

Parol Evidence Under the CISG: The “Homeward Trend” Reconsidered

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The CISG has been described as one of history’s most successful attempts to harmonize international commercial law. Consistent with its goal of harmonizing the law of international sales, Article 7(1) of the CISG instructs courts and arbitrators to interpret the Convention in light of “its international character and the need to promote uniformity in its application.” MCC-Marble v. Ceramica Nuova D’Agostina is a U.S. decision that has been praised for its adherence to Article 7(1). In contrast with conventional academic commentary, which praises MCC-Marble and criticizes the tendency of courts to interpret the CISG in light of their respective domestic legal traditions (the “homeward trend”), this Essay critiques MCC-Marble as a decision that emphasizes uniformity at the expense of other important considerations. Notwithstanding Article 7(1), uniformity was not the exclusive goal of the CISG project. Although it may result in some inconsistency in the Convention’s implementation, the homeward trend also should enhance the CISG’s legitimacy and acceptability over the long term. MCC-Marble is examined to illustrate how its interpretative approach to the CISG’s provisions regarding parol evidence may exacerbate the tendency of U.S. parties to opt out of the CISG. This Essay argues for an interpretation of the CISG that allows greater weight to be afforded the terms of a final written agreement.

I. INTRODUCTION

The U.N. Convention on Contracts for the International Sale of Goods¹ has been described as one of history’s most successful attempts to harmonize international commercial law.² Negotiated over a period of decades, the CISG finally entered into force in 1988 and since that time has been adopted

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¹ United Nations Commission on International Trade Law, 1980–United Nations Convention on Contracts for the International Sale of Goods, available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (last visited Jan. 26, 2007) [hereinafter CISG].

² See Michael P. Van Alstine, *Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law*, 37 VA. J. INT’L L. 1, 6 (1996) (“It can be said with little risk of overstatement that the [CISG] represents one of history’s most successful efforts at the unification of the law governing international transactions.”).

by over sixty-five countries.³ In addition to its widespread applicability, the CISG has generated voluminous scholarly commentary, the creation of websites that collect, translate, and index related decisions,⁴ and even a special moot that currently attracts about a thousand law students to Vienna each year.⁵

Yet since its inception, the Convention's goal of uniformity has been undermined by its uneven implementation in the states that have ratified it. While the courts of CISG signatory countries, particularly Germany, have interpreted and applied the CISG in thousands of cases,⁶ there are still relatively few such cases decided by United States courts.⁷ While the relatively low number of CISG cases litigated in U.S. courts may be explained by a number of factors, such as the prevalence of arbitration, or the possibility that the applicability of the CISG is unknown or ignored by U.S.

³ Counting Paraguay and El Salvador, where the Convention will go into force in February 2007 and December 2007, respectively, UNCITRAL's website currently lists sixty-nine parties to the CISG. *See supra* note 1. However, to date, the CISG has not been adopted by a number of important trading countries, most notably Japan and the United Kingdom.

⁴ *See, e.g.*, Institute of International Commercial Law at Pace Law School, <http://www.cisg.law.pace.edu> (last visited Jan. 26, 2007); UNCITRAL's Database of Case Law on UNCITRAL Texts (CLOUT), available at http://www.uncitral.org/uncitral/en/case_law.html (last visited Jan. 26, 2007); CISG-Online Database, available at <http://www.cisg-online.ch> (last visited Jan. 26, 2007); and UNILEX CISG Database, available at <http://www.unilex.info/dynasite.cfm?dssid=2376&dsmid=14315> (last visited Jan. 26, 2007).

⁵ The stated purpose of the Vis Competition is to promote the understanding of international commercial law and arbitration through its application to a concrete fact pattern. Pace University School of Law, The Annual Willem C. Vis International Commercial Arbitration Moot, available at <http://www.cisg.law.pace.edu/vis.html> (last visited Jan. 26, 2007). For a recent account of the competition, see Mark R. Shulman, *Moot Court Diplomacy*, INT'L. HERALD TRIB., Apr. 15, 2006, available at <http://www.iht.com/articles/2006/04/14/opinion/edshulman.php> (last visited Jan. 26, 2007).

⁶ The Pace University School of Law's website alone provides access to over 1700 decisions and 5000 case abstracts. *See* <http://www.cisg.law.pace.edu/cisg/text/case-annotations.html> (last visited Jan. 26, 2007). Although some of these decisions are arbitral awards, most are judicial decisions.

⁷ A search of the term "CISG" in the "allcases" database of Westlaw on February 18, 2006, yielded forty-eight decisions, some of which are appeals of lower court decisions, and most of which address the CISG only in passing. In other words, for each year since the CISG came into force, U.S. courts have issued on average fewer than three decisions that so much as mention the CISG. On the other hand, two-thirds (thirty-two out of forty-eight) of these decisions were issued in the past five years, which suggests that after an initial lag U.S. courts finally are beginning to catch up with some of their European counterparts.

courts resolving transnational contractual disputes, another likely factor is that U.S. parties engaged in such disputes (or their attorneys) choose to opt out of the CISG.

Article 6 of the CISG allows parties to exclude applicability of the Convention or to derogate from any of its provisions. Although there is no empirical evidence on this issue, anecdotal evidence suggests that U.S. parties to transnational sales contracts routinely opt out of the CISG.⁸ One need only go to <http://www.findlaw.com> to encounter international sales contracts containing CISG opt-out clauses. A typical example is the following clause from an international sales agreement between 3Com Corporation and Sonic Systems, Inc.: “The Parties exclude in its entirety the application to this Agreement of the United Nations Convention on Contracts for the International Sale of Goods.”⁹

Steven Walt attributes the tendency of U.S. parties to opt out of the CISG to a collective action problem resulting from the “novelty” of the Convention. Novelty occurs when a uniform law (such as the CISG) contains new rules that are distinct from national rules.¹⁰ The uncertainty generated by these new rules hinders the ultimate success of the uniform law, since, as Walt explains, “[l]acking information upon which to base reliable estimates about prospective outcomes under the law, transactors might avoid application of the [law].”¹¹ Walt concludes that resort to domestic law principles, both with respect to filling gaps in the Convention and interpreting ambiguous language, should limit the uncertainty generated by

⁸ See, e.g., Clayton P. Gillette & Robert E. Scott, *The Political Economy of International Sales Law*, 25 INT’L REV. OF L. & ECON. 446, 477–78 (citing anecdotal evidence from conversations with international transactional attorneys suggesting that “a substantial amount of opting out occurs”); Steven Walt, *Novelty and the Risks of Uniform Sales Law*, 39 VA. J. INT’L L. 671, 687–88 (1999) (“Only the hapless tend to have their contracts governed by the CISG.”); Monica Kilian, *CISG and the Problem with Common Law Jurisdictions*, 10 J. TRANSNAT’L L. & POL’Y 217, 227 (2001) (observing that U.S. attorneys “frequently” advise clients to opt out of the CISG); Anthony S. Winer, *The CISG Convention and Thomas Franck’s Theory of Legitimacy*, 19 NW. J. INT’L L. & BUS. 1, 44 n.267 (listing articles that advise practitioners to opt out of the CISG).

⁹ OEM Purchase and Development Agreement between 3Com Corporation and Sonic Systems, Inc. art. 23.9, available at <http://contracts.corporate.findlaw.com/agreements/sonicwall/3com.oem.1999.07.01.html> (last visited Jan. 26, 2007); see also AMD Saxony Wafer Purchase Agreement between AMD Saxony Holding GmbH and AMD Saxony Manufacturing GmbH, art. 7.09, available at <http://contracts.corporate.findlaw.com/agreements/amd/saxonia.wafer.1997.03.11.html> (last visited Jan. 26, 2007) (showing a contract between two German subsidiaries of a U.S. corporation, containing a CISG opt-out clause).

¹⁰ Walt, *supra* note 8, at 672–73.

¹¹ *Id.*

novelty, and therefore enhance the likelihood that parties ultimately will utilize the Convention.¹²

Resort to domestic law principles, however, is at odds with the ultimate goal of the Convention, which is to unify international sales law. Article 7(1) of the CISG instructs courts and arbitrators to interpret the Convention in light of “its international character and the need to promote uniformity in its application.” Relying on Article 7(1), CISG scholars exhort courts and arbitrators to adopt an *autonomous* perspective, rather than interpret the Convention’s terms by resorting to analogous domestic law principles.¹³ The imperative to promote uniformity in interpreting the Convention has long been a mantra of CISG scholars.¹⁴ At the same time, they disparagingly observe a tendency of courts, when interpreting the Convention, to do so within this framework of domestic law principles. John Honnold famously coined the tendency the “homeward trend,” suggesting that it is a regrettable but inevitable consequence of the unification process:

The Convention, *faute de mieux*, will often be applied by tribunals . . . who will be intimately familiar only with their own domestic law. These tribunals, regardless of their merit, will be subject to a natural tendency to read the international rules in light of the legal ideas that have been

¹² *Id.* at 698–701. Other scholars have observed that strict adherence to uniform interpretation of the CISG may undermine the Convention’s legitimacy. See Peter M. Gerhart, *The Sales Convention in Courts: Uniformity, Adaptability and Adoptability*, in *THE INTERNATIONAL SALE OF GOODS REVISITED* 77, 79 (P. Šarčević & P. Volken eds. 2001) (*see infra*, Part II); Winer, *supra* note 8, at 56–57 (suggesting that the CISG’s legitimacy would be enhanced if less emphasis were placed on uniformity in the interpretation and application of the Convention).

