INTERPRETING INTERNATIONAL CONTRACTS
FOR SALE IN NEW ZEALAND:
PAROL EVIDENCE, PLAIN MEANING
AND THE CISG

by

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(Under the Direction of Fredrick W. Huszagh)

ABSTRACT
The parol evidence rule has been described as an “embarrassment for the administration of modern transactions”. Nevertheless, in New Zealand it continues to closely influence admissibility of evidence in disputes concerning contractual interpretation. Together with the plain meaning rule, the parol evidence rule affords primacy to parties’ written agreements, often at the expense of any collateral agreement not reflected in the written contract. However, the adoption into New Zealand law of the United Nations Convention on Contracts for the International Sale of Goods has largely nullified the effect of these rules on the interpretation of international sales contracts. This paper identifies the norms of interpretation contained in the CISG and contrasts these against the existing rules of contractual interpretation employed by New Zealand courts in domestic disputes. In addition, options for contracting out of the application of the Convention’s interpretation provisions are canvassed and potential risks and best practice identified.

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CHAPTER 1

INTRODUCTION

The parol evidence rule has been described as an “embarrassment for the administration of modern transactions”.

Nevertheless, in New Zealand, the parol evidence rule, along with the related plain meaning rule, continues to closely influence the admissibility of evidence in disputes concerning contractual interpretation. The parol evidence and the plain meaning rules afford primacy to parties’ written agreements, often entirely at the expense of collateral agreements that are not reflected in the written contract. However, the adoption into New Zealand law of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter the “CISG” or “Convention”) has largely nullified the effects of these rules on the interpretation of international sales contracts.

Despite the immense interest created by the Convention among the overseas scholars, there is little academic commentary or significant case law in New Zealand to guide the legal profession and business people in the application of the Convention and the interpretation of the international sales contracts governed by it.


This paper will identify the norms of interpretation contained in the Convention and contrast them with the existing rules of contractual interpretation employed by the New Zealand courts in domestic commercial disputes. It will also demonstrate that the purpose of the Convention and the rules relating to its interpretation have a significant impact on the interpretation of international sales contracts, and as a result, an international stance is, therefore, essential. Where New Zealand law fails to provide clear guidance on a particular issue, this paper will examine authorities from other common law jurisdictions as well as various international instruments. Thereafter, it is will canvass options for contracting out of the application of the Convention’s interpretation provisions and explore potential risks and best practice.
CHAPTER 2
PAROL EVIDENCE AND PLAIN MEANING RULES

A Parol Evidence Rule - Introduction

Despite its name, the parol evidence rule is a principle of substantive law going towards interpretation of a contract, rather than a mere procedural rule of evidence.\(^3\) The rule reflects the traditional primacy ascribed under the common law to contractual agreements which are reduced to writing. Such agreements are proved by production of the written contract.\(^4\) Determining the terms of a written contract falls exclusively within the jurisdiction of the judge.\(^5\) Generally speaking, a judge exercising this function is constrained by the parol evidence rule so that extrinsic evidence tending “to add to, vary or contradict” the express terms of the contract is inadmissible.\(^6\) In the context of the rule, the term “parol evidence” is not limited to oral evidence; the rule also extends to exclude previous drafts of the written contractual document, copies of preliminary agreements and any letters or communications forming part of the negotiations connected with the final written agreement.\(^7\)


\(^7\) Chetwin & Graw, *supra* note 4, at 172.
**B Parol Evidence Rule - Historical Underpinnings**

The parol evidence rule was designed to serve two principal policy concerns. First, the rule was traditionally aimed at preventing an impressionable trier of fact from being misled by the adduction of perjured oral evidence.\(^8\) This is sometimes referred to as the evidentiary function.\(^9\) In jurisdictions such as New Zealand and Australia where civil jury trials no longer take place, the value of such a policy consideration must be minimal at best.\(^10\) Even in the United States, where civil jury trials are still conducted, this policy justification has been criticised. Given that juries in both tort and criminal trials are entrusted to determine the credibility of witnesses, there would seem no sound reason why a different regime should operate when the issue before the court is one of contract.\(^11\)

Second, by providing an assurance that the terms of a written contract cannot not be undermined by contradictory oral evidence, the rule seeks to achieve certainty in transactions generally by encouraging parties to reduce their agreements to a final

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\(^10\) If there were truly a concern as to a trial judge’s ability to detect perjured testimony, this concern is not alleviated by reliance on the parol evidence rule. Where a judge determines both admissibility and weight of relevant evidence, the rule cannot operate to shield the trier of fact from perjured evidence as the judge must examine the evidence when determining its admissibility. See Torzilli, *supra* note 8, at 867.

\(^11\) Torzilli, *supra* note 8, at 867-869.
written document. This is sometimes referred to as the channelling function.\(^\text{12}\) By ensuring that the written contract constitutes a total expression of the terms agreed to between the parties, the rule should, in theory, decrease the likelihood of a later dispute as to the exact content of the parties’ agreement. However, disputes involving the parol evidence rule tend to be heavily litigated.\(^\text{13}\) Moreover, pure oral testimony has now been supplemented by the advent of electronic communications as a source of collateral agreements. Given the latter’s greater reliability (when contrasted against a party’s recollection of an oral understanding), it is arguable whether the parol evidence rule continues to fulfil a valid policy function in this respect.\(^\text{14}\)

\section{C Plain Meaning Rule}

Under the plain meaning rule, if the words of a written contract are unambiguous, evidence of external context will not be admitted to qualify their meaning.\(^\text{15}\) Traditionally, the words employed by the parties were given their “natural and ordinary meaning”\(^\text{16}\) and only in the event of latent ambiguity would evidence of external context or the “matrix of fact”\(^\text{17}\) be admitted to assist in interpretation of a contractual term. The

\(^{12}\) Advisory Opinion, \textit{supra} note 9, § 1.2.7.

\(^{13}\) In the New Zealand context, \textit{see} David W. McLauchlan, \textit{A Contract Contradiction}, V.U.W.L. Rev. 33 (1999). \textit{See also} Torzilli, \textit{supra} note 8, at 869-870.

\(^{14}\) \textit{See generally} McLauchlan, \textit{supra} note 13, at 182-184 (where McLauchlan makes a similar criticism).

\(^{15}\) BURROWS, FINN & TODO, \textit{supra} note 5, at 170.


\(^{17}\) The concept of the “matrix of fact” has its origins in Lord Wilberforce’s judgment in Prenn v. Simmonds [1971] 1 W.L.R. 1381, 1384-1386 and is frequently referred to in the relevant case law. For further discussion on the “matrix of fact” \textit{see infra} notes 34-58 and accompanying text.
rule is designed to yield certainty of interpretation and reinforces the parol evidence rule so that evidence may not be admitted to vary the parties’ bargain. In restricting the range of materials available to a court when interpreting a contract, the rule is advocated as being more economical in terms of time and expense.

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18 Burrows, Finn & Todd, supra note 5, at 170.

19 Id. at 170.
CHAPTER 3

CONTRACT INTERPRETATION IN NEW ZEALAND: PAROL EVIDENCE, PLAIN MEANING AND “MATRIX OF FACT”

A Principles of Contract Interpretation

1 Parol Evidence Rule

As outlined above, the parol evidence rule operates to exclude extrinsic evidence which contradicts, varies or supplements a written agreement. However, the rule is subject to a number of well-established exceptions.

(a) Incomplete Contract

First, nothing in the rule should operate to exclude extrinsic evidence where it is clear that the contract is not, and was not intended to be, a complete record of the parties’ bargain. However, the rule creates a rebuttable presumption that a document that otherwise appears to be a complete contract will be treated as such. Yet, courts differ, in their approach to determining whether or not a contract is, in fact, complete. In the United States, for example, some courts deem a contract complete if it appears so

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20 See infra notes 3-7 and accompanying text.

