

THE PAROL EVIDENCE RULE: A COMPARATIVE STUDY OF THE COMMON LAW, THE CIVIL LAW TRADITION, AND *LEX MERCATORIA*¹

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I. INTRODUCTION

An American firm, which had purchased tiles from an Italian company, filed a complaint against the seller for breach of contract. The seller answered the claim relying on certain terms and provisions that appeared on the reverse of a preprinted form contract used for the sale that allowed the seller to stop deliveries in case the buyer failed to pay. The buyer presented affidavits from its president and from two employees of the seller stating that the parties did not intend to be bound by the standard terms on the order form. The district court excluded this evidence on the basis of the domestic parol evidence rule and granted summary judgment to the seller.² The decision was reversed on appeal,³ but the case presents a good example of how problematic the strict application of the common law parol evidence rule in a modern interconnected world may be. From the point of view of the civil law tradition, the crux of the problem will be the evidence of the truthfulness of the alleged fact, in accordance with the general rules of interpretation of contracts contained in specific dispositions of a code, and not a general restriction of extrinsic proof developed by varied and conflictive jurisprudence.

Farnsworth affirms that the parol evidence rule is “universally recognized”;⁴ however, its acceptance is limited to the common law world, and even there sometimes the rule is viewed with disfavor.⁵ Beyond the frontiers of the common law and some mixed jurisdictions, the parol evidence rule is virtually unknown.

This comparative study has two objectives. First, the Article seeks to demonstrate how different legal families resolve the same problem. To this end, this Article compares methodologies for resolving the question of framing the parties’ real intent in a contract in common law jurisdictions, in mixed jurisdictions, and in the civil law tradition. The comparison will review the evolution of the rule in the domestic jurisdictions and consider the way the rule responded to the modern needs of international commercial law. Second, this Article offers an analysis of the path selected by modern international commercial law for resolving the problems related with extrinsic evidence varying or contradicting a writing. The recent opinion rendered on this

² MCC - Marble Ceramic Ctr., Inc. v. Ceramica Nuova D’Agostino S.p.A., No. 92-2108-CIV (S.D. Fla.); *see also infra* Part IV.A.

³ *See* MCC - Marble Ceramic Ctr., Inc. v. Ceramica Nuova D’Agostino S.p.A., 144 F.3d 1384 (11th Cir. 1998).

⁴ E. ALLAN FARNSWORTH, CONTRACTS 415 (4th ed. 2004).

⁵ *See infra* Part III.B.1.

specific rule by the Advisory Council on the United Nations Convention on the International Sale of Goods⁶ is especially striking and demonstrates that the conflict continues on the use of the parol evidence rule when the parties are in different jurisdictions.⁷ This Article concludes that the manifold sources of information brought about by advancements in modern technology, as well as a coincident expansion in communications and electronic commerce, necessitate a reconsideration of the rule as it was originally conceived in the common law. A comparison of the domestic parol evidence rule with its equivalents as they have evolved in foreign and international legal spheres clearly reveals the need for adopting a more flexible approach in keeping with current times.

II. THE RULE

The parol evidence rule belongs to the common law tradition. It provides that a written instrument, intended by the parties thereto as the final manifestation of their mutual understanding, cannot be challenged by past or contemporary evidence contradicting it or modifying its content.⁸

The roots of the parol evidence rule in the common law originated at the end of the Middle Ages, when the custom was adopted of stamping a written agreement of the parties with a seal so as to make its authenticity indisputable.⁹ The rule also could be found latent in the reluctance of a sixteenth-century English court to construe a written will using evidence extrinsic to it.¹⁰ In

⁶ United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. No. 98-99 (1983), 1489 U.N.T.S. 3 [hereinafter CISG].

⁷ See *infra* Part IV.A.1 for a discussion of the advisory opinion.

⁸ For similar definitions see, for example, FARNSWORTH, *supra* note 4, § 7.3.

⁹ See John H. Wigmore, *A Brief History of the Parol Evidence Rule*, 4 COLUM. L. REV. 338, 342 (1904). For the first American cases see THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 168 (Philadelphia, Abraham Small 1824).

¹⁰ See *Sharington v. Strotton*, (1565) 75 Eng. Rep. 454 (K.B.) (holding that a sealed document is of a higher nature than other evidence). In *The Lord Cheyney's case*, (1591) 77 Eng. Rep. 158 (Ct. Wards), the court said: "for it would be full of great inconvenience that none should know by the written words of a will what construction to make or advice to give, but it should be controlled by collateral averments out of the will." However, a few years later in *Burglacy v. Ellington*, 1 Brownl. & Golds. 192, the court decided "when a deed is perfect and delivered as his deed, that then no verbal agreement afterwards may be pleaded in destruction thereof . . . but when the agreement is parcel of the original contract, as here it is, it may be pleaded." J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 270 (2d ed. 1979), mentions that already in the fifteenth century there was no way to overturn by oral evidence what was considered a valid deed. See also *Donne v. Cornwalle*, Y.B. 14 Hen. 7, Hil. 1, pl. 2 (1486).

those times, the existence of documents replaced the system of proving transactions by witnesses. The next historical step was in 1677 with the "Statute of Frauds,"¹¹ which required that some specific contracts be in writing. With the passing of time, reading and writing was no longer a "mysterious art of a few,"¹² and consequently, written contracts became the rule rather than the exception. Thereafter, the parol evidence rule began acquiring its modern form and started to spread in the common law, turning the writing itself into the agreement, rather than only a way to prove its existence.

According to one well-known decision, the rule ought to promote legal certainty.¹³ Corbin mentions preventing fraud and perjury, as well as contributing to the determination of justice and truth by a legal device.¹⁴ Furthermore, the rule was deemed to help the interpreter by allowing him to rely on the terms of a written agreement and to exclude unreliable or dishonest evidence.¹⁵ The well-intentioned purposes of the rule, however, have not prevented criticism of it as a "source of endless confusion in contract law."¹⁶ Indeed, the countless number of exceptions to the rule found in common law jurisprudence have produced the unintentional effect of undermining the original principle.¹⁷

The rule has been justified at common law using two different approaches.¹⁸ The first relates to the parties' consent: the parties intend to make the writing an expression of their final agreement that supersedes all

¹¹ Statute of Frauds, 29 Car. 2, c. 3 (1677) (Eng.). Its misleading name was derived from its first line, which explains that it was issued for the "prevention of many Fraudulent Practices which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury." *Id.* However, Jean Brissaud mentions that, as early as 1566, the Ordinance of Moulins made mandatory written contracts in France when the value involved was greater than 100 pounds. Proof by witnesses was not allowed beyond that worth. JEAN B. BRISSAUD, A HISTORY OF FRENCH PRIVATE LAW 613 (Rapelje Howell trans., Augustus M. Kelley 1968) (1912).

¹² 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 175 (6th ed. 1938).

¹³ See *Shore v. Wilson*, (1842) 8 Eng. Rep. 450.

¹⁴ See 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 575 (1960).

¹⁵ See BRIAN BLUM, CONTRACTS: EXAMPLES & EXPLANATIONS 308 (1998). In England, "parol evidence will not be admitted to prove that some particular term, which had been verbally agreed upon, had been omitted (by design or otherwise) from a written instrument constituting a valid and operative contract between the parties." *Jacobs v. Batavia & Gen. Plantations Trust Ltd.*, [1924] 1 Ch. 287.

¹⁶ See Note, *The Parol Evidence Rule: Is It Necessary?*, 44 N.Y.U.L. REV. 972, 972 (1969).

¹⁷ *Id.* at 974 n.11. See also *Zell v. Am. Seating Co.*, 138 F.2d 641, 643-44 (2d Cir. 1943), *rev'd*, 322 U.S. 709 (1944) (describing confusion resulting from the rule's exception).

¹⁸ See both approaches in JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS 234 (4th ed. 1999).

prior understandings, and that final understanding must be honored by the interpreter. The second approach regards the quality of evidence: a final writing carefully drafted to reflect the parties' intention deserves a better and preferred rank as proof than any other prior or contemporary agreement between the parties.

The relation between the parol evidence rule and interpretation is evident. When the parties in a claim introduce any written instrument, the words, expressions, terms, and usages of the document must be interpreted by the tribunal. When the parties have expressed their intent in an ambiguous way, despite the fact that the agreement was considered the final representation of their intention, the court must rely on the words selected to resolve the ambiguity. Sometimes it is difficult to be sure that the meaning of a document can be established by considering only that document.¹⁹ The parties have chosen the words and made the instrument, but the result sometimes does not reflect their intentions properly. Just as Corbin explained: "Its legal operation must be in accordance with the meaning that the words convey to the court, not the meaning that they intend to convey."²⁰

The distinction between *latent* and *patent* ambiguities, used in the United States for respectively accepting oral evidence or curing the obscurity only with the writing, has been seen as discredited.²¹ Is there any other rule to be considered for explaining when the judicial interpreter will read a word written in the contract as plain and evident and when will it be seen as ambiguous? In spite of appearing unambiguous and plain to the reader, the words used in the contract sometimes do not exactly explain what the author truly means.²²

¹⁹ E. Allan Farnsworth, *The Interpretation of International Contracts and the Use of Preambles*, INT'L BUS. L.J., No. 3-4, 2002, at 271, 275; see also *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968).

²⁰ Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 161 (1964). According to Corbin, the court must put itself "in the shoes" of the parties. *Id.* at 162.

²¹ James P. McBaine, *The Rule Against Disturbing Plain Meaning of Writings*, 31 CAL. L. REV. 145, 147 (1943) (referring to Bacon's rule); JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW (Augustus M. Kelley 1969) (1898).

²² See, e.g., *Baine v. Cont'l Assurance Co.*, 129 P.2d 396 (1942); see McBaine, *supra* note 21, at 156 (explaining the contradiction with the Code of Civil Procedure). Compare *Bulmer v. Bollinger*, [1974] 2 All E.R. 1226, 1234 (Lord Denning enumerating guidelines for the judge determined to interpret a treaty germane for somebody deciding between a writing and a statute), with Lord Hoffmann's opinion in *Investors Comp. Scheme v. West Bromwich Bldg. Soc'y*, [1998] 1 All E.R. 98, 114-15, available at <http://www.publications.parliament.uk/pa/ld199798/ldjudgmt/jd970619/invest01.htm> (summarizing the current principles of interpretation of contractual documents).

Extrinsic evidence could be helpful to the interpreter for understanding that meaning unless the parol evidence rule prohibited it.

III. THE PAROL EVIDENCE RULE IN DOMESTIC JURISDICTIONS

A. *The Rule in the United States*

In the United States, the duty of clarifying the increasing number of overlapping precedents of the parol evidence rule was entrusted, among other subject matters, to the American Law Institute. The general rules, or “Restatement” prepared by the Institute, affirm that the rule is not a rule of interpretation, but rather defines the theme of the interpretation.²³ If the instrument is a complete expression of the parties’ understanding, the agreement is said to be “integrated.”²⁴ If the writing produced is not complete, though a final instrument, the writing can be complemented, but not contradicted, by additional evidence. This is a case of “partial integration.” To determine that the instrument executed by the parties is final and complete, courts sometimes use the “four corners” rule.²⁵ This approach consists of gathering all information related to the interpretation of the contract from within the document itself and not from extrinsic sources.²⁶ At other times, the interpreter looks for a merger clause. This expression alludes to a provision of the contract stating that the writing is the final and complete agreement of the parties, which establishes in a definitive way that the document embodies the total and integrated agreement reached. The concept of “total integration” is the one regarded by some scholars as the major area of conflict of the rule.²⁷

²³ RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt. a (1981).

²⁴ FARNSWORTH, *supra* note 4, at 418–20.

²⁵ See, e.g., *Fed. Deposit Ins. Co. v. W.R. Grace & Co.*, 877 F.2d 614, 621 (7th Cir. 1989) (explaining the “four corners” rule).

²⁶ However, this method lost part of its original strict interpretation, which prevented juries from disregarding evidence outside the four corners of the contract.

²⁷ See JEFFREY THOMAS FERRIELL & MICHAEL J. NAVIN, *UNDERSTANDING CONTRACTS* 280 (2004). Concerning the different understandings between Professors Williston and Corbin, see John D. Calamari & Joseph M. Perillo, *A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 *IND. L.J.* 333, 337 (1967). In *Mitchill v. Lath*, 160 N.E. 646 (N.Y. 1928), the court admitted extrinsic evidence of an oral agreement made prior to the written contract when this agreement was not so clearly connected with the principal transaction as to be part and parcel of it. In *Masterson v. Sine*, 436 P.2d 561 (Cal. 1968), the court first accepted the evidence of a prior contract as credible for concluding that the written instrument was not fully integrated. See MARVIN A. CHIRELSTEIN, *CONCEPTS AND CASE ANALYSIS IN THE*

The relationship between integrated agreements and prior understandings are summarized in § 213 of the Restatement (Second) of Contracts:

- (1) A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.
- (2) A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.
- (3) An integrated agreement that is not binding or that is voidable and avoided does not discharge a prior agreement. But an integrated agreement, even though not binding, may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated.²⁸

The Restatement also reproduces the prevailing opinion that evidence of prior or contemporaneous negotiations is to be admitted to prove that the written agreement was not intended by the drafters as the final expression of the terms it contains.²⁹

Efforts among the states for promotion of uniform legislation governing private transactions were finalized in the Uniform Commercial Code (U.C.C.).³⁰ Its ratification as statute, with some variances, by forty-nine states of the Union seeks to promote the uniform understanding and interpretation of some specific legal areas of commercial transactions, including sales. The process restated by the U.C.C. has been praised for overcoming much of the confusion of the past and offering an effective guide to the courts.³¹ According to the U.C.C., the operation of the parol evidence rule depends on the intention of both parties that the writing would be the final expression of their agreement. The first step in determining this may be to ascertain whether the writing has reached the required level to be considered the final expression.

LAW OF CONTRACTS 100, 105 (5th ed. 2006). In *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. 1971), in the opinion of the court, the defendant should have been allowed to introduce evidence of trade usages. Course of dealing and trade usage, unless carefully negated, are admissible to supplement the terms of any writing. The contract should be read on the assumption that these elements were taken for granted when it was drafted.