¹³ See, e.g., PETER SCHLECHTRIEM & INGEBORG SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 10 (2d English ed. 2005) (finding it imperative for interpreters of the CISG to become familiar with uniform international concepts, and to “understand them as autonomous concepts and to counter the danger of their being interpreted in the light of the familiar solutions of domestic law”); C.M. BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 74 (1987) (having regard to the “international character” of the Convention under Article 7(1) “implies the necessity of interpreting its terms and concepts autonomously, *i.e.*, in the context of the Convention itself and not by referring to the meaning which might traditionally be attached to them within a particular domestic law”).

¹⁴ See, e.g., Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT’L & COMP. L. 183, 200–01 (1994) (arguing that Article 7(1) requires the interpreter to read the Convention, “not . . . through the lenses of domestic law, but . . . against an international background”); SCHLECHTRIEM & SCHWENZER, *supra* note 13; BIANCA & BONELL, *supra* note 13.

imbedded at the core of their intellectual formation. The mind sees what the mind has means of seeing.¹⁵

Of the relatively few U.S. cases that actually have applied the CISG, several have followed the homeward trend, utilizing U.S. contract law principles by analogy to interpret and fill gaps.¹⁶ These decisions have been harshly criticized by a number of CISG scholars.¹⁷ In contrast, the Eleventh Circuit's *MCC-Marble* decision,¹⁸ which relied on international scholarly commentary to reject applicability of U.S. contract law principles to an agreement governed by the Convention, is accepted as a "leading" CISG case¹⁹ and hailed as the "benchmark against which the progress of future U.S. decisions on the Convention can be measured."²⁰

¹⁵ JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES: THE STUDIES, DELIBERATIONS, AND DECISIONS THAT LED TO THE 1980 UNITED NATIONS CONVENTION WITH INTRODUCTIONS AND EXPLANATIONS 1 (1989) [hereinafter DOCUMENTARY HISTORY].

¹⁶ See, e.g., *Delchi Carrier S.p.A. v. Rotorex Corp.*, 71 F.3d 1024 (2d Cir. 1995) (relying on U.S. contract law principles to conclude that seller's lost profits under CISG Article 74 should not be calculated to include fixed costs); see also *Schmitz-Werke GmbH & Co. v. Rockland Indus., Inc.*, 37 F. App'x. 687 (4th Cir. 2002) (stating that Maryland contract law principles may be utilized to interpret CISG Article 35, or to fill in gaps with respect to issues on which the Convention is silent).

In discussing the homeward trend, this Essay does not argue in favor of those decisions that ignore the applicability of the Convention, or that otherwise apply domestic contract principles in ways that cannot reasonably be reconciled with the text of the Convention. See, e.g., *Beijing Metals v. Am. Bus. Ctr., Inc.*, 993 F.2d 1178, 1182 n.9 (5th Cir. 1993) (dismissing, without analysis, buyer's argument that the CISG applied, instead applying Texas' version of the parol evidence rule).

¹⁷ See Eric C. Schneider, *Consequential Damages in the International Sale of Goods: Analysis of Two Decisions*, 16 U. PA. J. INT'L BUS. L. 615, 616 (1995) (criticizing the *Delchi Carrier* Court for its "inability to set aside its own national thinking" and describing the case as an "unfortunate first decision" on the CISG's rules relating to consequential damages); Jeffrey R. Hartwig, *Schmitz-Werke & Co. v. Rockland Industries Inc. and the United Nations Convention on Contracts for the International Sale of Goods (CISG): Diffidence and Developing International Legal Norms*, 22 J.L. & COM. 77, 78 (2003) (referring to *Schmitz-Werke* as a "regression in the evolution of U.S. Convention jurisprudence").

¹⁸ *MCC-Marble Ceramic Ctr. v. Ceramica Nuova D'Agostina, S.p.A.*, 144 F.3d 1384 (11th Cir. 1998), cert. denied 526 U.S. 1087 (1999).

¹⁹ CISG Advisory Council opinion No. 3, cmt. 2.6 available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op3.html> (last visited Jan. 26, 2007).

²⁰ Harry M. Fletchner, *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).

This Essay argues that categorical condemnation of the homeward trend is unwarranted. The homeward trend is a natural consequence of any unification project and may be unavoidable. More importantly, the language and drafting history of the Convention suggest that, notwithstanding Article 7(1), uniformity was not the exclusive goal of the CISG project. The homeward trend may also enhance the legitimacy and acceptability of the CISG over the long term. In particular, the propensity of U.S. courts to interpret the Convention in light of domestic legal traditions may ameliorate the tendency of U.S. parties to opt out of the CISG. These considerations are illustrated in the context of the *MCC-Marble* decision, a contract interpretation case that vividly illustrates the problems generated by exclusive emphasis on uniform implementation of the CISG. Part II provides some background to the CISG, describing the history of the Convention so as to illustrate how competing goals of uniformity and legitimacy are reflected in it, and contrasting the Convention's approach with the U.S. approach to the parol evidence rule (PER). Part III describes the *MCC-Marble* decision and highlights the dilemma that the decision created for U.S. parties whose contracts may fall under the Convention. Part IV contrasts *MCC-Marble* with a number of German decisions and proposes an interpretation of CISG Article 8(3) that allows greater weight to be afforded the terms of a final written agreement.

II. BACKGROUND TO THE CISG

A. History

The origins of the CISG can be traced back to 1929, when comparative law jurist Ernst Rabel presented a report to the International Institute for the Unification of Private Law,²¹ outlining ideas for the unification of the law of international sales.²² The Institute set up a committee of European scholars to work on a draft uniform law (the Uniform Law for the International Sale of

²¹ The institute, today known as UNIDROIT, is an intergovernmental organization that was originally set up in Rome through the League of Nations but later was reestablished by international agreement. In addition to preparing the predecessor agreements to the CISG, UNIDROIT also created the Principles of International Commercial Contracts, a set of principles that are widely accepted as reflecting international commercial practice. The most recent version of the Principles was adopted by UNIDROIT in 2004, and is available online at <http://www.unidroit.org/english/principles/contracts/main.htm> (last visited Jan. 26, 2007) [hereinafter UNIDROIT Principles].

²² SCHLECHTRIEM & SCHWENZER, *supra* note 13, at 1.

Goods (ULIS),²³ the predecessor to the CISG).²⁴ In part due to the intervention of World War II, the law was not completed until 1964, and was never widely adopted beyond Europe.²⁵ However, the ULIS and its companion convention, the ULF, did provide a natural starting point for drafting the CISG, which process began not long after the ink was dry on the ULIS²⁶ and continued until the CISG was presented for signature in 1980.

Half a century elapsed between Professor Rabel's initial proposal in 1929 and the adoption of the CISG in 1980. This fact alone speaks to the difficulties inherent in harmonizing the law of international sales. More specifically, the CISG's drafting history reveals that, although the ultimate goal of the CISG always has been unification, many compromises were made along the way in order to ensure broad adoption of the Convention by states. A number of scholars have observed that the many open-ended terms and ambiguities in the Convention were the result of numerous political compromises reached during the drafting process.²⁷ To use uniformity as the sole interpretive guide would disregard the context within which the

²³ Convention Relating to a Uniform Law on the International Sale of Goods, available at <http://www.unidroit.org/english/conventions/c-ulis.htm> (last visited Jan. 26, 2007) [hereinafter ULIS]. The ULIS was prepared and adopted in conjunction with a separate convention dealing with contract formation. See Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, available at <http://www.unidroit.org/english/conventions/c-ulf.htm> (last visited Jan. 26, 2007) [hereinafter ULF].

²⁴ John Honnold, *The Uniform Law for the International Sale of Goods: The Hague Convention of 1964*, 30 LAW & CONTEMP. PROBS. 326, 326–27 (1965) [hereinafter 1964 Convention].

²⁵ JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER 1980 UNITED NATIONS CONVENTION 5–6 (3d ed. 1999) [hereinafter HONNOLD 1999 COMMENTARY]. Nine countries ratified or acceded to the ULIS and the ULF, of which Israel and Gambia were the only non-European countries. United Nations Commission on International Trade Law, Status of Convention Relating to a Uniform Law on the International Sale of Goods, available at <http://www.unidroit.org/english/implement/i-main.htm> (last visited Jan. 26, 2007).