21 Hoyts Pty Ltd v. Spencer (1919) 27 C.L.R. 133, 143.

“on its face”, while others will declare a contract complete only if such conclusion is supported by the available extrinsic evidence.\(^{23}\)

(b) **Collateral Contract**

Second, common law courts have been prepared to read oral agreements between contracting parties in conjunction with a written instrument to produce one comprehensive contract, through a device called “collateral contract”.\(^{24}\)

To establish the existence of a collateral contract two requirements must be fulfilled: first, the representor must have intended the promise to be legally binding, and second, the representee must have entered into the contract in reliance on that intention, i.e. without it the main contract may never have come into being.\(^{25}\) Collateral contracts must also satisfy the essential elements of a valid contract, namely agreement (i.e. offer and acceptance), consideration and intention to be bound.\(^{26}\)

It is clear that extrinsic evidence of a collateral contract which is complementary to a written agreement is more likely to be admissible than one which contradicts an express written term.\(^{27}\)


\(^{25}\) De Lassale v. Guilford [1901] 2 K.B. 215. See also CHETWIN & GRAY, supra note 4, at 177.

\(^{26}\) See CHETWIN & GRAY, supra note 4, at 178-180.

Nonetheless, even in the latter situation, New Zealand courts may admit extrinsic evidence that varies an express contractual term where such extrinsic evidence merely alters an aspect of a contractual term “without being directly contradictory of its main purpose”.  

(c) Other

In addition to partly oral, partly written contracts, extrinsic evidence may also be admissible where:

(i) the parties intend one or more terms of the contract to be subject to some form of trade usage or custom. In *Everist v. McEvedy* Tipping J summarised the main principles (originally enunciated in the leading New Zealand case *Woods v N J Ellingham*) of whether a custom may be implied. He stated that:

> First the custom must have acquired such notoriety that the parties should be taken to have known of it and intended that it should be part of their contract; second the custom must be certain; third it must be reasonable; fourth it must be proved by clear and convincing evidence and fifth it must not be inconsistent with any express term of the contract.

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28 *A M Bisley, supra* note 24, at 701-702.
29 *BURROWS, FINN & TODD, supra* note 5, at 167; *See also CHETWIN & GRAW, supra* note 4, at 174-176.
(ii) an oral agreement between the parties exists to suspend operation of the contract until fulfilment of some specie of condition precedent. This exception exists, because in such circumstances the extrinsic evidence does not “vary, add to or contradict” the written agreement, as there was never any agreement entered into;\(^\text{32}\)

(iii) extrinsic evidence is put forward that the contract is, or has become, invalid. This exception is allowed because the evidence does not go “to the contents of the contract but as to some defect in the manner in which it has come into being”.\(^\text{33}\) Accordingly, extrinsic evidence can be used to prove contractual invalidity on the grounds of duress, undue influence, incapacity or misrepresentation; or

(iv) as a result of a mistake, a prior oral agreement has not been correctly recorded in the final written contract and rectification is sought.

2 Plain Meaning and “Matrix of Fact”

(a) General Principles of Interpretation

Despite the traditional operation of the plain meaning rule, it is now well established that the modern approach of the English and the New Zealand courts to contractual interpretation has been to “assimilate the way in which such documents are

\(^{32}\) Pym v. Campbell (1856) 6 El. & Bl. 370 (Q.B. 1856).

\(^{33}\) JOSEPH CHITTY, CHITTY ON CONTRACTS 176 (28th ed. 2004).
interpreted by judges to common sense principles by which any serious utterance would be interpreted in ordinary life."  

These principles, originally articulated by Lord Wilberforce in *Prenn v. Simmonds* and *Reardon Smith Line Ltd v. Yngvar Hansen-Tangen*, have been famously summarised by Lord Hoffmann in *Investors Compensation Scheme* (which is perhaps the most cited case in commercial disputes in England) in the following passage:

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background… ‘matrix of fact’… is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and the exception [in 3] and to the exception to be mentioned next, it includes absolutely anything which would have

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37 *See Investors Compensation Scheme*, 1 W.L.R. 896.
affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life...

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax...

(5) The ‘rule’ that words should be given their ‘natural and ordinary meaning’ reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would
nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had…

The decision in *Investors Compensation Scheme* has been referred to in virtually every subsequent contract interpretation case and was adopted without reservation in New Zealand in *Boat Park*.  

(b) *When can the ‘matrix of fact’ be referred to?*

In New Zealand, there does not appear to be any coherent approach as to whether the “matrix of fact” can only be referred to if the words of the contract are vague, ambiguous or uncertain or whether the matrix can act as an automatic check, regardless of the plain meaning.

Traditionally, the New Zealand courts favoured the former approach. In *Benjamin Developments v. Robt Jones (Pacific) Ltd*, where the contract provided that the premises were to be “leased at the rates” stipulated in it, the Court of Appeal declined to examine the surrounding context, as the plain meaning of the words was clear. The Court declared that “where parties contract their obligations, rights and responsibilities,

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38 Boat Park Ltd v Hutchinson [1999] 2 N.Z.L.R. 74. For further discussion on the decision in Boat Park, see infra note 41 and accompanying text.


are to be determined from a reading of the contract. If there is uncertainty or ambiguity then the surrounding factual matrix will be taken into account.\textsuperscript{41}

On the other hand, in \textit{Boat Park Ltd v. Hutchison}\textsuperscript{42} the Court of Appeal rejected the plain meaning rule as “outdated” and bypassed it in favour of a more liberal approach. \textit{Boat Park} concerned the sale and purchase of a large block of land purchased for the purpose of subdivision. The contract included a provision for a vendor mortgage. The Court implied a term that the valuation must be “suitable for mortgage lending purposes” in order to give effect to the purpose of the clause, which was to protect the vendor in the event of the purchaser’s default. The valuation provided did not comply with this purpose, and the purchaser’s appeal was, therefore, dismissed.

Today, some recent New Zealand cases cite the dicta from \textit{Benjamin Developments} alongside the principles in Lord Hoffmann’s judgement.\textsuperscript{43}

Perhaps to deal with this conundrum, the Court of Appeal in \textit{Pyne Gould Guinness}\textsuperscript{44} has formulated a middle-ground “cross-checking” approach, which advocates the plain words of the contract as a starting point:

\begin{verbatim}
\textsuperscript{41} \textit{Id.} at 196.
\textsuperscript{42} \textit{Boat Park}, 2 N.Z.L.R. 74.
\textsuperscript{43} BURROWS, FINN & TODD, supra note 5, at 173.
\end{verbatim}
The best start to understanding a document is to read the words used, and to ascertain their natural and ordinary meaning in the context of the document as a whole. One then looks to the background – to “surrounding circumstances” – to cross-check whether some other or modified meaning was intended. Apart from matters of previous negotiation, and matters of purely subjective intention as to the meaning, both excluded on policy grounds, one looks at everything logically relevant.

(c) What can the “matrix of fact” contain?

Once it is concluded that evidence of the “matrix of fact” can be admitted, what is its scope? According to Lord Hoffmann’s second principle it can include “almost anything”. However, it should be noted, that in a subsequent case of Bank of Credit & Commerce International SA v. Ali45 Lord Hoffmann acknowledged that he was not “encouraging a trawl through ‘background’ which could only have made a reasonable person think that the parties must have departed from conventional usage.” By “absolutely anything” he, in fact, meant only anything a reasonable person would regard as relevant.

Nonetheless, Lord Hoffmann’s third principle excludes from the “matrix of fact” several important categories of conduct.

(i) Pre-Contractual Negotiations

\footnote{Ali, 1 All E.R. 961 at 975.}
Evidence of the parties’ prior negotiations and their declarations of subjective intent do not properly form part of the matrix. 46 This accords with the objective approach to contract interpretation. But even then, parties’ previous negotiations may sometimes be accepted as relevant if used for the purpose of ascertaining what objectively observable facts (but not intentions) must have been within the contemplation of both parties.47

Some members of the judiciary have advocated relaxing this restriction even further.

For example, in Air New Zealand Ltd v. Nippon Credit Bank Ltd,48 the Court allowed the possibility of admission of evidence of previous negotiations to resolve ambiguity in written contacts. Although irreconcilable with Lord Hoffman’s principles, the decision endorsed the following guidelines of interpretation originally laid down in the The Karen Oltmann49 case:

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48 Nippon Credit Bank, 1 N.Z.L.R. 218 at 223.

