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THE AFTERMATH OF MCC-MARBLE: IS THIS THE DEATH KNELL FOR THE PAROL EVIDENCE RULE?

PAOLO TORZILLI*

Cessante ratione, cessat ipsa lex—where the reason for the rule ceases, the rule also ceases.1 Twentieth century American case law contains numerous court holdings that recognize the maxim that once society no longer embraces a particular public policy objective, the associated rule must be reworked or eliminated.2 To sustain the vitality of our legal system, scholars

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2 It is a well-settled rule that the law varies with the varying reasons on which it is founded. This is expressed by the maxim: “Cessante ratione, cessat ipsa lex.” This means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself. If the reasons on which a law rests are overborne by opposing reasons, which, in the progress of society, gain a controlling force, the old law, though still good as an abstract principle and good in its application to some circumstances, must cease to apply as a controlling principle to the new circumstances. See Beardsley v. City of Hartford, 50 Conn. 529, 541–42 (1883); see also Funk v. United States, 290 U.S. 371, 385 (1933) (Sutherland, J.) (quoting with approval the Connecticut Supreme Court’s interpretation of the maxim); Marshall v. Moseley, 21 N.Y. 280, 292 (1860) (“[W]hen the reason for the rule ceases, [judges] have the right to renounce it.”). More recently, this precept was fortified by Justice Carro. See Thomas Crimmins Contracting Co. v. City of New York, 530 N.Y.S. 2d 779, 782 (1st Dep’t. 1988) (“It should go without saying that when the reason for the rule ceases, the rule also ceases. . .”).

Similarly, another rule of law states that a law “‘should not be applied when there is no reason for it.’” United States Liab. Ins. Co. v. Superior Court, 60 Cal. Rptr. 723, 727 (Cal. Ct. App. 1967) (quoting In re Troy’s Estate, 37 P.2d 471, 472 (Cal. Dist. Ct. App. 1934)).
and judges must continually scrutinize legal doctrine and propose changes when public policy warrants it. One prominent subject of such scrutiny has been the parol evidence rule.

reasonably be expected to succeed in life if he is denied the opportunity of an education." Id. at 493 (emphasis added); see also Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970). The Javins court overruled certain aspects of landlord-tenant law that had their source in feudal times. See id. at 1074. In so doing, Circuit Judge Skelly Wright wrote "[c]ourts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life—particularly old common law doctrines which the courts themselves created and developed." Id.

Judge Cardozo clearly recognized the need to reconcile the law with societal needs. For example, in the famous case of MacPherson v. Buick Motor Company, 111 N.E. 1050 (N.Y. 1916), he limited the caveat emptor doctrine in products liability law. In so doing he wrote:

Precedents drawn from the days of travel by stage coach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.

Id. at 1053.


One's "vision of the law changes with the changing facts of life—the perceptions, fears and aspirations by which the consensus of the nation assigns priorities to the basic purposes of the law. . . . There is a silent consent . . . as to the direction in which they are moving, the uneasiness that they experience and the restraints that they feel; and these things are spelled out in law-making, decision-making, and rule-making. . . ."

Id.

Similarly, judges understand that the law must evolve. Numerous opinions reflect this understanding. Justice Jacobs wrote one of the most eloquent opinions in Schipper v. Levitt & Sons, Inc., 207 A.2d 314 (N.J. 1965):

The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected. . . .

Id. at 325; see also Whetzel v. Jess Fisher Management Co., 282 F.2d 943, 946 (D.C. Cir. 1960) ("[T]he continued vitality of the common law, . . . depends upon its ability to reflect contemporary community values and ethics."); Yeo v. Tweedy, 286 P. 970, 972 (N.M. 1929) ("[I]t is often said that our common law is adaptable; that, while its principles operate continuously, changed conditions modify its rules. . . .").

Generally, the parol evidence rule seeks to exclude testimony of negotiations occurring prior to, or contemporaneous with, the execution of a written instrument.\(^5\) Numerous reasons for the parol evidence rule have been set forth.\(^6\) Two of these policy reasons are universally accepted. First, jurors are generally considered to be extremely impressionable.\(^7\) Second, there is a need for the integrity of a writing to be preserved.\(^8\)

Although courts have embraced the reasons behind the parol evidence rule, the uniformity ends there. This lack of uniformity creates confusion for students, scholars, judges, and practitioners. The confusion regarding this rule is enhanced by

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\(^5\) See O'Neill v. United States, 50 F.3d 677, 685 (9th Cir. 1995) ("Once a contract is found to be unambiguous the parol evidence rule excludes statements offered to contradict a clear contract term in a final expression of agreement."); Radiation Sys. Inc. v. Amplicon, Inc., 882 F. Supp. 1101, 1103 (D.D.C. 1995) ("Generally, when parties have reduced their entire agreement to writing, the parol evidence rule excludes evidence of prior or contemporaneous oral agreements inconsistent with the express terms of the writing."); Cusimano v. First Maryland Sav. and Loan, Inc., 639 A.2d 553, 560 (D.C. 1994) (holding that the parol evidence rule prohibits the introduction of evidence to "add to, contradict, or explain" the terms of an unambiguous contract provision); see also CLAYTON P. GILLETTE & STEVEN D. WALT, SALES LAW: DOMESTIC & INTERNATIONAL 139 (1999) ("The parol evidence rule asks [the] question: Assuming that a party can enforce a contract, what evidence is admissible to prove its terms?").

\(^6\) See Masterson v. Sine, 436 P.2d 561, 564 (Cal. 1968) ("In formulating the rule governing parol evidence, several policies must be accommodated."). For a good discussion of the policy reasons behind the parol evidence rule, see Judge Posner's decision in Patton v. Mid-Continent Systems, Inc., 841 F.2d 742, 745–46 (7th Cir. 1988).

\(^7\) See American Underwriting Corp. v. Rhode Island Hosp. Trust Co., 303 A.2d 121, 126 n.2 (1973) (concluding "that the parol evidence rule arose out of a fear of invention by witnesses and also to allow courts to prevent juries from making findings of fact based on their sympathies").

\(^8\) See George I. Wallach, The Declining "Sanctity" of Written Contracts – Impact of the Uniform Commercial Code on the Parol Evidence Rule, 44 Mo. L. Rev. 651, 653 (1979) ("The parol evidence rule... sanctifies the writing at the expense of the parties by excluding other forms of evidence from the jury's consideration when they determine the agreement of the parties.").
the inconsistent application of the rule\textsuperscript{9} and the limited precedential value provided by appellate decisions.\textsuperscript{10} In addition, the semantics of the rule itself are paradoxical.\textsuperscript{11} Finally, the rule is virtually engulfed by a plethora of exceptions.\textsuperscript{12} Nevertheless, the parol evidence rule survives.\textsuperscript{13}

\textsuperscript{9} See Susan J. Martin-Davidson, \textit{Yes, Judge Kozinski, There is a Parol Evidence Rule in California - The Lessons of a Pyrrhic Victory}, 25 SW. U. L. REV. 1, 71 (1995) (stating that "[a] rule which produces such mind-numbing manipulations cannot be justified as law or good policy").

\textsuperscript{10} See ARTHUR L. CORBIN, \textit{CORBIN ON CONTRACTS} § 573 (1952) (indicating that appellate decisions often create the appearance that the court is making an assumption that a contract represents an accurate integration, but this appearance is often erroneous).

\textsuperscript{11} The rule's application does not apply exclusively to parol (oral) terms. See Hawley v. Dresser Indus., Inc., 738 F. Supp. 243, 248 (S.D. Ohio 1990) ("[The 'parol evidence rule' is not limited to oral evidence."). It is a substantive rule, not a rule of evidence. See Electric Distrib., Inc. v. SFR, Inc., 166 F.3d 1074, 1082 n.3 (10th Cir. 1999); \textit{see also In re Continental Resources Corp.}, 799 F.2d 622, 626 (10th Cir. 1986) ("We begin by observing that the parol evidence rule is a rule of substantive law."); Baum v. Great W. Cities, Inc., 703 F.2d 1197, 1205 (10th Cir. 1983) ("The parol evidence rule is, of course, fundamentally a rule of substantive law, not the law of evidence . . . . Thus, any evidence offered to prove earlier conduct is irrelevant if offered to contradict unambiguous writing.") (emphasis added); Investors Royalty Co. v. Lewis, 91 P.2d 764, 766 (Okla. 1939) ("The parol evidence rule is a rule of substantive law.").