²⁸ RESTATEMENT (SECOND) OF CONTRACTS § 213 (1981).

²⁹ *Id.* § 214.

³⁰ See U.C.C. (1977). For the origin of the U.C.C., see the site of the National Conference of Commissioners on Uniform State Laws, <http://www.nccusl.org/nccusl/aboutus.asp> (last visited Apr. 3, 2007).

³¹ JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 450 (4th ed. 2001).

One of the distinctive features of the U.C.C. as compared with the Restatement is that the former avoids all mentions of “integration.” The U.C.C. identifies writings as either “complete and exclusive,” which cannot be supplemented with additional evidence, or “final expression,” which can be.³² If a record is final, but not complete and exclusive, it can be supplemented with other evidence drawn from any source of consistent additional terms. Additionally, the U.C.C. underlines the significance of prior commercial dealings between the parties or usages of trade for explaining contractual terms.³³

It should be recalled that the Restatement and the U.C.C. do not replace the understanding of the rule under the still operative and above-mentioned principles of the common law. Subsequently, the American development of the rule will be compared with its evolution in England, where the principle originated, as well as its equivalents in other common law traditions. The comparison will show how the rule has been reformed in most common law jurisdictions by a gradual process, which has diluted considerably part of its original content, leading one to wonder about its survival.

B. Other Members of the Common Law Tradition

1. England

In 1897 in England, Lord Morris explained the rule in conspicuous terms: “[p]arol testimony cannot be received to contradict, vary, add to or substract

³² U.C.C. § 2-202 (2003).

Final Written Expression: Parol or Extrinsic Evidence. (1) Terms with respect to which the confirmatory records of the parties agree or which are otherwise set forth in a record 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 supplemented* by evidence of: (a) course of performance, course of dealing, or usage of trade (Section 1-303); and (b) consistent additional terms unless the court finds the record to have been intended also as a *complete and exclusive statement of the terms of the agreement*. (2) Terms in a record may be explained by evidence of course of performance, course of dealing, or usage of trade without a preliminary determination by the court that the language used is ambiguous.

Id. (emphasis added).

³³ See *Trans World Metals, Inc. v. Southwire Co.*, 769 F.2d 902 (2d Cir. 1985); *Rose Stone & Concrete, Inc. v. County of Broome*, 429 N.Y.S.2d 295 (N.Y. App. Div. 1980).

from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract."³⁴

In 1972, Lord Denning, in a minority opinion, affirmed that in the event the contract is unclear, the parties are "the very best guides to the way in which it was used."³⁵ Later, the House of Lords admitted extrinsic evidence as proof of the background or "matrix of facts" of the agreement when this background was known by the parties at the time of the contract.³⁶ In England, the parol evidence rule was strictly applied in relation with the non-admission of the subsequent conduct of the parties for construing the terms of a written contract.³⁷ The English Law Commission in charge of the modernization of the law in England, in a first paper produced in 1976, recommended that the rule should be abolished.³⁸ However, ten years later, in 1986,³⁹ the same Commission pointed out that the several and extensive exceptions admitted to the rule by current jurisprudence allowed one to wonder whether the rule had not been in fact largely destroyed.⁴⁰ The presumption that the document, which seems to be the contract, as a matter of fact, is the whole contract has less strength today than in prior times. Accordingly, it seems unlikely that today in England the parol evidence restriction will preclude a party, for example, from bringing extrinsic evidence of terms which were intended to be part of the agreement.⁴¹ Some scholars recognize here the Victorian character of the English law of contracts and its lack of adaptation to the requirement of

³⁴ *Bank of Australasia v. Palmer*, [1897] A.C. 540, 545. See the rule stated by Lawrence in *Jacobs v. Batavia & General Plantations Trust Ltd.*, [1924] 1 Ch. 287. See also *Rabin v. Gerson Berger Ass'n*, [1986] 1 All E.R. 374.

³⁵ *Wickman Machine Tool Sales Ltd. v. Schuler A.G.*, (1972) 2 All E.R. 1173, 1181 (C.A.), *aff'd*, [1974] A.C. 235 (H.L.).

³⁶ This is the oft-quoted expression of Lord Wilberforce in *Prenn v. Simmonds*, [1971] 3 All E.R. 237, 1 W.L.R. 1381, 1383-84.

³⁷ See *Wickman Machine Tools Sales Ltd.*, (1974) A.C. at 261. However, Lord Steyn suggests the reexamination of the rule in Johan Steyn, Address, *The Intractable Problem of the Interpretation of Legal Texts*, 25 SYDNEY L. REV. 5, 10 (2003).

³⁸ *The Parol Evidence Rule* (English Law Comm'n, Working Paper No. 70, 1976).

³⁹ *The Parol Evidence Rule* (English Law Comm'n, Working Paper No. 154, 1986). However, see the comment of John W. Carter, *The Parol Evidence Rule: The Law Commission's Conclusions*, 1 J. CONT. L. 33 (1988), narrowing the concept of parol evidence used by the commissioners.

⁴⁰ See MICHAEL H. WHINCUP, *CONTRACT LAW AND PRACTICE: THE ENGLISH SYSTEM AND CONTINENTAL COMPARISONS* (4th ed. 2001); KIM LEWISON, *THE INTERPRETATION OF CONTRACTS* 34-37 (1989). *But cf.* G.H. TREITEL, *THE LAW OF CONTRACT* 177-85 (8th ed. 1991) (enumerating thirteen main exceptions to the rule accepted by the jurisprudence).

⁴¹ EWAN MCKENDRICK, *CONTRACT LAW* 113 (1990).

a global contractual society.⁴² In the birthplace of the rule, the parol evidence principle has begun to show its rifts.

In addition, it should be recalled that until recently the United Kingdom has been reluctant to sign the Convention on Contracts for the International Sale of Goods (CISG).⁴³ As explained later in this Article, the CISG will oblige the English courts to reconsider their rules on interpretation in relation to international contracts for the purpose of reaching the desired harmonization with other member states. This search for uniformity will impede the use of rules characteristic of one legal system but unknown to other legal traditions.

2. *Australia*

The English origin of the Australian legal system is apparent from its organization and influence in Australia's colonial period.⁴⁴ The pattern shows evident similarities with England, and the Australian courts closely followed the most important decisions of the House of Lords despite no longer being bound by English precedents.⁴⁵

In Australia, the application of the rule has been seen as unavoidable unless the claimant proves that the written document was not intended to embody the whole contract.⁴⁶ The courts have presumed that a written contract that appears to be complete contains all the terms of the agreement, and prior or contemporary evidence will not be admitted to add to or vary its terms.⁴⁷ Some authors have observed that, in practice, the exclusion contained in such an understanding of the parol evidence rule is less severe than it seems, and consequently, Australian courts have admitted several exceptions of the rule following the pattern initiated in England, but maintaining some appreciable differences. For example, the subsequent conduct of the parties cannot be used in England with the objective of interpreting the prior written contract, but in

⁴² See ROGER BROWNSWORD, *CONTRACT LAW: THEMES FOR THE TWENTY-FIRST CENTURY* 159–61 (2001) (referring to the discussion concerning the ratification by England of the CISG).

⁴³ See Angelo Forte, *The United Nations Convention on Contracts for the International Sale of Goods: Reason and Unreason in the United Kingdom*, 26 U. BALT. L. REV. 51 (1997).

⁴⁴ See LOUIS WALLER, *AN INTRODUCTION TO LAW* 35 (8th ed. 2000); J.M. BENNETT & ALEX CASTLES, *A SOURCE BOOK OF AUSTRALIAN LEGAL HISTORY* 248 (1979).

⁴⁵ See Australia Act 1986, 1985 (abolishing the Judicial Committee of the Privy Council and leaving the High Court of Australia as the last instance of appeals); Statute of Westminster Adoption Act 1942, 1942 (giving Australia full legal autonomy).

⁴⁶ See *Gordon v. McGregor* (1909) 8 C.L.R. 316.

⁴⁷ See, e.g., *Mercantile Bank of Sydney v. Taylor* (1891) 12 L.R. (N.S.W.) 252, 262, *aff'd*, [1893] A.C. 317.

Australia, ulterior behavior of the contractual parties has been seen as relevant to elucidate the contract when its terms were doubtful.⁴⁸ The High Court discussed the admission of extrinsic evidence in a well-known case.⁴⁹ In his opinion, Judge Mason affirmed that “[t]he true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible to more than one meaning.”⁵⁰ But it is not acceptable to contradict the contract language when it has a plain meaning. The intentions of the parties are superseded by the contract itself.⁵¹

It should be noted that Australia has ratified the CISG. Beyond the relevance of the Convention for amalgamating different legal traditions, the application of the parol evidence rule is deemed incompatible with the worldwide interpretation required by the CISG.⁵² An example of this incompatibility could be seen in the case of *South Sydney District Rugby League v. News Ltd.*, where the implications of the terms based upon the presumed or imputed intentions of the parties were discussed.⁵³ The judge mentioned in passing that “notwithstanding the supposed uncertainty in defining the concept of good faith and fair dealing . . .” this circumstance “has

⁴⁸ See *Farmer v. Honan* (1919) 26 C.L.R. 183, 197; *Air Great Lakes Pty. Ltd. v. K.S. Easter (Holdings) Pty. Ltd.* (1985) 2 N.S.W.L.R. 309. But see *FAI Traders Insurance Company v. Savoy Plaza Pty. Limited* (1993) 2 V.R. 343, where the Supreme Court of Victoria resolved that in its opinion, Australian law at present does not permit reliance on subsequent conduct. See JOHN W. CARTER & D.J. HARLAND, *CONTRACT LAW IN AUSTRALIA* 228–30 (3d ed. 1996).

⁴⁹ *Codelfa Constr. Pty. Ltd. v. State Rail Auth. of New South Wales* (1982) 149 C.L.R. 337 (ratified by the High Court in *Royal Botanic Gardens & Domain Trust v. South Sydney City Council* (2002) 186 A.L.R. 289, 293).

⁵⁰ *Codelfa Constr. Pty. Ltd.* (1982) 149 C.L.R. at 352.

⁵¹ See Carter, *supra* note 39, at 37. On the other hand, the rule explained in *Prenn v. Simmonds*, [1971] 3 All E.R. 237, 1 W.L.R. 1381, had been admitted as applicable. The courts in Australia are allowed to admit evidence of surrounding circumstances in the case of mutually known facts, but they cannot admit evidence from only one party's intentions. See *DTR Nominees Pty. Ltd. v. Mona Homes Pty. Ltd.* (1978) 138 C.L.R. 423, 429.

⁵² See Gabriel A. Moens, Lisa Cohn & Darren Peacock, *Australia, in A NEW APPROACH TO INTERNATIONAL CONTRACTS* (M.J. Bonell ed., 1999) (affirming that Section 66A of the Trade Practices Act 1974 provides that the CISG takes precedence over provisions of the Trade Practices Act, as well as providing that where the Act would apply were it not for a term in the contract, the term is overridden and the Act applies). The Trade Practices Act 1974 is available at http://www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/ (last visited Apr. 3, 2007).

⁵³ *S. Sydney Dist. Rugby League Football Club Ltd. v. News Ltd.* (2000) F.C.A. 1541.

not deterred every State and Territory legislature in this country from enacting into domestic law the provisions of [the CISG].”⁵⁴

3. *Canada*

With the exception of Québec,⁵⁵ the law of Canada followed English law, and the decisions of the House of Lords were considered binding on the Canadian tribunals.⁵⁶ Prior to 1949, it was possible to appeal a decision of the Supreme Court of Canada to the Privy Council in London.⁵⁷ This procedure no longer exists, and the Supreme Court of Canada is the country’s highest appellate court.⁵⁸

Canadian jurisprudence supported the parol evidence rule as a device to avoid injustice,⁵⁹ following a pattern understood as more consistent with the original rule in comparison to the current, flexible English approach.⁶⁰ Evidence of surrounding circumstances has been admitted to clarify ambiguities already existing at the time of contracting.⁶¹ However, the Supreme Court of Canada has been reluctant to allow proof of collateral agreements and less prepared to permit the parties to evade the consequences of a written understanding.⁶² As it happened in England and in Australia, some questions in Canada have arisen with the introduction of evidence by a party in order to establish the meaning of the contract understood in a certain way.⁶³

⁵⁴ *Id.* para. 393.3.

⁵⁵ See *infra* Part III.C.4.

⁵⁶ See BORA LASKIN, *THE BRITISH TRADITION IN CANADIAN LAW* 60 (1969).

⁵⁷ In 1949, the Supreme Court Act was amended to make the Supreme Court of Canada the last court of appeal in Canada. Supreme Court Act, R.S.C., ch. S-26 § 52 (1985), available at <http://laws.justice.gc.ca/en/ShowFullDoc/CS/S-26//en>.

⁵⁸ LASKIN, *supra* note 56, at 67.

⁵⁹ See *Hayward v. Mellick*, [1982] 23 R.P.R. 265, 269 (Ont. H.C.), *rev’d*, [1984] 2 O.A.C. 391 (Ont. C.A.).

⁶⁰ S.M. WADDAMS, *THE LAW OF CONTRACTS* 233 (2d ed. 1984) (referring to the status of the signed writing: “The attempt of the courts to secure certainty has led to their affording a kind of sanctity to contractual documents”).

⁶¹ G.H.L. FRIDMAN, *THE LAW OF CONTRACT IN CANADA* 458 (3d ed. 1994).

⁶² *Id.* at 461. See *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102; *Carman Constr. Ltd. v. Canadian Pac. Ry. Co.*, [1982] 1 S.C.R. 958. Both of these cases follow *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515, where an obligee sought to propose parol evidence of an oral agreement not included in the writing. The Supreme Court of Canada applied the parol evidence rule impeding the introduction of extrinsic evidence.