If a contract contains words which, in their context, are fairly capable of bearing more than one meaning, and if it is alleged that the parties have in effect negotiated on an agreed basis that the words bore one of the two possible meanings, then it is permissible for the Court to examine the extrinsic evidence relied upon to see whether the parties have in fact given their own dictionary meaning to the words as the result of their common intention.

McLauchlan in his commentary, has ventured further by asking why the exceptions should only confined to contracts where the words of the contract are ambiguous? Why should the parties' “common intention” be defeated simply because the words of the contract appear on their face to have a plain meaning?50 In his view, plain meaning should be persuasive, but not conclusive, evidence of the meaning intended by the parties.51

Similarly, in his dissenting judgment in *Yoshimoto v Canterbury Golf*52 Thomas J suggested that exceptions to the exclusionary rule should be made where “a departure would enable the Court to arrive at a meaning of the contract which accords with the ascertainable intention of the

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parties”. However, as the case had leave for appeal to the Privy Council, he noted “the reluctance of the English courts to look at extrinsic evidence as an aid to interpretation” and for that reason alone has abstained from using it.

Subsequent New Zealand cases have also indicated that this point, while “for present purposes” does not need to be reconsidered, remains open. 

(ii) Subsequent Conduct

The general exclusion of evidence establishing subjective intention traditionally extended to both pre- and post-contractual behaviour. However, most of the questions relating to the exclusion of pre-contractual negotiations discussed above also apply here. Extra-judicially, Lord Nichols commented that:

This exclusion is surprising. As with pre-contract negotiations, I suspect that in practice judges from time to do have regard to post-contract conduct when interpreting

53 ld. at 541.

54 See Bank of Credit & Commerce International SA v. Ali [2001] 1 All E.R. 961, 973 (where Lord Nicholls suggested that he would wish to keep the point open); See also Electricity Corporation of NZ Ltd v. Fletcher Challenge Energy Ltd. [2001] 2 N.Z.L.R. 219 (where majority said that “for present purposes” they had no need to reconsider the rule). But see Fletcher Aluminium Ltd v. O’Sullivan [2001] 2 N.Z.L.R. 731, 740 (where the Court of Appeal said that it is “wrong in principle” to look at negotiations and subjective intentions).

55 BURROWS, FINN & TODD, supra note 5, at 177.

contracts. It is surely time the law recognised what we all recognise in our everyday lives, that the parties’ subsequent conduct may be a useful guide to the meaning they intended to convey by the words of the contract. Judges are well able to identify, and disregard, self-serving subsequent conduct.

This proposition may now also be open to challenge in practice. In *Attorney-General v. Dreux Holdings* the Court of Appeal noted the well-established North American practice of admitting post-contractual behaviour to establish intention.  

Some subsequent New Zealand Court of Appeal cases have gone even further and referred to the possibility of the meaning (to which other factors are pointing) being illuminated by subsequent conduct.

## (d) References to the CISG

Interestingly enough Their Honours in both *Yoshimoto* and *Dreux Holdings* observed that it would be open to the Court to depart from the law as applied in England

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58 *Id.* at 627 (where the Court referred to a Canadian case of Montreal Trust Co of Canada v. Birmingham Lodge Ltd (1995) 125 D.L.R. (4th); 24 OR (3d) and to the United States U.C.C. § 2-208 (1977) and Restatement (Second) of Contracts § 202(4) (1981)).


61 *Dreux Holdings*, 7 T.C.L.R. 617 at 627.
on the basis of New Zealand’s implementation of the CISG and pronounced their support for the aligning of New Zealand’s domestic contract law with international best practice. Indeed, the exclusions in Lord Hoffmann’s third principles are inconsistent with most other legal systems as well as the CISG,\textsuperscript{62} UNIDROIT Principles of International and Commercial Contracts (hereinafter referred to as the “UNIDROIT Principles”)\textsuperscript{63} and the Principles of European Contract Law.\textsuperscript{64}

In \textit{Dreux Holdings}, the Court also considered that in interpreting such questions New Zealand should consider consistency with Australian domestic law – in light of Australia being New Zealand’s major trading partner and another Contracting State to the CISG.\textsuperscript{65} However, the question of whether subsequent conduct of parties should

\begin{itemize}
  \item \textsuperscript{62} See Part IV of the paper for discussion on the CISG.
  \item \textsuperscript{63} UNIDROIT is an intergovernmental organisation, which was originally set up through the United Nations, but was subsequently re-established by international agreement. In addition to the UNIDROIT Principles, UNIDROIT also prepared several predecessor agreements to the CISG, such as the Convention Relating to a Uniform Law on the International Sale of Goods (hereinafter referred to as “ULIS”). The most recent version of the UNIDROIT Principles was adopted in 2004, and is available at \url{http://www.unidroit.org} (last accessed on 26/11/07). Art. 3 of the UNIDROIT Principles requires that preliminary negotiations between the parties, practices which the parties have established between themselves, as well as subsequent conduct of the parties be taken into account.
  \item \textsuperscript{64} Commission on European Contract Law, \textit{Principles of European Contract Law, Part I and II Combined and Revised}, (Ole Lando & Hugh Beale eds., 2000) [hereinafter PECL]. Art. 5-102 of the PECL includes among relevant considerations the preliminary negotiations and the parties’ post-contract formation conduct.
  \item \textsuperscript{65} \textit{Dreux Holdings}, 7 T.C.LR. 617 at 627.
\end{itemize}
form part of the “matrix of fact” still remains open in both in Australia\(^{66}\) and New Zealand.\(^{67}\)

The discussion above shows that the parol evidence and the plain meaning rules in New Zealand contract law is a matter of ongoing conjecture for judges, practitioners and academics alike. The inconsistency of the rules’ application and the erosion of their effectiveness by numerous exceptions to them have created uncertainty around rules designed to minimise ambiguity in contractual interpretation. The position of the parol evidence and the plain meaning rules in New Zealand contract law would clearly benefit from further consideration and clarification from the New Zealand Court of Appeal.

**B Contract Interpretation versus Contract Formation: A paradox**

As demonstrated above, the present doctrines of contractual interpretation are not only inconsistently applied, they also, as pointed out by McLauchlan, conflict with the rules employed where the issue before the court is one of contract formation rather than interpretation.\(^{68}\)

\(^{66}\) Id. at 627 (where the question was described as “open”). *See also* Bruno Zeller, *Is the Sale of Goods (Vienna Convention) Act the Perfect Tool to Manage Cross Border Legal Risk Faced by Australian Firms?*, Mur. U.E.J.L. 28 (1999) (where he states that “there is little scholarly writing and no case law of significance in Australia to help business and guide the legal profession in the application of the CISG” and only refers to one Australian case (Roder Zelt und Hallenkonstruktionen GMBH v. Rosedown Park Pty Ltd. [1995] 17 A.C.S.R. 153)).


\(^{68}\) *See* McLauchlan, *supra* note 13.
McLauchlan demonstrates that whether or not extrinsic evidence is admissible may depend on the phrasing of the dispute at hand. If, for example, a party argues that misunderstanding of an essential term meant that there was no *consensus ad idem*, extrinsic evidence will be admissible to establish that the counterparty knew or ought to have known that the other party ascribed a different meaning to the particular contractual term. However, precisely the opposite result is reached if the issue is argued as one of interpretation, with extrinsic evidence being largely inadmissible where the relevant term is unambiguous or capable of objective definition.\(^{69}\)

To have this paradox operating at such a fundamental level of the law of contract appears highly undesirable.

\(^{69}\) *Id.* (See, in particular, Part IV of the McLauchlan’s article).
CHAPTER 4
PRINCIPLES OF CONTRACT INTERPRETATION UNDER CISG

A  Introduction to the Convention

The United Nations Convention on Contracts for the International Sale of Goods has been described as one of modern legal history’s most successful attempts to harmonise international commercial law. The Convention promises to “contribute to the removal of legal barriers in international trade and promote the development of international trade.”