²⁶ When the United Nations Commission on International Trade Law (UNCITRAL) held its first session in 1968, “high priority” was given to developing a uniform law on international sales. As soon as it was clear that the ULIS and the ULF lacked widespread support, UNCITRAL established a working group to begin development of a new text. HONNOLD 1999 COMMENTARY, *supra* note 25, at 9.

²⁷ Gerhart, *supra* note 12, at 82; see also Helen E. Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT'L L. 1, 49 (arguing that interpreters should not adopt an autonomous interpretation of CISG Article 4(a), because to do so would “do violence to the political compromise embodied” in the article); Gillette & Scott, *supra* note 8, at 446–49 (describing the vague standards and ambiguous language that resulted from compromises made during the CISG drafting process).

Convention was negotiated. Therefore, when CISG Article 7(1) instructs courts and tribunals to interpret the Convention in light of its “international character,” arguably it means more than a strictly autonomous interpretation; it also means that the interpreter should be sensitive to the compromises that made adoption of the Convention possible. Examples of these compromises are described below.

1. *Ambiguities and Vagueness*

As Robert Scott and Clayton Gillette have noted, “vague standards pervade the CISG.”²⁸ The concept of reasonableness is utilized in thirty-one of the Convention’s provisions.²⁹ To provide another example, a buyer receiving non-conforming goods under the CISG is entitled to cancel the contract only if the nonconformity amounts to a “fundamental” breach,³⁰ which is defined as a breach that results in “such detriment to [buyer] as to substantially deprive him of what he is entitled to expect under the contract, unless [seller] did not foresee, and a reasonable person of the same kind in the same circumstances would not have foreseen, such result.”³¹ Thus buyer’s right to avoid the contract hinges on the interpretation of several vague concepts: “substantial” deprivation, “entitled to expect,” “reasonable [seller]” under the circumstances, and foreseeability. Finally, Article 8(3), which is discussed at length below,³² is itself a vague standard.

It is clear from the Convention’s drafting history that many of the vague and ambiguous terms that ended up in the CISG were the result of deliberate compromise. Professor Gerhart found that the most litigated issue under the Convention has been the amount of interest to be awarded with respect to a damages award.³³ Although the CISG provides that an injured party is entitled to interest,³⁴ the manner in which interest is to be calculated is not specified. Gerhart explains that the omission was not an oversight but a deliberate decision by the drafting parties, as the issue of interest “was an obvious hot potato,” resulting from religious, economic and political

²⁸ Gillette & Scott, *supra* note 8, at 474.

²⁹ *Id.* at 447 (citing Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 751–52 n.267–69 (1998)).

³⁰ CISG, *supra* note 1, art. 49.

³¹ CISG, *supra* note 1, art. 25.

³² See *infra* Part II.B. Article 8(3) instructs a court or arbitrator to give “due” consideration to all relevant circumstances surrounding the making of a contract.

³³ Gerhart, *supra* note 12, at 97.

³⁴ See CISG, *supra* note 1, art. 78, 83.

differences among the countries that participated in the negotiation of the Convention.³⁵

Similarly, Article 16(2)(a), which deals with the revocability of offers, contains an ambiguity that was the result of a compromise between civil and common law countries. The provision states that “an offer cannot be revoked . . . [i]f it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable.” Therefore, the language of Article 16(2)(a) is ambiguous as to whether an offer is revocable where it fixes a deadline for acceptance but is otherwise silent on revocability. Under the law of common law countries such as the U.S., such an offer would be found to be freely revocable, whereas in civil law jurisdictions, fixing a time for acceptance gives rise to the inference that the offer is irrevocable.³⁶ Accounts of the Diplomatic Conference that led to the adoption of the CISG make clear that the ambiguity in Article 16(2)(a) is a product of compromise. Delegates from both the U.K. and Germany submitted proposals to clarify the effect of the provision. The U.K. proposal sought to clarify that the fixing of a period for acceptance would not in itself make an offer irrevocable, whereas the German proposal sought a clarification to the opposite effect.³⁷ Both proposals were rejected, after which the German delegate commented that the issue would be left to the courts to find a “reasonable common interpretation” in difficult cases.³⁸ However, to the extent that it would be futile to adopt a “common” interpretation of an ambiguous treaty provision resulting from a political compromise, Article 16(2)(a) should be interpreted by reference to applicable domestic law rather than attempting to compromise irreconcilable differences.

2. Exclusions from CISG Coverage

Another example of political compromise in the CISG is what is *not* addressed by the Convention. There are some important substantive issues that are not governed by the CISG, but rather are left to applicable domestic law. Examples include statutes of limitation,³⁹ procedural issues (such as

³⁵ Gerhart, *supra* note 12, at 97–98.

³⁶ Gillette & Scott, *supra* note 8, at 475.

³⁷ *Id.* at 48 (citing DOCUMENTARY HISTORY, *supra* note 15, at 499).

³⁸ *Id.* at 48–49 (citing DOCUMENTARY HISTORY, *supra* note 15, at 499–500).

³⁹ Although the CISG has no provision dealing with statutes of limitation, or limitation periods, the issue is addressed in a separate Convention. United Nations Commission on International Trade Law, Convention on the Limitation Period in the International Sale of Goods, June 12, 1974, S. TREATY DOC. NO. 103-10, 1511 U.N.T.S. 199, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_limitation_period.html (last visited Jan. 26, 2007) [hereinafter Limitation Convention]. The

rules of evidence or discovery), any area that is subject to reservation by a signatory state,⁴⁰ and perhaps most importantly, the validity of a contract. Article 4(a) provides that the Convention does not govern “the validity of the contract or of any of its provisions or any usage.”⁴¹ Thus, an argument that the contract of sale was procured by fraud or duress would be determined by applicable domestic law and not by the CISG.

Some commentators have argued for an “autonomous” interpretation of Article 4(a)—that is, they have argued that the term “validity” should not be determined by reference to domestic law.⁴² According to this view, the validity of a contract otherwise governed by the CISG should be decided by reference to domestic law only where all, or at least a majority of states, treat the issue as a question of domestic law.⁴³ However, as Helen Hartnell argues, such a construction of Article 4(a) would be at odds with its intended purpose. The exact purpose of Article 4(a) is to allow applicable domestic law to determine the politically sensitive issue of when a contract may be voidable. By including Article 4(a) in the CISG, the drafters recognized that the issue of contract validity can raise conflicting public policy concerns in the countries that negotiated and drafted the Convention.⁴⁴ Therefore, applicability of the Convention to this issue should be assessed, not only by

Limitation Convention was amended by protocol in 1980 and went into effect in 1988. It provides for a four-year period. Limitation Convention, art. 8. Nineteen countries (including the U.S.) are parties to the Limitation Convention as amended. United Nations Commission on International Trade Law, Status: 1974—Convention on the Limitation Period in the International Sale of Goods, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_status.htm 1 (last visited Jan. 26, 2007).

⁴⁰ For example, Denmark, Sweden, Norway, and Finland declared, as permitted by CISG Article 92, that they would not be bound by Part II of the Convention, which deals with contract formation. Ten countries declared, as permitted by CISG Article 96, that provisions in the Convention permitting a contract to be made in a form other than in writing would not be applicable. United Nations Commission on International Trade Law, Status: 1980—United Nations Convention on Contracts for the International Sale of Goods, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Jan. 26, 2007) [hereinafter Status of CISG]. Reservations are only permitted to the extent expressly provided for in the CISG. CISG, *supra* note 1, art. 98.

⁴¹ CISG, *supra* note 1, art. 4(a).

⁴² Hartnell, *supra* note 27, at 48 (citing Peter Winship, *Commentary on Professor Kastely's Rhetorical Analysis*, 8 NW. J. INT'L L. & BUS. 623, 637 (1988) and Peter Schlechtriem, *Unification of the Law for the International Sale of Goods*, XIITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW (GERMAN NATIONAL REPORT) 121, 127 (1987)).

⁴³ Hartnell, *supra* note 27, at 48.

⁴⁴ *See id.* at 49.

taking into consideration comparative practice, but by balancing it against domestic public policy considerations.

3. Gap-Filling

An issue that was subject to extensive debate during the drafting of the CISG was the role to be played by domestic law in filling gaps in the Convention. The predecessor convention to the CISG (the ULIS) provided that any gaps would be filled by reference to the “general principles” underlying the Convention. This provision was vigorously criticized by commentators, as well as by members of the UNCITRAL Working Group that participated in the initial drafting of the CISG, for introducing an undue degree of uncertainty into the interpretation of the ULIS.⁴⁵ Critics argued that gap-filling instead should be done through resort to domestic law.⁴⁶ On the other hand, supporters of the ULIS approach within the Working Group argued that the use of domestic law for gap-filling would generate even greater uncertainty and would subvert the goal of achieving uniformity.⁴⁷

The compromise that was eventually reached was Article 7(2), which provides:

Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.⁴⁸

In other words, Article 7(2) reiterates the ULIS concept of relying on “general principles” but also provides for resort to domestic law when general principles do not provide an answer. Although, as mentioned above, some CISG experts have argued against the use of applicable domestic law to interpret and fill gaps in the Convention,⁴⁹ resort to domestic law (determined through conflicts rules) is exactly what is contemplated by Article 7(2).

