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The Parol Evidence rule and the CISG [1] - a comparative analysis

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INTRODUCTION

The ascendancy of international commercial laws in the form of conventions and model laws has changed the contractual landscape significantly and can be viewed as a sea change in contract law. A knowledge of international contract law has become imperative considering that through ratification the CISG has become part of our domestic law. *Perry Eng P/L (Rec and Man appt'd) v Bernold AG* [2] in a general sense illustrates this problem well. The facts are simple. An Australian buyer sued the Swiss manufacturer for supplying defective goods in the South Australian Supreme Court. A clause in the contact, in brief, stipulated that the laws of South Australia govern the contract. However the judge noted:

> *"The statement of claim has been drawn up on the assumption that the South Australian Sale of Goods Act applies. This seems to me to be fatal to the plaintiff's ability to proceed to judgment* [*as the CISG applies*].[3]

The simple fact is that domestic law cannot shield itself indefinitely from the influence of international trade laws. Principles in domestic law must be reviewed to remain in step with best practices.

Considering that the creation of international uniform laws is deeply political it is not surprising that a compromise between the leading legal families had to be found. However having reached compromises the outcomes have shown to be workable and a significant international jurisprudence is already in existence. The importance of the CISG can be illustrated as it has in effect become the sales law of the EU and as another example has influenced significantly the writing of the new Chinese contract law.

This paper will only address one issue, namely the parol evidence rule. As such the question of intent of parties must be examined.[4] It is accepted that the common law insists on an objective theory of contract. Therefore in general terms the law of contract is not concerned with the subjective intent of parties. It only protects an expectation which, in an objective sense is common to both parties.[5]

This view is a result of the reforms of the nineteenth century when the influence of Continental writers was great hence the subjective theory of contract was well established. However by the end of the century the transition between the subjective and objective theories was well on its way.[6]

The basis for the objective theory can be traced back to the ascendancy of the classical concept of contract law. Eisenberg summarized the classical theory and pointed out that it operates under the premise that the contract is for a homogenous product concluded between two strangers who transact on a perfect spot market.[7] Given the background

of classical contract theory it is understandable that the parol evidence rule was developed.

Today with internationalization of trade and globalisation such a theory is untenable and "what made the classical contract theory infinitely worse was that its tacit empirical premise was wholly incorrect."[8] Needless to say that the CISG has recognized that many contracts are based on the concept of "bargain and exchange." It can be argued that the arguments are re-surfacing regarding the need to review the subjective theory of contract interpretation. In any case it is doubtful whether the objective theory was ever in complete control. In *Taylor v Johnson* [9] the court noted that:

> *"[while] the sounds of conflict have not been completely stilled, the clear trend in decided cases and academic writing has been to leave the objective theory in command of the field."*[10]

This paper argues that a total rethink of the parol evidence rule is warranted. This is specifically important for two reasons. First subjective intent is applied in certain circumstances within the common law anyway and secondly domestic law cannot ignore indefinitely the increasing importance of international uniform laws. It is not in the interest of domestic law to create a dual system within its own laws where depending on the place of business different laws can apply. Such a problem can be minimised if domestic law takes note of international law and adjusts its own laws where possible. Also an increasing number of academics are attacking the omission of subjective intent in the interpretation of contracts.[11] The parol evidence rule simply is incompatible with international developments and arguably with the needs of the business community.

This paper therefore in part 1 will illustrate how the parol evidence rule is applied under the CISG by examining the leading jurisprudence. Part II will explore what effect the intention of parties has in the courts deliberation to interpret the contractual obligations. Part III will argue that the intent of parties is best served under the rules of the CISG. For that purpose the parol evidence rule of the common law will be compared with article 8 of the CISG.

PART I: THE COURT RULING IN *MCC-MARBLE*

MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.P.A.[12] (*MCC-Marble*) is the leading case in determining the intent of parties under the CISG. It has created an enormous interest among scholars and jurists alike and the decision:

> *"reveals a court striving to transcend its background in domestic U.S. law, energetic in pursuing an international perspective on the Convention's meaning, and informed, thoughtful and coherent in its grasp of CISG provisions and their meaning."*[13]

The interpretation of contracts and the importance of the application of intent of the parties is regulated in article 8 of the CISG which states:

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

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

3. *In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.*

The court recognized the implications and importance of article 8 by stating that:

> *"Contrary to the result of the objective approach which is familiar practice in United States courts,*[14] *the CISG appears to permit a substantial inquiry into the parties' subjective intent, even if the parties did not engage in any objectively ascertainable means of registering this intent."*[15]

The judge made it perfectly clear that article 8(3) "trumps" the parole evidence rule. The clearest indication is expressed in the following statement:

> *"Moreover, article 8(3) of the CISG expressly directs courts to give due consideration ... to all relevant circumstances of the case including the negotiations ... to determine the intent of the parties. ... article 8(3) is a clear instruction to admit and consider parol evidence regarding the negotiations to the extent they reveal the parties' subjective intent"*[16]

In brief the President of *MCC-Marble* negotiated at a trade fair with D'Agostino. The negotiations took place in Italian with the help of a translator, as the American buyer did not speak any Italian. The documentation including the standard form clauses were written in Italian. The buyer did not request a translation and signed the contract. The signing took place after the parties agreed orally on price, quantity and other key terms. Under the signature in Italian was a clause stating that the buyer was aware and approved of the clauses printed on the reverse side of the order form. In the months that followed *MCC-Marble* submitted several orders using the Italian order form.

The court predictably dispensed with the fact of signing a document containing terms in a foreign language by stating:

> *"We find it nothing short of astounding that an individual ... would sign a contract in a foreign language and expect not to be bound simply because he could not comprehend its terms. We find nothing in the CISG that might counsel this type of reckless behavior and nothing that signals any retreat from the position that parties who sign contracts will be bound by them regardless of whether they have read them or understood them."*[17]

This opinion mirrors those in international jurisdiction as well as academic writing. It appears that the above views are settled law not only in the CISG but in any other legal system as well.

The court noted and agreed with the magistrate judge's report that "no interpretation of the contract's terms could support the buyers position."[18] In the common law this would have been the end of the matter as it was in the court of first instance. However the Circuit Judge correctly pointed out that the CISG allows an inquiry into the parties' subjective intent even if the parties did not "engage in any objectively ascertainable means of registering this intent."[19] The whole purpose of article 8 in simple terms can be narrowed down to the above observations. It follows therefore that arguably there is a difference between domestic law and international law in ascertaining the intent of the parties.

The *MCC-Marble* decision is also remarkable as the Circuit Judge recognized the importance of the CISG and its implementation by courts.

> *"One of the primary factors motivating the negotiation and adoption of the CISG was to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party's legal system might otherwise apply. Courts applying the CISG cannot, therefore upset the parties' reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result. We may only achieve the directives of good faith and uniformity in contracts under the CISG by interpreting and applying the plain language of [its articles]."*[20]

The international legal methodology, which is necessary to interpret the CISG has been recognized. In this regard it is significant that the court also consulted and cited treaties by scholars from outside the Anglo-American tradition.[21] It is also interesting to observe that the court in a footnote stated that they searched for foreign case law. In so doing they also noted that:

> *"the parties have not cited us any persuasive authority from the courts of other States party to the CISG. Our own research uncovered a promising source for such a decision at [an internet site]."*[22]

It must be acknowledged that it is not easy for a court trained and indoctrinated by domestic law to suddenly embrace a new methodology not only in an interpretive sense but also in substantive law. The fact is that under article 8(1) a

shared subjective intent is binding despite the fact that the parties signed documents, which show the contrary intent. Furthermore such subjective intent is not "blocked by that ancient pillar of common law tradition, the parol evidence rule."[23] However it should also be noted that the parol evidence rule is merely a particular way in which the parties' intentions are binding. In view of the above it can be argued that the parol evidence rule has outlived its usefulness considering the possibilities offered by international conventions and model laws.

PART II: INTENTION OF PARTIES

(i) Introduction

The first observation of the parol evidence rule is that there is no uniform rule in existence amongst common law countries. The rule varies between Australia and the Unites States and even within the United States the rule is not uniform. In the United States it has both statutory and varied common law manifestations and is expressed in the Uniform Commercial Code article 2.[24]

The parol evidence rule in identifying the content of a written contract determines which evidence is applicable in the circumstances. In the United States "the Corbin approach instructed courts to look at all relevant evidence surrounding the agreement to decide whether the parties actually intended the writing to be complete and exclusive."[25] The crucial point - it appears - is that the courts must determine whether the writing is a partial or a complete integration or statement of the contract. Common law courts in general solved this problem by taking a stance, which ostensibly promotes certainty and predictability in contract performance.

> *"The primary rule is to simply ascertain the meaning of the language of the contract and therefore ... evidence of the precontractual negotiations of the parties or their subsequent conduct cannot be used in aid of the construction of a written contract."*[26]

Such a view ignores the fundamental reason of a contract as it only looks at the outcome of an action and ignores the motif. A contract is not merely an instrument, which can be interpreted by an impassionate bystander ignoring each party's understanding of the statements or conduct of the other party.