The CISG came into force in 1988 and is “constantly gaining more success as more countries choose to ratify it.” Since its introduction, the Convention has been adopted by 70 countries - Contracting States, as they are referred to in the Convention - including most of New Zealand’s trading partners, such as Australia, France, Italy,


71 CISG, supra note 2.

Germany, Northern Asian economies and the United States. Notably neither the United Kingdom nor Japan have chosen to adopt the Convention.


B Structure of the CISG

The structure of the Convention is as follows. Part I (Articles 1-13), around which majority of this discussion will centre, sets out the sphere of the application of the Convention and the general provisions relevant to any determination concerning an international sale contract subject to the CISG, including provisions as to interpretation, usage and contracting out of the Convention.

Part II (Articles 14-24) deals with the formation of the sale contracts, and Part III (Articles 25-88) contains the main provisions relating to the sale of goods.\(^{73}\)

C Application of the CISG

The Convention’s rules apply to sale contracts between parties in different Contracting States (Article 1(1)(a)), as well as to circumstances where the rules of private international law lead to the application of the law of a Contracting State in accordance with Article 1(1)(b). The Convention may also be applied by a domestic court or an arbitral tribunal, which by virtue of Articles 17(1) and (2) of the ICC Rules of

Arbitration 1998\(^{74}\) holds that there is no better source for determining the appropriate law than the CISG and applies it as a new *lex mercatoria*\(^ {75}\).

One limitation on the Convention’s application and thus perhaps its ability to deliver on its promises is that it’s regime has no mandatory force. In fact, Articles 9 and 6 allow the buyers and the sellers to modify and even exclude the terms of the Convention.\(^ {76}\)

Notwithstanding express clauses in the contract for the sale of goods, the Convention may also be modified or excluded by the adoption of established international trade usages, such as Incoterms.\(^ {77}\) Article 9(1) endeavours to limit the ensuing conflict with these trade usages by allowing the parties to be “bound by any usage to which they have agreed and by any practices which they have established between themselves”. Article 9(2), in turn, states that:

[T]he parties are considered, unless they have otherwise agreed, to have impliedly made applicable to their contract or its formation a usage

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\(^{75}\) See Anna Rogowska, *CISG in the United Kingdom: How does the CISG Govern the Contractual Relations of English Businessmen?* I.C.C.L.R. 226, 227 (2007) (where she uses the term *lex mercatoria* in general sense that embodies international conventions of the sale of goods, unwritten customs and practices specific to a trade or a commercial transaction).

\(^{76}\) For further discussion, see Robin Burnett, *The Law of International Business Transactions* 4 (2004).

\(^{77}\) Incoterms are trade terms developed by international mercantile custom and expanded by the International Chamber of Commerce. For further discussion of Incoterms, see *id.* at 40.
of which the parties knew or ought to have known and which in international trade is widely known to and regularly observed by the parties to contracts of the type involved in the particular trade concerned.

**D Interpretative Framework under the CISG**

Article 1 of the CISG provides its own distinct norms and principles for the interpretation of not only the international sales transactions, but also of the Convention itself. These norms and principles are drawn from both the common and civil law traditions.

**1 Article 7**

In line with the Convention’s promise to “contribute to the removal of legal barriers in international trade”, Article 7(1) mandates that “[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.”

Courts in a number of jurisdictions have emphasised this approach when interpreting treaties in general. For example, Lord Wilberforce called for an approach,

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78 Advisory Opinion, *supra* note 9, at § 1.1.1.

79 Please note that the issue of observance of good faith in international trade was not addressed in this paper.

appropriate for the interpretation of an international treaty or a convention, unconstrained by technical rules of English law, or English precedent.\textsuperscript{81}

Article 7(2), in turn, states that cases “not expressly settled” by the CISG must be “settled in conformity with the general principles on which it is based”. Honnold refers to this language as is the “gap-filling” provision of the CISG\textsuperscript{82} and sees it as a message to the courts to interpret the treaty in light of its “international character” at the expense of any special rules of domestic commercial law. Honnold commented that:

[T]he domestic law would be foreign to one of the parties, and in most cases would be unsuited to the problems of international trade...

[R]eferring gap-filling to the diverse rules of domestic law would never lead to a uniform solution whereas recourse to the general principles of the Convention would develop common answers to the questions that arise within the scope of the law.\textsuperscript{83}

However, this interpretation of Article 7(2) is not without its critics, who submit that gap-filling should instead be approached through the medium of domestic law.\textsuperscript{84}

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\textsuperscript{82} \textit{See} Honnold, Uniform Law for International Sales, supra note 1, at 148-149.

\textsuperscript{83} \textit{Id}.

2 Article 8

If the principles in Article 7 provide the format for interpretation of the Convention, Article 8 then provides the framework for the interpretation. Article 8 contains the principal rules to be applied when interpreting a contract to which the CISG applies. The Article reads:

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

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

(c) 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.

Provisions of Article 8 mean that the language of the contracting parties will influence the interpretation of contracts in a wide variety of situations.\textsuperscript{85} Several basic points should be noted. First, Article 8 is applicable whether the contract is formed

\textsuperscript{85} See Honnold, Uniform Law for International Sales, supra note 1, at 177.
through the execution of a single contractual document or through an exchange of communications. Nowhere in the CISG is special primacy afforded to a contractual writing over other binding forms of undertaking. In fact, Article 11 provides that “a contract of sale need not be concluded in or evidenced by a writing. It may be proved by any means, including witnesses”.86

In addition, Article 8 specifically refers to the relevance of both pre- and post-contractual conduct to a trier of fact’s consideration.

Paragraph (1) (perhaps controversially from the perspective of a common law practitioner)87 is focused on subjective intent. A party’s intent may, therefore, be relevant to interpretation, but only where the other party either knew, or could not have been unaware of, that party’s intention. At a practical level, frequent consideration of Article 8(1) is unlikely to be necessary, due to the difficulty in producing credible evidence that a party possessed a particular intent during contracting process that was known to the other party or of which the other party could not have been unaware.88 However, evidence adduced by the purchaser in MMC-Marble (discussed in Part IV

86 CISG, supra note 2, Art. 11.
88 MCC-Marble Ceramic Center, Inc v. Ceramica Nuoca D’Agostino SpA 144 F.3d 1384 (11th Cir. 1998), 1391. See also HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES, supra note 1, at 117.
below) required the Eleventh Circuit to consider the provision, and it has been considered in a number of European CISG cases.\(^89\)

Where a party cannot bring itself within Article 8(1), Article 8(2) requires that an objective meaning be given to the conduct of a contracting party. The objective standpoint adopted is that of a reasonable person “of the same kind as the other party”. The phrase is intended to refer to “a person from the same background as the person concerned and engaged in the same occupation”.\(^90\) The provision establishes that statements or other conduct of a party will be construed \textit{contra preferentum}. In the context of international sales, the wording of the provision mitigates the use by one party of concepts that are ambiguous or obscure to the counterparty. Moreover, a party must be particularly alive to the possibility that a legal term may have divergent meanings in different jurisdictions. Where this is the case, the term will likely be given the meaning that would be attributed to it by a reasonable person in the counterparty’s jurisdiction.\(^91\) This also has significance in respect of the reference in Article 8(3) to trade usages as these again will be subjected to \textit{contra preferentum} treatment where the parties’ interpretations of the particular term do not coincide.\(^92\)

\(^{89}\) See e.g., CA Grenoble, RG/3275, 22 February 1995; SARL Bri. “Bonaventure” v. SPAE, as cited in HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES, supra note 1, at 117.


\(^{91}\) See also HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES, supra note 1, at 117.

\(^{92}\) For a discussion of trade usages under Arts. 8(2) and (3) of the CISG, see OLG Hamm, 11 U 206/93, 8 February 1992.
Of most relevance, however, to a discussion of parol evidence under the CISG is Article 8(3). The intent of a contracting party is to be ascertained by reference to all the relevant circumstances of the case, including:

(i) negotiations;

(ii) practices established between the parties,\(^93\)

(iii) usages,\(^94\) and

(iv) subsequent conduct of the parties.