⁴⁵ HONNOLD 1999 COMMENTARY, *supra* note 25, at 103; *see also* Harold J. Berman, *The Uniform Law on International Sale of Goods: A Constructive Critique*, 30 LAW & CONTEMP. PROBS. 354, 362 (1965) (surmising that the general principles on which the ULIS was based may be reasonableness and good faith, which “are often an inadequate guide to the resolution of close questions of interpretation,” especially in connection with transnational disputes).

⁴⁶ *See* HONNOLD, *supra* note 25, at 103; Berman, *supra* note 45, at 362.

⁴⁷ HONNOLD, *supra* note 25, at 103.

⁴⁸ CISG, *supra* note 1, art. 7(2).

⁴⁹ *See supra* note 13 and accompanying text.

As these examples illustrate, the parties who participated in the creation of the CISG continuously compromised to ensure that the Convention would be widely adopted. For this reason, Gerhart has argued that the CISG's ultimate goal of achieving uniformity should be balanced against the interest in ensuring the acceptability of the Convention over the long term.⁵⁰ He analogizes the CISG to a bridge, and suggests that "[i]nterpretation that weakens faith in the bridge by the nations that supported its construction, or that drives parties to resort to other regimes, will ultimately weaken the bridge or render it useless."⁵¹

In any event, even if it were true that the Convention unambiguously called for an autonomous approach to interpreting the Convention at the expense of other values—that is, interpreting the Convention in light of how other countries have interpreted it, rather than resorting to domestic law approaches—such an approach is fraught with difficulty. From the U.S. perspective, such an approach requires access to English language translations of foreign cases. Although some foreign CISG cases have been translated into English and posted on the Internet,⁵² the translations vary in quality. In addition, foreign case law is influenced by procedural rules and legal culture that may be lost on the U.S. reader. Finally, many of the cases that are available have not been fully translated into English but are based on abstracts,⁵³ which are selective in detail and fail to provide the full factual context of the cases.⁵⁴ Anthony Winer has also noted these difficulties and concludes that insistence on uniform interpretation of the CISG has served to undermine the Convention's coherence, and thus its legitimacy.⁵⁵ He

⁵⁰ Gerhart, *supra* note 12, at 80.

⁵¹ *Id.* Gerhart identifies a number of "legitimacy values" that presumably guided the drafters, including the interest in enabling countries to adopt the Convention as well as ensuring that private parties utilize it. *Id.* at 87, 89–90.

⁵² See *supra* note 4.

⁵³ See, e.g., the UNCITRAL's database of Case Law on UNCITRAL Texts (CLOUT), available at http://www.uncitral.org/uncitral/en/case_law.html (last visited Jan. 26, 2007).

⁵⁴ Just to provide one example, the CLOUT abstract for the *OLG Hamm* decision (discussed *infra* at notes 105–08 and accompanying text) consists of three paragraphs, and fails to make any mention of buyer's attempt to introduce extrinsic evidence or of the court's rationale for ultimately rejecting such evidence. See UNCITRAL CLOUT abstract no. 227, A/CN.9/SER.C/ABSTRACTS/20, available at http://www.uncitral.org/uncitral/en/case_law/abstracts.html (last visited Jan. 26, 2007).

⁵⁵ See Winer, *supra* note 8, at 24. Winer invokes Thomas Franck's concept of legitimacy with respect to a given international law rule, or the pull to compliance that a rule may exert on actors in the international system. One of the characteristics of a legitimate body of rules is coherence, or the rule's treatment of subjects according to "some rational principle of broader application." *Id.* at 23 (citing Thomas Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 741 (1988)).

contrasts the CISG with other international conventions that have successfully harmonized international commercial law, *without* prohibiting resort to domestic law principles to interpret or gap-fill.⁵⁶

This Essay considers these difficulties in the context of the CISG's rules dealing with contract interpretation. It evaluates the manner in which *MCC-Marble* interpreted the CISG's contract interpretation rules and suggests that the decision, by attempting to adopt an autonomous interpretation of the Convention, not only reached a result that may be unacceptable to U.S. contracting parties, but also adopted an interpretation of the Convention that does not necessarily reflect international practice. Before considering these aspects of the *MCC-Marble* decision, the following section compares the parol evidence rule (PER) of U.S. contract law with the Convention's approach to contract interpretation.

B. CISG Approach to Extrinsic Evidence and the Writing Requirement

The issue of whether to admit extrinsic evidence to interpret or supplement a written contract typically arises at the time of contract enforcement, such as when a party tries to present evidence of prior negotiations or other evidence of the parties' intent that is not reflected in the writing. The rationale behind the PER is that the final written agreement reflects the parties' understanding at the point of "maximum resolution."⁵⁷ Thus, the PER bars certain attempts to add to or contradict the writing after the fact.

There are two distinct ways in which the PER limits the introduction of extrinsic evidence. Under the U.C.C. version of the rule, if a written agreement is final, the PER bars attempts to *contradict* the writing with any prior agreement or contemporaneous oral agreement. If a written agreement is found to be final, complete and exclusive ("completely integrated"), the PER bars attempts to *supplement* the writing with evidence of consistent additional terms.⁵⁸ The PER does not, however, bar the introduction of

⁵⁶ *Id.* at 31. "Success" is defined by the extent to which the rule is regarded in practice as binding. *Id.* at 30. The instruments that Winer contrasts with the CISG are the Brussels Bill of Lading Convention, the Warsaw Air Transport Convention, and the Uniform Customs and Practice for Documentary Credits. *Id.* at 31.

⁵⁷ The phrase is borrowed from MARVIN A. CHIRELSTEIN, *CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS* 89 (4th ed. 2001).

⁵⁸ Uniform Commercial Code § 2-202 provides in full:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

extrinsic evidence to interpret an agreement, although courts disagree over whether the agreement must be facially ambiguous in order for the exception to apply.⁵⁹ Notwithstanding the fact that the PER has the effect of excluding certain evidence, the PER is treated as a rule of substantive contract law and not a rule of evidence.⁶⁰ Therefore, where a dispute is governed by the CISG, the Convention does not displace the forum's procedural rules but it does displace certain domestic rules of contract law, including, in cases otherwise governed by U.S. domestic law, the PER.

In contrast to U.S. domestic law, the CISG adopts a liberal approach to contract interpretation and rejects at least certain aspects of the PER. CISG Article 8(3) provides that when interpreting a contract, a court or arbitrator shall give "due consideration" to all relevant circumstances surrounding the making of a contract, including any course of dealing between the parties, trade usage, and prior negotiations.⁶¹ Unlike the PER, Article 8(3) does not

(a) by course of dealing, or usage of trade (Section 1-205) or by course of performance (Section 2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

U.C.C. § 2-202 (2004). Under U.C.C. § 2-202, evidence of course of performance, course of dealing or trade usage is always admissible to supplement or interpret a writing, unless the evidence cannot reasonably be construed consistently with the writing. U.C.C. §§ 1-205(4), 2-208(2) (2004).

⁵⁹ Compare, e.g., *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968) ("The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.") with *Air Safety, Inc. v. Teachers Realty Corp.*, 706 N.E.2d 882, 884 (Ill. 1999) ("If the language of the contract is facially unambiguous, then the contract is interpreted by the trial court as a matter of law without the use of parol evidence.").

Even a court that adheres to the "plain meaning" rule should still admit trade usage, course of dealing, and course of performance, regardless of facial ambiguity, if the contract at issue is governed by U.C.C. Article 2. Under the U.C.C., evidence of trade usage, course of dealing, and course of performance is always admissible to supplement or interpret a writing, unless such evidence cannot be reasonably reconciled with the writing. U.C.C. §§ 2-202, 1-205(4) (2004).

⁶⁰ This is because the rule is not based on the idea that a given piece of evidence is an unreliable method of proving a fact. The PER bars the showing of the fact itself. See, e.g., E. ALLEN FARNSWORTH, *CONTRACTS* § 7.2 (3d ed. 1999).