A French case illustrates the difference between the common law approach and the approach taken by the CISG. In *M. Caiato Roger v La Societé Francaise de factoring international factor France,* the court looked at the prolonged dealings between the parties and found it impossible for the seller to deny knowledge, that the goods were destined for the French market and hence had to comply with French marketing regulations.[27]

Arguably in the common law the evidence of the conduct of the parties would have been inadmissible under the parol evidence rule, as the written contract did not include compliance with French marketing regulations. However under the CISG the intention of parties is not a question of evidentiary rule rather it is treated a one of the factual pieces of information which are required to construct the contract as the parties intended it to be in the first place.

(ii) Subjective Intent under the Common Law.

The treatment of subjective intent is best summarised by McHugh JA who noted:

> *"Since the decision in Prenn v Simmonds [1971] 1 WLR 1381 ... a court's right to look at surrounding circumstances in construing a document ... is no longer open to dispute. No doubt the rule still remains that [evidence of the subjective intention] is not admissible to support particular interpretations of a contract."*[28]

One would be forgiven to assume that under the common law the subjective intent of parties has no place at all as it only introduces an area of uncertainty. However this is not so. Lord Styen admitted that a rule cannot be absolute and unqualified, as it would defeat the reasonable expectations of commercial men.[29] Admittedly a shift away from the black letter law approach has taken place and but in *Investors Compensation Scheme Limited v West Bromwich Building Society*[30] no shift in the treatment of subjective intent is detectable. Lord Hoffman in his influential principles has not embraced the introduction of subjective intent. Indeed in principle three he argues that:

> *"(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent.*[31]

Such an approach ignores that the parties may have in previous negotiations agreed on terminology, which is clear to them but may be foreign to others. In such instances, despite the parties clear understanding, the law will contradict such subjective and clear intent and introduce its own "foreign" construction to interpret the contract. Clark JA confirms this view when he noted:

> *"... if a party seeks to rely on an antecedent oral agreement to support a contention that the word or phrase in the written agreement bore an agreed meaning which, as a matter of English, it was not capable of bearing. In that instance the oral agreement would contradict the written contract and the parol evidence rule would prevent its reception into evidence."*[32]

Arguably if the parol evidence rule is applied in the above manner it will "defeat the reasonable expectations of commercial men."

The real problem, besides the potential artificial construction of a contract, is that in certain circumstances the principle of subjective intent is applied to interpret contracts. Lord Hoffman in his principle three noted that: "[Declaration of subjective intent] are admissible only in an action for rectification."[33]

Considering that subjective intent takes on a different meaning depending whether contract formation or contract interpretation is the issue there is a conflict between the policy of certainty and predictability. It does not make sense that subjective intent is admissible in one part of contract law but not in another one. Admittedly if one would take a micro look at contract theory an argument can be advanced that certainty and predictabily is achieved in the parol evidence rule. However in the "big picture" approach the argument of predictability and certainty is just not defendable.

(iii) Formation of contract

In the formation of contract *Smith v Hughes*[34] is often noted as advocating that the objective or apparent consensus is sufficient.[35] Blackburn J stated:

> *"If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."*[36]

Clearly a consensus *ad idem* or meeting of mind is an essential element in the formation of the contract. However to ascertain what the parties consented to Blackburn J in his judgment not only referred to the objective intent he also included a subjective element. Specifically his passage " ... that other party upon that belief enters into the contract with him ..."[37] indicates that to show formation of a contract a subjective understanding is essential. Simply put:

> "*A party who alleges the formation of a binding contract because a reasonable person in her position would have been entitled to infer a contractual offer can only succeed if, in addition, she subjectively understood that there was an offer."*[38]

The importance of the above argument is that a distinction must be drawn between presumed and actual intention of the parties. The most important consideration is that the actual or subjective intent of the parties is sought. If an informed bystander looking at the words concludes that there is a contract but both parties are aware that they are play-acting no contract has been concluded.This illustrates the problem of applying the objective theory: "is it objectivity from the point of view of the promisor, the promisee or the detached bystander?"[39]

Only if no subjective intent can be established should the objective or presumed intent be considered. Hope JA put it succinctly when he said:

> *"... if the mutual actual intention was that there should be a concluded contract, it would be fraudulent to*

> *deny that intent."*[40]

In essence it "remains of social and commercial importance to enforce the actual intention of parties to make a contract as manifested by their conduct."[41]

(iv) Interpretation of contracts

As soon as a binding contract is admitted the rules change. The evidence the parties relied upon to prove a contract becomes inadmissible if there is a dispute as to the interpretation of the contract. Even liberal versions of interpretations stressing "commonsense" and "the importance of commercial men" merely reject the literal or plain meaning approach and not the parol evidence rule. As pointed out above Lord Hoffman set out five rules as to the application of the parol evidence rule. He basically reinforces that evidence of subjective intentions is inadmissible. However in rule 3 Lord Hoffman acknowledges that subjective intent "[is] admissible only in an action for rectification."[42]

Rectification and the implication of terms have one thing in common. The problem is caused by the omission of a term, which should have been included. It must be noted that the implication of terms in this context is to be considered within the application of the parol evidence rule. Mason J noted this difference when he said that '[the] remarks were directed not to the implication of a term but to the application of the parol evidence rule ..."[43] Furthermore Mason J explained the difference between rectification and the implication of a term.

