might otherwise apply. Courts applying the CISG cannot, therefore, upset the parties' reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result.

MCC-Marble, 144 F.3d at 1391 (citations omitted).

124. See UNIDROIT PRINCIPLES, *supra* note 104, cmt. to art. 2.17 at 55 ("in the absence of a merger clause, extrinsic evidence supplementing or contradicting a written contract is admissible"). Unlike the CISG, the UNIDROIT Principles do not directly have the force of law. See UNIDROIT PRINCIPLES, *supra* note 105, pmbli. (providing for the mandatory application of the Principles only where the parties to a contract have adopted them). Certainly the comments to the Principles are not binding. Furthermore, the cmt. to art. 2.17 stating that the absence of a merger clause means that a writing cannot

cause nothing in the CISG mandates that the intent to integrate be declared only through a merger clause. Indeed, requiring a merger clause before treating a writing as an integration would itself violate the Convention's "informality principle" that the parties' intent need not be formally expressed.¹²⁵ Clearly the absence of a merger clause makes the burden of proving integration more difficult to carry, but it should not be deemed dispositive. The fact that a writing is a formal contract document prepared and signed by the parties is evidence of an intent to integrate, but it too should not be considered dispositive.¹²⁶ It certainly may be countered by direct evidence that the parties did not intend an integration, and it might possibly be rebutted by proof that the document is a form prepared by one side which was not carefully reviewed by the other party.

Applying this approach to the facts of *MCC-Marble* would probably yield the same result as the court actually reached.¹²⁷ The evidence that the parties did not intend the buyer to be bound by the notice provisions on the reverse of the seller's form should be admitted unless the seller could prove, without benefit of a presumption, that the parties intended the form to constitute a final statement of the terms of their agreement (an integration).¹²⁸ While the form was drafted by the seller for the purpose of embodying sales contracts and it was signed by the parties, thus providing some evidence of integration, there is contrary evidence. The lack of a merger clause or any other direct expression of an intent to integrate (while not dispositive), combined with the fact that the form was in a language unknown to the buyer, constitutes some such contrary evi-

be considered an integration is not convincingly supported.

125. See CISG, *supra* note 1, art. 11; Ferrari, *supra* note 104, at 173.

126. Compare the Restatement's approach to this issue under U.S. law: "That a writing was or was not adopted as a completely integrated agreement may be proved by any relevant evidence. A document in the form of a written contract, signed by both parties and apparently complete on its face, may be decisive of the issue in the absence of credible contrary evidence." RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 93, § 210 cmt. b.

127. The Eleventh Circuit lamented the fact that it could locate no relevant foreign CISG case law on the parol evidence issue. As was noted in the previous section of this article, the court apparently was unaware of many sources of non-American case law on the Convention. Research in these other sources, however, would probably have confirmed the court in its decision that the parol evidence rule should not bar the buyer's evidence in *MCC-Marble*. For example, the UNILEX database cites a German case that, according to its English summary, asserts as a general principle that oral agreements are valid under the CISG even if they contradict written versions. See OLG Hamm (Germany), UNILEX, No. 19 U 97/91 (Sept. 22, 1992).

128. Because the form included language stating that the buyer was aware of and approved the notice provisions on the reverse of the form, the buyer's evidence would appear to contradict the writing. Thus to prevent introduction of this evidence the seller would have to prove only that the writing was a partial integration: the seller would not have to establish that the integration was complete.

dence—although whether those facts alone would be sufficient to rebut the evidence of integration is unclear.¹²⁹ Perhaps the strongest items of affirmative evidence that the parties did not intend the form to be an integration, however, are the very affidavits whose admissibility is at issue.¹³⁰ Those affidavits, by representatives of both the buyer and the seller, declare that the parties did not intend the buyer to be bound by provisions of the executed form. Thus, they amount to declarations that the parties did not intend the seller's form to constitute any sort of integration. If credible, the affidavits would establish that the seller had not carried the burden of proving that the signed form was an integration, and the affidavits would be admissible despite the seller's parol evidence argument.

The approach suggested here to parol evidence questions arising under the CISG may not be much different than the domestic law approach to such issues advocated by some U.S. authorities. Not every U.S. court and commentator accepts the idea that one should presume contract writings are integrations. Indeed, the leading luminary of 20th century U.S. contract law, Arthur Corbin, was associated with the idea that courts should consult the parties' "actual intent" (without benefit of presumptions) in determining the question of integration.¹³¹ The diversity of approaches to parol evidence questions within the United States¹³² confirms the idea that asking simply whether the CISG adopts or rejects "the pa-

129. Worried about the effect of its decision on the reliability of international commercial contracts, the Eleventh Circuit declared:

We find it nothing short of astounding that an individual, purportedly experienced in commercial matters, would sign a contract in a foreign language and expect not to be bound simply because he could not comprehend its terms. We find nothing in the CISG that might counsel this type of reckless behavior and nothing that signals any retreat from the proposition that parties who sign contracts will be bound by them regardless of whether they have read them or understood them. Cite.