\textsuperscript{12} See \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 214. The Restatement provides that:

Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish

(a) that the writing is or is not an integrated agreement;
(b) that the integrated agreement, if any, is completely or partially integrated;
(c) the meaning of the writing, whether or not integrated;
(d) illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause;
(e) ground for granting or denying rescission, reformation, specific performance, or other remedy.

\textit{Id.}

The difficulties surrounding the rule have prompted some to call for its curtailment, or even its demise.\textsuperscript{14} This position has gained new support in recent years. The judicial trend limiting the exclusionary force of the rule was advanced with the Eleventh Circuit Court of Appeal's holding in \textit{MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, SpA.}\textsuperscript{15} The court held that cases governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG) may not apply the parol evidence rule to preclude parties from proffering extrinsic evidence.\textsuperscript{16} The \textit{MCC-Marble} decision leaves observers to question whether such a ruling will permeate contract cases governed by other law.\textsuperscript{17}

This Note posits that the parol evidence rule, as a device to exclude extrinsic evidence of prior agreements, should be abandoned. Part I defines the parameters of the rule, its intended function, and judicial trends in this area of the law. Parts II and III review the CISG and its treatment of extrinsic evidence. Part IV analyzes relevant American case law. Part V of this Note discusses the public policy reasons for the rule and examines the extent to which those policy objectives are no longer embraced. Part VI identifies ramifications of the rule's abandonment. This Note ultimately concludes that the rule is an evolutionary relic. Contract law must adapt to modern business practices. The holding in \textit{MCC-Marble} confirms that the interests of commerce and trade are best served without the parol evidence rule.

\section*{I. THE RULE'S FUNCTION AND CASE LAW TREND}

The intention of this Note is to go beyond a discussion of doctrinal framework.\textsuperscript{18} In order to conceptualize the elimination...
of the rule, however, several important cases must be reviewed. This review is necessary because it is easier to accept abandonment of the rule when viewed in light of the trend supporting its abandonment.

A. Case Law Trend: Narrow Interpretation of the Parol Evidence Rule

Cases from the nineteenth century strictly applied the parol evidence rule. In Thompson v. Libbey, the parties agreed to a sale of logs. The seller, Thompson, brought suit for the purchase price of the logs. Libbey argued that the contract included a warranty that was breached, thereby discharging his duty to tender the purchase price of the goods. Libbey claimed that, though such a term did not appear in the writing, the parties had orally agreed to it. The court held that the trial court erred in failing to conclude that the parol evidence rule barred such extrinsic evidence from consideration by the jury. Noting that the writing contained the entire agreement of the parties, the court declared that "[t]he only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself." Such an


20 26 N.W. 1 (Minn. 1885).

21 See id. at 2; see also CHARLES L. KNAPP & NATHAN M. CRYSTAL, PROBLEMS IN CONTRACT LAW 454–61 (3d ed. 1993) (discussing the Thompson case and the parol evidence rule). The parties memorialized the agreement in a simple writing. See Thompson, 26 N.W. at 2.

22 See Thompson, 26 N.W. at 2.

23 See id.

24 See id.

25 See id. at 2–4.

26 Id. at 2. One observer has noted that the Thompson ruling "is highly artificial." See Wallach, supra note 8, at 657.

Naturally, this case was decided before the adoption of the Uniform Commercial Code. Suppose Thompson had been decided under the Uniform Commercial Code? It seems likely that the extrinsic evidence would undoubtedly have been permitted. This is a very persuasive indicator of the liberalizing trend regarding the parol evidence rule. See U.C.C. § 2-202 (1978) (stating that certain types of evidence may
approach led one scholar to conclude that "the reins" were "still tightly held by the judges."  

B. Case Law Trend: Liberalization

Recent cases have applied the rule more broadly. The leading case of Masterson v. Sine highlights this liberalization. In Masterson, the defendants appealed the trial court's determination precluding the admission of extrinsic evidence that an option to purchase land included an oral term prohibiting assignment of the option. The court held, in a 5-2 decision, that the extrinsic evidence should have been admitted even though it would have directly contradicted an implied-at-law term. Chief Justice Traynor reasoned that excluding such evidence was proper only "when the fact finder was likely to be misled. The rule must therefore be based on the credibility of the evidence." A comparison of the Thompson case with the more recent Masterson case illustrates the trend of courts be offered to explain or supplement an otherwise final written agreement between parties).

27 Charles T. McCormick, The Parol Evidence Rule as a Procedural Device for Control of the Jury, 41 Yale L.J. 365, 370 (1932). McCormick criticized the principle that "[t]he writing is the 'sole criterion' of its own completeness ... [as] too narrow to meet the actual need for recognition of reasonable and genuine oral agreements dealing with matters related to those covered by the written document, but not intended by the parties to be superceded by the writing ...." Id. at 369-70.

28 436 P.2d 561 (Cal. 1968).


30 See Masterson, 436 P.2d at 562. This was vital to the outcome of the case because if the option was indeed not assignable, the trustee in Masterson's bankruptcy could not exercise it. See id. Under California law, such an option is impliedly assignable unless specified to the contrary in writing. See id. at 567 (Burke, J., dissenting).

31 See id. at 565 ("The fact that there is a written memorandum, however, does not necessarily preclude parol evidence rebutting a term that the law would otherwise presume.").

32 Id. at 564.
applying the parol evidence rule less rigorously.\textsuperscript{33} The liberalization trend is a signal that courts recognize that the rule’s exclusionary effect is often unworkable. This makes it easier to advocate the rule’s demise.

II. THE CISG AND THE PAROL EVIDENCE RULE

After World War II, the United States was experiencing an economic boom and sought to build a national commercial network.\textsuperscript{34} Toward that end, forty-nine states adopted Article 2 of the Uniform Commercial Code (UCC).\textsuperscript{35} The obvious goal of such adoption was to provide uniformity of law throughout the country for contracts involving the sale of goods.\textsuperscript{36} Article 2 of the UCC has been an unquestioned success.\textsuperscript{37}

\textsuperscript{33} See Posner, supra note 29, at 562 n.50 (1998) (observing California as a jurisdiction with a liberal approach to parol evidence).

\textsuperscript{34} See James A. Rahl, 1983 Survey of Books Relating to the Law, 81 MICH. L. REV. 1130 (1983) (reviewing JAMES R. ATWOOD & KINGMAN BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (2d ed. 1981)). Professor Rahl acknowledged “the great growth of the... post-World War II years.” Id.

\textsuperscript{35} See Flagg Bros. v. Brooks, 436 U.S. 149, 161–62 n.11 (indicating that the UCC is “the law in 49 States and the District of Columbia”); see also Glenn L. Norris, et. al., Hedge to Arrive Contracts and the Commodity Exchange Act: A Textual Alternative, 47 DRAKE L. REV. 319, 337 n.73 (1999); Boyd Allan Byers, Note, Making a Case for Federal Regulation of Franchise Terminations—A Return-of-Equity Approach, 19 IOWA J. CORP. L. 607, 641 (1994) (lauding the authors of Article 2 of the UCC). This commitment arguably took a great leap forward when United States Supreme Court decisions of the New Deal era greatly expanded Congress’s power under the Commerce Clause. Much of the New Deal legislation had as its goal the creation of national economic systems. See, e.g., Ann Althouse, Theoretical and Constitutional Issues: Enforcing Federalism after United States v. Lopez, 38 ARIZ. L. REV. 793, 812 (1996) (“[T]he work of [the] New Deal Congress [was to] struggl[e] with the nation’s economic problems.”); Suzanna Sherry, The Ghost of Liberalism Past, 105 HARV. L. REV. 918, 919 (1992) (“The New Deal... repudiat[ed] the notion that the national government had limited powers over economic... development.”) (reviewing BRUCE ACKERMAN, WE THE PEOPLE (1991)) (internal quotation omitted).