⁶¹ CISG Article 8(3) provides in full: "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." CISG, *supra* note 1, art. 8(3).

set any express limit on the admissibility of extrinsic evidence to interpret a contract, but instructs a court or arbitrator to give “due consideration” to such evidence. Additionally, the Convention does not contain a Statute of Frauds, permitting a contract to be proven “by any means,” including through the use of extrinsic evidence.⁶²

The documentary history to the Convention indicates that both Articles 8(3) and 11 were adopted over the objection of certain states represented at the Diplomatic Conference. Interestingly, the early drafting history to Article 8(3) suggests that the provision was originally intended to be limited to determining whether a contract had been concluded and was not intended to regulate the interpretation of contracts more generally. Certain members of the Working Party that prepared the initial draft of the Convention were of the view that “rules on interpretation of contracts were too complex to be set out adequately in the proposed Convention.”⁶³ During the Diplomatic Conference, the Swedish delegate (supported by delegates from Belgium and the United Kingdom) proposed (unsuccessfully) to delete the article entirely, explaining that discussion had revealed “wide differences of view” on the issue of contract interpretation, and questioning whether it was necessary or useful to establish new rules for the interpretation of contracts.⁶⁴

⁶² CISG Article 11 provides in full: “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.” CISG, *supra* note 1, art 11.

To accommodate certain countries whose domestic law requires that an agreement be in writing to be enforceable, Article 96 was added to the CISG, which allows a signatory state to make a declaration that Article 11 will not apply where any party has his place of business in that state. As of February 2006, ten countries had made such a reservation, including Argentina, Belarus, Chile, China, Hungary, Latvia, Lithuania, Paraguay, Russia and Ukraine. See UNCITRAL, Status: 1980—United Nations Convention on Contracts for the International Sale of Goods, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Jan. 26, 2007).

⁶³ United Nations Commission on International Trade Law [UNCITRAL], *Report of the Working Group on the International Sale of Goods on the Work of Its Ninth Session*, ¶ 14, U.N. Doc. A/CN.9/SER.A/1978 (Jan. 6, 1978), *reprinted in* DOCUMENTARY HISTORY, *supra* note 15, at 294.

The Secretariat Commentary to the Convention later made clear that the provision was applicable, not only to contract formation issues, but to the interpretation of any statement or conduct of a party falling under the Convention. The Secretariat, *Commentary on the Draft Convention on Contracts for the International Sale of Goods*, U.N. Doc. A/Conf.97/5 (Mar. 14, 1979) [hereinafter *Commentary on the Draft Convention*], *reprinted in* DOCUMENTARY HISTORY, *supra* note 15, at 408.

⁶⁴ *Commentary on the Draft Convention*, *supra* note 63, at 262, *reprinted in* DOCUMENTARY HISTORY, *supra* note 15, at 483. The committee voted against the Swedish proposal.

An unsuccessful attempt was also made at the Diplomatic Conference to amend Article 11, which provides that an agreement of sale may be proved by “any means, including witnesses.” The Canadian delegate introduced a proposal to add the following language to what is now Article 11:

Between the parties to a contract of sale evidenced by a written document, evidence by witnesses shall be inadmissible for the purposes of confuting or altering its terms, unless there is *prima facie* evidence resulting from a written document from the opposing party, from his evidence or from a fact the existence of which has been clearly demonstrated. However, evidence by witnesses shall be admissible for purposes of interpreting the written document.⁶⁵

In other words, the Canadian delegate sought to modify Article 11, which otherwise does away with the writing requirement, by introducing a limitation on admitting extrinsic evidence where the parties have chosen to put their agreement in writing. The delegate explained in support of the proposed amendment that “it was important to ensure a minimum of protection” for parties who sought the certainty of a written contract.⁶⁶ In rejecting the Canadian proposal, other delegates criticized it as being overly rigid, and suggested it was a restatement of the PER, a rule whose application had been inconsistent even in common law countries.⁶⁷ This piece of drafting history has been cited to support the proposition that the CISG rejects the PER.⁶⁸ However, it is worth noting that the proposal that was rejected was not an amendment to Article 8 (which deals with contract interpretation) but rather to Article 11 (which states that a contract of sale may be proved “by any means”), an article to which ten of the CISG signatories made reservations.⁶⁹ More significantly, the response to the Canadian proposal only suggests that the drafters rejected a *per se* rule barring the admissibility of extrinsic evidence to prove a contract where the parties have adopted a writing; it says nothing about the amount of consideration that should be “due” to such extrinsic evidence under Article 8(3).

⁶⁵ *Id.* at 90, reprinted in DOCUMENTARY HISTORY, *supra* note 15, at 662 (emphasis in original).

⁶⁶ *Id.* at 270, reprinted in DOCUMENTARY HISTORY, *supra* note 15, at 491 (emphasis in original).

⁶⁷ *Id.*

⁶⁸ CISG Advisory Council Opinion No. 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, Oct. 23, 2004, at cmt. 2.3 (Rapporteur: Richard Hyland), available at <http://www.cisg.law.pace.edu/cisg/CISG-AC-op3.html> (last visited Jan. 26, 2007) [hereinafter CISG Advisory Council].

⁶⁹ See *supra* note 62.

Therefore, although it is clear that the delegates to the Diplomatic Conference declined to include a parol evidence rule in the Convention, it is by no means clear that the delegates rejected the proposition that the written contract is to be given some weight. As elaborated in the following Part, the court in *MCC-Marble* framed the question in the case simply as whether the CISG “rejects the PER.” Framing the issue in this way naturally led the court to respond in the affirmative, thereby adopting an interpretation of Article 8(3) that may encourage future U.S. contracting parties to opt out of the Convention.

III. *MCC-MARBLE* DECISION

MCC-Marble has been touted by CISG scholars as a leading U.S. decision on the Convention. One reason it has been so well received is because the court endeavored to use an autonomous approach to interpreting the Convention, citing a wealth of academic commentary in support of the proposition that the CISG rejects the parol evidence rule. However, a closer look at the underlying facts and the outcome of *MCC-Marble* reveals troubling implications for contracting parties, particularly U.S. parties whose agreements are governed by the Convention.

The parties to the case were MCC-Marble Ceramic, Inc. (*MCC-Marble*), a Florida-based retailer of tiles, and Ceramica Nuova D’Agostino (D’Agostino), an Italian tile manufacturer.⁷⁰ The two companies entered into a contract for the sale of tile, which was negotiated and signed at a trade fair in Milan. MCC-Marble was represented by its president, Juan Carlos Monzon, and D’Agostino by its commercial director, Gianni Silingardi. Since Monzon spoke no Italian and Silingardi no English, communications between the parties were facilitated by a third party.⁷¹ Monzon and Silingardi verbally agreed to the basic terms of the sales agreement, including the quality and quantity of tile ordered, the purchase price, and the delivery and payment terms, and recorded these terms on a purchase order form that was prepared by D’Agostino.⁷² The purchase order form, however, contained a number of pre-printed terms on the back side. These terms included Clause 4, which required complaints regarding any defects in the tile to be made by certified letter within ten days of receipt, and Clause 6(b), which gave D’Agostino the right to cancel the contract for failure to make timely payment.⁷³ On the front side of the form, just below the signature line

⁷⁰ *MCC-Marble Ceramic Ctr. v. Ceramica Nuova D’Agostina, S.p.A.*, 144 F.3d 1384, 1385 (11th Cir. 1998), *cert. denied* 526 U.S. 1087 (1999).

⁷¹ *Id.*

⁷² See Brief of the Appellant at 8, *MCC-Marble*, 144 F.3d 1384 (No. 97-4250).

⁷³ *MCC-Marble*, 144 F.3d at 1386.

containing Monzon's signature, was printed language that read "[T]he buyer hereby states that he is aware of the sales conditions stated on the reverse and that he expressly approves of them with special reference to those numbered 1-2-3-4-5-6-7-8."⁷⁴

A dispute between the parties later arose when MCC-Marble withheld payment for tile, arguing that the tile delivered was not of the quality specified in the contract. D'Agostino refused to deliver any further shipments of tile, claiming that it was entitled to cancel the contract for nonpayment. MCC-Marble filed suit in U.S. District Court, and D'Agostino cross-claimed for damages. Liability turned on whether the printed terms on the back of the purchase order formed part of the agreement. MCC-Marble argued that the CISG applied to the contract and submitted affidavits of Monzon, the translator, and Silingardi (who, according to D'Agostino, was a "disgruntled former employee" of D'Agostino by the time of trial).⁷⁵ Each of the affidavits stated that, although the parties had recorded the agreed price, quantity, and other essential terms on a D'Agostino order form, the form "was not intended to modify or supersede the parties' oral agreement."⁷⁶ Relying on CISG Article 8, MCC-Marble argued that the standard form terms should not be read into the contract because, as the affidavits demonstrated, neither it nor D'Agostino subjectively intended for the standard form terms to become part of their agreement.⁷⁷

A magistrate judge recommended that the district court grant summary judgment to D'Agostino. The magistrate judge explicitly rejected MCC-Marble's CISG argument: "Article 8 cannot be read to give binding effect to a contracting party's intentions when they contradict the explicit and unambiguous terms of a signed contract. To do so would render terms of written contracts virtually meaningless and severely diminish the reliability of commercial contracts."⁷⁸

After the district court granted summary judgment to D'Agostino, MCC-Marble appealed to the Eleventh Circuit. The Eleventh Circuit opinion framed the issue on appeal as whether the parol evidence rule "plays any role in cases involving the CISG."⁷⁹ After considering the language of Article 8(3) and academic commentary concluding that the CISG rejects the parol

⁷⁴ *Id.* The original purchase order form was written in Italian. The court quoted the language of the English translation provided by D'Agostino at trial. *Id.* at n.3.