> *"Rectification ensures that the contract gives effect to the parties' actual intention; the implication of a term is designed to give effect to the parties' presumed intention."*[44]

Such a distinction is very useful if it would be based on an examination of the intent of the parties. If subjective intent can be established then rectification should automatically be used to give effect to the contract. However if subjective intent is lacking an implication of a term using objective criteria is the only way to give effect to a contract. But in essence the whole issue hinges on the approach by counsel and not what evidence is available. In rectification evidence of subjective intent is admissible but if counsel relies in the implication of a term the parol evidence rule will bar the exact same evidence to be admitted and taken into consideration.

There is no debate that the presumed or objective intention leads to the implication of a term. The court in its capacity as the informed bystander can imply a term into a contract, which, objectively analyzed, belonging into the contract. As an example good faith is becoming increasingly such a term.

In sum it can be argued, that as soon as subjective intent can be established rectification should be sought. If subjective intent cannot be established, it ought to be seen whether objective intent can be elicited and a term can be implied into a contract. Mason J confirms this view when he said that:

> *"the prior oral argument of the parties being inadmissible in aid of construction, though admissible in an action for rectification."*[45]

Logically speaking it does not make sense that the same evidence is admitted if rectification or the formation of a contract is at issue but is not admissible if the interpretation of the contract is in dispute. The observation of Lord Wilberforce is instructive when he noted that the alternative claim for rectification: "let in a mass of evidence ... which would not be admissible on construction."[46]

There is simply no consistency in the argument or at best the policy is not consistent. It appears that this inconsistency by analogy is the same as to argue that there is a difference between being pregnant and "being a little bit" pregnant. After all is it not to find out and to give meaning to the contract as it was intended by the parties?

The inconsistency argument is given weight when it is considered that extrinsic evidence "is not even going to be admissible on the implication of a term."[47] This ruling is rather confusing if another exception to the parol evidence rule, which was laid down in *the Karen Oltmann*[48]is considered. Kerr J had to consider how meaning can be given to words which are capable of bearing more than one interpretation. He said:

> *" ... it is permissible for a Court to examine the extrinsic evidence relied upon to see whether the parties have in fact used the words in question in one sense only, so that they have in effect given their own dictionary meaning to the words as a result of their common intention."*[49]

The problem with the view of Kerr J is that the court must make a decision whether words are capable of one meaning only. The argument reverts back to the informed bystander who has to decide what the parties intended in the first place. A strong argument can be advanced to suggest that it would be perhaps simpler just to ask the parties what their subjective intent was instead to second guess what it objectively was. In any case the exceptions do not advance the predictability and consistency argument which is frequently noted as being the basis of contract theory.

McLaughlan also points out that the exception should not only be limited to evidence of actual common intention. He advances the argument that where the evidence establishes that one party intended a particular meaning and the party reasonably believes the other party accepted the meaning such evidence should also be included. "It would be a strange twist in the law if such an objectively determined agreement as to the meaning did not suffice."[50] This is specifically so if consideration is given that in the formation of contract the above argument would not be contested.

Even in the landmark decision of the High Court[51] Mason J found it important enough to admit the need for exceptions to the parol evidence rule. The fact that there should be exceptions is not surprising considering the speech of Lord Wilberforce where he noted:

> *"When one speaks of the intention of the parties to the contract, one is speaking objectively - the parties cannot themselves give direct evidence of what their intention was - and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties."*[52]

It is indeed strange to ignore primary evidence of the parties and base a judgment on secondary evidence. Whichever way the argument is presented, even an informed bystander is still only "second guessing" what the actual or subjective intent of the parties was.

There is also a naiveté in the argument of the "informed bystander." As an example the words "the goods must be in good repair" appears in a contract. The question is do they have to be repaired before shipment or do they only have to be in good order that is faults due to normal wear and tear are permissible? A person equally situated is now required to shed light on the proper interpretation of the contract as ostensibly now an objective intent is elicited. If this line of argument is extended it can be argued that the only person equally situated are the two contractual parties as they are the only reliable source of extrinsic evidence. However the parol evidence rule would prohibit such evidence.