In stark contrast to the position for interpretation of a domestic sales contracts in New Zealand, negotiations and other forms of extrinsic evidence (both those listed in Article 8(3) and more generally) will be available for the court’s consideration in respect of an international sales contract for any interpretative purpose and not merely where the document is ambiguous on its face. Consideration of Article 8(3) will inform any determination to be made under either of Articles 8(1) or 8(2).

\(^{93}\) CISG, \textit{supra} note 2, Art. 9(1).

\(^{94}\) CISG, \textit{supra} note 2, Art. 9(2).
CHAPTER 5
APPLICATION OF CISG
A  Parol Evidence Rule and the CISG

1  Background

As can be seen from the above discussion, the text of Article 8(3) does not explicitly override the parol evidence rule. In fact, it could be said that the words of the Article are somewhat vague.

Thus, common law courts initially struggled with whether the placing of the CISG on the domestic statute books required a wholesale rejection of the parol evidence rule when interpreting international sales contracts. The conflict has principally been played out in United States’ courtrooms given the dearth of the CISG authority from other common law jurisdictions. The United States CISG case law has been described as “by far the most developed and thoroughly examined amongst common law member states to the CISG.”\(^ {95} \) It contributes 85 decisions to the CISG case database established by Pace University, compared to New Zealand’s 9 and Australia’s 11 decisions.\(^ {96} \)

It should be noted at this point that there are some differences between the operation of the parol evidence rule in the United States and its operation in England,


Australia and New Zealand. Under the laws of the latter countries, the rule establishes a rebuttable presumption that the writing was intended to include all terms of the contract. In the United States, a court first asks whether the writing is “integrated,” that is, whether the writing was intended as a final expression of the terms it contains.

The operation of the rule is qualified by a further distinction between “completely integrated” and “partially integrated” written contracts, which is determined by the degree to which the parties intended the writing to reflect their final bargain. The legal effect of such a determination is that, in the case of a partially integrated agreement, evidence of prior agreements or negotiations is admissible to supplement, but not to contradict, the writing. Where the writing is completely integrated, i.e. that is where it was intended to completely represent the parties’ agreement, not even a consistent additional term would be admissible. Needless to say, there are differing approaches to how the question of complete and partial integration is determined.

2 Beijing Metals & Minerals Import/Export Corp. v American Business Center, Inc

Early jurisprudence from the United States dealing specifically with application of the parol evidence rule in CISG cases was unpromising. In Beijing Metals, the first case

98 See generally, E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS, § 7.2-7.3 (3rd ed. 2004).
99 Advisory Opinion, supra note 9, § 1.2.5.
100 Advisory Opinion, supra note 9, § 1.2.5.
101 993 F.2d 1178 (5th Cir. 1993).
to directly consider the issue, the District Court for the Southern District of Texas recognised that the CISG applied to a contract for the sale of fitness equipment by a Chinese seller to a United States buyer. However, the District Court held that the parol evidence rule prevented the introduction by the buyer of evidence regarding two further oral agreements between the parties which contradicted their written contract.\footnote{Id. at 1182.} Nothing in the contract indicated the existence of contingent collateral agreements and, given the unambiguous nature of the writing, the Court held that the oral agreements could not be employed as a defence against the buyer’s payment obligations under the written contract.\footnote{Id.}\footnote{Id.} This was affirmed on appeal by the Court of Appeals for the Fifth Circuit, which determined that the parol evidence rule applied regardless of whether the CISG or Texas state law governed the dispute.\footnote{Id.}

It is generally accepted by commentators that the \textit{Beijing Metals} decision is unsound, and abrogates the responsibilities of domestic courts under Article 7 when applying the CISG.\footnote{See generally Calleo, supra note 3, at 817-818 and Torzilli, supra note 8, at 860-862. But see D.H. Moore, \textit{Note: The Parol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying Beijing Metals & Minerals Import/Export Corp. v American Business Center, Inc.}, B.Y.U.L. Rev. 1347 (1995) (where Moore attempts a considered argument in support of the decision in \textit{Beijing Metals}). However, even this careful analysis requires a straining of the Convention’s meaning in order to justify the rule. \textit{See e.g.}, R.N. Andreason, \textit{MCC Marble Ceramic Center: The Parol Evidence Rule and Other Domestic Law under the Convention on Contracts for the International Sale of Goods}, B.Y.U.L. Rev. 351, 364-368 (1999).} In addition, the decision ignored dictum from \textit{Filanto, SpA v
Chilewich Int’l Corp, an earlier CISG decision which had suggested that the parol evidence rule did not apply to the CISG cases.

3 MCC-Marble Center, Inc. v Ceramica Nuova D’Agostino

The first, fully reasoned judgment to consider the relationship between the CISG and the parol evidence rule was the decision of the Court of Appeal for the Eleventh Circuit in MCC-Marble Center, Inc. v Ceramica Nuova D’Agostino. The case involved a contract for the sale of ceramic tiles by an Italian manufacturer to a United States buyer. During the course of a trade show in Italy, the parties had agreed orally on a number of key terms, including price and quantity. MCC’s president had then signed D’Agostino’s standard, pre-printed order form written in Italian. No translation of the order form was requested prior to signing. Included in the form’s terms was a clause requiring the buyer to give written notice of any defects in the merchandise within 10 days after delivery. In addition, any delay in payment would permit the seller to cancel all contracts with the buyer. Directly above the signature line, the form provided (in Italian) that the buyer was aware of, and approved, these terms. MCC later complained orally about the quality of tiles in some shipments and withheld certain

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107 144 F.3d 1384 (11th Cir. 1998).

108 ld. at 1385.

109 ld. at 1386.

110 ld.
payments on this basis. D’Agostino then refused to make further shipments of MCC’s orders.\textsuperscript{111}

MCC sued D’Agostino in the Federal District Court for alleged defects in the tile shipments and for failing to fulfil further orders made under the parties’ contract. D’Agostino counter-claimed for the balance due on the tile deliveries already made and moved for summary judgment. At trial, MCC alleged that neither party intended to be bound by the provisions on the reverse of the order form signed by MCC. Pursuant to Article 8(1) of the CISG, MCC argued that this intent was subjectively shared by the parties, even in the absence of manifest objective intent to that effect. In support of its allegation, MCC tendered affidavits from its president, a former commercial director of D’Agostino and the agent who had acted as translator in the negotiations. MCC argued that the affidavits precluded summary judgment on the basis that they raised a genuine issue of material fact. At first instance, Article 8(1) was held inapplicable because the evidence MCC was attempting to adduce was for the purpose of contradicting the provisions of the order forms, rather than interpreting the parties’ statements.\textsuperscript{112} MCC appealed.

Before the Eleventh Circuit, MCC argued that the Convention rejected the parol evidence rule on which the District Court’s judgment had implicitly been founded and that this, combined with the emphasis given to any shared subjective intent of the

\textsuperscript{111} Id.

\textsuperscript{112} Id. See also H.M. Flechtner, The U.N. Sales Convention (CISG) and MCC-Marble Ceramic Centre, Inc. v. Ceramica Nuova D’Agostino SpA: 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, 262 (1999).
parties under Article 8(1), meant that the affidavits produced raised a material issue of fact preventing the entry of summary judgment. The Court accepted MCC’s arguments, overturning the District Court’s decision and remitting the case to a full hearing. On the Court’s reasoning, Article 8(1) encompasses interpretation of the parties’ conduct and is not limited to interpretation of the terms of a contract. While expressing doubt as to their future credibility, the Court held that the affidavits offered evidence of a subjective intent held by both MCC’s president and D’Agostino’s representative. Given that the case therefore fell squarely within the boundaries of Article 8(1), the Court held that it was obligatory to consider MCC’s evidence “as it interprets the parties’ conduct”.

