The Paradox of Substance-Procedure Dichotomy and the Admissibility of Extrinsic Evidence for the Interpretation of Contracts Governed by the CISG 1980*

ปัญหาการนำแนวคิด “Substance-Procedure Dichotomy” มาใช้กับการรับฟังพยานหลักฐานนอกเอกสารเมื่อต้องตีความสัญญาที่อยู่ภายใต้บังคับอนุสัญญาสหประชาชาติว่าด้วยสัญญาซื้อขายสินค้าระหว่างประเทศ ค.ศ. 1980

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(Received: May 12, 2021:; Revised: July 6, 2021:; Accepted: July 15, 2021)

Abstract

As established in its Preamble and Article 7, the CISG 1980’s Principle of Uniformity is of utmost importance, reflecting the intention to remove “artificial impediments to commerce caused by differences in national legal systems that govern international sales of goods.” In reality however, uniform rules do not per se guarantee uniform application. The CISG, has tended to be analyzed largely from a “substantive law” point of view, with a relatively limited clarification on various procedural implications that may arise from its world-wide applications. The literature review undertaken in this research indicates that one of the most common causes of the so-called “homeward-trend” phenomenon, theoretically, stems from the orthodox view of substance-procedure dichotomy in the

* บทความวิจัยนี้เรียบเรียงจากโครงการวิจัยที่ได้รับทุนสนับสนุนจาก Asian Law Institute, National University of Singapore โดยได้รับการคัดเลือกให้นำเสนอผลการวิจัย ณ มหาวิทยาลัยแห่งชาติสิงคโปร์ ในเดือนตุลาคม ปี พ.ศ. 2562 ทั้งนี้ ผู้เขียนขอขอบพระคุณ Professor Gary F. Bell ผู้ทำหน้าที่ให้ความเห็นหลัก (Chairperson/Discussant) รวมถึงคณาจารย์คณะนิติศาสตร์ มหาวิทยาลัยแห่งชาติสิงคโปร์และผู้เข้าร่วมรับฟังที่ได้แสดงความเห็นอันเป็นประโยชน์อย่างยิ่งต่องานวิจัยนี้

traditional settings of the conflict of laws. The creation of a uniform law might not in and of itself guarantee a uniform application of such law, giving rise to a potential inconsistency in the outcomes. If the Convention is to be applied one way in United States and another in Singapore, or, perhaps, in a prospective Contracting State like Thailand, there is no such thing as a truly uniform sales law.

This study proposes that domestic courts in the Contracting States should not rely on the substance-procedure analysis, as this approach would be more complicated in the context of the CISG than in the traditional conflict of laws paradigm. Instead, in confronting the issue of admissibility of evidence for the purpose of interpreting the contracts governed by CISG, this study recommends that the courts in Contracting States should honor their duty to apply the CISG Article 8 through the lens of international law obligations, in the interests of legal certainty and uniformity in international sales law. This suggested approach can also have wider and better implications for other CISG provisions, as well as other uniform law projects.

Keywords: CISG, Interpretation of Contract, Extrinsic Evidence

บทคัดย่อ

อนุสัญญาสหประชาชาติว่าด้วยสัญญาซื้อขายสินค้าระหว่างประเทศ ค.ศ. 1980 (CISG) มีเจตนารมณ์เพื่อลดอุปสรรคทางการค้าที่เกิดจากความแตกต่างของกฎหมายภายในประเทศ ผู้ประกอบธุรกิจการค้าระหว่างประเทศจึงได้รับประโยชน์จากกฎหมายที่มีความเป็นสากลและถูกออกแบบโดยคำนึงถึงลักษณะพิเศษของการซื้อขายสินค้าระหว่างประเทศโดยเฉพาะ อย่างไรก็ดี จากการทบทวนวรรณกรรมพบว่าแม้อนุสัญญาฯ จะมีบทบัญญัติว่าด้วยหลักความเป็นเอกภาพภายใต้ข้อ 7. ปรากฏการณ์ที่นักวิชาการเรียกว่า “homeward trend” อันขัดต่อเจตนารมณ์ของ CISG นั้น ยังคงปรากฏอยู่ในการตัดสินคดีของศาลภายในรัฐภาคีได้ โดยอาจมีสาเหตุมาจากความคุ้นชินกับการนำแนวคิด“substance-procedure dichotomy” ซึ่งมีบทบาทสำคัญในการพิจารณาคดีการค้าระหว่างประเทศที่อยู่ภายใต้กฎเกณฑ์ว่าด้วยการขัดกันแห่งกฎหมายตามปกตินั้นมาใช้ในการตัดสินคดีที่อยู่ภายใต้บังคับของอนุสัญญาฯโดยเฉพาะในกรณีที่บทบัญญัติเรื่องการตีความสัญญาภายใต้ CISG ที่มักจะถูกวิเคราะห์ว่าเป็นกฎหมายสารบัญญัตินั้น อาจจะมีเนื้อหาที่ต่างจากหลักเกณฑ์เรื่องการรับฟังพยานหลักฐานนอกเอกสารภายใต้กฎหมายภายในของรัฐภาคีได้ การศึกษาวิจัยนี้พบว่า การนำแนวคิด “substance-procedure dichotomy” มาใช้ในบริบทของข้อพิพาทที่อยู่ภายใต้บังคับของอนุสัญญาโดยศาลภายในรัฐภาคีนั้น อาจทำให้เกิดปัญหาด้านความเป็นเอกภาพและประสิทธิภาพในการบังคับใช้อนุสัญญาฯ ได้ จึงได้เสนอแนวทางเพื่อแก้ไขปัญหาดังกล่าว โดยการนำหลักการเรื่องพันธกรณีระหว่างประเทศมาปรับใช้ในกระบวนการพิจารณาคดีของศาลในรัฐภาคีแทนการใช้แนวคิดแบบดั้งเดิม ทั้งนี้ เพื่อให้การอำนวยความยุติธรรมของศาลในรัฐภาคีนั้นดำเนินไปได้อย่างสอดคล้องกับเจตนารมณ์สูงสุดของอนุสัญญาฯ