\textsuperscript{36} See John Anecki, Note, Selling in Cyberspace: Electronic Commerce and the Uniform Commercial Code, 33 GONZAGA L. REV. 395, 396 (1997–98) (“The purpose of the UCC Article 2, when it was written in 1944, was to foster uniformity between states in resolving contractual disputes which concern the sale of goods. By 1972, every state had adopted the UCC except Louisiana.”) (footnotes omitted).

More recently, the United States has attempted to facilitate international trade. One obstacle to international trade has been the different legal rules used by America’s major trading partners. The United Nations responded by creating the United Nations Convention on Contracts for the International Sale of Goods (“CISG”). The CISG is described as “constantly


gaining more success as more countries choose to ratify it.\textsuperscript{41}

The CISG is currently in force in fifty two countries, and the trade activity of these countries accounts for over two-thirds of all world trade.\textsuperscript{42}

\textsuperscript{41} Camilla Baasch Andersen, \textit{Furthering the Uniform Application of the CISG: Sources of Law on the Internet}, 10 PACE INT'L. L. REV. 403, 403 (1998) (footnote omitted).

\textsuperscript{42} See id. The countries with the CISG in force are: Argentina, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Canada, Chile, China (PRC), Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Guinea, Hungary, Iraq, Italy, Lesotho, Lithuania, Luxembourg, Mexico, Moldova, Netherlands, New Zealand, Norway, Poland, Romania, Russian Federation, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Uganda, Ukraine, United States, Uzbekistan, Yugoslavia, Zambia, and the USSR (superseded). In 1999, the Convention will enter into force in Greece and Mongolia (January 1, 1999 and February 1, 1999, respectively). Id. at 403 n.2. “Eventually, the number of member countries is expected to surpass 100. It is worth noting, however, that two major trading countries have chosen not to adopt the convention to date: Britain and Japan.” JBC International, \textit{Think You Understand the Vienna Convention? Then Read This Sad Tale}, J. OF COM., June 24, 1998, at 11C (“Essentially, when a country adopts the convention, it finds itself with two sales laws: a domestic sales law and the CISG. In the United States, for example, the Uniform Commercial Code and the CISG are now both U.S. law.”).
The CISG applies to contracts for the sale of goods if the contracting parties are located in different countries that have ratified the treaty.\(^43\) For example, if an Italian manufacturer of motorcycles sold their product to a distributor in New Jersey, the general rule is that the contract would be governed by the CISG.\(^44\) In addition, parties not otherwise subject to the CISG may agree to be governed by it.\(^45\) The validity of such an agreement is based on the choice-of-law rules of the particular forum.\(^46\) Moreover, parties can agree that the otherwise applicable CISG does not govern their agreement.\(^47\)

The flexibility with which parties can agree to apply or avoid the treaty's law is an important consideration. Commercial buyers and sellers of the world have the applicable effect of this body of contract law in the palm of their hands. If they deemed the CISG unwieldy, every contract for the sale of goods could void its governing effect. This is especially noteworthy when one considers that the purpose of the CISG is to reconcile diverse bodies of contract law.\(^48\) In other words, the world's


\(^{45}\) See Gabriel, supra note 43, at 5 (“The CISG may also apply to a transaction if the parties agree to be bound [by it].”); Reed Kathrein & Daniel Magraw, Introduction in The Convention for the International Sale of Goods: A HANDBOOK OF BASIC MATERIALS (Daniel Magraw & Reed Kathrein eds., 2d ed. 1990) (“It is also possible that parties to a contract will choose to specify that the law of the Convention applies even if it would not otherwise apply.”). The Convention itself does not suggest the parties could agree to be bound by it, but choice-of-law rules support this notion. See Kathrein & Magraw, supra, at 1–2; see also U.C.C. § 1-105 (1978); Dore, supra note 43, at 527 (discussing same).

\(^{46}\) See Gabriel, supra note 43, at 5 (suggesting a choice-of-law clause in a contract could be barred by “choice-of-law rules in the forum”).

\(^{47}\) See Gillette & Walt, supra note 5, at 32; Aleksandar Goldstajn, Usages of Trade and other Autonomous Rules of International Trade According to the UN (1980) Sales Convention, in DUBROVNIK LECTURES, supra note 40, at 95.

businesspeople could thwart the United Nations' best attempt to homogenize international sales law. This has not been the case.

The absence of such avoidance suggests that businesspeople have embraced the CISG.\(^4^9\) There are several differences between the CISG and the contract law that students learn in law school. For example, the CISG recognizes no statute of frauds.\(^5^0\) The abandonment of the statute of frauds reflects an overwhelming rejection of the doctrine among the world's legal systems.\(^5^1\) Similarly, the next section will discuss why the CISG does not provide for a parol evidence rule.

### III. Treatment of Extrinsic Evidence by the CISG

The conclusion that the CISG contains no provision for the parol evidence rule is not determinable at a mere glance. The text itself does not explicitly state that there is no parol evidence

\(^4^9\) On the other hand, it may also suggest they did not know the CISG could be opted out of, or that the parties were entirely unaware it even applied to a particular transaction. The evidence, however, leads one to conclude the CISG is lauded globally. 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) (indicating that by 1988, 47 states adopted the CISG, accounting for over 60% of the world's trade); Andreason, *supra* note 48, at 351 (lauding it as "one of the greatest achievements of modern legal history").

Praise for the achievement of the CISG is not limited to American observers. For example, German scholar Rolan Loewe wrote that the CISG "represented a milestone in legal history." Van Alstine, *supra*, at 7 (quoting ROLAN LOEWE, INTERNATIONALES KAUFRECHT 5 (1989)). In addition, Norway has embraced it as their domestic sales law, and Sweden and Finland have amended their commercial law to accommodate CISG provisions. See Peter Winship, *Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention*, 37 LOY. L. REV. 43, 46 (1991); Andreason, *supra* note 48, at 351 n.5.

\(^5^0\) See CISG, *supra* note 16, art. 11 ("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.").

rule. Rather, to make such a determination, scholars have sought inferential evidence from the text of the document. In addition, they have looked to the purpose of the treaty and by what means the purpose is best served.

A. A Textual Analysis

Article 8 of the CISG relates to contractual construction. More importantly, Article 8(3) states that "due consideration is to be given to all relevant circumstances of the case including the negotiations." Armed with such clear text, what is a fair construction of this clause? There is no guarantee that the drafters intended to exclude the parol evidence rule because there is nothing explicit in the text to support such a notion. Furthermore, including negotiations does not further the quest

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52 The most popular rationale for the silence in the text on this issue was asserted by Professor Honnold. “Article 8 does not directly address the ‘parol evidence rule;’ references to this and other technical domestic rules would have cluttered the draft and would have mystified jurists from legal systems that have no such rule.” HONNOLD, supra note 51, at 170.


Scholars are not alone in pursuing the theme of uniformity. The text of the treaty itself confirms the emphasis on homogeneous commercial law. See CISG, supra note 16, pmbl. (“[T]he adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.”).

55 See CISG, supra note 16, art. 8; see also Gyula Eorsi, General Provisions, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS § 2.05 (Nina M. Galson & Hans Smit eds., 1984) [hereinafter INTERNATIONAL SALES] (discussing Article 8 as the basis for governing the parties’ conduct and the contract’s construction).

56 CISG, supra note 16, art. 8(3) (emphasis added).

57 See supra note 52 and accompanying text (discussing the lack of explicit guidance by the drafters on the parol evidence rule issue).
to exclude the parol evidence rule from CISG cases because the UCC has already allowed parties to submit negotiations in court. Therefore, it seems that if the language of the CISG is construed in parallel with UCC Article 2, the parol evidence rule was not abandoned.