This is exactly where the problem lies namely in determining primary evidence that is reliable evidence, which is obtainable from negotiations and the party's actions.

> *"There is no sensible reason why the interpretation process required to determine whether a contract was formed should differ so fundamentally from the process required to determine the meaning of that contract."*[53]

A further problem with the objective approach is that it assumes that all relevant clauses are included into the contract and by definition everything the parties rejected or did not find common ground is not included into the contract. McLaughlan had this in mind when he posed the question "why allow evidence of the fact that the parties have united in rejecting a particular meaning but disallow evidence of the fact that they have united in accepting a particular meaning?"[54]

It is also appears to be settled law that the reason for exclusion of previous negotiations as admissible evidence is not one of policy. Lord Wilberforce stated succinctly that the reason for exclusion simply is "that such evidence is unhelpful."[55] There is no doubt that caution must be exercised when admitting evidence of previous negations. It is an entirely different matter if there is a situation, which the parties did not anticipate or a party with the benefit of hindsight gives a different and unsubstantiated version of events. In such circumstances the subjective view must be rejected.

The argument that certainty in commercial transactions is of paramount importance must also be questioned in relation to the parol evidence rule. Arguably the most important element of certainty in commercial transaction is the ability of the business community to rely on the subjective or mutual intent of the contractual obligations and for courts to enforce such intent. The certainty argument in relation to interpretative disputes is a weak one considering that judges cannot even agree whether a word has a plain meaning or not.[56]

The fact that language often is incapable to express meaning in a certain and uniform way is well documented.[57] Therefore to argue that a "policy certainty" demands that evidence of pre contractual nature is not admissible is fallacious and weak. This is specially so as some evidence is found that courts will allow post-contractual conduct as an aid to determine the meaning of words in a written contract.[58]

In sum it has been shown that the parol evidence rule is not a "rule" in the true sense as too many exceptions and variations indicate that its abandonment is warranted. The argument is strengthened if consideration is given that many interpretation disputes are accompanied by alternative claims for rectification, misrepresentation or estoppel. In those cases evidence of all the negotiations are admissible. However the most compelling argument is that the parol evidence rule is out of step with international developments. Justice would not be well served if one class of litigants, namely foreign ones, would be treated differently than domestic ones.

PART III: INTENTION OF PARTIES - JURISPRUDENCE OF THE CISG

In contrast to the common law the CISG exhibits what could arguably be termed, a simplified approach in ascertaining the intention of the parties and hence give meaning to the contract. Not only the CISG but also the UNIDROIT principles as well as the European Principles have adopted the same approach in viewing the subjective intent as an important tool in understanding the purpose of the bargain which is expressed in a contractual arrangement. Arguably the common law as well as international instruments aim to give effect to a contract however their approach has diverged. The common law in essence views the written contract as the culmination of negotiations and hence the contract expresses the bargain of the parties. Such an approach is logical if placed within the classical contract theory. The CISG on the other hand has realized that a contract is an evolving instrument of bargain and exchange. Considering the cultural influences within an internationalized trade a strict adherence to a written contract is illusionary. Especially in Asian trade a contract is an evolving instrument which can change according to economic situations.

The "key stone" in the interpretation of a contract is the teasing out of the intention of the parties pursuant to article 8. The first question the courts would ask is, what is each party's understanding of the statements or conduct of the other party? The Oberlandesgericht München applied article 8(1) in such a way. The German buyer insisted that he could pay a reduced price as arranged in the contract. However the court noted that by ordinary interpretation of the subjective intent, the parties had agreed to a discounted payment only if the buyer meets certain terms. As he failed to do so the full price became due.[59]

Not all intentions are expressly stated as silence can also amount to an expression of intent. Article 8(1), not only includes statements made, but also conduct by parties as constituting intent. A Swiss decision[60] illustrates this point. A German supplier filled an order for a Swiss buyer regarding a summer cloth collection. Because the buyer did not pay on time the seller did not supply the winter collection. The purchaser, after part payment sent a letter to the seller setting out a payment schedule for the outstanding amount as well as delivery dates for the winter collection. The seller refrained from delivering and was sued for damages arising from the failure to deliver the winter collection pursuant to the written contract. The question was whether the seller's silence constituted an acceptance of the content of the letter. The court established the intention of the parties and found that silence in this case does not constitute acceptance of the amendment of the contract. The other party, that is the Swiss buyer must have been aware that through silence the seller did not accept the variations as proposed by the buyer. In other words the buyer could not have been unaware of the true intention of the seller.[61]