⁶³ *Black Bros. Realty Ltd. v. 254929 Bank of Montreal*, [1989] 67 Alta. L.R.2d 268 (Alta. C.A.) (upholding the validity of a quit claim deed); see also *Auto. Renault Canada Ltd. v.*

Canadian courts have been less inclined to allow a contractual party to invoke an oral statement that may modify the strictness of the contracts.⁶⁴ On the other hand, they have been receptive to accepting the subsequent conduct of the parties for interpreting the contract.⁶⁵ It should be mentioned that the recent enactment of legislation in all Canadian provinces related to business practices and consumer protection has increasingly restricted the application of the exclusion rule.⁶⁶

The CISG was implemented in Canada on May 1, 1992⁶⁷ and since then has been transformed into law in all provinces and territories.⁶⁸ The recent Canadian jurisprudence on the CISG has shown a certain reluctance to recognize the use of the Convention.⁶⁹ This reluctance was usually shown by considering and applying domestic law despite the fact that the case was clearly governed by the CISG.⁷⁰ However, there are exceptions, and, for

Maritime Import Autos. Ltd., [1961] 31 D.L.R.2d 592 (N.S.S.C.) (admitting evidence in case of ambiguous language).

⁶⁴ FRIDMAN, *supra* note 61, at 461. *But see* Johnson Invs. Ltd. v. Pagratide, [1923] 2 W.W.R. 736 (Alta. C.A.) (admitting an oral agreement that payment would not be enforced until a subsequent date in an action for foreclosure and sale in accordance with a written contract).

⁶⁵ *See* Bank of Montreal v. Univ. of Sask., [1953] 9 W.W.R. (N.S.) 193, 199; Manitoba Dev. Corp. v. Columbia Forest Prods. Ltd., [1974] 2 W.W.R. 237 (Man. C.A.); CHML/CKDS v. Telemedia Commc'ns Inc., [1988] 40 B.L.R. 223, 242.

⁶⁶ *See, e.g.*, Business Practices and Consumer Protection Act, S.B.C., ch. 2, § 187 (2004), available at http://www.qp.gov.bc.ca/statreg/stat/B/04002_00.htm.

§ 187. In a proceeding in respect of a consumer transaction, a provision in a contract or a rule of law respecting parole or extrinsic evidence does not operate to exclude or limit the admissibility of evidence relating to the understanding of the parties as to the consumer transaction or as to a particular provision of the contract.

The drafting is similar in other Canadian provinces. *See also* David W. Scott, *The Parol Evidence Rule - A Litigator's Perspective: Will the Cummunings of the Parties Be Received in Evidence?*, in SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA: LAW IN TRANSITION: CONTRACTS 87, 90 (1984).

⁶⁷ International Sale of Goods Contracts Convention Act, 1991 S.C., ch. 13 (Can.), available at <http://www.yorku.ca/osgoode/cisg/legis/canen.htm>.

⁶⁸ *See* list of acts available at <http://www.yorku.ca/osgoode/cisg/legislation.html> (last visited Apr. 4, 2007).

⁶⁹ *See* Rajeev Sharma, *The United Nations Convention on Contracts for the International Sale of Goods: The Canadian Experience*, 36 VICTORIA U. WELLINGTON L. REV. 847, 858 (2005).

⁷⁰ *See, e.g.*, Nova Tool & Mold, Inc. v. London Indus., Inc., [1998] O.J. 5381 (O.C.J. Dec. 16, 1998), available at <http://www.yorku.ca/osgoode/cisg/cases/novatool.htm>; *see also* GreCon Dimter, Inc. v. J.R. Normand, Inc., [2005] 2 S.C.R. 401 (containing no discussion of the CISG even though the parties were in different contracting states and CISG was applicable).

example, in *Diversitel Communications v. Glacier*, Judge Toscano applied principles of the CISG related to fundamental breach and lack of observation of a specific delivery schedule.⁷¹

4. *New Zealand*

New Zealand was a dependent dominion of England until 1947 when the Statute of Westminster Adoption Act was enacted.⁷² The Supreme Court of New Zealand was established in 2003, ending the appeals to the Judicial Committee of the Privy Council in England.⁷³

The original British rules excluding evidence of the parties' negotiations before the contract and evidence of post-contractual behavior were initially followed by the courts of New Zealand.⁷⁴ New Zealand's Contractual Remedies Act of 1979 applies to contracts in force after April 1, 1980 and affirms that a merger clause in a contract will not prevent a court from inquiring into further evidence of the position of the parties.⁷⁵ Despite the report of the drafting committee stating that the Act is not intended to affect the parol evidence rule,⁷⁶ in fact, it did. Under the Act, a claimant may recover damages for misrepresentation in spite of the misrepresentation not being recorded in the writing as if it were a term.⁷⁷ However, this Act does not apply to all contracts, and the parol evidence rule continues to exist, although with the several exceptions recognized by English law.⁷⁸

⁷¹ See *Diversitel Commc'ns, Inc. v. Glacier Bay, Inc.*, [2004] 181 O.A.C. 6, available at <http://www.yorku.ca/osgoode/cisg/cases/diversitel.htm>.

⁷² See Statute of Westminster Adoption Act 1947, 1947 S.N.Z. No. 38 (adopting Statute of Westminster 1931, 1931, 22 & 23 Geo. 5, c. 4, §§ 2–6 (U.K.), as of Nov. 25, 1947).

⁷³ See Supreme Court Act 2003, 2003 S.N.Z. No. 53, available at http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes (follow "Supreme Court Act 2003" hyperlink in statutory database).

⁷⁴ J.F. NORTHEY, *CHESHIRE AND FIFOOT'S LAW OF CONTRACT* 114 (6th New Zealand ed. 1984) (mentioning *Roberts v. Indep. Publishers Ltd.*, [1974] 1 N.Z.L.R. 459; *Herriott v. Crofton Holdings Ltd.*, [1974] 2 N.Z.L.R. 383).

⁷⁵ Contractual Remedies Act 1979, 1979 S.N.Z. No. 11, § 4(1), available at http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes (follow "Contractual Remedies Act 1979" hyperlink in statutory database).

⁷⁶ FRANCIS DAWSON & DAVID W. McLAUCHLAN, *THE CONTRACTUAL REMEDIES ACT 1979*, at 41 (1981).

⁷⁷ *Id.* at 42.

⁷⁸ NORTHEY, *supra* note 74, at 114 n.9 (mentioning that the effect of the Contractual Remedies Act 1979 on the parol evidence rule is disputed).

The CISG went into effect in New Zealand in 1995,⁷⁹ and some of the subsequent jurisprudence relates to the questions being researched here. An example of the possible conflict of interpretation may be shown by the dissenting opinion of Judge Thomas in *Yoshimoto v. Canterbury Golf International Ltd.*⁸⁰ Judge Thomas was convinced that the parties' negotiations and draft agreements must be admitted by the court if reliable extrinsic evidence were available to confirm the parties' intentions.⁸¹ In *Attorney-General & NZ Rail Corporation v. Dreux Holdings Ltd.*,⁸² the court analyzed whether the subsequent conduct of the parties may help to interpret the contract and decided that taking account of it was an established international practice and accepted by the CISG.⁸³

5. Summary of the Common Law

In summary, the persistence of the parol evidence rule in common law systems has been restricted to written contracts representing the entire memorandum of the parties' intent, and even in those cases, some jurisdictions have abolished the rule. The effect of the CISG has also been anticipated in the jurisprudence of those common law countries that are part of the Convention. The following Part will discuss the rule in some representative jurisdictions of mixed origin where the prohibition had been submitted to the centripetal forces of both common and civil law traditions. The analysis in this Part will try to delve deeper into the differences already identified in the common law and its counterparts in the Roman family.

⁷⁹ See Sale of Goods (United Nations Convention) Act 1994, 1994 S.N.Z. No. 60.

⁸⁰ *Yoshimoto v. Canterbury Golf Int'l Ltd.*, [2001] 1 N.Z.L.R. 523 (C.A.), *rev'd*, [2004] 1 N.Z.L.R.1 (S.C.); see also Henning Lutz, *The CISG and Common Law Courts: Is There Really a Problem?*, 35 VICTORIA U. WELLINGTON L. REV. 711, 726 n.81 (2004).

⁸¹ *Yoshimoto*, [2001] 1 N.Z.L.R. at 538–49, paras. 59–95. In *Potter v. Potter* [2003] 3 N.Z.L.R. 145 (C.A.), *aff'd*, [2005] 2 N.Z.L.R.1 (S.C.), Judge Thomas' interpretation was rebutted.

⁸² *Attorney-Gen. & NZ Rail Corp. v. Dreux Holdings Ltd.*, [1996] 7 T.C.L.R. 617 (C.A.); see also David McLauchlan, *A Contract Contradiction*, 30 VICTORIA U. WELLINGTON L. REV. 175, 192 (1999).

⁸³ Petra Butler, *Celebrating Anniversaries*, 36 VICTORIA U. WELLINGTON L. REV. 775, 776 (2005).

C. *Mixed Jurisdictions*

A legal system where the components of the common law tradition and the civil law heritage, as well as other legal legacies are combined could be identified as mixed.⁸⁴ Two mixed jurisdictions are compared in this Part: Louisiana and Scotland. Both are rooted in the civil law family and both fight for survival in a common law environment; however, these jurisdictions have produced different results. Finally, South Africa and Québec also merit some reference.

1. *Louisiana*

Louisiana is the only state in the United States of America where a substantial part of the original French and Spanish civil law local tradition has been preserved. The codification of the parol evidence rule in Louisiana dates back to the first civil digest. The English version of Article 242 of the Digest of Louisiana of 1808 stated: "Neither shall *parol evidence* be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making the said acts or since."⁸⁵ This text, contained in the Compiled Edition of the Louisiana Civil Code by the Louisiana State Law Institute, translated as "parol evidence" what the original French version taken from the Code Napoleon mentioned as "*preuve par témoins*," which could have been more accurately translated as "proof by witnesses." The implication of this misleading translation from the original French has not been corrected in further versions of the text.⁸⁶ Article 242 was reproduced as Article 2256 in the 1825 version of the Louisiana Civil Code,⁸⁷ and as Article

⁸⁴ See William Tetley, *Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified)*, 4 REVUE DE DROIT UNIFORME [UNIFORM L. REV.] 591 (1999), available at <http://www.unidroit.org/english/publications/review/articles/1999-3.htm>.

⁸⁵ Articles were not correlative in that Code. The accurate quotation of the cited text is LOUIS MOREAU-LISLET & JAMES BROWN, A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS, Book III, tit. III, ch. 6, § 2, art. 242 (1808) [hereinafter Article 242]. For the French text with annotations and the English translation, see A REPRINT OF MOREAU-LISLET'S COPY OF A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS (1808 de la Vergne Volume) 205, 310 (1968).

⁸⁶ For examples of substitutions of other terms in the former drafting, as well as a synopsis of the common law forays into the Louisiana Civil Code, see Robert Anthony Pascal, *Of the Civil Code and Us*, 59 LA. L. REV. 301, 309 (1998).

⁸⁷ The 1825 text is slightly different from that of Article 242 of 1808, replacing the phrase "the said acts" with the single word "them."

2276 in the 1870 revised Civil Code,⁸⁸ which remained valid until its revision in 1985. In the current Civil Code, the former text may be recognized in Article 1848, although now modified. This article states:

Testimonial or other evidence may not be admitted to negate or vary the contents of an authentic act or an act under private signature. Nevertheless, in the interest of justice, that evidence may be admitted to prove such circumstances as a vice of consent, or a simulation, or to prove that the written act was modified by a subsequent and valid oral agreement.⁸⁹

From the plain text, it is clear that not just witnesses, but also any other evidence, is included in the prohibition when the evidence is intended to negate or vary the content of an act, whether authentic or private. That which is protected is the "content" of the "act."⁹⁰ Parol evidence is then admissible in those cases where the terms of the written contract are susceptible to more than one interpretation, in other cases where there is uncertainty or ambiguity as to the terms, or finally in those cases where the language used does not allow the court to ascertain the intent of the parties.⁹¹

Louisiana jurisprudence generally recognizes that the parol evidence rule excludes only oral testimony and does not extend to extrinsic writings that emphasize the oral aspect of the expression.⁹² Although the rule is codified as a prohibition, exceptions to the rule are numerous as they are in other common law jurisdictions. Several exceptions to the parol evidence rule recognized by Louisiana jurisprudence in fact were related to evidentiary aspects of the consent given by one of the parties.⁹³ This happened with cases where the

⁸⁸ The article number was vacated by the amendment and reenactment of Titles III and IV of 1984 La. Acts 331, § 1, effective Jan. 1, 1985.

⁸⁹ LA. CIV. CODE art. 1848 (1973).

⁹⁰ Concerning the kind of acts included in the word "content," the Louisiana jurisprudence declared it was narrower than "any recital" and oral agreements were not generally included. See Reginald E. Cassibry, *Louisiana's Parol Evidence Rule: Civil Code Article 2276*, 35 LA. L. REV. 779, 781 (1975).

⁹¹ See *Dixie Campers, Inc. v. Vesely Co.*, 398 So. 2d 1087 (La. 1981); *White v. Rimmer & Garrett, Inc.*, 340 So. 2d 283 (La. 1976); *Billingsley v. Bach Energy Corp.*, 588 So. 2d 786, 790 (La. Ct. App. 1991).

⁹² Cassibry, *supra* note 90, at 780.

⁹³ Occasionally the courts have asserted that in Louisiana the rule is "evidentiary in nature and not substantive." *First Nat'l Bank of Ruston v. Mercer*, 448 So. 2d 1369, 1377 (La. Ct. App. 1984); *Wade v. Joffrion*, 387 So. 2d 1265, 1266 n.1 (La. Ct. App. 1980); see also 5 SAÛL

writing was ineffective between the parties due to an alleged defect in the consent,⁹⁴ lack of consideration,⁹⁵ or in case of simulation.⁹⁶ Contemporaneous oral agreements that are not made part of the written contract do not qualify as an exception to the rule.⁹⁷ Exceptions to the rule were recognized also where proof of an additional term that the parties had not included in the writing was admitted,⁹⁸ or where there was a later oral modification of the agreement.⁹⁹ Another exception is accepted for purposes of interpretation of the written agreement.¹⁰⁰ Although parol evidence has been admitted in Louisiana to clarify the true intent of the parties when the terms of the contract allow more than one interpretation or when the terms used are ambiguous or uncertain,¹⁰¹ mere dispute about the meaning and scope of a contract clause does not make

LITVINOFF, LOUISIANA CIVIL LAW TREATISE: THE LAW OF OBLIGATIONS § 12.94 (2d ed. 2001). This understanding, according to one source, was based on *Writings and Oral Proof in Civilian Jurisdictions: A Theoretical and Historical Perspective*, 35 LA. L. REV. 745 (1975). See *Wade*, 387 So. 2d at 1266–67 (Watkins, J., dissenting). At other times, the courts recognized the exclusionary rule as a substantive one. See *Parlay Enters., Inc. v. R-B-CO, Inc.*, 504 So. 2d 660 (La. Ct. App. 1987); *Ortolano v. Snowizard Mfg., Inc.*, 476 So. 2d 359 (La. Ct. App. 1985).