⁷⁵ Brief of the Appellee at 8, *MCC-Marble*, 144 F.3d 1384 (No. 97-4250).

⁷⁶ Brief of the Appellant, *supra* note 72, at 8-9; *see also* Brief of the Appellee, *supra* note 75, at 7-8 (describing the affidavits).

⁷⁷ Brief of the Appellant, *supra* note 72, at 6.

⁷⁸ *Id.*

⁷⁹ *MCC-Marble*, 144 F.3d at 1388.

evidence rule,⁸⁰ the Eleventh Circuit reversed the district court's grant of summary judgment. Although the court acknowledged that a reasonable fact finder could disregard the affidavits submitted by MCC-Marble as "simply too incredible to believe," it found the affidavits raised a material issue of fact as to the proper interpretation of the agreement.⁸¹

MCC-Marble is an influential U.S. decision. As already stated,⁸² it has been cited as a leading decision on the CISG by international authorities on the Convention, and even has been included in a number of U.S. contract law casebooks.⁸³ *MCC-Marble* has been followed by several U.S. courts,⁸⁴ most notably in the case *Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB*.⁸⁵ In *Mitchell Aircraft*, the court relied on *MCC-Marble* to find there was a question of fact sufficient to deny summary judgment over whether a written contract for the sale of aircraft parts numbered "729640" could have been intended by the parties to refer to aircraft parts numbered "708254."⁸⁶

⁸⁰ The court stated that its "reading of article 8(3) as a rejection of the parol evidence rule . . . is in accordance with the great weight of academic commentary on the issue." *Id.* at 1390 (citing, among others, John Honnold, Herbert Bernstein & Joseph Lookofsky, Harry Fletcher, and Peter Winship).

⁸¹ *Id.* at 1391–92.

⁸² See *supra* notes 19–20 and accompanying text (citing the praise of Fletcher and the CISG advisory council).

⁸³ See, e.g., CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 405–06 (5th ed. 2003); E. ALLAN FARNSWORTH, WILLIAM F. YOUNG & CAROL SANGER, CONTRACTS: CASES AND MATERIALS 566–67 (Robert C. Clark et al. eds., 6th ed. 2001); EDWARD J. MURPHY, RICHARD E. SPEIDEL & IAN AYRES, STUDIES IN CONTRACT LAW 630–31 (6th ed. 2003); JOHN D. CALAMARI, JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CASES AND PROBLEMS ON CONTRACTS 14 (4th ed. 2004).

⁸⁴ *Shuttle Packaging Sys., L.L.C. v. Tsonakis, S.A.*, 2001 WL 34046276 at *8 (W.D. Mich. Dec. 17, 2001) (citing *MCC-Marble* for the idea that agreements under the CISG "are not subject to the parol evidence rule and are to be interpreted based on the 'subjective intent' of the parties based on their prior and subsequent statements and conduct"); *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 2001 WL 1000927 at *2 (N.D. Ill. Aug. 29, 2001) (citing *MCC-Marble* for the idea that the CISG "mandate[s] universality rather than a purely home-town rule"). The award of attorneys' fees in *Zapata Hermanos* ultimately was reversed on appeal. See *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 389 (7th Cir. 2002).

⁸⁵ 23 F. Supp. 2d 915 (N.D. Ill. 1998).

⁸⁶ *Id.* at 919–20. The contract at issue in *Mitchell Aircraft* involved the sale by a Swedish seller to an Illinois-based buyer of three integrated drive generators (IDGs), or parts for the Lockheed L-1011 Tristar, a jet airliner that went out of production in 1984. *Id.* at 916–17. Admittedly, extrinsic evidence might have been admissible in the case even if the court had applied Illinois common law, as the contract arguably was ambiguous as to whether the objects of sale were aircraft parts numbered "729640" or the

In contrast to earlier U.S. decisions applying the CISG,⁸⁷ *MCC-Marble* endeavored to adopt an interpretation of Article 8(3) that complied with Article 7(2)'s instruction to interpret the CISG with regard to "the need to promote uniformity in its application." As such, the court found that Article 8(3) required that the affidavits submitted by MCC-Marble had to be given "due consideration," thereby defeating D'Agostino's summary judgment motion. However, this interpretation of Article 8(3) not only heightens the uncertainty generated by a novel rule, it also interprets the Convention in a way that may prove to be unacceptable to U.S. contracting parties.⁸⁸ *MCC-Marble* ensures that, with respect to contracts governed by the CISG, summary judgment will be denied so long as the other party introduces any evidence alleging that the writing is not what it appears to be. Thus, *MCC-Marble's* approach may exacerbate the tendency of U.S. parties to opt out of the Convention.

Indeed, a group of New York lawyers recently raised these very concerns regarding *MCC-Marble* to a group of CISG experts. The CISG Advisory Council is an international group of CISG academics that organized in 2001 to promote and assist the uniform interpretation of the Convention.⁸⁹ The Foreign and Comparative Law Committee of the Association of the Bar of the City of New York recently submitted to the Council a request for an opinion on whether, inter alia, the parol evidence rule applies under the CISG. In its written request, the bar committee suggested that *MCC-Marble* introduced into contract drafting "what may be an unnecessary degree of uncertainty,"⁹⁰ noting that under such an approach, "there is no certainty that the provisions of even the most carefully negotiated and drafted contract will be determinative."⁹¹ The CISG Advisory Council responded with a written opinion emphasizing that neither the PER nor the plain meaning rule applies

aircraft parts that the seller had on hand. *Id.* at 921. However, the opinion's treatment of *MCC-Marble* and CISG Article 8 suggests that summary judgment would have been denied even if the contract unambiguously called for the sale of aircraft part "729640." *Id.* at 919-21.

⁸⁷ See, e.g., *Beijing Metals v. Am. Bus. Ctr., Inc.*, 993 F.2d 1178, 1182 n.9 (5th Cir. 1993) (stating, without further analysis, that, regardless of whether the CISG or Texas law governed the dispute, the PER would still be applicable).

⁸⁸ For a discussion of novelty risk, see *supra* notes 10-12 and accompanying text.

I am not arguing that the *MCC-Marble* court should have applied U.S. domestic law. In fact, the contract at issue in *MCC-Marble* may well have been governed by Italian and not U.S. law, since the contract was concluded in Italy and involved an Italian seller. Rather, I argue for a different interpretation of CISG Article 8(3), one that is more consistent with U.S. domestic law but that is also consistent with international practice, as explained in Part IV below.

⁸⁹ CISG Advisory Council, *supra* note 68, at n.1.

⁹⁰ *Id.* at n.2.

⁹¹ *Id.*

under the CISG,⁹² and cited *MCC-Marble* as “[t]he leading US case” on this issue.⁹³ The opinion also observed that parties are free to derogate from any of the CISG’s provisions, including those relating to norms of interpretation.⁹⁴ Hence, the Advisory Council opinion not only endorsed *MCC-Marble*, but it also invited U.S. contracting parties who seek to avoid the uncertainty generated by the decision to opt out of the Convention’s provisions.

As mentioned above, what was at stake in *MCC-Marble* was whether there was an issue of fact sufficient to mandate a trial. *MCC-Marble*’s approach to contract interpretation is particularly burdensome for litigants under U.S. rules of procedure, since the outcome of the litigation may hinge on whether a party’s motion for summary judgment is granted. The stakes are not the same for litigants operating under rules of procedure in other countries, as explained below.

The expanded availability of summary judgment in the U.S. in recent years can be explained in part by the pressing need to avoid the costs (both financial and otherwise) inherent in going to trial. In the colorful words of Samuel Gross and Kent Syverud:

A trial is a failure. Although we celebrate it as the centerpiece of our system of justice, we know that trial is not only an uncommon method of resolving disputes, but a disfavored one. . . . Much of our civil procedure is justified by the desire to promote settlement and avoid trial. More important, the nature of our civil process drives parties to settle so as to avoid the costs, delays, and uncertainties of trial⁹⁵

In fact, a very high percentage of litigated disputes in the U.S.—between 85 and 95 percent—do not go to trial, either because the parties settle the dispute or because the dispute is disposed of in some other way, such as by

⁹² *Id.* at cmts. 2, 3.

⁹³ *Id.* at cmt. 2.6.

⁹⁴ *Id.* at cmt. 4. The opinion also observes that extrinsic evidence would be admissible to determine the parties’ intent with respect to any such opt-out clause. CISG Advisory Council, *supra* note 68, at cmt. 4.5.