Formation of contract

The CISG unlike the common law does not distinguish between formation or interpretation of contracts in relation to the admissibility of extrinsic evidence. However the CISG, unlike the common law, includes silence as an expression of the intent of parties. In *Ste Calzados Magnanni v. SARL Shoes International*[62] the buyer placed an order for shoes but the

seller denied ever having received such an order and furthermore relied on article 18(1) which states that silence "does not in itself amount to acceptance." Article 18 through its terminology does not indicate that silence as such is always insufficient. "In itself" indicates that unless otherwise shown silence does not constitute acceptance. The court therefore again looked at article 8 and found that the practice in previous years indicated that the seller always fulfilled the orders without formal acceptance. In addition the seller was asked to manufacture samples and he was left with the original material in his possession.[63] The court found that this fact alone should have prompted the seller to question the buyer how an absence of an order should have been interpreted.

Silence as such is a part of several articles notable 18 and 14. Article 14(1) allows for indications of silent intentions (*stillschweigende Festsetzung*). Difficulties to discover the subjective intent merely means that article 8(2) is the next step in a courts endeavor to ascertain the "true intent" of the parties. In other words in the absence of subjective intent, objective intent will also assist the court in establishing the contractual intent of the parties. The Austrian High Court[64] noted that price, quantity and character of goods can be ascertained by "a reasonable person similarly situated" through a construction of the objective intent pursuant to article 8(2).[65] Silence, as expressing the intent of parties in relation to the offer and acceptance of a contract, can be summarized by *Inta SA v. MCS Officina Meccanica S.p.A*[66] where the Judge noted:

> *"It is certain that in this framework the Convention provides that silence or inactivity in itself will not constitute acceptance, but in this case there were repeated acts that were taken to conclude the contract and, by the standards discussed above ... there was no disagreement with the clause and, even less, abuse of a dominant position by one party over the other."*[67]

In sum there is a strong similarity between the common law and the CISG in the treatment of intent in relation to the formation of contracts. Both view subjective intent as being of primary importance and only in the absence of mutual consent will the court ascertain objective intent of the parties. Arguably the CISG goes one step further by also including silence into its deliberations. If there is a difference it can be argued that the CISG advocates a holistic approach whereas the common law is more technical in nature in extracting the true intent of the parties.

Interpretation of Contracts

At first glance it could be argued that the common law and the CISG are similar in their approach to the interpretation of contracts. Both view the words in the contract as the primary source of interpretation. The ICC Court of Arbitration as an example referring to article 8 argued:

> "*When parties have concluded a contract ... the agreement of the parties has to be analyzed in first instance by interpreting the wording of the contract itself. According to art. 8(3) ... usages of trade constitute guidelines only to establish what a reasonable person had to understand in view of the wording of the contract*."[68]

It would indeed be strange if any system of law should not refer to the written contract in the first instance. More than likely the parties would have expressed their bargain in the contractual document. The question is whether the contract corresponds with the shared aspiration or subjective intent of the parties. If there is a discrepancy the CISG will in all circumstances attempt to ascertain the true intent of the parties and will give effect to that intent. The common law on the other hand arguably puts far to much reliance on the written contract and ignores the wishes of the parties in favor of perceived notions of certainty and predictability. There is a strong argument that the CISG pursuant to article 8 has managed to introduce a balance between certainty, predictability and the enforcement of the true intent of what the bargain between the parties ought to be.

The difference between the common law and the CISG becomes apparent when a contract needs to be interpreted. He difference is that the CISG only asks whether there is evidence of subjective intent pursuant to article 8(1). That is the other party either knew or could not have been unaware of the intent of the party. The common law on the other hand will dismiss subjective intent as extrinsic evidence and will only allow its reception into a contract in exceptional circumstances such as rectification, misrepresentation and estoppel. In other words the common law introduces two variables into the interpretation of contracts. In essence the problem with the common law is, as Bingham L.J. noted:

> *"English law has developed piecemeal solutions in response to demonstrated problems of unfairness."*[69]

The CISG on the other hand solves the problem of fairness of performance of contracts pursuant to article 8.

The holistic approach of the CISG can be illustrated in an important area where the intention of the parties is not always easily ascertainable, namely in the inclusion of general terms and conditions into contracts. Schlechtriem in a lecture pointed out that:

> [*As the CISG lacks*] *provisions on the control on standard form contracts, I think the one tool that may come to grips with standard contracts is Art. 8(2). It enables the court to ignore fine print, which is contradictory, vague, or difficult to understand by using a "reasonable person similarly situated" standard. And it is also possible that fine print in a language which under normal circumstances could not be expected to be understood by the other party will not determine the content of the contract."*[70]

Schlechtriem alludes to two points namely the treatment of standard form contracts and the choice of a foreign language.