One possible construction of this text supporting the abandonment argument is centered on the word "all," as used in Article 8(3) of the CISG. "All" is a very encompassing choice of language. It suggests courts use every possible indicia of party intent. This construction of CISG Article 8(3) goes further than section 2-202 of the UCC and provides the underpinnings for the MCC-Marble decision. Yet, there is an alternative textual construction. It is based on the phrase that "all relevant circumstances" be given "due consideration." The word "relevant" was placed between "all" and "circumstances." It seems clear that "relevant" is used to modify "all" to restrict its broad connotation. Assuming this is true—that the "circumstances" to be given "due consideration" are something less than "all"—what circumstances should be excluded?

The final clause of Article 8(3) provides some examples of relevant circumstances. These include "the negotiations, any practices which the parties established between themselves, usages and any subsequent conduct of the parties." The latter three examples mirror the course of dealings, custom/usage, and

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58 See U.C.C. § 2-202 (1978) ("Terms... included therein may not be contradicted by evidence of any prior agreement."). The language of the UCC prohibits previous agreements to "contradict;" previous understandings may be proffered for purposes other than contradiction. Therefore, the UCC already allowed consideration of the negotiations, and one possibility is that the CISG goes no further. Id.

59 See CISG, supra note 16, art. 8(3) (indicating consideration be given to all circumstances).

60 See MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 29 (10th ed. 1993) (defining the term as "the whole amount or quantity of" and "as much as possible").

61 See U.C.C. § 2-202 (1978). The UCC does not allow all prior agreements to be proffered to the court. It does not allow those understandings that contradict the final agreement. See id.

62 See MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, SpA, 144 F.3d 1384, 1389 (1998) (quoting CISG Article 8(3)).

63 See CISG, supra note 16, art. 8(3) (emphasis added).

64 Id.

65 See id.

66 Id.
course of performance, respectively, that are expressed in section 1-205 of the UCC. The "negotiations," however, presents difficulty with the interpretation because there are two interpretations of "negotiations" as used in this clause. Unfortunately, each leads to a different conclusion about whether the parol evidence rule should apply to CISG cases.

One interpretation provides that all the negotiations are relevant. This is consistent with the other examples given. Any course of dealings, course of performance, and usage may be offered to the court. To conclude all negotiations are allowed before the trier of fact supports the assertion that the CISG has not provided for a parol evidence rule. A second interpretation provides that the word "relevant" limits the negotiations in some way. In addition, the lack of the use of "any" to modify "negotiations," could be construed as a restriction. If the negotiations are limited to those which are "relevant," how do we determine which negotiations fall into this category? For example, if relevant negotiations are limited to those tending "to explain or supplement," the exclusionary force of the CISG only goes so far as the UCC. It seems that such a textual

67 See UCC § 1-205(1) (1978) (discussing "[a] course of dealing."); see also UCC § 1-205(2), (3) (defining "a usage of trade" and "[a] course of dealing," respectively). Use of these examples lends support to the assertion that Article 8(3) be construed parallel with UCC § 2-202.

68 Very little has been published on the issue of the CISG and its textual implications. There are three reasons for this. First, cases governed by the CISG are sparse. See MCC-Marble Ceramic, Inc. v. Ceramica Nuova D'Agostino, SpA, 144 F.3d 1384, 1389 (11th Cir.1998) ("Despite the CISG's broad scope, surprisingly few cases have applied the Convention in the United States....") (citation omitted); Delchi Carrier, SpA v. Rotorex Corp., 71 F.3d 1024, 1027-28 (2d Cir. 1995) ("[T]here is virtually no case law under the Convention...."). Second, the treaty is drafted in several unrelated languages, leading scholars and courts to rely much more on purpose construction than textual evidence, which can be subtly (or not so subtly) different in the various languages. See generally Steven Walt, Novelty and the Risks of Uniform Sales Law, 39 VA. J. INT'L. L. 671, 676 n.11 (1999) (acknowledging the difficulties in multiple language statutory construction even though "production of multiple language versions of treaties is common"); Dinah Shelton, Reconcilable Differences? The Interpretation of Multilingual Treaties, 20 HASTINGS INT'L. & COMP. L. REV. 611 (1997). Third, much of the language is broad in order to reconcile with the general purpose of the treaty, which is to incorporate various legal systems. See HONNOLD, supra note 51, at 136 ("To read the words of the Convention with regard for their 'international character' requires that they be projected against an international background.").


70 The commentary is equally uninformative. Id. In fact, a persuasive argument
construction would not lead one to conclude that the CISG totally abandoned the parol evidence rule.

No matter what construction of the text one embraces, it is clear that a textual analysis of the CISG does not provide an answer to the parol evidence rule issue. One may go so far as to conclude that the words of Article 8(3) are vague. Therefore, the purpose of the treaty must be ascertained, and the problem of parol evidence should be resolved in favor of best serving the stated purpose.

B. Purpose Construction

Unlike analyzing the textual evidence in the CISG, analyzing the treaty's purpose is a much easier task. The preamble and Article 7 of the CISG give those attempting to construe the treaty ample material to do so. An analysis of these provisions seems to lend itself to one clear conclusion—the CISG has no parol evidence rule provision. The preamble gives guidance on the purpose of the treaty. It states two purposes. First, the treaty as a uniform governing system is designed to "contribute to the removal of legal barriers in international trade." Second, it was adopted to "promote the development of
international trade."\(^7\) Article 7 of the treaty provides construction provisions.\(^7\) Section 1 of Article 7 provides that one should take into account the treaty’s “international character” and that construction must dovetail with “the need to promote uniformity in its application.”\(^7\) Section 2 of Article 7 states that cases “not expressly settled” by the CISG must be “settled in conformity with the general principles on which it is based.”\(^7\) It seems this provision is paramount for domestic courts to use in ruling on cases governed by the CISG. The message to courts is clear: construe the treaty in favor of its international flavor and disregard special domestic rules of commercial law.\(^7\) Therefore, if one were to conclude that the parol evidence rule was unique to domestic law, it would have no application in cases governed by the CISG.\(^8\)

\(^{75}\) CISG, supra note 16, pmbl.
\(^{76}\) See id. art. 7; see also INTERNATIONAL SALES, supra note 55, § 2.01–2.04 (reviewing construction provisions); Andersen, supra note 41, at 403 (“Uniformity applies throughout the Convention by way of Article 7(1).”).
\(^{77}\) CISG, supra note 16, art. 7(1); see also INTERNATIONAL SALES, supra note 55, § 2.03 (“[T]he elements of regard to the international character of the Convention and uniformity in its application were well chosen. The first, as we have seen, was devised to check the homeward trend, and the second is an admonition to follow precedents on the international plane.”) (footnote omitted).
\(^{78}\) CISG, supra note 16, art. 7(2); see also HONNOLD, supra note 51, at 148–49 (indicating this language is the gap filling provision of the CISG). It was already submitted that a review of the plain meaning is inconclusive. See supra Part III.A. Therefore, it would not be unreasonable to conclude that parol evidence questions are “not expressly settled,” under the treaty. CISG, supra note 16, art. 7(2).
\(^{79}\) See HONNOLD, supra note 51, at 148–49.


Parties with a contract governed by the CISG have two options to protect their
IV. RELEVANT U.S. CASE LAW

Interestingly, despite the broad reach of the CISG, there is relatively little CISG case law.\textsuperscript{81} Even more rare is a CISG case relating to the parol evidence rule.\textsuperscript{82} Nevertheless, looking at the relevant cases is important to understanding how American courts view this issue.