4 Rejection of parol evidence rule

Having reached a conclusion as to the Court’s obligation to consider MCC’s affidavit evidence under Article 8(1), the Eleventh Circuit in MCC-Marble went on consider whether, in CISG cases, the parol evidence rule could continue to play any role in determining the admissibility of evidence tending to vary or contradict a contract in writing. The Court concluded that the requirement in Article 8(3) to determine the parties’ intent by giving “due consideration” to “all relevant circumstances of the case

113 See Flechtner, supra note 111, at 263.

114 Id. at 264.

115 MCC-Marble Center, Inc. v Ceramica Nuova D’Agostino 144 F.3d 1384 (11th Cir. 1998), at 1388.
including the negotiations” could only entail a wholesale rejection of the parol evidence rule.\footnote{Id. at 1389-1390.}

Unusually, the Court gave substantial consideration to the academic comment that existed on the issue,\footnote{Id. at 1390.} including references to Honnold’s work on the Convention\footnote{HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES, supra note 1, at 170-171.} and the English-language work of civil law academics.\footnote{See H. BERNSTEIN & J. LOOKOFFSKY, UNDERSTANDING THE CISG IN EUROPE: A COMPACT GUIDE TO THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 29 (1997). See also Flechtner, supra note 111, at 269-270 (where he notes that this reliance by the Eleventh Circuit on academic writing in the area incorporates an element of the civil law tradition and evidences a genuine attempt on the part of the Court to fulfil its obligations under Art. 7 of the Convention.)} Amongst other things, these works evidenced the reality that a large number of other signatory states to the CISG have rejected the rule in their domestic jurisdictions.\footnote{MCC-Marble, supra note 114, at 1391.} Noting that providing certainty as to the principles of law governing disputes was a primary motivator behind adoption of the CISG, the Court concluded:

Courts applying the CISG cannot, therefore, upset the parties’ reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result. We may only achieve the directives of good faith and uniformity in contracts under the CISG by
interpreting and applying the plain language of Article 8(3) as written and obeying its directive to consider this type of parol evidence.\textsuperscript{121}

The Eleventh Circuit’s decision in \textit{MCC-Marble} represents “a thoughtful and fairly (but not completely) successful attempt to implement the mandate of CISG 7(1) to interpret the Convention with regard for ‘its international character and ... the need to promote uniformity in its application’”\textsuperscript{122} and has been followed in a number of subsequent decisions. In \textit{Mitchell Aircraft Spares, Inc. v European Aircraft Service} the Court declared that “it must consider any evidence concerning any negotiations, agreements, or statements made prior to the issuance of the purchase order”.\textsuperscript{123} It is also worth noting the case of \textit{Calzaturificio Claudia v Olivieri Footwear Ltd},\textsuperscript{124} which was decided by the Court without relying on the authoritative decision in \textit{MCC-Marble}, because it was released just after the \textit{Calzaturificio Claudia} decision. The Court held that “contracts governed by the CISG are freed from the limit of the parol evidence rule and there is a wider spectrum of admissible evidence to consider in construing the terms of the parties’ agreement.”\textsuperscript{125}

\begin{flushleft}
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} Flechtner, \textit{supra} note 111, at 271.
\textsuperscript{125} \textit{Id.} at 5.
\end{flushleft}
5 CISG Advisory Council Opinion No. 3

Any consternation as to whether the parol evidence rule may operate in conjunction with the CISG has been dispelled by the release of the CISG Advisory Council Opinion No. 3 in October 2004. The opinion categorically states: “The Parol Evidence Rule has not been incorporated into the CISG. The CISG governs the role and weight to be ascribed to contractual writing.”\textsuperscript{126}

In any event, the Convention’s legislative history should have been sufficient to demonstrate that the drafters of the CISG intentionally excluded the parol evidence rule from the Convention’s provisions on interpretation. A version of the rule was proposed by a Canadian delegate in Vienna as a means to limit admissible evidence in cases where the parties had reduced their agreement to writing.\textsuperscript{127} However, the amendment received little support and was strongly resisted by a number of delegates from civil law jurisdictions who argued that to prevent a judge from reviewing all the evidence would violate a fundamental principle of their domestic law.\textsuperscript{128}

\textbf{B Plain Meaning Rule and the CISG}

Not directly dealt with in the North American jurisprudence is the relationship between the plain meaning rule and Article 8 of the CISG. A version of the plain meaning rule can be seen as operating in the majority of the jurisdictions in the United States, given that the plain meaning rule cannot be employed to supplement a written

\textsuperscript{126} Advisory Opinion, supra note 9.

\textsuperscript{127} See Calleo, supra note 3, at 823-826; Advisory Opinion, supra note 9, § 2.3.

\textsuperscript{128} Advisory Opinion, supra note 9, § 2.3; \textit{See also} HÖNNOLD, DOCUMENTARY HISTORY, supra note 83, at 491.
contract where the writing is deemed “integrated”. This would seem to be roughly equivalent to the prohibition imposed on the consideration of external context to qualify a seemingly unambiguous term through operation of the plain meaning rule.

Insofar as *MCC-Marble* holds that application of the parol evidence rule in any form is inconsistent with the CISG, it would be only natural to conclude that the CISG prevents application of the plain meaning rule in international sales disputes.

It is also worth noting that the plain meaning rule is also significantly qualified in the Restatement (Second) of Contracts and is expressly rejected in the Uniform Commercial Code.

The UNIDROIT Principles, which have been described as “in the nature of a restatement of the commercial contract law of the world”, also rejected the plain meaning rule. The interpretation provision of Article 4.1 begins with the following:

(1) A contract shall be interpreted according to the common intention of the parties.

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129 For discussion on the meaning of “integrated”, see *infra* notes 96-9 and accompanying text.

130 Restatement (Second) of Contracts § 212, comment (b) (1981).


133 UNIDROIT Principles, *supra* note 52.
(2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

Article 4.2 repeats the interpretation principles of the CISG, while Article 3 identifies “preliminary negotiations between the parties”, “practices which the parties have established between themselves” and “the conduct of the parties subsequent to the conclusion of the contract” as the circumstances to be given regard to in application of Articles 4.1 and 4.2.

The matter is largely put beyond doubt by paragraph 3 of the Advisory Opinion. The Opinion reiterates that neither Article 8 nor any other relevant provision of the CISG deems a writing to be the preferred, let alone the exclusive determinant of contract’s terms.\textsuperscript{134} Consistent with numerous observations made by the English (and the New Zealand) judiciary,\textsuperscript{135} the Opinion goes on to state that “[w]ords are almost never unambiguous.”\textsuperscript{136} Finally, the Opinion concludes that the application of the plain meaning rule frustrates one of the key goals of contractual interpretation under the CISG, which is to focus attention on the parties’ actual intent.\textsuperscript{137}

\textsuperscript{134} Advisory Opinion, \textit{supra} note 9, § 3.2.


\textsuperscript{136} Advisory Opinion, \textit{supra} note 9, § 3.2.

\textsuperscript{137} \textit{Id.}
an apparently unambiguous writing will not prevent recourse to extrinsic evidence in CISG cases where the evidence assists in determining the parties' intent.\(^{138}\)

\(^{138}\) Id. at § 3.3.
CHAPTER 6
ABANDONING PAROL EVIDENCE RULE IN NEW ZEALAND

If both the parol evidence and the plain meaning rules no longer inform the interpretation of international sales contracts under the CISG, what evidential restrictions (if any) still remain to be imposed by a New Zealand court considering a dispute to which the CISG applies? What weight is to be given to a written agreement where evidence of collateral oral agreements also exists? In addition what, if any, steps can the parties to an international sales contract take in order to ensure that the terms of their written contract are upheld by the courts as the final expression of their bargain?

A New rules of contractual interpretation

1 International Stance

It is undeniable that the success of the Convention as a “uniform” sales law depends entirely on its interpretation by domestic courts. The national courts must be careful not to “plac[e] a ‘domestic gloss’ on [CISG] cases”. The “general principles” of

139 See generally LARRY A. DI MATTEO ET AL., INTERNATIONAL SALES LAW: A CRITICAL ANALYSIS OF CISG JURISPRUDENCE (2005) (where the authors showcased their research, which attempts to show that although there are clear divergences in national courts’ treatment of the CISG, there is a fair amount of evidence to show that national courts are becoming exceedingly sensitive to the “international character” of the Convention and “the need for uniformity.” Unfortunately, it was also clear that the evidence of convergence and “sensitivity” was largely taken from the civil law jurisdictions.)

interpretation of the Convention contained in Article 7, therefore, must always underpin
the approach of any court or arbitral panel in interpreting a contract for the sale of goods
governed by the CISG.