This dicta suggests that, absent the contrary affidavits from both parties, the court might well have found that the seller's form in *MCC-Marble* form constituted an integration merely because it was signed, and the fact the form was in a language unknown to the buyer would not have prevented this conclusion. Whether this attitude toward the binding effect of executed contract documents represents too parochial an American view to pass muster under the internationality principle of Article 7(1) is unclear.

130. Even under the U.S. parol evidence rule the affidavits would clearly be admissible for the limited purpose of establishing whether or not the seller's form was an integration. See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 93, § 214(a), (b); MURRAY ON CONTRACTS, *supra* note 93, § 84B, at 384-85.

131. See MURRAY ON CONTRACTS, *supra* note 93, § 84C(3), at 389.

132. For an account of some of the diversity in approaches to the U.S. parol evidence rule, see Eric A. Posner, *Essay: The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533 (1998).

rol evidence rule," as U.S. courts have tended to do to date, is a misleading way to pose the issue. The parol evidence rule is not a single well-defined doctrine that the Convention has to accept or disavow wholesale; it is, rather, a complex of several substantive and procedural aspects toward which different U.S. authorities take different (and sometimes inconsistent) approaches, and which have varying degrees of consistency with the CISG. Some aspects of the parol evidence rule—specifically the core substantive doctrine that parties can, if they so intend, discharge prior agreements by omitting them from a later writing, and the procedural rule that parol evidence issues are to be resolved by the judge rather than a jury—appear to remain valid under the Convention. Other aspects of the rule—the traditional parol evidence "tests" in U.S. law and the presumption of integration employed by some jurisdictions—appear to conflict with and, thus, be inapplicable under the CISG.

CISG and Other (Domestic) Law—The "Substantive/Procedural" Distinction

The Eleventh Circuit begins its discussion of the parol evidence rule by noting that "contrary to its title, [the rule] is a substantive rule of law, not a rule of evidence."¹³³ From this it concludes that "a federal district court cannot simply apply the parol evidence rule as a procedural matter—as it might if excluding a particular type of evidence under the Federal Rules of Evidence, which apply in federal court regardless of the source of the substantive rule of decision."¹³⁴ In a footnote, the court provides the following example of the distinction it is making:

The CISG provides that a contract for the sale of goods need not be in writing and that the parties may prove the contract "by any means, including witnesses." CISG, art. 11. Nevertheless, a party seeking to prove a contract in such a manner in federal court could not do so in a way that violated in [*sic*] the rule against hearsay. . . . A federal district court applies the Federal Rules of Evidence because these rules are considered procedural, regardless of the source of the law that governs the substantive decision.¹³⁵

The distinction the court makes between substantive issues, where the Convention supplies international rules and preempts otherwise applicable domestic law, and procedural matters, where the normal domestic

133. *MCC-Marble*, 144 F.3d at 1388-89.

134. *Id.* at 1389 (citation omitted).

135. *Id.* at 1389 n.13 (citations omitted).

rules of the court continue to apply, is clearly a correct one.¹³⁶ Furthermore, the court's assertion that the parol evidence rule falls on the "substantive/preempted" side of the distinction, whereas hearsay rules would fall on the non-preempted procedural side, also appears correct. The distinction, however, may not always be so easy to draw.

For example, Article 76 of the Convention provides that, where a party avoids the contract (thus ending the parties' obligations to perform),¹³⁷ the aggrieved party can recover as damages the difference between the price in the avoided contract and "the current price"—i.e., the market price—of the goods.¹³⁸ The current price is to be measured "at the time of avoidance"¹³⁹ and at "the place where delivery of the goods should have been made."¹⁴⁰ U.S. domestic sales law (Article 2 of the U.C.C.) contains an analogous rule for measuring damages by the difference between the contract price and the market price at a specified time and place.¹⁴¹ The U.C.C. also adds a liberal rule for proving market price: whenever evidence of the price prevailing at the specified time or place is "not readily available," U.C.C. § 2-723(2) permits proof of "the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described."¹⁴²

136. See HONNOLD TREATISE, *supra* note 35, § 110, at 143 (asserting that "[t]he Convention, of course, does not interfere with [procedural] domestic rules on the allocation of authority between the judge and jury. . .").