The mere fact that by mutual consent a foreign language has been chosen does not in itself bring article 8(2) into play. It is settled law that there is an obligation on the other party to have the contract translated. If in doubt the principle of good faith would dictate that the party in question would ask for clarifications from the other party or gain understanding through expert translations. A party who agrees to contract in a particular language is bound generally not only by the standard form terms but also by an expectation that the language is understood.[71]

Schlechtriem also argues that a term in a foreign language cannot necessarily be relied upon if the choice of communicating a term in a foreign language is unilateral.[72] Again the principle of good faith as well as the reasonable person test pursuant to article 8(3) will determine this issue.

As far as the inclusion and treatment of standard terms and conditions is concerned the matter appears to be settled. The Oberlandesgericht Zweibrücken confirmed the views held by Schlechtriem. It noted that the CISG does not provide specific requirements for the incorporation of standard form contracts. "Whether such terms become part of the contract must be determined by the application of article 8."[73] The court tested the subjective intent first and found that there were no negotiations which could have helped to establish the subjective intent. Recourse to article 8(3) also established that there was no customary practice either and therefore the objective intent could not be established. As far as the validity of the exemption clause was concerned the court relied on article 4 and decided the matter by taking recourse to national law.[74]

What then is the mandate of article 8? The Landgericht Heilbronn pointed to the fact that article 8 is not only concerned with communications. The question is what can a reasonable person in the same circumstances expect to have understood and hence how do they interpret the communication?[75] The Landgericht Zwickau put it similarly by pointing out that in a communication between parties "the wording was clear and unambiguous and furthermore the meaning given to the words corresponds with those a 'reasonable person' would attribute to those words."[76] Such intent is in line with the desire of the CISG to keep the contract afoot as long as there is a possibility to perform contractual obligations. This principle conforms with the attempts of uniform laws to overcome problems of distance, expense and time to have a contract terminated, where in fact a contract can be executed if the principle of good faith is applied.

CONCLUSION

Article 8 seeks to direct the courts or tribunals to take into consideration the parties actual intention. This is manifested in article 8(1) where it is stated "statements made by and other conduct of a party are to be interpreted according to his intent."[77] Failing this the court will establish the objective intent of the parties pursuant to article 8(2) Such mandates do not pose any problems as seen by the above jurisprudence.

Article 8(3) however does need further careful analysis. This article has recognized that to establish the intent of a party certain tools or events must be used such as the negotiations, any practices the parties may have established, usage as

well as subsequent conduct of the parties.[78] The intention of this article is to find out the state of mind or the belief of the parties in relation to the execution of their contractual obligations. An important point must be noted. The CISG and the common law are not "poles apart". The CISG does recognize that the contract is the crucial evidence, which establishes the intent of the parties. However if a contract needs interpreting the common law and the CISG vary in techniques in relation to extrinsic evidence. Whereas the CISG pursuant to article 8(1) will admit subjective intent the common law will not in all circumstances do that.

FOOTNOTES

1. United Nations Convention for the International Sale of Goods

2. No SCGRG-99-1063 [2001] SASC 15 (1 February 2001)

3. Ibid 16.

4. The common law problem of mistake as well as the introduction of the principle of good faith can only be understood in a comparative sense if the question of intent of the parties is examined. This paper in that context is an extension of a paper published in the European Journal of Law Reform.

5. Steyn, J "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) *113 LQR* 433, 434.

6. McHugh JA in *Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty Ptd* [1985] 2 1985 NSWLR, 309, 335.

7. Eisenberg, M. in Beatson, J., Friedman, D., 1936- "*Good Faith and Fault in Contract Law*" (1995) Clarendon Press, 296.

8. Ibid 297.

9. (1983) 151 CLR 422.

10. Ibid 429.

11. See McLaughlan, D. "A Contract Contradiction" (1999) 30 *VULWLR.*

12. 144 F.3d 1384 (11th Cir. (Fla.) 1998) [http://www.cisg.law.pace.edu]

13. H.M. Flechtner, "The U.N. Sales Convention (CISG) and MCC-Marble Ceramic Center Inc. v Ceramica Nuova D'Agostino, S.p.A.: The Eleventh Circuit Weighs in on Interpretation, Subjective Intent, Procedural Limits to the Conventions's Scope, and the Parol Edidence Rule" (1999) 18 *Journal of Law and Commerce* 259, 260

14. MCC-Marble, above n 81, 1387 n. 8 and 1388 n.11.

15. Ibid 1387 to 88.

16. Ibid 1389

17. Ibid 1387 to 88 n.9.

18. Ibid 1388

19. Ibid 1387

20. Ibid 1390

21. H.M. Flechtner, above n 1, 271

22. MCC-Marble, above n 81, at note 14

23. H.M. Flechtner, above n 1, 273

24. D.H. Moore, "The United States Parol Evidence Rule under the United Nations Convention on Contracts for the International Sale of Goods" (1997) Vol III *International Trade and Business Law*, 61.