It is apparent that the challenge facing the New Zealand judiciary is considerable.
New Zealand courts need to be prepared to transcend the modes of analysis and rules
of interpretation that they would normally employ in domestic disputes. Unquestioning
application of domestic rules and assumptions, such as the parol evidence and the plain
meaning rules, would be entirely at odds with the international character of the
Convention.

The “gap-filling” process envisaged by Article 7(2), while a very familiar process
in the civil law jurisdictions, is likely to pose difficulties to New Zealand practitioners,
who would no longer be able to draw on the common law to interpret the CISG. The
following five steps have been proposed to assist the common law practitioners in that
respect:

(1998) and Michael J. Kolosly, *Beyond Partisan Policy: The Eleventh Circuit Lays Aside the Parol

and Finance* 46-47 (1993) (where in identifying the above five steps, Wilde and Islam drew heavily on
the works by Honnold, Bonell and Pryles).
1) First it must be determined whether the issue at hand is governed by the Convention. ¹⁴³

2) If the issue is governed by the Convention, the court has to decide whether it is “expressly settled by it”.

3) If there is a gap in the Convention, then the first course should be to resolve the issue “by means of an analogical application of its specific provisions”.

4) The “general principles” on which the Convention is based can then be used. The principles that can be expected to be drawn upon fall into 2 groups. First, those expressly referred to in the Convention, such as the autonomy of the parties,¹⁴⁴ good faith,¹⁴⁵ promotion of uniformity and an international approach¹⁴⁶. The second group is made up of the principles that derive from the repeated use of word or concepts such as “reasonable” or by establishing a “common thread” in a number of provisions. Examples would include the parties co-operating sufficiently to enable the other to properly perform their obligations,¹⁴⁷ the duty to

¹⁴³ This will largely depend on the scope of Arts. 2 to 6 of the Convention.

¹⁴⁴ CISG, supra note 2, Art. 6.

¹⁴⁵ CISG, supra note 2, Art. 7(1).

¹⁴⁶ CISG, supra note 2, Art. 7(1).

¹⁴⁷ CISG, supra note 2, Art. 32(3), 48(2), 60(a), 65.
mitigate loss\textsuperscript{148} and the application of a subjective and an objective tests to the knowledge of one party of the conduct of another.\textsuperscript{149}

5) Finally, if the gap in the Convention cannot be filled, the question before the court is to be determined “in conformity with the law applicable by virtue of the rules of private international law”.

2 \textit{Rejection of Parol Evidence and Plain Meaning Rules}

English precedent, applied by the courts for at least a hundred years, can no longer play a substantial role in the CISG environment. New Zealand courts must be ready to admit any relevant extrinsic evidence, including evidence of both pre-contractual negotiations and post-contractual conduct in order to comply with Article 8(3). \textsuperscript{150}

A party’s subjective intent is also made plainly relevant under Article 8(1). The fact that extrinsic facts are within the mutual contemplation of the parties is no longer a precondition for admission of such evidence, although it may be necessary to establish such mutuality, particularly under Article 8(1).

\textsuperscript{148} CISG, \textit{supra} note 2, Art. 77, 85, 86, 87, 88.

\textsuperscript{149} CISG, \textit{supra} note 2, Art. 2(a), 8, 9(2).

\textsuperscript{150} See e.g., Lord Hoffmann, \textit{The Intolerable Wrestle with Words and Meanings}, S.A.L.J. 1998 658, 670 (where he reveals that judges often “cheat”, bypassing the rule, to give words a flexibility that is perhaps unwarranted.) Thus, it would seem that adhering to the interpretation principles contained in the CISG would probably not considerably alter the current practice.
Most difficult, however, will be the Convention’s requirement that primacy not be given to contractual terms merely because they are in writing. The CISG requires an even-handed consideration of all available evidence of the parties’ agreement in order to determine the terms of the bargain.\textsuperscript{151}

3 \textit{Acknowledgement of scholarly writings and travaux préparatoires}

Under the new interpretative framework included in the CISG, in particular, the terms of Article 7, a New Zealand court would also need to acknowledge elements of the civil law tradition in giving weight to scholarly writings and \textit{travaux préparatoires} when interpreting a contract subject to the provisions of the CISG.\textsuperscript{152} In the context of Article 8 generally, and the parol evidence and the plain meaning rules in particular, the CISG Advisory Council Opinion No. 3 is likely to be extremely persuasive, as well as the Official Records of the 1980 Conference and the UNCITRAL Yearbooks (1968-1978). It is encouraging that the Court of Appeal has already indicated its willingness to embrace the broadened categories of admissible evidence under the CISG, in particular the consideration of the parties’ subsequent conduct.\textsuperscript{153}

\textsuperscript{151} Advisory Opinion, \textit{supra} note 9, § 2.8.

\textsuperscript{152} Flechtner, \textit{supra} note 111, at 268-269. The practice of using extrinsic aids such as \textit{travaux préparatoires} has been advocated in the leading English authority Fothergill v. Monarch Airlines Ltd [1981] A.C. 251, as well as several Australian cases, e.g., Commonwealth v. Tasmania (1983) 158 C.L.R. 1 and Thiel v. Commissioner of Taxation (1990) 64 A.L.J.R. 516.

\textsuperscript{153} Attorney-General v. Dreux Holdings (1996) 7 T.C.L.R. 617, 627.
4 Promotion of the CISG

An important practical consideration as regards the application of the CISG is the promotion of the national court judgements on the CISG regime.\[154\]

A number of helpful databases and publications have been developed to assist in achieving consistency in CISG jurisprudence. The database established by Pace University currently lists over 40 cases that discuss Article 8 of the Convention.\[155\] Other databases include the Case Law on UNCITRAL texts published by UNCITRAL\[156\] (containing abstracts of CISG decisions in the official languages of the United Nations)\[157\], CISG Online (made available by the Institute of Foreign and International Private Law of the University of Freiburg)\[158\] and the UNILEX database published by the Centre for Comparative and Foreign Law Studies in Rome.\[159\]


\[155\] As at 23 November 2007, 41 cases were listed in respect of Art. 8. See http://cisgw3.law.pace.edu/cisg/text/casecit.html (last accessed 25 November 2007).

\[156\] The United Nations Commission on International Trade Law (UNCITRAL) has established CLOUT (an acronym for Case Law on UNCITRAL texts) – a system for collecting and disseminating information on judical decisions and arbitral awards relating to various conventions. CLOUT can be accessed on the UNCITRAL’s homepage http://www.un.or.at/uncitrals/.

\[157\] For a further discussion on CLOUT, see Ferrari, supra note 140, at 255-256.

\[158\] Available at http://www.cisg-online.ch (last accessed 25 November 2007).

\[159\] Available in hard copy from the Centre for Comparative and Foreign Law Studies in Rome.
UNCITRAL should be more active in addressing the promotion of the CISG and should explore the possibility of a protocol to CISG, as well as form a working group to consider further improvements and clarifications to the Convention (like it has done in the area of international commercial arbitration).\textsuperscript{160}

However, the promotion of the CISG’s rules and principles should not stop at the international level. Given the potentially wide application of the CISG,\textsuperscript{161} the implication for New Zealand cannot be underestimated. It is likely that many international sales contracts involving New Zealand businesses – in particular those involving Australia and major European countries - are probably already governed by the CISG.\textsuperscript{162} It is imperative for legal practitioners (both contract drafters and litigators) to understand the CISG and the principles of interpretation laid down in it, which when applied can produce different results to those produced by the application of the parol evidence and the plain meaning rules (as demonstrated by the United States case law ) to avoid claims in negligence.\textsuperscript{163} Business people too would benefit from the familiarity with the CISG’s rules, which can provide meaningful guidance on issues to be addressed and negotiated when planning international deals.\textsuperscript{164} It will be up to the New Zealand Law Commission, the New Zealand Law Society, academics and educational institutions to


\textsuperscript{161} Refer Section C of Part IV of this paper for discussion on the application of the Convention.