Some commentators have questioned whether a standard merger clause would be sufficient to derogate from CISG Article 8(3). See William S. Dodge, *Teaching the CISG in Contracts*, 50 J. LEGAL EDUC. 72, 89 (2000) (explaining that under the CISG, “there is no parol evidence rule for a merger clause to invoke”); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 84 at 454 (4th ed. 2001) (advising that parties wishing to derogate from Article 8(3) should include in any merger clause an express statement to that effect). In addition, the enforceability of a merger clause on unconscionability or other grounds would be determined by international law pursuant to CISG Article 4(a).

⁹⁵ Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991).

arbitration or dismissal.⁹⁶ In other words, the denial of a summary judgment motion in the vast majority of cases will set the parameters for the parties' settlement of the dispute.

In civil law jurisdictions, in contrast, proceedings are not sharply delineated between pre-trial and trial practice.⁹⁷ German trial practice in particular has been characterized as relatively informal, flexible and "discontinuous."⁹⁸ From the initiation of proceedings until final judgment, proceedings in German courts may occur in a series of episodic sessions where oral argument is interspersed with fact-finding, with the court entering intermediate judgments to dispose of issues as they arise.⁹⁹ And in contrast to the adversarial, party-driven nature of U.S. trial practice, in civil law jurisdictions the judge takes on the central role in investigating the facts of the case.¹⁰⁰ In other words, there is nothing comparable to a summary judgment motion in German civil trial practice. These differences, plus the general absence of juries in civil cases,¹⁰¹ explain why civil law jurisdictions have little need for rules, such as the PER, that limit the admissibility of evidence to prove a commercial contract.¹⁰²

⁹⁶ Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339-40 (1994).

⁹⁷ For a discussion of the general differences between civil and common law systems in this regard, see Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1672-74 (1998); Edward F. Sherman, *The Evolution of American Civil Trial Process Towards Greater Congruence with Continental Trial Practice*, 7 TUL. J. INT'L & COMP. L. 125, 128 (1999); Mirjan Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839, 840-41 (1997).

⁹⁸ Arthur Taylor von Mehren, *Some Comparative Reflections on First Instance Civil Procedure: Recent Reforms in German Civil Procedure and in the Federal Rules*, 63 NOTRE DAME L. REV. 609, 609 (1988); see also Benjamin Kaplan, Arthur T. von Mehren & Rudolf Schaefer, *Phases of German Civil Procedure I*, 71 HARV. L. REV. 1193, 1211-12 (1958).

⁹⁹ Kaplan, von Mehren, & Schaefer, *supra* note 98, at 1211-12.

¹⁰⁰ Hazard, *supra* note 97, at 1672-73; Damaska, *supra* note 97, at 843-44. Damaska explains that in most European civil law countries, the judge controls the examination of witnesses and appoints experts. *Id.* at 844. Parties' counsel are not involved in fact investigation, do not examine or cross-examine witnesses, and rely primarily on the proof supplied by their clients in presenting arguments to the court. *Id.*

¹⁰¹ See Hazard, *supra* note 97, at 1674 (explaining that, other than the U.S., "[n]o other country routinely uses juries in civil cases").

¹⁰² Although the French Civil Code has a version of the PER for non-merchant contracts, there is no PER under the law of most civil law countries, including Germany, the Scandinavian countries, and Japan. CISG Advisory Council, *supra* note 68, at cmt. 1.2.8.

To summarize, *MCC-Marble* held that, because the CISG requires a court to consider all extrinsic evidence surrounding the making of a contract, affidavits to the effect that the parties never intended for the pre-printed terms to form part of their contract raised an issue of fact sufficient to deny a summary judgment motion in favor of D'Agostino. While under German law the admissibility of such evidence would have a relatively limited impact on the proceedings, under the U.S. system denial of summary judgment would have a significantly greater impact. The following section argues in favor of an alternate interpretation of Article 8(3), one that is informed by international commentary on the CISG and by a number of German decisions.

IV. PROPOSED INTERPRETATION OF CISG ARTICLE 8(3)

What is particularly notable about *MCC-Marble* is that, in rejecting out of hand the applicability of the PER in cases governed by the CISG, the Eleventh Circuit adopted an interpretation of CISG Article 8(3) that affords less deference to a final written contract than the text of the rule requires.¹⁰³ A more conservative interpretation of CISG Article 8(3) would not have been inconsistent with international practice and might have changed the outcome of the case. Recall that CISG Article 8(3) instructs a court or tribunal to give "due consideration" to extrinsic evidence in interpreting a contract. Several of the leading commentators on the CISG have noted that, while CISG Article 8(3) requires courts and tribunals to *consider* extrinsic evidence, "due consideration" nonetheless allows a court to weigh the evidence against a presumption that the final written contract is accurate and complete.¹⁰⁴

¹⁰³ The Eleventh Circuit's approach may have been influenced by the arguments presented on appeal. Counsel for D'Agostino, relying on the much-criticized *Beijing Metals* decision, argued that the PER applies "regardless" of whether the contract at issue is governed by the CISG. Brief of the Appellee, *supra* note 75, at 13–14 (citing *Beijing Metals v. Am. Bus. Ctr., Inc.*, 993 F.2d 1178, 1182 n.9 (5th Cir. 1993)).

¹⁰⁴ HERBERT BERNSTEIN & JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG IN EUROPE 78–79 (2d ed. 2003); *see also* HONNOLD 1999 COMMENTARY, *supra* note 25, at 121 ("Jurists interpreting agreements subject to the Convention can be expected to continue to give special and, in most cases, controlling effect to detailed written agreements."); COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 88 (Peter Schlechtriem ed., 2d ed. 1998) (stating CISG Articles 8(3) and 11 do not "preclude the existence of a 'preference' for evidence of declarations in written form").

Interestingly, a subsequent edition of the Schlechtriem treatise adopts a more equivocal position on this issue:

Articles 8 and 11 call into question corresponding concepts of other legal systems, such as the German presumption of accuracy and completeness. As a rule of law this can only apply under the Convention to the extent it is found in Article 8. The fact

German courts applying the CISG have relied on a presumption in favor of the accuracy and completeness of a written contract as a basis for rejecting certain extrinsic evidence, after giving such evidence “due consideration” as required under Article 8(3). One such case was decided by the Oberlandesgericht Hamm in September 1992.¹⁰⁵ The case involved an Italian seller and a German buyer that entered into a contract for the sale of frozen bacon to be delivered in installments. The contract was formed through the exchange of letters between representatives of buyer and seller. Although the German buyer’s letter requested that the bacon be packaged in polyethylene bags, the Italian seller’s reply letter rejected the packaging request. Buyer accepted seller’s counteroffer in a fax that expressly referenced the terms set forth in seller’s reply letter. After several installments of bacon were delivered and paid for, buyer refused to take delivery of the remaining installments and seller brought suit in German court to recover damages. Buyer’s defense was that the agreement was subject to an express condition: due to buyer’s concerns about the unpackaged condition of the bacon, the parties verbally agreed that each installment would be subject to the previous installment not being rejected by health and customs authorities. Buyer submitted witness testimony to support its interpretation of the contract. However, the court rejected buyer’s argument, basing its decision on the presumption that the documents that led to the formation of the contract were complete and correct.¹⁰⁶ The witness testimony that buyer produced was insufficient to overcome the presumption of an unconditional contract based on the writing. The court observed that it was of decisive importance that buyer had accepted seller’s terms with a fax that referenced seller’s letter without reservation or mention of any agreed-upon condition.¹⁰⁷ OLG Hamm illustrates how CISG Article 8(3) may be construed to allow a court or

that the presumption is rebuttable speaks for compatibility with the Convention
Nevertheless, such a preference for written statements cannot be inferred from
Articles 8 and 11

COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 126 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d English ed. 2006). As referenced in the above-quoted text, under German law courts and arbitrators employ a presumption in favor of the correctness and completeness of a writing. *Id.*

¹⁰⁵ Oberlandesgericht Hamm, 19U 97/91, Sept. 22, 1992, full German text available in UNILEX: INTERNATIONAL CASE LAW & BIBLIOGRAPHY ON THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, (English translation available on file with author) [hereinafter OLG Hamm].

An abstract of the decision is available online at http://www.uncitral.org/uncitral/en/case_law/abstracts.html (CLOUT Abstract no. 227) (last visited Jan. 26, 2007).

¹⁰⁶ As stated in the German text, “die Vermutung der Vollständigkeit und Richtigkeit.” OLG Hamm, *supra* note 105.