137. See CISG, *supra* note 1, art. 81(1). Avoidance is permitted where the other party has committed a "fundamental breach" of the sales contract. *Id.* arts. 49(1)(a) & 64(1)(a). "Fundamental breach" is defined as one that "results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result." *Id.* art. 25. Avoidance is also permitted where the seller has failed to deliver or the buyer has failed to accept or pay for the goods within the deadline established through the so-called *Nachfrist* procedure described in Articles 47 and 63. *Id.* arts. 49(1)(b) & 64(1)(b). For description of the *Nachfrist* procedure and its application, see HONNOLD TREATISE, *supra* note 35, §§ 287-91, 35-51.

138. CISG, *supra* note 1, art. 76(1).

139. *Id.* If the aggrieved party avoids the contract after "taking over the goods," however, the current price is measured at the time of "such taking over." *Id.*

140. *Id.* art. 76(2).

141. See U.C.C. §§ 2-708(1) & 2-713. For a comparison of these provisions to CISG Article 76, see Harry M. Flechtner, *Remedies Under the New International Sales Convention: The Perspective From Article 2 of the U.C.C.*, 8 J.L. & COM. 53, 98-101 (1988).

142. Article 76(2) of the CISG provides that, if there is no "current" price at the place of delivery, the aggrieved party can substitute "the price at such other place as serves as a reasonable substitute." CISG, *supra* note 1, art. 76(2). This CISG provision, however, applies only if no current price exists in the market of delivery, whereas U.C.C. § 2-723(2) allows for use of a reasonable substitute market whenever evidence of the price in the designated market is "not readily available." Unlike

The question that arises is whether U.C.C. § 2-723(2) is a procedural rule that U.S. courts should apply even in transactions governed by the CISG, or a substantive rule preempted by the Convention. One could view the U.C.C. provision as a mere rule of evidence, equivalent to the rule against hearsay, addressing the procedural question of how one proves market price. Alternatively, one could view § 2-723(2) as a substantive provision that changes the time and place for measuring market price in certain circumstances. Support for the latter view could be found in the fact that the rule appears in a sales code, not among rules of evidence. The different characterizations might dictate whether a party who (for example) cannot prove the current price at the time required by CISG Article 76 but can prove market price as of a reasonable time thereafter, could use the Article 76 measure of damages.

The substantive-procedural distinction made by the *MCC-Marble* court demonstrates that the scope of the Convention is limited: the CISG does not attempt to provide all the law that fora will have to apply in litigation involving international sales of goods.¹⁴³ The rules of procedure governing such litigation, as well as substantive rules for issues beyond the scope of the CISG—such as questions concerning the “property in” (title to) goods¹⁴⁴—remain subject to applicable domestic law. Thus when applied to actual disputes the Convention resembles an island of international rules surrounded by an ocean of still-applicable national law.¹⁴⁵ This means that courts will often face difficult boundary questions as to exactly where the sovereignty of the CISG ends and domestic law takes over. An important and frequently-discussed issue in this regard involves defining what constitutes an issue of contractual “validity” that is expressly excluded from the Convention by Article 4(a) and relegated to applicable domestic law.¹⁴⁶ The substantive-procedural distinction made by the *MCC-Marble* court is another example of an area where drawing the line between the scope of the CISG and the reach of domestic law may sometimes be difficult.

U.C.C. § 2-723(2), furthermore, the CISG has no provision for substituting a “reasonable time” for measuring the current/market price.

143. See Flechtner, *Several Texts of the CISG*, *supra* note 65, at 198.

144. According to Article 4, “this Convention . . . is not concerned with: . . . (b) the effect which the contract may have on the property in the goods sold.” CISG, *supra* note 1, art. 4(b).

145. Compare Professor Honnold’s description of statutes in common law systems as “islands surrounded by an ocean of case-law.” HONNOLD TREATISE, *supra* note 35, § 96(1), at 149.

146. See, e.g., Flechtner, *More U.S. Decisions*, *supra* note 35, at 165-66; Helen Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT’L L. 1, *passim* (1993).

CONCLUSION

The Eleventh Circuit's opinion in *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.* represents a positive development for CISG jurisprudence in the United States. Although the court was not aware of all the resources available to those researching the Convention, its approach to interpreting the CISG moves toward the kind of international legal methodology that is required to achieve the Convention's goal of enhancing uniformity in international sales law. The court may have framed the primary issue in the case—whether parol evidence is admissible in a transaction governed by CISG—in an overly-simplistic manner, but its emphasis on interpreting the Convention from an international perspective led it to the proper result. In addition, the court's comments on the distinction between rules of substantive domestic sales law, which are preempted by the CISG, and domestic procedural rules, which continue to apply in litigation involving CISG transactions, raise an important point about limits on the scope of the Convention. Thus, the *MCC-Marble* decision establishes an excellent standard for CISG jurisprudence in U.S. courts, and a benchmark against which the progress of future U.S. decisions on the Convention can be measured.