\textsuperscript{162} New Zealand Report, \textit{supra} note 153, at § 2.


\textsuperscript{164} Nottage, \textit{supra} note 158, at 830.
promote and teach the CISG regime to New Zealand students, legal practitioners and businesses to overcome their fear of the unfamiliar, and embrace the CISG to maximise its potential to “contribute to the removal of legal barriers in international trade and promote the development of international trade.”

B Merger Clauses under the CISG

Unfortunately, there is a clear trend for New Zealand parties to international sales agreements to seek to nullify application of the CISG through the contracting-out method prescribed in Article 6. In fact, some Australian and New Zealand law firms go as far as to advise their clients to opt out of the CISG. Furthermore, a large number of contracting parties are seemingly unaware that their sales contract is governed by the CISG.

Common practice in New Zealand, and, indeed, throughout common law jurisdictions generally, is to include a “merger” or “entire agreement” clause in written contracts. Such clauses provide that the written agreements in which they appear supersede and cancel any prior agreement between the parties and constitute the complete and exclusive statement of the terms of the relevant agreement. Their aim is to provide certainty as to the terms of the written agreement. In one sense, an “entire agreement” clause is simply a statement of the parties’ agreement that the aspect of the

165 See Richard L. Abel, English Lawyers between Market and State - The Politics of Professionalism (2003). See also, Nottage, supra note 158, at 830-840 (where he discusses overcoming “psychological” phenomenon of embracing the unfamiliar).

166 CISG, supra note 2.

167 See generally, Nottage, supra note 158.

168 See, for instance, Advisory Opinion, supra note 9, at n. 26.
parol evidence rule, which limits the circumstances in which extrinsic evidence may be given of the terms of the contract, applies to the written agreement.\(^{169}\)

The Court in *MCC-Marble* suggested that the use of a merger clause in a written contract would prevent application of Article 8 (and, to some extent, Article 11) and would thereby enable a domestic court to employ the parol evidence rule to exclude extrinsic evidence, which contradicts or varies the written agreement.\(^{170}\)

While many commentators agree that the use of a merger clause may revive application of the parol evidence rule in CISG cases,\(^{171}\) the Advisory Opinion and numerous other commentators suggest that the position is not so clear cut.\(^{172}\) Under the CISG, merger clauses will establish a presumption that prior statements and agreement are not intended to form part of the parties’ agreement, but the actual effect of the clause will be determined by reference to the parties’ statements and negotiations as well as all other relevant circumstances.\(^{173}\) A merger clause will be effective only if its specific wording, together with all other relevant factors, make it clear that the parties


\(^{170}\) MCC-Marble Ceramic Center, Inc v. Ceramica Nuova D’Agostino SpA 144 F.3d 1384 (11th Cir. 1998), at 1391.


intended to derogate from Article 8 for the purposes of contract interpretation.\textsuperscript{174} This places some onus on parties who may later wish to rely on their merger clause to ensure that it is separately negotiated and does not merely form part of standard-form boilerplate provisions of the contract.\textsuperscript{175}

The position taken by the Advisory Council in its Opinion is consistent with the Principles of the European Contract Law, which (in addition to the rebuttable presumption outlined above)\textsuperscript{176} provides that, where a party reasonably relied on declarations or conduct of a counterparty, the counterparty may not seek to rely on a merger clause to have such conduct excluded.\textsuperscript{177} Under the PECL (and, presumably, under the CISG), merger clauses do not extend to the negotiations or to agreements entered into following the conclusion of the contract.\textsuperscript{178}

A conservative approach suggests that, where parties wish to avoid the application of Article 8 to the interpretation of their agreement, a merger clause should be specifically negotiated and should specify that the clause is intended to have the effect of contracting out of at least Article 8(3) of the Convention, if not Article 8 in its entirety. In addition, the clause should also seek to exclude consideration of extrinsic evidence when interpreting the merger clause itself.

\textsuperscript{174} Id. at § 4.6.
\textsuperscript{175} Id. at § 4.4.
\textsuperscript{176} PECL, \textit{supra} note 63, Art. 2:105(2).
\textsuperscript{177} Id. Art. 2:105(4).
Given that the parties wish to assert the primacy of the writing, contracting out of Article 11 must also be considered. Where the parties employ specialised trade terms in their written agreement which are intended to carry the definition prescribed in that written agreement, contracting out of Article 9(1)\textsuperscript{179} will also be necessary. However, the Advisory Opinion suggests that a merger clause will not generally operate to exclude consideration of trade usages under Article 9(1), or for that matter any of the other exceptions to the parol evidence rule.\textsuperscript{180} Most importantly, a merger clause must clearly demonstrate that it is based on the parties’ mutual intentions.\textsuperscript{181}

Given the potential complexity involved in drafting a binding merger clause, it is hardly surprising that parties may instead opt to contract out of the Convention in its entirety, rather than risk application of certain of its provisions despite an express contractual term to the contrary.

\textbf{C \quad Should the CISG’s interpretation principles inform New Zealand domestic law?}

An interesting question is whether the CISG’s norms of interpretation should inform New Zealand’s domestic contract law. While it is not the purpose of this paper to discuss the arguments for and against such a development, incorporating provisions like Article 8 into domestic law would not only reduce the disconnect between the legal doctrines governing contract formation and those applicable to contract interpretation,

\begin{itemize}
\item \textsuperscript{179} Advisory Opinion, above supra 9, at § 4.7.
\item \textsuperscript{180} Andreason, supra note 104, at 371.
\item \textsuperscript{181} Attorney-General v. Dreux Holdings (1996) 7 T.C.L.R. 617, 627.
\end{itemize}
but would also promote international legal harmonisation. The New Zealand Court of Appeal has shown some sympathy to this approach by observation that “[t]here is something to be said for the idea that New Zealand domestic contract law should be generally consistent with the best international practice”. \(^{182}\)

It is worth noting that New Zealand has been willing to incorporate the principles of international conventions into its domestic law. For example, the Arbitration Act 1996 was based on the Model Law on International Commercial Arbitration, developed by the United Nations Commission on International Trade Law. The Model Law on International Commercial Arbitration has been recently updated and these changes have been incorporated into the Arbitration Amendment Act 2007, thus ensuring that New Zealand remains current with international best practice. Incidentally, New Zealand is one of the first countries to adopt these changes.

Statutory amendment of the existing common law rules of contract interpretation to allow the judiciary greater flexibility when interpreting contracts could, perhaps, be justified on this basis.

Adoption of the CISG as the governing law for international sales disputes in New Zealand represents a major departure from existing rules of contractual interpretation. The Convention not just permits, but rather requires, consideration of many classes of evidence previously rendered inadmissible by the operation of both the parol evidence and the plain meaning rules. In order for New Zealand courts to fulfil their clear mandate under Article 7 of the Convention, all relevant extrinsic evidence must be admitted to reach a final determination as to the meaning of particular provisions of an international sales contract.

While there is currently no New Zealand authority directly on point, the courts’ obligations under the Convention warrant consideration of existing international jurisprudence that deals with the interpretation of international sales contracts in situations where the parol evidence and the plain meaning rules cannot apply. Of great influence will be the detailed academic commentary which discusses the norms contained in Article 8 of the Convention, and in particular the CISG Advisory Council Opinion No. 3 of October 2004, which specifically discusses the relationship between the CISG, the parol evidence and the plain meaning rules and the use of merger clauses to contract out of the Convention’s interpretative provisions.

In reality, the greatest challenge for the judiciary is likely to lie in disregarding the traditional primacy afforded to written agreements in order to give a fair and equal
consideration to all evidence which goes to establishing the parties’ contractual intentions. The Convention’s objectives may only be met by a genuine embracing of its provisions and its underlying goal of achieving international consistency in the law governing the international sale of goods.
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