คำสำคัญ : อนุสัญญาสหประชาชาติว่าด้วยสัญญาซื้อขายสินค้าระหว่างประเทศ, การตีความสัญญา, พยานหลักฐานนอกเอกสาร

I. Introduction

The United Nations Convention on Contracts for the International Sale of Goods ("the CISG" or "the Convention"),[1] has been described as "one of the most important instruments in international commercial law", and "one of history's most successful attempts" by a number of nations, representing the international effort, to harmonize and establish international sales law.[2] At the 2005 UNCITRAL colloquium celebrating the 25th anniversary of the CISG, Professor Kronke, former Secretary-General of UNIDROIT, highly praised the Convention, as "the single most successful treaty in the history of modern transnational commercial law."[3] Several scholarly writings at the 2007 UNCITRAL Congress on Modern Law for Global Commerce also pointed out that parties "are increasingly selecting the CISG to govern their international sales contracts."[4] In 2020, the year that marks the 40th anniversary of the Convention, following the accessions of Laos, Guatemala, and Portugal respectively, there are currently 94 CISG Contracting States from different legal traditions around the world.[5] Notably, even with the then 63 Contracting States in 2005, the CISG Contracting States at that time already represented over two-thirds of the total volume of international trade.[6]

In addressing the trajectory of the Convention in terms of "what has been achieved thus far", Professor Veneziano fascinatedly highlights the overall positive influence of the CISG as follows:

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[1] United Nations Commission on International Trade Law, 1980–United Nations Convention on Contracts for the International Sale of Goods.

[2] *See* Michael P. Van Alstine, *Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law,* 37 VA. J. INT'L L. 1, 6 (1996) ("It can be said with little risk of overstatement that the [CISG] represents one of history's most successful efforts at the unification of the law governing international transactions."); *see also* James J. Callaghan, *U.N. Convention on Contracts for the International Sale of Goods: Examining the Gap-Filling Role of CISG in Two French Decisions*, 14 J.L. & COM. 183, 183-85 (1995).

[3] Herbert Kronke, *'The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond'*25 Journal of Law and Commerce 451 [2005]

[4] *See* e.g., Harry M Flechtner, *Changing the Opt-Out Tradition in the United States, (2007); Eckart Br?dermann, The Practice of Excluding the CISG: Time for Change?* (2007); MJ Dennis, *'Modernizing and Harmonizing International Contract Law: The CISG and the UNIDROIT Principles Continue to Provide the Best Way Forward'* 19 Uniform Law Review 114 (2014).

[5] *See* Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG) available at https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status.

[6] *See* Jernej Sekolec, 'Welcome Address, 25 Years UN Convention on Contracts for the International Sale of Goods' 25 Journal of Law and Commerce xv [2005].

"The Convention indeed constitutes an extraordinary achievement not only for the unprecedented width of its scope of application and the high number of States from all continents which participated in the Diplomatic Conference in Vienna, nor just for its subsequent undeniable success in terms of ratifications and its practical application. Perhaps even more significantly, it has played a major role in building a universally shared vocabulary and a common denominator of rules which have since represented the basis for any academic discourse on international contract law, as well as serving as a model for national legislation and international and supranational instruments alike. Last but not least, it has offered the opportunity to develop various methods to strive for uniformity in the interpretation by domestic courts and arbitral tribunals in different jurisdictions."[7]

Indeed, as firmly established in its Preamble[8] and Article 7, the Convention's goal of uniformity is of utmost fundamental value, reflecting the drafters' intent to remove "artificial impediments to commerce caused by differences in national legal systems that govern international sales of goods."[9] To safeguard this ultimate goal, CISG Article 7(1) unequivocally instructs domestic courts to interpret and apply the legal text of the Convention with regard to "its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."[10] To further secure the uniformity in its application, Article 7(2) of the Convention provides domestic courts with a gap-filling mechanism for matters "governed by" the Convention but not expressly settled therein.[11]

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[7] *See* Anna Veneziano, *'The Soft Law Approach to Unification of International Commercial Contract Law: Future Perspectives in Light of UNIDROIT's Experience'*58 Villanova Law Review 521, 522–3 [2013].