¹⁰⁷ *Id.*

tribunal to consider but ultimately reject extrinsic evidence that cannot be reconciled with the terms of a final writing.¹⁰⁸

Of course, OLG Hamm was decided by a German court where, as discussed earlier,¹⁰⁹ rules of civil procedure allow the court to consider evidence and question witnesses as the issues arise. The issue from a U.S. procedural perspective, in contrast, would be whether the extrinsic evidence raised an issue of material fact sufficient to defeat a motion for summary judgment.¹¹⁰ Nonetheless, the modern U.S. standard for summary judgment is sufficiently relaxed that one could imagine a different outcome in *MCC-Marble*—one upholding the district court’s grant of summary judgment in favor of D’Agostino—had the court employed an interpretation of CISG Article 8(3) that afforded greater weight to the final writing.¹¹¹ If the writing

¹⁰⁸ For another example of a German decision involving facts somewhat similar to *MCC-Marble*, see Oberlandsgericht Saarbrücken, Jan. 13, 1993, full German text available in UNILEX: INTERNATIONAL CASE LAW & BIBLIOGRAPHY ON THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, no. 1 U 69/92 (English translation available on file with author) [hereinafter OLG Saarbrücken].

OLG Saarbrücken involved a contract for the sale of doors between a French seller and a German buyer, which contract buyer claimed had been breached due to delivery of non-conforming goods. The issue in the case was whether buyer had given timely notice of lack of conformity of the goods as required under CISG Articles 38 and 39. Buyer claimed that under prevailing trade usage, it would be unusual for buyers to examine the delivered goods within a very short timeframe. In rejecting buyer’s argument, the court noted that one of the terms and conditions of sale printed on the back of seller’s confirmation form (item no. 5) required that buyer give notice of any complaints relating to the quality of the goods within eight days of delivery. The court noted that the existence of item no. 5 in the written terms and conditions weighed in favor of finding that the parties intended to deviate from the alleged trade usage. *See id.*

¹⁰⁹ *See supra* notes 98–100 and accompanying text.

¹¹⁰ Of course, the procedural posture would change if the parties had submitted their dispute to arbitration.

¹¹¹ The “trilogy” of cases decided by the U.S. Supreme Court in 1986 significantly expanded the availability of summary judgment. In *Matsushita Electric Industrial Corp. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), a huge, complex antitrust case involving conspiracy charges against a group of Japanese manufacturers, the Court found that if the factual context makes plaintiffs’ conspiracy charges “implausible,” then plaintiffs must produce “more persuasive evidence to support their claim than would otherwise be necessary” to defeat a summary judgment motion. *Id.* at 587. The Court concluded that, “in light of the absence of any rational motive to conspire,” the alleged conduct by defendants did not give rise to a reasonable inference of conspiracy and therefore was insufficient to create a “genuine issue for trial.” *Id.* at 597; *see also* *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (in determining whether a reasonable jury could return a verdict for the plaintiff on the evidence presented, “[t]he mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient”); *Celotex Corp. v. Catrett*, 477 U.S. 317, 317 (1986). A thorough discussion of these Supreme Court decisions and how they have affected the availability of summary judgment in the

had been given greater weight, the *MCC-Marble* court may well have found that the affidavits submitted did not raise a material issue of fact in that they could not be reasonably reconciled with the contract's express terms.¹¹²

To summarize, while it is clear that the CISG rejects certain aspects of the U.S. approach to contract interpretation and the PER, it is much less clear how much "consideration" extrinsic evidence is "due" when interpreting a contract under Article 8(3). This essay argues for an interpretation of Article 8(3) that affords greater weight to the final writing than was allowed in *MCC-Marble*. The preceding discussion explains that such an approach would be more palatable to U.S. contracting parties, and is consistent with the approach followed in at least one other CISG jurisdiction (Germany). Although the German cases cited herein could be criticized as reflecting domestic law influence rather than endeavoring to adopt an autonomous reading of Article 8(3), an interpretation that is informed by national approaches may enhance the long-term legitimacy of the Convention.

lower courts is presented in Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 84-94 (1990); see also Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 99 (1988) (suggesting that in issuing the three decisions that make up the trilogy, the Court "effectively rewrote" the summary judgment rule).

The implication for contract interpretation cases is that, under the modern standard, summary judgment may be appropriate even if a contract is sufficiently ambiguous to permit the introduction of extrinsic evidence. See Joseph D. Becker, *Disambiguating Contracts by Summary Judgment*, 69 N.Y. ST. B.J. 10, 10 (Dec. 1997). Becker concludes that, under the modern approach to summary judgment, the mere existence of ambiguity in a contract "does not itself preclude summary judgment," since extrinsic evidence may be admitted and considered without necessarily raising a material issue of fact. *Id.* at 14.

¹¹² Note that the interpretation of Article 8(3) proposed herein is somewhat analogous to the liberal approach to contract interpretation under U.S. law, which was exemplified by Justice Traynor's opinion in *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641 (Cal. 1968), and endorsed by the Restatement Second. See RESTATEMENT (SECOND) OF CONTRACTS § 214 cmt. b ("Even though words seem on their face to have only a single possible meaning, other meanings often appear when the circumstances are disclosed."). Under such an approach, a court or arbitrator should consider the extrinsic evidence and exclude it only if the evidence does not support an interpretation to which the language of the written contract is reasonably susceptible. *Pacific Gas*, 442 P.2d at 644. In contrast, the "plain meaning" approach to contract interpretation that is followed by some U.S. courts cannot be used as a basis for interpreting the meaning of "due consideration" in CISG Article 8(3), since it precludes a court from giving *any* consideration to extrinsic evidence when a contract is unambiguous on its face. See *supra* note 59 (discussing the *Air Safety* decision).

V. CONCLUSION

This Essay has argued against the result in *MCC-Marble* and in favor of a less autonomous interpretation of the CISG. Of course, one could argue that sacrificing the goal of uniform interpretation to other values ultimately defeats the purpose of adopting a uniform law. To put the issue another way, is a CISG that is subject to non-uniform interpretations worse than having no CISG at all? Is the CISG project, like Esperanto, a utopian but ultimately futile attempt at harmonization?

Commentators have suggested that harmonization through the adoption of international rules is futile, and that any uniform law drafting process is inherently inefficient because it will not result in the type of law that commercial parties themselves would have chosen.¹¹³ In my view, such predictions of the irrelevance or ultimate demise of the CISG are premature. Most of the U.S. cases that refer to the CISG have been decided in the past few years.¹¹⁴ Over time, as the CISG increasingly is taught in U.S. law schools and more attorneys become familiar with the Convention, the novelty of the CISG will abate. In addition, I think that a uniform law that is flawed and subject to varied interpretations is preferable to a complete lack of a uniform law. As John Honnold noted in 1965 (referring to the then-recently adopted ULIS and ULF):

Surely even those who were most disappointed in some of the provisions of these Uniform Laws must recognize that they would improve the sorry legal situation confronting trade, which must cope with national laws antique and unsuited to international transactions, unintelligible to traders from different legal and linguistic backgrounds, and subject to the vagaries of the conflict of laws.¹¹⁵

From this perspective, the CISG offers potential advantages to parties negotiating a transnational sales agreement. From a psychological perspective, the CISG provides a common frame of reference around which to negotiate the contract, which should result in lower transaction costs for the parties.¹¹⁶ Although the CISG does not completely do away with the “vagaries” of conflicts rules (as there are matters that the CISG does not

¹¹³ See Gillette & Scott, *supra* note 8, at 485 (predicting the CISG ultimately will lose out to domestic law systems that provide more desirable substantive rules to contracting parties).

¹¹⁴ See *supra* note 7.

¹¹⁵ 1964 Convention, *supra* note 24, at 331–32.

¹¹⁶ See Filip De Ly, *The Relevance of the Vienna Convention for International Sales Contracts—Should We Stop Contracting It Out?*, 3 BUS. L. INT’L 241, 246 (2003) (listing cross-cultural, transaction cost, and contract management advantages of the CISG).

address that are to be covered under applicable domestic law), the existence of a uniform convention nonetheless narrows the scope of issues that are subject to conflicts rules. These same advantages could also be obtained by resorting to the UNIDROIT Principles of International Commercial Contracts,¹¹⁷ another set of uniform rules applicable to transnational sales contracts. However, unlike the CISG, the UNIDROIT principles do not apply by default to a contract, but instead represent international commercial principles that parties can expressly opt into. As such, one would suppose (and existing case law suggests) that the UNIDROIT principles are even less familiar to U.S. attorneys and judges than the CISG.¹¹⁸

In sum, the CISG is not a futile effort. The prospects of the CISG's continued acceptance, however, will be enhanced if courts are allowed greater leeway to interpret the CISG in light of domestic legal traditions.

¹¹⁷ See *supra* note 21.

¹¹⁸ A search of the term "UNIDROIT" in the "allcases" database of Westlaw on April 28, 2006 located only a single case that referred to the UNIDROIT Principles. The case involved a request to confirm a foreign arbitral award that had applied the UNIDROIT Principles. See *Ministry of Def. and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 29 F. Supp. 2d 1168 (S.D. Cal. 1998).