The first reported case on the CISG and parol evidence was \textit{Filanto, SpA v. Chilewich International Corp.}\textsuperscript{83} In \textit{Filanto}, the dispute involved other issues, such as the application of an arbitration provision.\textsuperscript{84} Chief Judge Brient, however, dropped a footnote stating: “the Convention essentially rejects both the Statute of Frauds and the parol evidence rule.”\textsuperscript{85} This observation appears to be the first judicial acknowledgement that the CISG does not incorporate the parol evidence rule.

In \textit{Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.},\textsuperscript{86} the Fifth Circuit Court of Appeals discussed the issue of the CISG and the parol evidence rule in only the second reported case on that topic. The defendant corporation argued that two terms, orally agreed written instrument. First, they may simply agree that the CISG does not apply to their agreement and specify the application of law from a jurisdiction where the rule is in effect. \textit{See} GILLETTE \& WALT, supra note 5, at 153. Second, the parties may even be able to create their own parol evidence rule through the use of a merger clause. \textit{See id.} Only once have American courts mentioned the issue of merger clauses in connection with the CISG. \textit{See MCC-Marble,} 144 F.3d at 1391 (“[T]o the extent parties wish to avoid parol evidence problems they can do so by including a merger clause in their agreement that extinguishes any and all prior agreements and understandings not expressed in the writing.”) (footnote omitted); \textit{see} also Ronald A. Brand \& Harry M. Fletcher, \textit{Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention,} 12 J.L. \& COM. 239, 252 (1993).

\textsuperscript{81} \textit{See} MCC-Marble, 144 F.3d at 1389 (recognizing that “surprisingly few cases have applied the Convention in the United States”); Delchi Carrier, SpA v. Rotorex Corp., 71 F.3d 1024, 1028 (2d Cir. 1995) (acknowledging that “there is virtually no caselaw under the Convention”); \textit{see also} Anthony S. Winer, \textit{The CISG Convention and Thomas Franck’s Theory of Legitimacy,} 19 J. INT’L L. \& BUS. 1, 3 n.20 (1998).

\textsuperscript{82} \textit{See} MCC-Marble, 144 F.3d at 1389 (noting that “only two reported decisions touch upon the parol evidence rule”).


\textsuperscript{84} \textit{See} Filanto, 789 F. Supp at 1236 (framing the issue “of whether the parties agreed to arbitrate their disputes”).

\textsuperscript{85} \textit{Id.} at 1238 n.7 (dictum).

\textsuperscript{86} 993 F.2d 1178 (5th Cir. 1993).
The court held that the parol evidence rule barred the defendant from offering proof of the oral terms. This holding was based on the application of Texas law. More importantly, Judge Barksdale wrote that the parol evidence rule applied whether Texas law or the CISG governed. The Fifth Circuit’s decision to apply Texas law and not the CISG drew substantial criticism. To determine whether a contract is governed by the CISG, a simple three-part test is applied. First, the parties must be from different nations. By all accounts, Beijing’s principal place of business was the People’s Republic of China, and American Business Center was a Texas corporation. Both countries were parties to

87 See id. at 1182. ABC contended that the writing reflected only one part of their three-part agreement, in which ABC agreed to “adhere to a payment schedule.” Id.

88 See id. at 1184.

89 See id. at 1182 n.9 (“We apply Texas law in this diversity action.”).

90 See id. (“We need not resolve this choice of law issue, because our discussion is limited to application of the parol evidence rule (which applies regardless).”).


Professor Fletchner was the most prominent critic. He argues that “the approach to parol evidence questions taken by the Fifth Circuit in Beijing Metals is inconsistent with CISG, and that the result in the case might well have changed had the court applied the Convention.” Fletchner, supra at 158.

92 See CISG, supra note 16, art. 1–4, 6.

93 See id. art. 1 (“This Convention applies to contracts ... between parties whose places of business are in different ... [s]tates.”).

94 See Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr., Inc., 993 F.2d 1178, 1179 n.1 (5th Cir. 1993) (noting that Beijing “is a company formed and existing under the laws of the People’s Republic”); see also Moore, supra note 91, at 1356.

95 See MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino, SpA, 144 F.3d 1384, 1390 n.15 (11th Cir. 1998) (“The Beijing Metals opinion does not state the place of the defendant’s incorporation, but the defendant must have been a United States corporation because the court noted that the case was a ‘diversity action.’”) (citations omitted). If American Business Center were not a United States Corporation, no diversity jurisdiction would attach to the case. See 28 U.S.C. § 1332 (1994).
the CISG for the relevant period. Second, the "preponderant part" of the contract must have related to the sale of goods. The parties' contract related to fitness equipment manufactured by Beijing Metals. Third, the parties must not have agreed to avoid the application of the CISG. There was no indication from Judge Barksdale's opinion that the parties attempted to avoid the CISG. Since the three-part test was satisfied, criticism of the court's decision to apply Texas law appears well-founded. Subsequent cases dealing directly on this issue explicitly diverted from the seemingly flawed dicta of *Beijing Metals*.

American courts had not dealt directly with the CISG and the parol evidence rule until *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, SpA*.

In this case, the parties agreed to a requirements contract where D'Agostino would sell ceramic tile to MCC. D'Agostino did not satisfy MCC's orders for April, May, and August of 1991. MCC filed a suit for breach of contract and D'Agostino argued that MCC defaulted on payments for previous shipments. D'Agostino pointed to "pre-printed terms" on the contract giving D'Agostino the right to cancel the agreement if MCC failed to deliver payment. At trial, MCC sought to prove that the parties' agreement did not include the pre-printed terms by offering extrinsic evidence of

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96 See supra note 42 (listing nations who are parties to the treaty).
97 CISG, supra note 16, art. 3; see also id. art. 2.
98 See *Beijing Metals*, 993 F.2d at 1178-79 (stating that the parties entered into a business relationship "in order to cooperatively develop the fitness... equipment market in the U.S. and Canada").
100 If the contract had included such a provision, it would have been unnecessary for the court to engage in their discussion of application of law; the CISG would certainly have been inapplicable. See *Beijing Metals*, 993 F.2d at 1182-83 n.9.
101 144 F.3d 1384, 1389-90 (11th Cir. 1998); see also Delchi Carrier SpA. v. Rotorex Corp., 71 F.3d. 1024, 1027-28 (2d Cir. 1995) (observing that "there is virtually no case law under the [CISG]").
102 See *MCC-Marble*, 144 F.3d at 1385.
103 See id.
104 See id.
105 See id. at 1385-86.
the negotiations. The district court applied the parol evidence rule and granted summary judgment in favor of D'Agostino. The Eleventh Circuit reversed, holding contracts governed by the CISG were not subject to the parol evidence rule.

In its analysis, the court announced that the case was governed by the CISG. Then, the court determined that the CISG had no express provision for the parol evidence rule. After reviewing the reported opinions concerning the issue, the court realized that the persuasive value of these previous decisions was negligible. The Eleventh Circuit, therefore, carved a clean slate onto which MCC-Marble could be decided.

The court certainly could have circumvented the issue of the applicability of the parol evidence rule to CISG cases. It is well established that extrinsic evidence of negotiations is always admissible to prove that a writing is not an integration.

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106 See id at 1386. The evidence included an affidavit from Juan Carlos Monzon, president of MCC. See id. More importantly, "MCC also filed affidavits from Silingardi and Copelli, D'Agostino's representatives at the trade fair, [where the parties consummated their agreement] which supports Monzon's claim that the parties subjectively intended not to be bound by the terms on the reverse side of the order form." Id. The pre-printed terms in dispute in this case were on the reverse of the order form. See id at 1385.

107 See id. at 1387; Andreaison, supra note 48, at 358 ("The magistrate judge held those affidavits to be barred by the parol evidence rule, and the district court agreed.") (footnote omitted); CISG, supra note 16, art. 8.

108 See MCC-Marble, 144 F.3d at 1388–89 (addressing in detail the question of whether the parol evidence rule plays any role in cases involving the CISG).