[8] As set out in its Preamble, the CISG was created "to remove legal barriers in international trade and promote the development of international trade." *See* CISG, supra note 1, at pmbl. In addition, the Preamble was drafted and adopted at the 1980 Conference without significant debate. See the Report of the Drafting Committee, U.N. Doc. A/CONF.97/17, reprinted in U.N. Conference on Contracts for the International Sale of Goods, Official Records 154 (1981); Summary Records of the 10th Plenary Meeting, U.N. Doc. A/CONF.97/SR.10, paras. 4-10, reprinted in U.N. Official Records, at 219-20.

[9] *See* Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law,* 88 AM. J. INT'L L. 89, 103 (1994).

[10] CISG Article 7(1) states in full as follows:

"(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." See CISG, *supra* note 1, art. 7(1).

[11] CISG Article 7(2) states in full as follows:

"(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law." *See* CISG, *supra* note 1, art. 7(2).

Here, only in the absence of the applicable general principles on which the CISG is based[12] can the domestic law, chosen by the rules of private international law (i.e., conflict of laws rules), come into play.[13]

Pursuant to the mandate of "autonomous interpretation" derived from Article 7 of the Convention,[14] domestic courts in the Contracting States are, as a consequence, required to interpret the Convention autonomously, meaning that the courts have to interpret the Convention "free from preconceptions of domestic laws."[15] Indeed, the enforcement of such mandate requires judicial awareness and fidelity to the need to interpret the terms and concepts of the Convention in the context of the Convention itself, and "not by referring to the meanings which might traditionally be attached to them within a particular domestic law."[16] In other words, Article 7 instructs the courts to "become a different court",[17] that is no longer influenced by its own domestic laws in the course of interpreting and applying the CISG.[18] To this end, decisions of the foreign courts on CISG matters, although without binding force, should be treated as having a "persuasive value".[19]

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[12] For example, these "CISG general principles" include the general principles of good faith (in international trade not in a sense of domestic German law); reasonableness ("reasonable" appears 47 times in the CISG text); and estoppel (extracted from Article 16 CISG). For more examples of CISG General principles, *see* 2016 Edition of the Digest of International Sale of Goods Contract Law (CISG Digest).

[13] *See* CISG, *supra* note 1, art. 7(2). *See* CISG Digest, supra note 12, at art. 7.

[14] It should be noted that Article 7(1) of the CISG can also be found in other uniform law conventions. Among others, these include the Rome Convention on the Law Applicable to Contractual Obligations 1980 and the 1988 UNIDROIT Conventions on International Factoring and International Financial Leasing 1988.

[15] *See* Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article* 7(1),17 I.L. &COM. 187, 188 (1998). *See* also, Larry A. DiMatteo et al., Th*e Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence,* 24 Nw. I. INT'L L. & Bus. 299, 302-04 (2004). In addition, to illustrate, the Federal Supreme Court of Germany held that the CISG shall be interpreted autonomously and uninfluenced by the German domestic law, including legal principles under German law and even when they might be relevant to the matters at dispute, they cannot be applied to the CISG litigations, as it would go against the principle of uniformity and undermine the international character of the CISG firmly established under Article 7(1). *See* Federal Supreme Court of Germany, Case VIII ZR 51/95, 3.9.1996; *see* S. Granrot, *Comparative Analysis on the Interpretation of the CISG by German and Chinese Courts, European Union and International Law,* Tallinn, (2018).

[16] *See* C.M. BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 74 (1987) (explaining that "having regard to the 'international character' of the Convention under Article 7(1) implies the necessity of interpreting its terms and concepts autonomously, i.e., in the context of the Convention itself and not by referring to the meaning which might traditionally be attached to them within a particular domestic law").

[17] *See* John E. Murray, Jr., *The Neglect of CISG: A Workable Solution,* 17 J.L. & COM. 365, 367 (1998).

[18] *See* e.g., CLOUT case No. 222 [U.S. Court of Appeals (11th Circuit), United States, 29 June 1998]; CLOUT case No. 413 [U.S. District Court, Southern District of New York, United States, 6 April 1998]; CLOUT case No. 230 [Oberlandesgericht Karlsruhe, Germany, 25 June 1997]; CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996]; CLOUT case No. 201 [Richteramt Laufen des Kantons Berne, Switzerland, 7 May 1993]; see CISG Digest, supra note 12, at 42-46.