⁹⁴ Louisiana courts have invoked lack of consent or vices in consent in *Le Bleu v. Savoie*, 33 So. 729 (La. 1903), and *Sylvester v. Town of Ville Platte*, 49 So. 2d 746 (La. 1950); error in *B. Segall Co. v. J.C. Trahan*, 290 So. 2d 854 (La. 1974); and unfulfilled suspensive condition in *Wampler v. Wampler*, 118 So. 2d 423 (La. 1960), among other cases. Cases of error in personam were admitted in *Haney v. Dunn*, 96 So. 2d 243 (La. Ct. App. 1957), *Succession of Prescott*, 127 So. 611 (La. 1930), *Robert v. Boulat*, 9 La. Ann. 29 (La. 1854), and *Palangue v. Guesnon*, 15 La. 311 (La. 1840); error in substantiam was discussed in *Harnischfeger Sale Corp. v. Sternberg Co.*, 154 So. 10 (La. 1934).

⁹⁵ See *Smith v. Smith*, 119 So. 2d 827 (La. 1960); *Logan v. Walker*, 94 So. 430 (La. 1922); George M. Snellings III, Note, *Sales - Admission of Parol Evidence to Annul an Authentic Act*, 21 LA. L. REV. 680, 681 (1961).

⁹⁶ *Rachal v. Rachal*, 4 La. Ann. 500 (La. 1849).

⁹⁷ *Pope v. Khalailieh*, 905 So. 2d 1149 (La. Ct. App. 2005); *Bernard v. Iberiabank*, 832 So. 2d 355 (La. Ct. App. 2002); *Crochet v. Pierre*, 646 So. 2d 1222 (La. Ct. App. 1994).

⁹⁸ See, e.g., *Rosenthal v. Gauthier*, 69 So. 2d 367 (La. 1953) (discussing whether in case of absence of a required amount of money the plaintiff has carte blanche or a cost limitation).

⁹⁹ *Tholl Oil Co. v. Miller*, 3 So. 2d 97 (La. 1941). This case was a proceeding for the cancellation of recordation of an oil and gas sublease containing an option to repurchase. See also *Parlor City Lumber Co. v. Sandel*, 173 So. 737 (La. 1937).

¹⁰⁰ In *Gulf Ref. Co. v. Garrett*, 25 So. 2d 329 (La. 1946), a case involving monies deposited for royalties, the supreme court accepted extrinsic evidence as an aid to construction when the contract is so ambiguous that it creates doubt as to what the parties intended.

¹⁰¹ In *Hogan v. Lobell*, 608 So. 2d 240 (La. Ct. App. 1992), the court refused to see ambiguities as to the location or extent of a servitude. But see *Mathieu v. Nettles*, 383 So. 2d 1337 (La. Ct. App. 1980); *Choctaw Home Builders, Inc. v. Lena, Inc.*, 223 So. 2d 23 (La. Ct. App. 1969); *Hamill v. Moore*, 193 So. 715 (La. 1939).

the contract an ambiguous one.¹⁰² It is noteworthy that the concept of good faith between parties is central to the rules on obligations established in the Louisiana Civil Code.¹⁰³ The Civil Code of Louisiana contains a reference to contracts for a value not in excess of five hundred dollars.¹⁰⁴ In the former case, the contract must be proved by “competent evidence,” i.e., evidence regarded as relevant and admissible.¹⁰⁵ The reference to a limit in money is somewhat akin to the civil law rule fixing a limit in money for proving a contract by witnesses, which will be explained later in this Article.¹⁰⁶ However, the similarities end there as shown by the parol evidence rule of Article 1848 of the Louisiana Civil Code and the rules related to the scope of discovery in the Louisiana Code of Civil Procedure.¹⁰⁷ The question in Louisiana will be then, how the document executed by the contrary party came into the possession or knowledge of the party.¹⁰⁸ The principle of commencement of proof, as known by the civil law tradition, is not applicable in Louisiana.¹⁰⁹

Finally, it should be mentioned that the parol evidence rule had also been accepted in cases related to the so-called *sale per aversionem*.¹¹⁰ This

¹⁰² See *Gulf States Fin. Corp. v. Airline Auto Sales, Inc.*, 181 So. 2d 36 (La. 1965). In this case, the Supreme Court of Louisiana stated that parol evidence was admissible: 1) to prove fraud, mistake, illegality, want or failure of consideration; 2) to explain an ambiguity when such explanation was not inconsistent with the written terms; and 3) to show that the writing was only a part of an entire oral agreement between the parties. *Id.* at 38–39. See also *Scaffidi v. Johnson*, 420 So. 2d 1113 (La. 1982); *Myles v. Consol. Cos.*, 906 So. 2d 677 (La. Ct. App. 2005).

¹⁰³ See, e.g., LA. CIV. CODE arts. 1759, 1983 (1973). On the influence of the U.C.C. as well as the incorporation of the CISG rules in Louisiana, see Alain Levasseur, *La Convention de Vienne sur la Vente de Marchandises et le Code Civil Louisianais*, in *ETUDES OFFERTES À JACQUES DUPICHOT - LIBER AMICORUM* 299 (2004).

¹⁰⁴ “When the agreement does not exceed five hundred dollars, it is not required to be reduced to writing, but the statement of the claim must be recorded, in the manner required by law, to preserve the privilege.” LA. CIV. CODE art. 2776 (1973). In the case of contracts exceeding that amount, see LA. CIV. CODE art. 2775 (1973).

¹⁰⁵ See LA. CIV. CODE art. 1846 (1973); see also LA. CODE EVID. arts. 401, 402 (referring to “relevant” and “admissible evidence”).

¹⁰⁶ See *infra* Part III.D; see also LITVINOFF *supra* note 93, § 12.106.

¹⁰⁷ See LA. CODE CIV. PROC. art. 1422 (restricting the rules on privileged matters).

¹⁰⁸ *Id.*

¹⁰⁹ See *infra* Part III.D.

¹¹⁰ This term is defined as the sale for a lump price of immovables described as a certain and limited body. See *Robinson v. Atkins*, 30 So. 231 (La. 1901); *Jackson v. Harris*, 136 So. 166 (La. Ct. App. 1931). Under Article 2495 of the Civil Code of Louisiana, the courts have consistently accepted the completion of the description of the property sold, designated by its name only, or in general when the writing is insufficient to identify that property with accuracy.

jurisprudence can be better evaluated by considering the system for recordation in use in most of Louisiana.¹¹¹ After the hurricanes that affected the coastal states in 2005, eroding considerable parts of land and flooding several registries for immovable transactions, proving titles, deeds, and boundaries will be in some cases extremely difficult.¹¹² It should be recalled that only eight of sixty-four parishes in Louisiana had digitalized their title records before the hurricanes.¹¹³ Any court confronted with conflicting interests on a tract of land whose boundaries have disappeared and its records washed away by the flood will require a more flexible approach to the parol evidence rule for resolving the multiple problems arising from the loss of the registered documents.

2. *Scotland*

In Scotland, where the Roman law applied at the time Scotland and England were different kingdoms, the development of the rule has followed a different

This practice is referred to as “eking out title.” M. Thomas Arceneaux, *Writing Requirements and the Authentic Act in Louisiana Law: Civil Code Articles 2236, 2275 & 2278*, 35 LA. L. REV. 764, 770 (1975). See *Tircuit v. Burton-Swartz Cypress Co.*, 110 So. 489 (La. 1926); *Saunders v. Bolden*, 98 So. 867 (La. 1923).

¹¹¹ All deeds related to the transfer of title or any rights on immovables must be filed for registry to be effective against third parties. Consequently, attorneys and title researchers in Louisiana must look in the respective binder, bundle, or package where the deed was placed in order to determine its respective chain of title. The reference is to those documents affecting the property which should be recorded and properly indexed in the respective record (conveyance and mortgages) maintained by the clerk of the court in the parish where the immovable is located. See the position against the so called “title insurance companies” pointed out by KONRAD ZWEIGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 39 (Tony Weir trans., 3d ed. 1998).

¹¹² The real estate title examiner usually looks for a survey drawn by an engineer or a professional land surveyor which will control in case of discrepancy between the title description and the survey. See, e.g., *Michel v. James*, 144 So. 2d 435 (La. Ct. App. 1962); *Casso v. Ascension Realty Co.*, 196 So. 1 (La. 1940); *Lotz v. Hurwitz*, 141 So. 83 (La. 1932). The original surveys usually have been done taking geographic or relevant marks as points of reference. In 1927, the Louisiana Coordinate System was established for defining the geographic position of points within the state. LA. REV. STAT. § 50:1 (2006). See Fred A. Bernstein, *The New Orleans Market Is Poised to Recover*, N.Y. TIMES, Nov. 13, 2005, at A16. All surveys or re-surveys approved by the Register of the State Land Office are binding on the parties and serve as “conclusive evidence of the correctness thereof in any court.” LA. REV. STAT. § 50:128 (2006).

¹¹³ See Deon Roberts, *Digitized Deeds Protected Jeff Parish Market*, NEW ORLEANS CITY BUS., Nov. 14, 2005, available at <http://www.jpclerkofcourt.us/Miscellaneous/CityBusiness.pdf>.

path.¹¹⁴ As it happens in common law jurisdictions, the parol evidence rule in Scotland declared extrinsic evidence inadmissible when the parties condensed their understanding in a written instrument, which was presumed to be the best and complete expression of their will.¹¹⁵ When the deed conclusively probes its genuineness as a complete and self-delimited expression of the will of its executors, it has been regarded as *probatio probata* of the parties' intentions.¹¹⁶ When a formal deed has been executed, the expressed will of the parties supersedes any other document or testimony having arisen from prior negotiations between them.¹¹⁷ However, the application of the rule has not been so strict and rigorous, with the courts admitting further evidence when necessary for the sake of doing justice to the parties,¹¹⁸ letting the rule's scope be reduced by numerous exceptions.¹¹⁹ Thus, one court has held the parol evidence rule does not apply when the written agreement was just the exercise of the desire to preserve in writing what was agreed to verbally.¹²⁰ Extrinsic evidence also has been seen as competent to explain ambiguous circumstances related in a writing,¹²¹ in case of patent or latent ambiguity of the contractual terms,¹²² or in case of mistake in the description of the object of the contract.¹²³

¹¹⁴ See William M. Gordon, *Roman Law in Scotland*, in *THE CIVIL LAW TRADITION IN SCOTLAND* 13–40 (Robin Evans-Jones ed., 1995); LORD STAIR, *THE INSTITUTIONS OF THE LAW OF SCOTLAND* (David M. Walker ed., University Press 1981) (1681).

¹¹⁵ STEPHEN WOOLMAN, *AN INTRODUCTION TO THE SCOTS LAW OF CONTRACT* 93–94 (1987).

¹¹⁶ A proven proof. See *M'Intyre v. National Bank of Scotland*, 1910 S.C. 150; 6 *ENCYCLOPEDIA OF THE LAWS OF SCOTLAND* 418–19 (1928). See also the very illustrative case concerning a lessor of a café in Glasgow invoking the parol evidence rule to prove an additional oral agreement between the parties in *Perdikou v. Pattison*, 1958 S.L.T. 153.

¹¹⁷ DAVID M. WALKER, *THE LAW OF CONTRACTS AND RELATED OBLIGATIONS IN SCOTLAND* 345 (3d ed. 1995); see also *Guthrie v. Glasgow & S.W. Ry.*, (1858) 20 D. 825; *Clark v. Clark's Trs.*, (1860) 23 D. 74. In case of a subsequent written agreement, the rule of parol evidence has been seen as ineffective. See *Stewart v. Clark*, (1871) 8 S.L.R. 402; *Largue v. Urquhart*, (1881) 18 S.L.R. 491.

¹¹⁸ WOOLMAN, *supra* note 115, at 94.

¹¹⁹ J.J. GOW, *THE MERCANTILE AND INDUSTRIAL LAW OF SCOTLAND* 13–14 (1964). Consent to the nonperformance of the other party may be proved by parol evidence. See *Kirkpatrick v. Allanshaw Coal Co.*, 1888 R. 327, cited in STAIR, *supra* note 114, at 347 n.6.

¹²⁰ *Ireland & Son v. Rosewell Gas Coal Co.*, (1900) 7 S.L.T. 445.

¹²¹ *Hunter v. Miller*, (1862) 24 D. 1011; *Fleming & Co. v. Airdrie Iron Co.*, (1882) 9 R. 473; *Sutton & Co. v. Ciceri & Co.*, (1890) 17 R. 40.

¹²² See W.M. GLOAG & R. CANDLISH HENDERSON, *INTRODUCTION TO THE LAW OF SCOTLAND* 139, para. 12.16 (A.B. Wilkinson et al. eds., 9th ed. 1987). Marshall explains that an ambiguity is "latent" where doubt about the precise meaning used in the contract arises from knowledge derived from its surrounding circumstances. ENID A. MARSHALL, *GENERAL PRINCIPLES OF SCOTS LAW* 263 (1971). Extrinsic evidence has been accepted for determining the true meaning of

Gow mentions the admission of extrinsic evidence to explain, for example, what property was “the property known as the Royal Hotel.”¹²⁴ The parol evidence rule has not been followed when, in spite of an unambiguous deed, the writing was recognized by the parties to be incorrect.¹²⁵ Extrinsic evidence has been sometimes avowed in cases of collateral agreements pretending to be part of the final agreement.¹²⁶ A situation in which the parties have executed a written agreement does not exclude the introduction of proof of an existing trade usage between them, unless the contract expressly declared the usage inapplicable.¹²⁷

The work of the Scottish Law Commission,¹²⁸ an independent body established in 1965 with the purpose of modernizing Scottish law, has produced some interesting results. In a *Report on Three Bad Rules in Contract Law*,¹²⁹ the Commission recommended the abolition of the parol evidence rule

contractual terms or words. WALKER, *supra* note 117, at 356; *see also* GLOAG & HENDERSON, *supra*, para. 12.14 (citing *Renison v. Bryce*, (1897) 5 S.L.T. 222; *De Lasalle v. Guildford*, (1901) 2 K.B. 215). In one case, the admission by the defendant that the contract did not express the agreement between the parties allowed the court to admit extrinsic evidence. *See Grant's Trs. v. Morison*, (1875) 2 R. 377; *Cairns v. Davidson*, 1913 S.C. 1054.