109 See id. at 1386–87. In fact, the parties themselves agreed that the CISG is the governing law in the case. See id. at 1386–87. Therefore, application of the three-part test was not needed. More importantly, the problem for which Beijing Metals was so castigated, failure to apply the CISG, was avoided in MCC-Marble.

110 See id. at 1389 ("The CISG itself contains no express statement on the role of parol evidence."); HONNOLD, supra note 51, at 170. Compare CISG, supra note 16, art. 11 (stating that a contract of sale need not be concluded or evidenced in writing) with U.C.C. § 2-201 (1978) (precluding the enforcement of oral contracts for the sale of goods involving more than $500). The court also disposed of the issue of whether the parol evidence rule applied to the case anyway on grounds that it was a rule of substantive law. See MCC-Marble, 144 F.3d at 1388–89; see also FARNSWORTH, supra note 18, at 194. If it were a rule of evidence, it seemingly would be applied without regard to the fact that the CISG governed the dispute.

111 See MCC-Marble, 144 F.3d at 1389. The court implicitly embraced the same criticism of the Beijing Metals opinion as Professor Fletchner. See supra note 91 and accompanying text.

112 See MCC-Marble, 144 F.3d at 1388 (referring to "a question of first impression in this circuit"); see also U.C.C. § 2-202 (1978).

113 See RESTATEMENT (SECOND) OF CONTRACTS § 214(a) (1981) ("Agreements
Instead, the court chose to base its decision on broader, more ubiquitous grounds. The Eleventh Circuit rested its decision on two propositions. First, the court looked at the CISG textual reference in Article 8(3) to the “negotiations.” Resting a decision on a treaty’s textual embodiment, especially when the document is drafted in multiple languages, is a tenuous proposition. Fortunately, the Eleventh Circuit went further. The court acknowledged that American jurisdictions found the rule useful to control breach of contract cases when a party offered extrinsic evidence. They also recognized that uniformity of international commercial law was “one of the primary factors motivating the negotiations and adoption of the CISG.” In order to facilitate the main purposes of the CISG, the court reviewed the treatment of extrinsic evidence by other member nations and concluded that “a wide number of other States Party to the CISG have rejected the rule in their domestic jurisdictions.” Therefore, in the interest of promoting uniform

and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish that the writing is or is not an integrated agreement.”). This would allow MCC to offer the affidavits of the three individuals to prove that the printed form did not embody the parties’ final agreement. In this case, application of the common law (UCC) would seemingly have provided the same result.

114 MCC-Marble, 144 F.3d at 1389. The court readily embraced the phrase “including the negotiations,” and confirmed the CISG commitment to the use of oral contracts and terms by referring to the treaty’s failure to include a statute of frauds provision. See id.

115 See supra note 68.

116 See MCC-Marble, 144 F.3d at 1390–91 (discussing the flexibility needed in applying the parol evidence rule).

117 Id. at 1391.

118 See supra notes 71–80 and accompanying text (discussing the policy objectives of the treaty).

119 MCC-Marble, 144 F.3d at 1391. The court did not survey various legal systems, but referred to the proposition as “in accordance with the great weight of academic commentary on the issue.” Id. at 1390. Several scholars have indicated that the parol evidence rule barely existed in civil law systems. See DiMatteo, supra note 70, at 104 (“The CISG applies the view of many of the civil law countries that a writing is not a required formality to the finding of a contract.”). The court itself acknowledged, albeit in a footnote, that “outside of Europe and North America, the parol evidence rule is nonexistent. Even in Europe, it is rare; Germany has no parol evidence rule, and France’s version of the rule does not apply to commercial transactions.” Andreason, supra note 48, at 359 n.50; see also Murray, supra note 54, at 45 (“Civil law countries have often managed without it, or have been willing to apply it sparingly.”) (footnotes omitted). Even countries with legal systems similar to the United States have little confidence in the rule. See Andreason, supra
application of the CISG among the member nations, the court held that the rule did not apply and therefore MCC could offer the affidavits for consideration by the trier of fact.\textsuperscript{120}

Similarly, in \textit{Claudia v. Oliveri Footwear Ltd.},\textsuperscript{121} the court refused to grant summary judgment\textsuperscript{122} and held that "contracts governed by the CISG are freed from the limits of the parol evidence rule and [that] there is a wider spectrum of admissible evidence to consider in construing the terms of the parties' agreement."\textsuperscript{123} In \textit{Mitchell Aircraft Spares Inc. v. European Aircraft Service AB},\textsuperscript{124} the court indicated that "it must consider any evidence concerning any negotiations, agreements, or statements made prior to the issuance of the purchase order."\textsuperscript{125} These rulings suggest American law is settled on the abandonment of the parol evidence rule for cases governed by the CISG.\textsuperscript{126}

\textsuperscript{120} See \textit{MCC-Marble}, 144 F.3d at 1391 (holding that the parol evidence rule did not apply because MCC's affidavits evidenced a subjective intent for MCC not to be bound to the conditions on the reverse side of the form).

\textsuperscript{121} No. 96 Civ. 8025, 1998 WL 164824 (S.D.N.Y. Apr. 7, 1998). Since the \textit{MCC-Marble} case was not decided until June 29, 1998, the \textit{Claudia} court derived their ruling without the persuasive authority of \textit{MCC-Marble}.

\textit{Claudia} currently has no further reported developments. Since this issue is in its appellate infancy, it will be interesting to see if and how the Second Circuit Court of Appeals deals with this issue.

\textsuperscript{122} See \textit{id.} at *11.


\textsuperscript{124} 23 F. Supp. 2d 915 (N.D. Ill. 1998).

\textsuperscript{125} \textit{Id.} at 920. The defendant argued that the CISG applied; the plaintiff did not contest this assertion. \textit{See id.} at 918. Nevertheless, after holding that evidence of the negotiations was admissible, the court mentioned that the evidence would still be admissible even if Illinois law were applied. \textit{See id.} at 921. \textit{Compare id.; with Beijing Metals & Minerals v. American Bus. Ctr., 993 F.2d 1178, 1179 n.9 (5th Cir. 1993) (applying Texas law).}

\textsuperscript{126} This Part illustrated how every court dealing with the parol evidence rule
V. DETERIORATION OF THE PURPOSE BEHIND THE RULE

The cases beginning with Thompson and culminating with MCC-Marble suggest a clear change in the way courts are willing to permit evidence of the negotiations. Further deterioration culminating in abandonment of the rule's force can be further supported. To do so, exploration to the core of the rule is required. At the rule's epicenter is its purpose. If the underlying objectives are identified and it is concluded that these objectives are no longer embraced, abandonment is appropriate.

A. Trusting the Trier

One policy underlying the parol evidence rule is the traditional notion that the trier of fact is impressionable and must be protected from the perjury often associated with parol evidence. It seems greater trust is held in the trier of fact today, which would support the assertion that the associated doctrinal framework should be dismantled. To accurately assess the policy shortcomings of the parol evidence rule, the environment in which commercial litigation takes place must be looked at. Specifically, in the American court system, two types of trials exist—bench trials and jury trials.

1. Bench Trials

Assume for a moment that there is significant concern that the fact finder is often persuaded by perjurious testimony. It

issue has directly held that it did not apply. In addition, every court which has addressed the issue has rejected (implicitly or explicitly) the dicta in Beijing Metals. See supra notes 86–100 and accompanying text (discussing Beijing Metals). But see Rebecca Amthor, Note, Eleventh Circuit: Survey of Recent Decision: International Law, 29 CUMB. L. REV. 265, 268 (1998–99) (“Whether other circuits take a similar position with regard to contracts governed by the CISG remains to be seen.”).

127 See CORBIN, supra note 10, at 522 (“[T]he rule is supported by the public policy of preventing frauds and perjuries by limiting evidence of facts that contradict a valid contract.”); Note, The Parol Evidence Rule: Is it Necessary?, 44 N.Y.U. L. REV. 972, 982 (1969) (indicating “that to allow extrinsic evidence to vary... terms would open the door to perjury”); see also Richard D. Dreyfus, The Effect of Masterson v. Sine on California’s Parol Evidence Rule, 43 L.A. BAR BULL. 411 (1968).