25. Ibid 62

26. *Hideo Yoshimoto v Canterbury Golf International Limited* [2000] NZCA 350 (27 November 2000), 60.

27. Cour d'appel de Grenoble, 93/4126 [http://cisgw3.law.pace.edu/cases/950913f1.html] last update October 24,2000

28. *Air Great Lakes Pty Ltd* above n 5, 334.

29. Lord Steyn above n , 440.

30. [1998] 1 WLR 896.

31. Ibid 912H-913E.

32. *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326, 362.

33. Investors compensation Scheme above n , 912H-913E.

34. (1981) LR 6 QB 597.

35. McLauchlan, D. "A Contract Contradiction" (1999) *30 VUWLR*, 175, 176.

36. Smith v Hughes above n 15, 607.

37. Ibid.

38. Mc Lauchlan above n , 177 specifically fn 7.

39. *Air Great Lakes Pty Ltd* above n 5, 336.

40. *Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty Ptd* [1985] 2 1985 NSWLR, 309, 319.

41. Air Great Lakes 338.

42. Lord Hoffman above n , 912.

43. Codelfa 347.

44. Codelfa 346

45. *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] 149 CLR. 337, 352.

46. *Prenn v Simmonds* [1971] 1 WLR 1381, 1383.

47. *Lexcray Pty Ltd v Northern Territory of Australia* D1/2001 (3 May 2002), HCA

48. *Partenreederei MS Karen Oltmann v Scasdale Shipping Co Ltd* [1976] 2 Lloyd's Rep 708.

49. Ibid 712.

50. McLauchlan above n , 187.

51. Codelfa Constructions above n, 352.

52. *Reardon Smith Line v Hansen-Tangen* [1976] 3 All E.R. 570, 574.

53. McLauchlan above n , 182.

54. McLaughlan above n , 187.

55. *Prenn v Simmonds* [1971] 1 WLR 1381, 1384.

56. See for example the House of Lords reversal in *Mannai v Eagle Star* above n , and *Investors Compensation v West Bromwich* above n .

57. See for example McLaughlan, D. "The Plain Meaning Rule of Contract Interpretation." (1996) *2 NZ Business LQ* 80.

58. See for example *Attorney-General v Dreux Holdings Ltd*. (1996) 7 TCLR 617.

59. 7 U 2070/97 [[http://cisgw3.law.pace.edu/cases/970709g1.html] last update Feb. 24, 2000

60. Obergericht Basel-Landschaft, 40-99160 (A15) [http://cisgw3.law.pace.edu/cases/991005s1.html] last update July 19, 2000

61. Ibid

62. Cour d'appel de Grenoble, Ocober 21, 1999, [http://cisgw3.law.pace.edu/cases/991021f1.html] last update July 12,2000

63. Ibid

64. Oberster Gerichtshof, Austria

65. Oberster Gerichtshof 10.11.1994, 2 Ob 547/93 [http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/117.htm]

66. Argentina. Camera Nacional de Apelaciones en lo Comercial, 14 Ocober 1993, 45.626 [http://cisgw3.law.pace.edu/cases/931014a1.html] last update October 24, 2000

67. Ibid.

68. ICC Arbitration Case No. 7645, March 1995, (2000) 11 *ICC International Court of Arbitration Bulletin* [ACAB] 36-37

69. *Interfoto Library Ltd. v Stiletto Ltd* [1989] 1 QB 433, 439.

70. P. Schlechtriem, "Uniform Sales Law - The Experience with Uniform Sales Law in the Federal Republic of Germany" (1991/92) *Jurisdik Tidskrift* 1, 12

71. Landgericht Kassel, 1. Kammer für Handelssachen, 15.02.1996, 11 O 4187/95 [http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/190.htm]

72. P. Schlechtriem, above n 55, 20.

73. 8 U 46/97, [http://cisgw3.law.pace.edu/cases/980331g1.html] last update July 17, 2000

74. Ibid

75. Landgericht Heilbronn, 15.09.1997, 3 KfH 653/93 [http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/562.htm]

76. Landgericht Zwickau, 3. Kamer für Handelssachen, 19.03.1999, 3HKO 67/98 [http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/519.htm]

77. Article 8(1) CISG

78. Article 8(3) CSG

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