¹²³ *See Anderson v. Lambie*, 1954 S.C. (H.L.) 43; *see also Krupp v. Menzies*, 1907 S.C. 903 (admitting oral evidence for contradicting a mistake expressed in the written deed).

¹²⁴ GOW, *supra* note 119, at 14 (quoting *Macdonald v. Newall*, (1898) 1 F. 68). *Macdonald* is a clear case of sale *per aversionem* as considered by Article 2495 the Civil Code of Louisiana: an immovable described as a certain limited body or as a distinct object sold for a lump price. LA. CIV. CODE art. 2495 (2006).

¹²⁵ *Grant's Trs.*, (1875) 2 R. 377. *Grant's Trustees* was mentioned by Lord Guthrie in *Pickard v. Pickard*, 1963 S.C. 604, 611 and by Lord Russell in *M'Menemy v. Forster's Trustee*, 1938 S.L.T. 555. *See also Grant v. Mackenzie*, (1899) 1 F. 889 (holding that when one of the parties gave evidence that destroyed the trust, parol evidence was competent to show the true agreement).

¹²⁶ *Dodds v. Walker*, (1882) 2 S. 81 (N.E. 73); *Semple v. Kyle*, (1902) 4 F. 421. This occurred, for example, in a case where one party was allowed to prove by parol evidence that the written contract had been executed subject to a suspensive condition as to ratification. *Abraham & Sons v. Robert Miller Ltd.*, 1933 S.C. 171. It should be recalled that proof of a fact contained in a written agreement or in a conveyance on the sale of any property required to be stamped could not be given as evidence according to the Stamp Act of 1891 still in force, unless duly stamped. Stamp Act, 1891, 54 & 55 Vict., c. 39. However, GOW, *supra* note 119, at 15, affirms that there is authority allowing the use of a non-stamped document for proving a collateral purpose, such as to show the state of accounts between the parties.

¹²⁷ *Duthie & Co. v. Merson & Gerry*, 1947 S.C. 43; *Eunson v. Johnson & Grieg*, 1940 S.C. 49; *Tancred, Arrol & Co. v. Steel Co. of Scotland Ltd.*, (1890) 17 R. 31 (H.L.), (1887) 15 R. 215.

¹²⁸ *See* Scottish Law Commission, <http://www.scotlawcom.gov.uk> (last visited Apr. 5, 2007).

¹²⁹ *See* SCOTTISH LAW COMMISSION, SCOT LAW COM NO. 152, REPORT ON THREE BAD RULES

based on the several exceptions to the rule which negated all presumed advantages of it: "It is difficult to see any justification for a rule which prevents a party from proving a valid and subsisting term of a contract and which is plainly liable to produce injustice and resentment."¹³⁰ The draft of the bill proposed by the Commission replaced the parol evidence rule with a rebuttable presumption. The Contract (Scotland) Act 1997 established that "[w]here a document appears . . . to comprise all the express terms of a contract . . . , it shall be presumed, unless the contrary is proved, that the document does . . . comprise all the express terms of the contract"¹³¹ Extrinsic evidence shall be admissible to prove that the contract includes any additional agreed term whether written or not.¹³²

Scottish scholars reacted favorably to the approval of CISG within the United Kingdom.¹³³ The Scottish Law Commission rendered a report recommending the enactment of legislation modifying some aspects of Scottish law following CISG.¹³⁴ However, as of the date of publication it has not been enacted.

3. *South Africa*

Roman-Dutch influence was present in the colony established by the Dutch at the "Western Cape" colony in Africa and remained in force even after England seized the colony in 1806, being however overlaid by the heavy

IN CONTRACT LAW (1996), available at <http://www.scotlawcom.gov.uk/downloads/rep152.pdf>.

¹³⁰ *Id.* para. 2.14.

¹³¹ See Contract (Scotland) Act, 1997, c. 34, para. 1(1), available at <http://www.opsi.gov.uk/acts/acts1997/1997034.htm>.

¹³² *Id.* para. 1(2). Paragraph 1(2) of the Act, in the pertinent part, states that "[e]xtrinsic oral or documentary evidence shall be admissible to prove . . . that the contract . . . includes additional express terms (whether or not written terms)." *Id.*

¹³³ Forte, *supra* note 43, at 66.

¹³⁴ See SCOTTISH LAW COMMISSION, SCOT LAW COM NO. 144, REPORT ON FORMATION OF CONTRACT: SCOTTISH LAW AND THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS para. 2.6 (1993), available at <http://www.scotlawcom.gov.uk/downloads/rep144.pdf>. In this report, the Scottish Law Commission deals briefly with the parol evidence rule in paragraph 2.6. Notwithstanding that the Commission expresses its intention to reconsider in the future the rules of interpretation, it opines that the mere adoption of Article 8 of the CISG will bring the attention of the parties to the question of whether a contract had been concluded, which would be a good thing in itself for avoiding contradictory views between different instances as in *Mathieson Gee (Ayrshire) Ltd. v. Quigley*, 1952 S.C. (H.L.) 38.

English influence after its incorporation into the British Empire until the creation of the Union of South Africa.¹³⁵

In South Africa, the parol evidence rule has been predominantly regarded as part of the law of evidence, and consequently, decisions of the English courts have had special relevance as part of the law of evidence.¹³⁶ As long as the evidence in discussion relates to objective background facts, the admission of which does not offend the parol evidence rule, it will be seen as admissible. If a contract is required by law to be rendered in writing, the agreement must contain a proper description of the thing sold and parol evidence will not be accepted.¹³⁷ A commission charged with suggesting changes rendered a report summarizing the divergent views in South African doctrine about abolishing or retaining the parol evidence rule.¹³⁸

4. Québec

Québec is an isolated civil law system within a common law nation. As it will be shown in the following Part, countries belonging to the Roman Civil law tradition are more inclined to recognize that contracts should be honored because of the *pacta sunt servanda* principle,¹³⁹ and additionally, when such contracts are written, some principles should be followed for their interpretation. Accordingly, the Civil Code of Québec establishes that the parties to a juridical act set forth in writing may not contradict or vary the

¹³⁵ ZWEIGERT & KÖTZ, *supra* note 111, at 232; see Daniel Visser, *The Structure of Law in South Africa*, in LA STRUCTURE DES SYSTÈMES JURIDIQUES, XVII^E CONGRÈS DE L'ACADÉMIE INTERNATIONALE DE DROIT COMPARE 89–114 (Olivier Moréteau & Jacques Varlinden eds., 2002).

¹³⁶ See *Cassiem v Standard Bank of S. Afr. Ltd.* 1930 A.D. 366 (A) (S. Afr.); ALASTAIR KERR, *THE PRINCIPLES OF THE LAW OF CONTRACT* 264 (1989).

¹³⁷ See *Haedermans (Vriburg) (Pty) v Ping Bai* 1997 (3) SA 1004, at 1008–09 (S. Afr.); *Kriel & Another v Le Roux* 2000 (2) All SA 65 (SCA) (S. Afr.); *Slabbert v Lötter* 2004 (opinion of Leach, J.) (unreported case of the High Court of South Africa), available at <http://www.ru.ac.za/academic/faculties/law/ecd/Judgments/Slabbert.doc>.

¹³⁸ SOUTH AFRICAN LAW COMMISSION, *DISCUSSION PAPER 65, PROJECT 47, UNREASONABLE STIPULATIONS IN CONTRACTS AND THE RECTIFICATION OF CONTRACTS* (1998). The suggestion of the Commission to incorporate reform of the South African legislation in the future is evident in the following paragraph: “Whether or not the words of the contract appear to be ambiguous evidence of what passed during negotiations between the parties during and after the execution of the contract and surrounding circumstances is admissible to assist in the interpretation of any contract.” *Id.* at 206.

¹³⁹ Latin expression signifying that any agreement, contract, or treaty should be honored.

terms of the writing by testimony unless there is *commencement of proof*.¹⁴⁰ In Canadian jurisprudence, this expression connotes a writing emanating from the party against whom it is to be used, which tends to render probable the existence of the fact which is desired to be proven.¹⁴¹ In interpreting a contract, the Civil Code of Québec recommends recognizing the common intention of the parties and their usages, rather than the literal meaning of the words used in a document.¹⁴² The Consumer Protection Act¹⁴³ modified some aspects of the law of contracts, requiring that in specific cases the contract must be evidenced in writing.¹⁴⁴ As it will be shown in the next Part, the pattern followed by Québec belongs clearly to the civil law tradition.

5. *Summary of Mixed Jurisdictions*

There is no other location where the parol evidence rule might be seen in all its possible varieties as in the mixed jurisdictions. The range goes from the clear common law attitude adopted in South Africa, passing through the contradictions shown in Louisiana, the transformations of Scotland, up to the clear civil law attitude assumed in Québec. Nothing could better summarize the discrepancies, ambivalence, and fluctuations triggered by the rule.

D. *The Civil Law Tradition*

Most of the nations belonging to the civil law tradition accept the probative force of a writing on the assumption that when there is no indication of the existence of a vice of consent of any kind in the contract, the presumption prevails that the instrument is an accurate mirror of the entire agreement of the parties. This principle is the result of a group of provisions contained either in the civil or commercial codes and in the codes of civil proceedings. The written text is presumed to be the final agreement reached by the parties, and

¹⁴⁰ Compare Civil Code of Québec, S.Q., ch. 64, art. 2863 (1991), with *Chong Lee Dojang, Inc. v. Garadex, Inc.*, [1986] R.D.J. 526 (C.A.). The new version of the Civil Code of Québec came into effect in January 1994 replacing the Civil Code for Lower Canada of 1865.

¹⁴¹ See *Johnston v. Buckland*, [1937] S.C.R. 86, summarized in LES PRINCIPAUX ARRÊTS DU DROIT DE LA PREUVE CIVILE - RECUEIL COLLECTIF 255 (Themis 1994).

¹⁴² Civil Code of Québec, S.Q., ch. 64, §§ 1425–1426 (1991).

¹⁴³ Consumer Protection Act, R.S.Q., ch. P-40.1, available at <http://www.ijcan.org/qc/laws/sta/p-40.1/20060310/whole.html> (last visited Apr. 5, 2007).

¹⁴⁴ See, e.g., *id.* §§ 58, 150.4, 158, 190, 199; see *Gérald Goldstein & Najla Mestiri, La Liberté Contractuelle et ses Limites*, in MELANGES JEAN PINEAU 323 (Benoit Moore ed., 2003).

it should be honored according to the principle of *pacta sunt servanda*, and the basic rule of good faith.¹⁴⁵ The main difference between the use of the rule at common law and in the civil Roman tradition is that in the former system, parol evidence is a rule of substantive law—a prohibition to go outside of the written document which consolidates the will of the parties—but in the latter, if something similar to the rule could be recognized, it should be seen as a rule of evidence.¹⁴⁶

In most of the codes of civil proceedings belonging to the civil law tradition, there is a mention that proof by witnesses is admissible only up to a certain point, unless there is commencement of proof by writing. Commencement of proof, already mentioned in the brief summary of Québec, means any written document originating with an adverse party that provides evidence of the alleged fact or the litigious right. Accordingly, under the French Civil Code, whenever the object of an agreement exceeds a certain sum of money, a contract should be made in writing and no proof by witnesses will be allowed against it.¹⁴⁷ This clause is suggested not to be of public order, and

¹⁴⁵ See *supra* note 139; see also C. CIV. art. 1134 (Fr.) (providing “[l]es conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. . . . Elles doivent être exécutées de bonne foi.”). The English translation is available at Legifrance, Civil Code, http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm (last visited Apr. 6, 2007) (“Agreements lawfully entered into take the place of the law for those who have made them. They may be revoked only by mutual consent, or for causes authorized by law. They must be performed in good faith.”). Similar text appears in Cód. Civ. arts. 1197–98 (Arg.); C.C. art. 1258 (Spain), and C.C. arts. 1366, 1372, 1375 (Italy), among others.

¹⁴⁶ In Roman law, any writing between private persons was sufficient proof of the facts transcribed when the writing was done with the necessary clarity and accuracy, and provided that there were no doubts upon the authenticity and veracity of the writing. If it was attacked, the remaining proof was testimonial. 1 CHARLES MAYNZ, COURS DE DROIT ROMAIN 456, § 154 (3d ed. 1870).

¹⁴⁷ See C. CIV. art. 1341 (Fr.):

Il doit être passé acte devant notaires ou sous signatures privées de toutes choses excédant une somme ou une valeur fixée par décret, même pour dépôts volontaires, et il n’est reçu aucune preuve par témoins contre et outre le contenu aux actes, ni sur ce qui serait allégué avoir été dit avant, lors ou depuis les actes, encore qu’il s’agisse d’une somme ou valeur moindre.

See English version, Legifrance, Civil Code, available at http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm (last visited Apr. 6, 2007) (“An instrument before *notaires* or under private signature must be executed in all matters exceeding a sum or value fixed by decree, even for voluntary deposits, and no proof by witness is allowed against or beyond the contents of instruments, or as to what is alleged to have been said before, at the time of, or after the instruments, although it is a question of a lesser sum or value.”).

accordingly, the parties may decide otherwise.¹⁴⁸ Something similar happens in Spain. According to the first paragraph of Article 51 of the Spanish Commercial Code, proof by witnesses alone is not enough to show the existence of a contract worth more than a certain amount of money. Contracts made with specific formalities are exempted.¹⁴⁹ Only the Italian Civil Code, in force since 1942, contains a text similar to the common law understanding of the parol evidence rule, refusing the proof by witnesses of prior or contemporary agreements of a written document.¹⁵⁰ In Italy, other means of evidence are accepted if the legitimacy of the writing involved is questioned.¹⁵¹ Thus, a judge may allow means of proof by witnesses of agreements or documents made after the writing.¹⁵²

The German Civil Code amalgamates ideas of good faith (*Treu und Glauben*) and recognized customs for the interpretation of contracts.¹⁵³ The will of the parties should be recognized, keeping in mind the true sense of the contract and not just its literal meaning.¹⁵⁴ Complete written agreements are

¹⁴⁸ See PHILIPPE MALINVAUD, *DROIT DES OBLIGATIONS* 250 (8th ed. 2003).