128 Scholars and courts are perpetually concerned with witness testimony misleading the jurors. See, e.g., Steven I. Friedland, On Common Sense and the Evaluation of Witness Credibility, 40 CASE W. RES. L. REV. 165, 194 (1990) (“Some
makes little sense that such a rule extends to bench trials. At bench trials, the judge acts as the decision-making authority on the law and trier of fact. If society lacks confidence in trial judges' ability to detect perjurious testimony, it suggests a fundamental problem running to the heart of our system of justice. Also, at bench trials, the judge is assessing the evidence twice. The judge must first determine whether the proffered extrinsic evidence may become part of the trial record. If the judge concludes the evidence is worthy of admission, he or she may consider it in the role as trier of fact. Therefore, it seems that an attempt to shield the fact finder from certain evidence would be unworkable in the context of a bench trial.

2. Jury Trials

It appears likely that an attempt to deceive the fact finder by one of the parties would be more effective in a jury trial. Avoiding the jury in such cases prompted the rise of contract law as independent from tort law. As the twenty first century courts have also been concerned that [psychological] testimony could prove costly, prolong a trial, and still mislead the jury by presenting 'extraneous information having an aura of scientific credibility.'


131 See People v. True, 272 N.E.2d 24, 26 (Ill. App. Ct. 1971). Interestingly, the case often referred to as the beacon of contemporary parol evidence rule jurisprudence, Masterson v. Sine, based its holding, in part, on this "trusting the trier" concept. Masterson v. Sine, 436 P.2d 561, 564 (Cal. 1968) (concluding that "evidence of oral collateral agreements should be excluded only when the factfinder is likely to be mislead").

132 See Grant Gilmore, The Death of Contract 107-09 (2d ed. 1995)
begins, such notions should be rejected for two reasons. First, “[o]ur system allocates to the jury the function of determining credibility of witnesses.” There is nothing to suggest that “their normal credibility-determining function” is ineffective, or even less effective in breach of contract cases “than construction accidents, consumer injuries or gift tax cases.” Second, the idea that juries favor the underdog is unfounded.

(suggesting distrust of the jury “played some role” in the creation of a schism between contract law and tort law). “To the extent contract litigation can be phrased as questions of law for the court, the vagaries of juries can be controlled.” Id. Other legal systems have discarded trial by jury in contract law cases. For example, the English have “virtually abolished . . . the jury system in civil cases.” Justin Sweet, Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule, 53 CORNELL L. REV. 1036, 1055 (1968); see also Campbell Discount Co. v. Gall, 1 Q.B. 431, 439 (C.A. 1961).

133 Sweet, supra note 132, at 1055; see also Jay Sterling Silver, Truth, Justice and the American Way: The Case Against the Client Perjury Rules, 47 VAND. L. REV. 339, 405–06 (1994) (discussing the jury’s duty to examine witnesses’ credibility).

134 Sweet, supra note 132, at 1055; Note, supra note 127, at 988 (“The same issues of credibility arise in other areas of the law where the jury is faced with evidence from witnesses who may have a claim on its sympathy or evidence which seems inherently suspect.”). These scholars suggest that juries can deal with personal injury cases, where the plaintiff walks into court with a neck brace, feigning an injury, as well as they can deal with a party recounting an oral contract term. It seems such a proposition does not violate the public’s sense of justice.

135 See Valerie P. Hans, The Illusions and Realities of Jurors’ Treatment of Corporate Defendants, 48 DEPAUL L. REV. 327, 327–28 (1998) (arguing that civil jurors are not anti-business but are largely supportive of the aims of American business and are concerned about the negative effects of excessive litigation on business corporations); Laura Gaston Dooley, Essay, Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury, 80 CORNELL L. REV. 325, 327–41 (1995) (discussing the 20th century history of civil juries). Juries have had a “bipolar presence” in modern times. On one hand, the jury represents true democracy and is a respected icon in American culture. On the other hand, recent controversial jury verdicts have intensified the debate about the effectiveness of the jury as the decision-maker in the court system. Id.; see also Phoebe C. Ellsworth, Jury Reform at the End of the Century: Real Agreement, Real Changes, 32 U. MICH. J. L. REFORM 213 (1999) (stating that “social science research provides no support for the public’s perception that this failure is due to the inclusion of jurors who are biased or unfit” and that the greatest weakness of jurors is their lack of understanding of the law). Professor Hans used “public opinion poll data and archival research” to conclude that “there is no evidence that Americans generally hold heated anti-business attitudes,” and “the evidence for a defendant’s wealth effect is weak.” Richard Lempert, Why Do Juries Get a Bum Rap? Reflections on the Work of Valerie Hans, 48 DEPAUL L. REV. 453, 453 (1998). The University of Chicago Jury Project, the first major jury survey study in the United States, studied verdicts “in over four thousand civil trials that occurred during the 1950s.” Neil Vidmar, The Performance of the American Civil Jury: An Empirical Perspective, 40 ARIZ. L. REV. 849, 853 (1998). Juries have been labeled as “incompetent, capricious,
3. Protecting the Writing

A second reason behind the parol evidence rule is to encourage written contracts by protecting them from oral attack. The parol evidence rule seeks to give greatest effect to contract terms memorialized in writing. In so doing, the belief is that parties take greater care to make the written instrument a total integration. There is no indication this higher regard for writings has influenced the practice of contract formation. In fact, disputes involving the parol evidence rule are among the most heavily litigated issues in American courts. In this unreliable, biased, . . .” Id. at 849. However, the data revealed that the judge and the jury agreed on the issue of liability 78% of the time. In cases of disagreement, the judge still found the jury verdict reasonable. See id. at 853; see also Note, supra note 127, at 985; Harry Kalven & Hans Zeisel, The American Jury 63 (1966); Harry Kalven, The Dignity of the Civil Jury, 50 Va. L. Rev. 1055 (1964) (discussing the acumen of the civil jury in the United States). This compatibility suggests that either jurors do not favor the underdog or both judges and jurors favor the underdog.

Traditionally, however, authorities have argued that juries need to be controlled in such cases. See Nicholas R. Weiskopf, Supplementing Written Agreements: Restating the Parol Evidence Rule in Terms of Credibility and Relative Fault, 34 Emory L.J. 93, 95 (1985) (discussing preference for the “little guy,” in the transaction at hand”); Michael B. Metzger, The Parol Evidence Rule: Promissory Estoppel’s Next Conquest?, 36 Vand. L. Rev. 1383, 1387 (1983) (stating that “[l]eft to their own devices, jurors may favor underdogs by relying upon alleged oral terms thereby deciding the case in a manner calculated to avoid a perceived injustice”); McCormick, supra note 27, at 366 (“The average jury will, other things being equal, lean strongly in favor of the side which is threatened with possible injustice and certain hardship by the enforcement of the writing.”); Michael A. Lawrence, Comment, The Parol Evidence Rule in Wisconsin: Status in the Law of Contract, Revisited, 1991 Wis. L. Rev. 1071, 1075 (indicating that jurors’ lack of sophistication may favor the party without deep pockets).

See Martin-Davidson, supra note 9, at 12 (explaining that the “parol evidence rule provides greater protection for written agreements” and should be applied because written evidence is more accurate than human memory); Wallach, supra note 8, at 653 (“Written contracts have long enjoyed a preferred status in the law over oral contracts as a result of their tendency to be more accurate and detailed.”).

See Mooney, supra note 13, at 1147 (“The assumption that most parties in fact reduce their entire agreement to a single, perfectly accurate writing seems [to modern scholars and judges] increasingly unrealistic. Worse, judging by reported decisions at least, the parol evidence rule seemed actually to assist more dissemblers than it thwarted.”); Sweet, supra note 132, at 1047 (“Some of the parol evidence rule’s adverse effect on counseling and litigation might be excusable if the rule caused contracting parties to put their entire agreement in the writing. But the rule has not had this effect.”).