¹⁴⁹ C. COM. art. 52.1 (Spain). The Civil Code of Puerto Rico cites article 1281 of the Spanish Civil Code as a source for its own section 3471 ("If the words should appear contrary to the evident intention of the contracting parties, the intention shall prevail."). P.R. LAWS ANN. tit. 31, § 3471 (2004).

¹⁵⁰ See C.C. art. 2722 (Italy) ("La prova per testimoni non è ammessa se ha per oggetto patti aggiunti o contrari al contenuto di un documento, per i quali si alleggi che la stipulazione è stata anteriore o contemporanea.") ("Proof by witnesses is not permitted to establish stipulations which have been added or are contrary to the contents of a document, and which are claimed to have been made prior to or at the same time as the document."). The English translation is provided by MARIA BELTRAMO, GIOVANNI E. LONGO & JOHN HENRY MERRYMAN, *THE ITALIAN CIVIL CODE* 693 (1969). See also Cass., 25 maggio 1992, n.6246. In relation to the rules of interpretation of contracts, see C.C. art. 1362 (Italy).

¹⁵¹ C.C. art. 2724 (Italy).

¹⁵² *Id.* art. 2723.

¹⁵³ See Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18, 1996, Reichsgesetzblatt [RGBl], §§ 133, 157, 242 (F.R.G.). Concerning the multiplicity of cases and scholarly contributions on BGB § 242, see Peter Schlechtriem, *Good Faith in German Law and in International Uniform Laws*, in CENTRO DI STUDI E RICERCHE DI DIRITTO COMPARATO E STRANIERO, SAGGI, CONFERENZE E SEMINARI NO. 24 (Michael J. Bonell ed., 1997), available at <http://soi.cnr.it/~crdcs/crdcs/schlechtriem.htm>.

¹⁵⁴ BGB § 133 (F.R.G.) ("Bei der Auslegung einer Willenserklärung ist der wirkliche Wille zu erforschen und nicht an dem buchstäblichen Sinne des Ausdrucks zu haften.") (In the interpretation of a declaration of intention the true intention is to be sought without regard to the literal meaning of the expression.). Translation provided by ARTHUR TAYLOR VON MEHREN, *THE CIVIL LAW SYSTEM: CASES AND MATERIALS FOR THE COMPARATIVE STUDY OF LAW* 880 (1957).

presumed to be correct under the principle of good faith. However, additional evidence, even unwritten, may be admissible.¹⁵⁵

Concerning the rule of evidence, it should be recalled that an attenuated distinction between merchants and non-merchants continues to be recognized in the civil law tradition. In France, the differences are reflected in the existence of a *Code civil* and a *Code de commerce*. Merchants must record their transactions in mercantile books, the keeping of which is mandatory.¹⁵⁶ Accordingly, a question arises whether these books can be brought as evidence against a written instrument. Originally, the French doctrine accepted those books as proof even against a non-merchant party if they were carried in due form.¹⁵⁷ The former Article 109 of the French *Code de commerce*, for example, listed the recognized means to confirm the existence of a sale. Today, the new drafting allows any kind of recognized legal means to confirm a sale between merchants.¹⁵⁸ Thus, mercantile books can be used as proof against merchants, but not against non-merchants to whom the rules of the Civil Code apply.¹⁵⁹

Other countries maintain the difference. In the chapter concerning contract interpretation, the Spanish Civil Code establishes the rule of recognizing the intention of the parties in the case of civil (non-commercial) contracts. To ascertain that intention, attention must be given to acts of the parties that are

¹⁵⁵ See KARLLARENZ, ALLGEMEINER TEIL DES DEUTSCHEN BÜRGERLICHEN RECHTS 306, 315 (5th ed. 1980).

¹⁵⁶ See C. COM. art. L 123-12 (Fr.). The English version can be found at Legifrance, Commercial Code, http://www.legifrance.gouv.fr/html/codes_traduits/commercetextA.htm (last visited Apr. 6, 2007).

¹⁵⁷ 7 MARCEL PLANIOL & GEORGES RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 936 (2d ed. 1954). Article 1341 of the French Civil Code expressed that the main rule concerning written documents is without prejudice of the situation of merchants regulated by commercial legislation: "Le tout sans préjudice de ce qui est prescrit dans les lois relatives au commerce." ("All of which without prejudice to what is prescribed in the statutes relating to commerce.") Translation provided by Legifrance, available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=22&r=484> (last visited Apr. 6, 2007).

¹⁵⁸ C. COM. art. L 110-3 (Fr.) ("A l'égard des commerçants, les actes de commerce peuvent se prouver par tous moyens à moins qu'il n'en soit autrement disposé par la loi.") ("With regard to traders, commercial instruments may be proven by any means unless the law specifies otherwise."). Translation provided by Legifrance, available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=32&r=2940> (last visited Apr. 6, 2007).

¹⁵⁹ This difference between commercial and non-commercial contractual obligations is now vanishing. Formerly, Article 44 of the Italian Codice di commercio enumerated the means to prove the existence or nonexistence of a commercial obligation. After 1942, as it also later happened in Switzerland and in the Netherlands, both commercial and civil obligations have been reunited in the civil code.

contemporary with or which occur after the writing.¹⁶⁰ Contracts between merchants, on the other hand, are regulated in a specific chapter of the Spanish Commercial Code.¹⁶¹ In Switzerland, the legislation seems to go beyond the differences between merchants and non-merchants. According to the Swiss Civil Code, the Swiss Code of Obligations applies in all matters related to formation, performance, and termination of contracts.¹⁶² If a contract must be in writing, every alteration thereof must also be made in writing, except supplementary nonessential provisions that do not contradict the instrument.¹⁶³ The intention of the parties must be considered when interpreting the form and the content of a contract,¹⁶⁴ looking into the parties' behavior at the time of the contract and thereafter.¹⁶⁵

¹⁶⁰ See C.C. art. 1282 (Spain) ("Para juzgar de la intención de los contratantes, deberá atenderse principalmente a los actos de éstos, coetáneos y posteriores al contrato.") ("In order to judge the intention of the parties to a contract, attention should be paid principally to their acts, contemporaneous with and subsequent to the contract.")

¹⁶¹ See C. COM., Book I, Tit. IV.

¹⁶² See Schweizerisches Zivilgesetzbuch [ZGB] [Civil Code] Dec. 10, 1907, SR 210, art. 7 (Switz.). "Les dispositions générales du droit des obligations relatives à la conclusion, aux effets et à l'extinction des contrats sont aussi applicables aux autres matières du droit civil." ("The general rules laid down in the law of obligations regarding the formation, the effect and the determination of contracts apply also to the other parts of Private Law.") Translation by SIEGFRIED WYLER & BARBARA WYLER, *THE SWISS CIVIL CODE: COMPLETELY RESET, REVISED AND UP-DATED EDITION WITH NOTES, VOCABULARIES, INDEX AND A SYNOPSIS OF ALL CHANGES OF THE LAW SINCE 1912*, at 2 (1987).

¹⁶³ Schweizerisches Obligationenrecht [OR] [Code of Obligations] Mar. 30, 1911, SR 220, art. 12 (Switz.). "Lorsque la loi exige qu'un contrat soit fait en la forme écrite, cette règle s'applique également à toutes les modifications du contrat, hormis les stipulations complémentaires et accessoires qui ne sont pas en contradiction avec l'acte." ("Where the law requires a contract to be in writing, such requirement is also applicable to any modification thereof, except for ancillary points of a complementary nature which are not contradictory to such contract.") English translation by the SWISS-AMERICAN CHAMBER OF COMMERCE, *SWISS CONTRACT LAW 18* (1984). The French text is also available at Les autorités Fédérales de la Confédération Suisse, <http://www.admin.ch/ch/f/rs/220/a12.html> (last visited Apr. 6, 2007).

¹⁶⁴ OR art. 18, ¶ 1. "Pour apprécier la forme et les clauses d'un contrat, il y a lieu de rechercher la réelle et commune intention des parties, sans s'arrêter aux expressions ou dénominations inexactes dont elles ont pu se servir, soit par erreur, soit pour déguiser la nature véritable de la convention." ("As regards both the form and content of a contract, the real intent which is mutually agreed upon shall be considered, and not an incorrect statement or method of expression used by the parties, whether due to error, or with the intention of concealing the true nature of the contract.") English translation by the SWISS-AMERICAN CHAMBER OF COMMERCE, *SWISS CONTRACT LAW 20* (1984) (references omitted). The French text is also available at Les autorités Fédérales de la Confédération Suisse, [http:// admin.ch/ch/f/rs/220/a78.html](http://admin.ch/ch/f/rs/220/a78.html) (last visited Apr. 6, 2007).

¹⁶⁵ See Bundesgericht [BGer] [Federal Court] 96 Entscheidungen des Schweizerischen

Some contracts in civil law jurisdictions are required by law to be written, and this precondition affects the validity of the legal transaction.¹⁶⁶ Hence, as it happens with the deeds conveying ownership on immovable property, a public document is required, usually a contract prepared and signed before a notary.¹⁶⁷ But informality or lack of valid form is the usual rule between the parties for everyday transactions. In relation to the interpretation of contracts, the Roman law system recognizes that if the terms of a contract are clear and unequivocal on the intention of the parties, they prevail over any other interpretation.¹⁶⁸ If some provisions are in conflict, or ambiguous, they should be interpreted in the manner most consistent with the parties' intent, taking into account usages and customs.¹⁶⁹ Several codes adopt the *contra proferentem* rule, which, in case of doubt about the meaning of a clause, places the burden of proof on the drafting party.¹⁷⁰

The first Part of this Article has presented how the rule operates at common law, how it is considered in jurisdictions of mixed character, as well as how it has proven relatively uniform among the nations belonging to the Roman civil law tradition. The second Part will analyze how the parol evidence rule is evaluated in three main areas of current international commercial law: the CISG, the UNIDROIT principles, and the European Principles on Contract. These three different instruments, however diverse in their nature and scope, all share the common objective of unifying rules of international contracts.

IV. *LEX MERCATORIA*

Lex Mercatoria is a Latin expression identifying a dynamic group of rules established by merchants for regulating international trade. The use of this expression initially was regarded as vague and diffuse.¹⁷¹ Today, the concept

Bundesgerichts [BGE] II 333 (Switz.); Bundesgericht [BGer] [Federal Court] 107 Entscheidungen des Schweizerischen Bundesgerichts [BGE] II 418, E.6.

¹⁶⁶ See Cód. Civ. art. 1184 (Arg.); C.C. art. 1280 (Spain), C.C. art. 1350 (Italy).

¹⁶⁷ C. Civ. art. 1317 (Fr.).

¹⁶⁸ C. Civ. art. 1156 (Fr.); Código Civil Distrito Federal [C.C.D.F.] [Civil Code for the Federal District] art. 1851 (Mex.); C.C. art. 1362 (Italy); C.C. art. 1281 (Spain).

¹⁶⁹ See C. Civ. art. 1159 (Fr.); Cód. Civ. art. 1198 (Arg.); C.C. art. 1368 (Italy), C.C. art. 1287 (Spain).

¹⁷⁰ C. Civ. art. 1162 (Fr.), C.C. art. 1288 (Spain), C.C. art. 1370 (Italy).

¹⁷¹ Like a ghost ship, this term sails through the discussion of international trade. "Wie ein Geisterschiff treibt dieser Begriff durch die internationale handelsrechtliche Diskussion," according to the colorful language of Rolf Herber, "'Lex Mercatoria' und 'Principles'-Gefährliche Irrlichter im internationalen Kaufrecht," 3 INTERNATIONALES HANDELSRECHT 1,

summarizes international commercial usages and customs as well as several treaties, conventions, and rules accepted by the international merchant community, which in fact are the major force moving the legal dynamic of international commerce.¹⁷² In this Part, three different, but sometimes overlapping, groups of rules will be compared: the CISG, the principles of UNIDROIT, and the principles of European Contract Law. It is, however, beyond the purpose of this Article to inquire about the reasons behind this proliferation of different instruments with the common objective of harmonizing international commercial law.¹⁷³ Some principles can be reconciled among themselves, but others seem to be in conflict with the original pursued objective of international unification, such as creating a separate group of rules where some unification has already been attained.¹⁷⁴ Among the group of norms included and first to be considered, the 1980 U.N. Vienna Convention on Contracts for the International Sale of Goods (CISG) has a relevant position in modern *lex mercatoria*, representing in its seventy member states more than 80% of world commerce.¹⁷⁵

5 (2003). However, see the explicative and descriptive title of the sixth edition of two volumes prepared at the beginning of the nineteenth century by WYNDHAM BEAWES, *LEX MERCATORIA, OR, A COMPLETE CODE OF COMMERCIAL LAW BEING A GENERAL GUIDE TO ALL MEN IN BUSINESS; WHETHER AS TRADERS, REMITTERS, OWNERS, FREIGHTERS, CAPTAINS, INSURERS, BROKERS, FACTORS, SUPERCARGOES, OR AGENTS WITH AN ACCOUNT OF OUR MERCANTILE COMPANIES OF OUR COLONIES AND FACTORIES ABROAD OF OUR COMMERCIAL TREATIES WITH FOREIGN POWERS, OF THE DUTY OF CONSULS, AND OF THE LAWS CONCERNING ALIENS, NATURALIZATION, AND DENIZATION: TO WHICH IS ADDED AS ACCOUNT OF THE COMMERCE OF THE WHOLE WORLD* (1813).

¹⁷² See Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 183, 186 (1994).

¹⁷³ The CISG and the UNIDROIT Principles could be seen as complementary instruments, but taking as a point of reference the 2004 version of the Principles, no fewer than two-thirds of their articles have equivalent provisions in the European principles. See MICHAEL JOACHIM BONELL, *AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW* 339 (3d ed. 2005); Herbert Kronke, *The U.N. Sales Convention, the UNIDROIT Contract Principles and the Way Beyond*, 25 J.L. & COM. 451, 458 (2005).

¹⁷⁴ But see Ewan McKendrick, *Harmonisation of European Contract Law: The State We Are In*, in *THE HARMONISATION OF EUROPEAN CONTRACT LAW: IMPLICATIONS FOR EUROPEAN PRIVATE LAWS, BUSINESS, AND LEGAL PRACTICE* 28–29 (Stefan Vogenauer & Stephen Weatherill eds., 2006).

¹⁷⁵ UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Apr. 6, 2007).

A. *The 1980 U.N. Vienna Convention (CISG)*

In a treaty such as the CISG, with the primary goal of obtaining uniformity in harmonizing different global understandings of the most important international contracts, it was very unlikely to include a rule that has lost supporters even in its own legal family. Article 11 of the CISG states, “[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.”¹⁷⁶ The original official comment of this article,¹⁷⁷ prepared by the drafting Conference, explained this inclusion by the fact that many contracts for the international sale of goods were concluded through modern means of communication, not always involving a writing. A proposal presented by Canada, introducing a limitation on admissible evidence in cases where contracting parties had freely chosen to have a written contract, did not obtain the necessary support from other participants at the drafting Conference.¹⁷⁸ The final approved text of the article states that “[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.”¹⁷⁹ Generally, it is accepted that the first part of the adopted text of the article alludes to the doctrine of consensualism,¹⁸⁰ according to which no specific formal requirement would be necessary regarding the formation of contracts. But the second sentence of the article explains procedural consequences related to the evidence accepted to prove a contract regulated by the CISG in the civil law tradition.

It should be emphasized that Article 11 will not be applicable if the related country, when ratifying the CISG, has made a declaration conforming to Article 96 of the CISG.¹⁸¹ The CISG’s lack of the requirement of form leaves

¹⁷⁶ CISG, *supra* note 6, art. 11.

¹⁷⁷ UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 20 (1981). The article was numbered “10” during the drafting discussion and its text was almost identical to the one approved.

¹⁷⁸ *Id.* at 270.

¹⁷⁹ CISG, *supra* note 6, art. 11.

¹⁸⁰ See Jerzi Rajski, *Article 11*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 122 (Michael J. Bonell & C.M. Bianca eds., 1987), available at <http://www.cisg.law.pace.edu/cisg/biblio/rajski-bb11.html>.

¹⁸¹ Article 96 of the CISG reads:

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part

behind the already-mentioned and well-recognized common law statute of frauds.¹⁸² Consequently, when the CISG is applicable, oral contracts are admissible,¹⁸³ but this rule will not apply to a contracting party having his place of business in a state that has made an Article 96 declaration.¹⁸⁴ The drafters of Article 13 extended the meaning of "writing" to include the telegram and the telex, which were common at the time of the signing of the Convention. Naturally, other methods of electronic communication popular today were unknown at the time of the drafting. When the Convention entered into force in January 1988, the fax machine was already known and accepted as the equivalent of a writing.¹⁸⁵ After all, faxes are printed on thermal paper

II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

CISG, *supra* note 6, art. 96.

¹⁸² See discussion *supra* Part III.B; see also U.C.C. § 2-201 (1995); Statute of Frauds, 29 Car. 2, c. 3, § 4 (Eng.); Statute of Frauds Amendment Act, 1828, 9 Geo. 4, c. 14 (Eng.); Mercantile Law Amendment Act, 1856, 22 Vic., c. 14 (U.K.); Sale of Goods Act, 1893, 57 Vic., c. 71, § 4(B) (U.K.). American courts were especially reluctant to reject the application of the rule. One of the first American decisions involving the CISG analyzed this reluctance in a footnote. *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1238 n.7 (S.D.N.Y. 1992). The court arrived at the same conclusion in a well-reasoned decision in the unreported case of *Claudia v. Olivieri Footwear Ltd.*, No. 96 Civ. 8052, 1998 WL 164824 (S.D.N.Y. Apr. 7, 1998). In *Beijing Metals & Minerals Import/Export Corporation v. American Business Center, Inc.*, 993 F.2d 1178, 1183 (5th Cir. 1993), another court asserted that the parol evidence rule as recognized in Texas was applied to the parties, notwithstanding that the relationship between the parties was regulated by the CISG. Also, the court stated in a footnote that "[w]e need not resolve this choice of law issue, because our discussion is limited to application of the parol evidence rule (*which applies regardless*), . . ." *Id.* at 1182 n.9 (emphasis added).

¹⁸³ See Louis F. Del Duca, *Implementation of Contract Formation Statute of Frauds, Parol Evidence, and Battle of Forms CISG Provisions in Civil and Common Law Countries*, 35 UCC L.J. 56 (2005). The principle of freedom of forms does not impede the parties from deciding otherwise. Article 29(2) of the CISG explains:

A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

CISG, *supra* note 6, art. 29(2). The only limitation appears in the restriction explained in Article 96, when the law of a contracting state requires written contracts of sale.

¹⁸⁴ See *supra* note 181 and accompanying text.

¹⁸⁵ ALEJANDRO M. GARRO & ALBERTO L. ZUPPI, *COMPRAVENTA INTERNACIONAL DE MERCADERÍAS* 69 (1990); ROLF HERBER & BEATE CZERWENKA, *INTERNATIONALES KAUFRECHT* 71 (1991); PETER SCHLECHTRIEM, *INTERNATIONALES UN-KAUFRECHT* 55, § 68 (2d ed. 2003).

that decolorizes with the passing of time, yet still a printed paper and easy to assimilate to a telegram or telex. But the newly developed electronic transactions do not involve a “writing” in the classical sense. Only after domestic legislation began to implement electronic contracting¹⁸⁶ have scholars shown a more flexible attitude toward extending the meaning of a “writing” to electronic documents in accordance with CISG Article 13.¹⁸⁷

Returning to the main subject of the comparison rule, it should be pointed out that several U.S. courts have refused to apply the parol evidence rule within the framework of the CISG.¹⁸⁸ For example, in the case presented in the introduction, *MCC - Marble Ceramic Center*, where the CISG applied, the court of appeals reversing the original decision refused to consider the restriction included in the parol evidence rule.¹⁸⁹ Despite the buyer’s apparent consent to the conditions stated on the back of a printed form, the court considered the negotiations and the parties’ subjective intent. The tribunal stated that parties wishing to avoid parol evidence problems may include a merger clause in their contract.¹⁹⁰ According to the court, such mergers or

¹⁸⁶ See, e.g., Federal Electronic Signatures in Global and National Commerce (ESGNC) Act, 15 U.S.C. § 7001 (2001), available at <http://www.ftc.gov/os/2001/06/esign7.htm>; National Conference of Commissioners on Uniform State Laws, Uniform Electronic Transactions Act (UETA), available at <http://www.law.upenn.edu/bll/ulc/uecicta/eta1299.htm> (last visited Apr. 6, 2007).

¹⁸⁷ See Advisory Council of the United Nations Convention on Contracts for the International Sale of Goods, Opinion No. 1, *Electric Communications Under CISG*, Aug. 15, 2003, available at http://www.cisg-online.ch/cisg/docs/CISG-AC_op_no_1.pdf (“A contract may be concluded or evidenced by electronic communications.”); see also JOHN HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 141 (3d ed. 1999), available at <http://www.cisg.law.pace.edu/cisg/biblio/ho13.html>; Ulrich G. Schroeter, *Interpretation of ‘writing’: Comparison between provisions of CISG (Article 13) and counterpart provisions of the Principles of European Contract Law*, http://www.cisg.law.pace.edu/cisg/text/peclcom_p13.html (last visited Apr. 6, 2007). However, see Oberster Gerichtshof [OGH] [Supreme Court] Apr. 24, 1997, 2 Ob 109/97M (Austria), with references to Austrian scholars and the different opinion of German doctrine and jurisprudence.

¹⁸⁸ *MCC - Marble Ceramic Ctr., Inc. v. Ceramica Nuova D’Agostino S.p.A.*, 144 F.3d 1384 (11th Cir. 1998); Christian Thiele, *Das UN-Kaufrecht vor US-amerikanischen Gerichten*, *INTERNATIONALES HANDELSRECHT*, Sept. 2002, at 814; Olaf Meyer, *Die Anwendung des UN-Kaufrechts in der US-amerikanischen Gerichtspraxis*, *PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHT*, Sept. 2005, at 462.

¹⁸⁹ *MCC - Marble Ceramic Ctr.*, 144 F.3d 1384.

¹⁹⁰ *Id.* at 1391 (“Moreover, 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.”); see also ALBERT H. KRITZER, *GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR*

integration clauses would exclude evidence outside the contract. The result arrived at by the court is a correct application of the general rule stated in Article 8(3) of CISG,¹⁹¹ which relieves a tribunal deciding a case under the CISG law from any domestic parol evidence rule or other kind of restrictions of other means of proof different from a writing.¹⁹² That article excuses a tribunal from the application of domestic rules that might bar the court from “considering” any evidence that is relevant between the parties,¹⁹³ and is a clear direction to the court to admit and consider all other evidence related to the negotiations which could reveal the parties real intent.¹⁹⁴ This approach has been seen as a “benchmark against which the progress of future U.S. decisions on the Convention can be measured.”¹⁹⁵ In fact, the case where that decision was rendered was immediately followed.¹⁹⁶

1. CISG Advisory Council Opinion

The Institute of International Commercial Law of Pace University has developed an extensive database related to CISG.¹⁹⁷ The Institute has been a

THE INTERNATIONAL SALE OF GOODS 96 (1994).

¹⁹¹ CISG, *supra* note 6, art. 8(3) (“In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.”). According to Franco Ferrari, the rule would not be applicable per se. Franco Ferrari, *Auslegung von Parteierklärungen und -verhalten nach UN-Kaufrecht*, INTERNATIONALES HANDELSRECHT, Feb. 2003, at 14.

¹⁹² HONNOLD, *supra* note 187, at 121, § 110 (“This added flexibility for interpretation is consistent with the growing body of opinion that the ‘parol evidence rule’ has been an embarrassment for the administration of modern transactions.”).

¹⁹³ *Id.* at 170–71, § 110.

¹⁹⁴ *MCC - Marble Ceramic Ctr.*, 144 F.3d at 1389.

¹⁹⁵ 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, 287 (1999). Another author praises the tribunal as open-mindedly embracing a new methodology regarding its training and indoctrination in domestic law. Bruno Zeller, *The Parol Evidence Rule and the CISG - A Comparative Analysis*, 36 COMP. & INT’L L.J. S. AFR. 308 (2003).

¹⁹⁶ *Mitchell Aircraft Spares, Inc. v. European Aircraft Serv. AB*, 23 F. Supp. 2d 915, 919 (N.D. Ill. 1998) (characterizing the *MCC - Marble* opinion as “highly persuasive”). In 2001, it was followed by *Shuttle Packaging Sys., L.L.C. v. Tsonakis*, No. 1:01-CV-691, 2001 U.S. Dist. LEXIS 21630 (W.D. Mich. Dec. 17, 2001).

¹⁹⁷ See Pace Law School, CISG Database, <http://www.cisg.law.pace.edu> (last visited Apr. 6,

strong supporter of the idea of creating an Advisory Council formed by a group of recognized scholars aimed at promoting the uniform international interpretation of the CISG. This initiative has been praised.¹⁹⁸

The application of the parol evidence doctrine to a sale contract regulated by the CISG has been considered in Advisory Council Opinion Number 3.¹⁹⁹ The main conclusions of the Advisory Council are:

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.
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.

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.²⁰⁰

The "Comments" to this opinion recognize that in the United States, the parol evidence rule is concerned with whether the writing involved was a complete expression of the terms it contained, and whether it is intended as the final expression of the will of the parties concerning its content.²⁰¹ In the first

2007).

¹⁹⁸ See Rolf Herber, *Eine neue Institution: Der CISG Advisory Council*, INTERNATIONALES HANDELSRECHT, Oct. 2003, at 201–02.

¹⁹⁹ Advisory Council of the United Nations Convention on Contracts for the International Sale of Goods, Opinion No. 3, *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG*, Oct. 23 2004, available at http://www.cisg-online.ch/cisg/docs/CISG-AC_Op_no_3.pdf [hereinafter Opinion No. 3].

²⁰⁰ *Id.*

²⁰¹ *Id.* para. 1.2.5.

situation, the writing regarded as “integrated” forbids either party to introduce other evidence which could contradict it.²⁰² The opinion contemplates the merger clause as the stipulation, which usually provides that the writing represents the entire or the unique agreement of the parties, and that no document or evidence will be accepted to contradict the writing. As expected, the opinion recognizes that the parol evidence rule has not been incorporated into the CISG, which “governs the role and weight to be ascribed to contractual writing.”²⁰³ However, in a controversial paragraph, the opinion affirms that when a merger clause has been agreed upon in a contract governed by the CISG rules, such clause has the effect of derogating the CISG’s norms of interpretation.²⁰⁴ The effect of the merger clause, according to the opinion, “may be to prevent a party from relying on evidence of statements or agreements not contained in the writing.”²⁰⁵ In other words, when the parties include a merger clause of this kind, they are departing from the rules for the interpretation of contracts contained in the CISG. As drafted, that conclusion is not accurate. At least, the consequences of this assertion extend far beyond what the opinion originally intended. In fact, when reference is made to the CISG’s interpretation rules, the reference necessarily includes the consideration of Articles 7, 8, and 9 of the CISG as a whole. Accordingly, when the CISG’s text provides in Article 6²⁰⁶ that the parties may depart from its rules, as is the case of Article 9(2)²⁰⁷ for example, only some of the rules of interpretation can be modified or set aside by the parties. However, those norms concerning the international character of the CISG and the need to promote uniformity like the ones contained in Article 7(1), are principles that cannot be set aside because they are not susceptible to abrogation by the will

²⁰² *Id.*

²⁰³ *Id.* para. 2.

²⁰⁴ “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.*” *Id.* para. 4 (emphasis added).

²⁰⁵ Opinion No. 3, *supra* note 199, para. 4.