See Sweet, supra note 132, at 1047 (suggesting that the “volume” of cases on the issue indicates that there are many part-written and part-oral contracts); see
respect, it seems the parol evidence rule has failed. In addition, the "slippery memory" rationale for protection is less necessary. Business transactions are now conducted electronically as often as face-to-face. Until electronic media garnered widespread acceptance in the business world, a party's extrinsic evidence was often substantiated or refuted only by another's oral testimony. Today, it is common to refute or


139 Richard J. Ross, The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter, and Identity, 1560-1640, 10 YALE J.L. & HUMAN. 229, 273 (1998) (arguing that to commit something to memory after reading it without anything else is no way to remember it); see also Raoul Berger, On Civil Rights and Civil Liberties: "Original Intention" in Historical Perspective, 54 GEO. WASH. L. REV. 296 (1986); H. Jefferson Powell, The Original Understanding of Original Intent, 98 HARV. L. REV. 885, 900 (1985) (stating that the common law was not concerned with the subjective intent of the parties, but the contracting parties were presumed to have put their exact intentions in writing and to have been aware of the law's canons of interpretation). One should be encouraged to "'commit... to writing, and not to trust slippery memory.'" Ross, supra at 273 (quoting WILLIAM PHILLIPS, STUDII LEGALIS RATIO 155–56 (1662)). "Slippery" is used in the sense that parties' recollection will fade and become altered. It is not intended to refer to the perjurious intent of parties. Id.


"The huge development of electronic commerce necessitates many other changes such as the use of electronic records and electronic or digitized signatures. More than forty states have either enacted or are enacting new legislation to allow the use of such electronic forms in place of standard documents and signatures." Dr. John Murray, Jr., Big Changes are Due in Laws Governing U.S. Commerce, PURCHASING, July 15, 1999, at 59.

141 Cf. Jonathan Bick, The Electric Commerce Landscape, N.J. L.J., June 28, 1999, at 36 (stating that electronic commerce is a huge, growing business and experts estimate that online spending could reach thirty billion dollars by the year 2000); Francis Dummer Fisher, 1984 Survey of Books Relating to the Law, 82 MICH.
support an understanding between parties by producing e-mails, voice mail recordings, faxes, or other electronic media as evidence. In addition, today's fast-paced business environment frequently does not allow for thoroughly drafted, well-planned written contracts. Boiler plate contracts and oral agreements drive the modern world of commerce in many respects. Therefore, rules of exclusion are unnecessarily cumbersome and obtrusive.


Such records are deemed reliable in other legal context. See, e.g., Deborah L. Wilkerson, Electronic Commerce Under the U.C.C. Section 2-201 Statute of Frauds: Are Electronic Messages Enforceable?, 41 KAN. L. REV. 403, 425 (1992) (discussing the enforceability of electronic messages under the UCC statute of frauds and ways to enhance the integrity of modern computerized records); Egon Guttman, Federal Regulation of Transfer Agents, 34 AM. U. L. REV. 281, 317 (1985) (referring to the necessity of telephone records for regulation of transfer agents); Lee A. Watson, Note, Communication, Honesty, and Contract: Three Buzzwords for Maintaining Ethical Hourly Billing, 11 GEO. J. LEGAL ETHICS 189, 195 (1998) (identifying such records as vital to proper client billing). These sources suggest that electronic communications can also be used to prove contract terms not reflected in the final writing. In commercial law, revisions to UCC Article 2 have attempted to address this issue. Article 2 now allows electronic forms and signatures to facilitate the development of electronic commerce. See Murray, supra note 140, at 59.

In fact, today's business world often does not afford people time to do much of anything. See, e.g., Thomas R. Marton, Child-Centered Child Care: An Argument for a Class Integrated Approach, 1993 U. CHI. L. SCH. ROUNDTABLE 313, 350 (1993) (indicating businesspeople often sacrifice time with their family); Anthony Kruglinski, Going into a Deal, What You Think is True Probably Isn't, RAILWAY AGE, Aug. 1, 1999, at 10 (indicating the greater value of communication in an era where time is precious); Thinking Like an Agent, AGENCY SALES MAG., Feb. 1998, at 4 (pointing out businesspeople's need for planning).


This is especially true when the rule of exclusion frustrates the ascertainment of actual party intent. See Mark K. Glasser & Keith A. Rowley, On Parol: The Construction and Interpretation of Written Agreements and the Role of Extrinsic Evidence in Contract Litigation, 49 BAYLOR L. REV. 657, 702 (1997) (discussing party intent in light of the parol evidence rule and the fact that the court determines the parties' intentions and rights under an agreement).
VI. RAMIFICATIONS OF THE RULE’S ABANDONMENT

The refusal to apply the parol evidence rule beyond CISG cases is an admittedly aggressive proposition. Yet, there is support for the idea that provisions of the CISG may influence the UCC. Even though the CISG is derived from the laws of many jurisdictions, the United States is the most influential member nation and it is therefore reasonable to conclude that some of the UCC was ultimately incorporated in the CISG. Therefore, it is possible that the approach to the parol evidence rule by the CISG may influence the approach to the parol evidence rule of the UCC.

Similarly, abandonment of the parol evidence rule in breach of contract cases produces disadvantages. Consider the effect of the aforementioned proposition upon litigation strategy. The court will allow a party to admit extrinsic evidence of an additional term. The trier of fact must then make a credibility assessment and determine if the proffered term is part of the final agreement. Therefore, the court is effectively precluded from granting summary judgement in these cases because an

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146 It is not, however, a position unknown to the world of legal scholarship. See Sweet, supra note 132; Note, supra note 127.


148 See DiMatteo, supra note 123, at 133 (“T]he CISG was forged from the world’s different national legal systems.”).

149 See DiMatteo, supra note 123, at 133; Richard D. Kearney, Book Review, 78 AM. J. INT’L. L. 289, 292 (1984) (regarding CISG laws “sufficiently akin to Article 2 of the UCC so that experience with one will be readily translatable for use with the other”).

150 See Gabriel, supra note 147, at 2014 (comparing the revised UCC Article 2 provisions with parallel CISG terms).
issue of material fact will always exist.\footnote{See FED. R. CIV. P. 56(c) (stating that a motion for summary judgment will be granted if the "pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact . . . ").} In jurisdictions where judicial economy is an especially important consideration, abandonment of the parol evidence rule may be discouraged.\footnote{There is no indication that foreign legal systems feel that an expansion of the parol evidence rule's application would solve their problems with backlogged cases.}

\section*{CONCLUSION}

The parol evidence rule, as a device to exclude evidence of agreements made prior to the adoption of a final written instrument, should be abandoned. First, the trend in the case law highlights an increasingly lenient application of the rule, suggesting that courts are comfortable admitting extrinsic evidence. Second, the CISG, which governs a significant amount of the commercial transactions occurring in the United States every day,\footnote{See Michael G. Davies, \textit{International Sale of Goods: Do Not Ignore United Nations Convention}, N.Y. L.J., Sept. 20, 1999, at S1. Davies writes: [There are] billions of dollars of foreign trade between the U.S. and the CISG's other signatory nations and although there is virtually no U.S. case law interpreting CISG, this will change in the future because CISG governs all contracts between parties with places of business in different nations, provided both nations are signatories to the Convention. \textit{Id.}} does not recognize a parol evidence rule. The rule is castigated, or even non-existent, in virtually every jurisdiction outside the United States. No authority has suggested a uniquely American legal precept as a basis for the rule's existence in American courts and other provisions of UCC Article 2 have been reworked to parallel similar CISG terms. Third, the rule's underlying policy objectives are no longer readily embraced by society or the legal community. More importantly, those goals do not accurately reflect the commercial environment of the twenty first century. Many judges and scholars have long called for the demise of the parol evidence rule. The \textit{MCC-Marble} decision provides critics of the parol evidence rule an impetus to renew the debate.