²⁰⁶ “The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.” CISG, *supra* note 6, art. 6.

²⁰⁷ The parties are considered, *unless otherwise agreed*, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Id. art. 9(2) (emphasis added).

of the parties.²⁰⁸ If the parties to an international agreement governed by the CISG include a merger clause of this kind, declaring the signed, written instrument to be the only agreement between the parties, superseding any other prior or contemporary instrument, and representing the complete integration of what they agreed to, notwithstanding the conclusiveness of such clause, Article 7 of the CISG will continue to apply in order to resolve questions related to the uniformity and international applicability of any decision concerned with such a contract. Perhaps the most important proof of the success of the CISG consists in the uniform application by the national courts of these internationalized objectives. Germany has produced the most outstanding examples of this essentially international manner of resolving CISG disputes.²⁰⁹ Notwithstanding the general agreement in its conclusion that the parol evidence rule has not been incorporated into the CISG, it is regrettable that in one of its first opinions, the Advisory Council failed to contemplate the consequences of its assertion that in a contract regulated by the CISG, its rules of interpretation could be excluded by a merger clause.

2. Principles of UNIDROIT

The objective of the UNIDROIT Principles of International Commercial Contracts is to offer to the international arena a set of well-balanced principles applicable to any international agreement regardless of the legal traditions to which the parties belong.²¹⁰ They can be described as a positive step in the search for international uniformity, and a valuable tool for interpreting and supplementing other international commercial instruments.²¹¹ Notwithstanding

²⁰⁸ See M.J. Bonell, *Article 7*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION, *supra* note 180, at 93–94; MARÍA DEL PILAR PERALES VISCASILLAS, LA FORMACIÓN DEL CONTRATO EN LA COMPRAVENTA INTERNACIONAL DE MERCADERÍAS 77 (1996); Alberto L. Zuppi, *La interpretación en la Convención de Viena de 1980 (CISG - Compraventa internacional de mercaderías)*, LA LEY [L.L.], 1997-F-1290.

²⁰⁹ Germany's constitutions have been praised by Peter Schlechtriem, *10 Jahre CISG - Der Einfluss des UN-Kaufrechts auf die Entwicklung des deutschen und des internationalen Schuldrechts*, INTERNATIONALES HANDELSRECHT, 2001, at 12; and Claude Witz, *La Convention de Vienne sur la vente internationale de marchandises à l'épreuve de la jurisprudence naissante*, RECUEIL DALLOZ SIREY, 1995, at 143, among other scholars.

²¹⁰ See the expanded version of the UNIDROIT Principles of International Commercial Contracts, Rome, Unidroit, 2004, in M.J. BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW, *supra* note 173, with versions of the Principles in Chinese, English, French, German, Italian, Russian, and Spanish.

²¹¹ Alejandro M. Garro, *The Gap-Filling Role of the UNIDROIT Principles in International*

the similarity of objectives and even the treatment of some issues between the Principles and the CISG, the UNIDROIT Principles are not an international convention or legislative enactment such as the CISG, and will apply only when the parties incorporate them expressly into the contract.²¹²

The parol evidence rule, as it is known in the United States, has not been included in a set of rules looking to attain international uniformity. Under the integration or "merger clause," Article 2.1.17 of the Principles states: "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. However, such statements or agreements may be used to interpret the writing."²¹³ In the absence of such a merger clause, Article 1.2 of the Principles accepts any utterances proved by any means.²¹⁴ This solution balances the parol evidence rule with an allowance to admit evidence subsequent to the writing, but only for the purpose of interpreting the contract. It is also consistent with the principle stated in Article 4.3(a),²¹⁵ which accepts the preliminary negotiations between the parties as a circumstance that has to be taken into account when applying the main rules of interpretation. First, the common intention of the parties or subjective test must be considered; and second, if the intention cannot be ascertained, a reasonable person standard must be used.

Sales Law: Some Comments on the Interplay between the Principles and the CISG, 69 TUL. L. REV. 1149, 1152-53 (1995).

²¹² According to its preamble, the application of the Principles may also be possible in cases where a general reference to the rules of international commerce or *lex mercatoria* has been expressed in the contract, or even as supplementary law when it proves impossible to establish the applicable law of the contract. It will be seen whether this extension of the application of the Principles is accepted by future doctrine and jurisprudence. See UNIDROIT Principles of International Commercial Contracts 2004, pmbl., <http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf> (last visited Apr. 7, 2007) [hereinafter UNIDROIT Principles].

²¹³ *Id.* art. 2.1.17.

²¹⁴ *Id.* art. 1.2: "Nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form. It may be proved by any means, including witnesses."

²¹⁵ *Id.* art. 4.3(a); see also UNILEX, Official Comment to the UNIDROIT Principles, <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13637&x=1> (last visited Apr. 7, 2007).

B. European Principles of Contracts

The last example of modern international commercial law to be considered is the European trend toward the unification of the rules of contracts. The European Commission of the European Union called for proposals to modernize and unify the legal systems of contracts, producing two different drafts: 1) The “Principles of European Contract Law,” a project directed by Ole Lando; and 2) the “European Contract Code,” a project directed by Giuseppe Gandolfi.²¹⁶ The former has received the most consistent support. There was clear consent in the sense that the development of European private law would depend on the promotion and elaboration of principles complementing and summarizing national legislation, which were the main directives of the organs of the European Union and international treaties.²¹⁷

Again, in a group of legal axioms like the ones analyzed, here the parol evidence rule has no place. One clause of the Principles of European Contract Law (PECL)²¹⁸ deals with the good faith and fair dealing that the parties must

²¹⁶ European Contract Code, <http://www.academiagiurprivatistieuropei.it/docs/EuropeanContr.pdf> (last visited Apr. 7, 2007).

²¹⁷ See Christian von Bar, *A European Civil Code, International Agreements and European Directives*, in European Parliament, Directorate General for Research, *Working Paper: Study of the Systems of Private Law in the EU with regard to Discrimination and the Creation of a European Civil Code* (June 1999), available at <http://www.cisg.law.pace.edu/cisg/biblio/vonbar1.html>. The Council of the European Union, at first acting alone, and later together with the European Parliament, has already issued a group of directives related to consumer protection and contract law of the member states. The following directives are among the most important: Council Directive 85/577, 1985 O.J. (L 372) 31 (EEC), to protect the consumer regarding contracts negotiated away from business premises; Council Directive 90/314, 1990 O.J. (L 158) 59 (EEC), known as the Package Travel Directive; Council Directive 93/13, 1993 O.J. (L 95) 10 (EEC), on unfair terms in consumer contracts; Council Directive 97/7, 1997 O.J. (L 144) 19 (EC), on the protection of consumers regarding distance contracts; Council Directive 1999/44, 1999 O.J. (L 171) 12 (EC), on certain aspects of the sale of consumer goods and associated guarantees; Council Directive 2002/65, 2002 O.J. (L 271) (EC), concerning the distance marketing of consumer financial services and amending some previous directives; Council Directive 2005/29, 2005 O.J. (L 149/22) 30 (EC), concerning unfair business-to-consumer commercial practices in the internal market and amending other directives. See also *Communication from the Commission to the Council and the European Parliament*, COM (2001) 398 final (July 11, 2001); Council, *Draft Council Report on the Need to Approximate Member States' Legislation in Civil Matters*, Doc. No. 13017/01 (Oct. 29, 2001).

²¹⁸ It should be mentioned that according to the Principles of European Contract Law in the revised 1998 version, such Principles may be applied when the parties of the contract agreed that their contract is governed by the “lex mercatoria.” See Commission on European Contract Law, *The Principles of European Contract Law*, http://frontpage.cbs.dk/law/commission_on_

observe in relation to their rights and duties; a rule which cannot be limited by them.²¹⁹ Freedom of contractual form is dealt with in another clause, which, in fact, excludes the parol evidence rule.²²⁰ These principles are complemented by a merger or entire agreement clause,²²¹ and another providing that the modification of a written contract must also be made in writing.²²² A distinction is proposed dependent on whether the merger clause is the result of individual negotiation between the contractual parties. If the merger clause is not the product of a specific negotiation between the parties, the principle establishes only a rebuttable presumption that any prior statement does not

european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm [hereinafter PECL] (last visited Apr. 7, 2007); PRINCIPLES OF EUROPEAN CONTRACT LAW (Ole Lando & Hugh Beale eds., 2000).

²¹⁹ See PECL, *supra* note 218, art. 1:201. "Good Faith and Fair Dealing: (1) Each party must act in accordance with good faith and fair dealing. (2) The parties may not exclude or limit this duty." *Id.* See also Matthias E. Storme, *Good Faith and the Contents of Contracts in European Private Law*, 7.1 ELECTRONIC J. COMP. L. (2003).

²²⁰ See PECL, *supra* note 218, art. 2:101. "Conditions for the Conclusion of a Contract: . . . (2) A contract need not be concluded or evidenced in writing nor it is subject to any other requirement as to form. The contract may be proved by any means, including witnesses." *Id.*

²²¹ See *id.* art. 2:105.

Merger Clause:

(1) If a written contract contains an individually negotiated clause stating that the writing embodies all the terms of the contract (a merger clause), any prior statements, undertakings or agreements which are not embodied in the writing do not form part of the contract.

(2) If the merger clause is not individually negotiated it will only establish a presumption that the parties intended that their prior statements, undertakings or agreements were not to form part of the contract. This rule may not be excluded or restricted.

(3) The parties' prior statements may be used to interpret the contract. This rule may not be excluded or restricted except by an individually negotiated clause.

(4) 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 them.

Id.

²²² See *id.* art. 2:106.

Written Modification Only:

(1) A clause in a written contract requiring any modification or ending by agreement to be made in writing establishes only a presumption that an agreement to modify or end the contract is not intended to be legally binding unless it is in writing.

(2) A party may by its statements or conduct be precluded from asserting such a clause to the extent that the other party has reasonably relied on them.

Id.

form part of the contract. If a clause in a written contract declares that the writing embodies all the terms agreed upon by the parties in a specific negotiated merger or integration clause, any prior statements, undertakings, or agreements which are not embodied in the writing will not be regarded as forming part of the contract, although they may be used for interpreting the contract. When the parties are faced with clear evidence of a prior agreed term, which was not included in the document, that term will be binding. As in several codes of the civil law tradition, the PECL includes a *contra proferentem* clause for construing a clause against its drafter.²²³ Unlike the U.C.C. and most of the civil codes, the PECL does not establish a money limit under which a writing is not necessary to prove the existence of the contract.

On March 23, 2006, the European Parliament rendered a resolution reiterating its conviction that a uniform internal market cannot be fully functional without harmonizing the civil law, but called for respecting different legal traditions among member States.²²⁴ The European Union's group of experts is working upon a "Common Frame of Reference" (CFR) in European contract law, which will help to revise the existing law, and a draft is expected by the end of 2007.²²⁵ It is doubtful that any reference to the parol evidence rule will be considered in the frame of reference, and the last surviving vestiges of the rule will remain confined to simple domestic cases with the limitations and great number of exceptions of the prohibition summarized in this Article.²²⁶

²²³ See *id.* art. 5:103.

²²⁴ See Hugh Beale, *The European Commission's Common Frame of Reference Project: A Progress Report*, 2 EUR. REV. CONT. L. 303 (2006).

²²⁵ See European Parliament Resolution on the Communication from the Commission to the European Parliament and the Council—A More Coherent European Contract Law—An Action Plan, EUR. PARL. DOC. (COM) (2003) 68; see also Workshop of the Network of Member State Experts on European Contract Law, May, 31, 2005, *Summary*, http://ec.europa.eu/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/experts_membstates3105_en.pdf.

²²⁶ See discussion *supra* Part III. In Ireland, the other independent common law member of the European Union, the rule has been seen as "archaic," and as being virtually abolished through various judicial decisions. RAYMOND J. FRIEL, *THE LAW OF CONTRACT* 171 (2d ed. 2000). One explanation has been the decline of the institution of the jury in civil cases. ROBERT CLARK, *CONTRACT LAW IN IRELAND* 112 (4th ed. 1998). See also ROBERT CLARK, *CONTRACT* 63 (2d ed. 1986).

V. CONCLUSION

Since *the Countess of Rutland's Case* decided in 1604,²²⁷ the parol evidence rule has suffered considerable changes by reducing the extent of its application through the admission of endless exceptions. After revisiting the main forms adopted by this common law principle and its equivalents in the systems derived from Roman law, as well as the lack of regard for the rule in modern *lex mercatoria*, it seems possible to conclude that there remains only a tame hybrid, domestically applied in some jurisdictions, of the rule as it was originally conceived. The application of the rule has considerably reduced and narrowed its scope when compared with the solutions shaped by other international principles. Among the countries and jurisdictions considered in this research, only the United Kingdom and South Africa belong to the group that has not ratified the CISG. In England, where the parol evidence rule was originally used, the large number of exceptions allowed by case law invites inquiry into whether the rule has survived. Even Scotland, a mixed jurisdiction, has shown a clear trend toward following the path of the international sales conventions' extensive interpretation in the admission of evidence. Only in the United States does the rule continue to be domestically considered, but only within the clear boundaries shown in this research.

Certainly, the concept of the written document today is also different from the one used when the rule was in full application. Traditionally, a written document usually implied a writing in paper. Today, electronic documents and transactions are terms of common use, and expressions like EDI (electronic data interchange), electronic commerce, electronic records, or e-mails are part of our lives. The extraordinary changes in communications, the common use of computers in the legal profession, the advances of technology, and the easy global access to sources of information are alternatives that help to show the parties' true intentions more accurately. This conclusion approaches closely the civil law understanding of the force of extrinsic evidence to clarify a written agreement, rather than the common law traditional apprehension of looking beyond the face of the document because of the parol evidence rule.

²²⁷ (1604) 77 Eng. Rep. 89 (K.B.). This case is presumed by some legal authors to be one of the first appearances of the rule. See R.H.V., Note, *Sales—Integrity of Written Instrument Violated by the Admission of Prior Agreement*, 15 VA. L. REV. 502 (1929); Lawrence M. Solan, *The Written Contract as Safe Harbor for Dishonest Conduct*, 77 CHI.-KENT L. REV. 87, 91 (2001).