[19] *See* Lookofsky, JM (2004) "CISG foreign case law: how much regard should we have?' in FERRARI, FLECHTNER, AND BRAND (EDS.) THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION Sellier European Law Publishers/Sweet & Maxwell at 218 (suggesting that "foreign court decisions at most have "persuasive (non-binding) value.")

To illustrate, the High Court of New Zealand in 2010 correctly asserted that interpreting the Convention autonomously means that "the Convention must be applied and interpreted exclusively on its own terms, *having regard to the principles of the Convention and Convention-related decisions in overseas jurisdictions, Recourse to domestic case law is to be avoided."*[20] On this premise, it is, therefore, crucial for the "interpreters" of the language of the Convention to "understand them as autonomous concepts and to counter the danger of their being interpreted in the light of the familiar solutions of domestic law."[21]

II. The Homeward-Trend Problem and the Substance-Procedure Dichotomy

In reality however, "uniform rules do not per se guarantee uniform application."[22] Despite several reported cases affirming the autonomous interpretation doctrine, and various leading CISG scholars constantly reminding the courts to avoid interpreting the Convention by hastily resorting to their own familiar domestic laws,[23] the "homeward-trend" problems still persist. As Professor Honnold famously remarked, some domestic courts will, either consciously or, more often, subconsciously, be victims of the so-called "homeward trend"—a phenomenon that he referred to as a "regrettable and inevitable" consequence of the unification process.[24]

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[20] *See* e.g., High Court of New Zealand, New Zealand, 30 July 2010; see also Tribunale di Forl?, Italy, 16 February 2009; CLOUT case No. 842 [Tribunale di Modena, Italy, 9 December 2005]; CLOUT case No. 774 [Bundesgerichtshof, Germany, 2 March 2005]; see also CLOUT case No. 720 [Netherlands Arbitration Institute, the Netherlands, 15 October 2002]. See CISG Digest, *supra* note 12, at 42-47.

[21] *See* PETER SCHLECHTRJEM & INGEBORG SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 10 (2d English ed. 2005) (proposing that it is necessary for interpreters or the tribunals of the CISG to become familiar with uniform international concepts, and to "understand them as autonomous concepts and to counter the danger of their being interpreted in the light of the familiar solutions of domestic law").

[22] *See* R.J.C. Munday, *The Uniform Interpretation of International Conventions,* 27 Int'l & Comp. L.Q. 450, 450-51 (1978).

[23] *See* e.g., SCHLECHTRIEM & SCHWENZER, supra note 21 (suggesting that it is of utmost importance for the CISG interpreters to become familiar with uniform international concepts, and to "understand them as autonomous concepts and to counter the danger of their being interpreted in the light of the familiar solutions of domestic law"); C.M. BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 74 (1987) (suggesting that Article 7(1) "implies the necessity of interpreting its terms and concepts autonomously, *i.e.,* in the context of the Convention itself and not by referring to the meaning which might traditionally be attached to them within a particular domestic law"). *See* Karen Halverson Cross, Parol Evidence Under the CISG: The. "Homeward Trend" Reconsidered, 68 OHIO ST. L.J. 133, 136 (2007).

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

The *literature review* undertaken in this research indicates that one of the most common causes of the homeward-trend phenomenon, theoretically, stems from the orthodox view of substance-procedure dichotomy, prevalent in the traditional settings of the conflict of laws rules.[25] At a higher level of abstraction, this orthodox view might be traced back to Jeremy Bentham's Work in 1782, proposing that "substance" and "procedure" can be clearly and sharply separated.[26] Inherent in judicial methodology of domestic courts, the conflict between the *lex fori* and the *lex causae*, especially on the issue of evidence, "brings us back to the traditional distinctions between substantive and procedural rules", which becomes extremely decisive for the resolution of conflicts of laws in the traditional paradigm of international commercial disputes.[27] As such, the substance-procedure distinction is fundamental to private international law, both practically and theoretically.[28]

For the purpose of judicial application of the traditional substance-procedure analysis in the context of the CISG, the CISG has generally been described as "substantive law".[29] Assuming that the traditional substance-procedure analysis was to be adopted and also that the domestic courts, under the substance-procedure analysis, have determined that the admissibility of certain evidence would be a matter of procedural law, in this scenario, the relevant domestic law as *lex fori* would govern the admissibility of such evidence instead of the relevant provisions of the CISG.[30] Nonetheless, as Professor Orlandi put it, "uniform

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[25] The orthodox view relating to the substance procedure dichotomy is that "matters pertaining to the form in which the action is brought are clear instances of what relates to the remedy, to be settled by the lex fori." *See* GooDRcIH, CONFLICT OF LAWS 157, 159 (1927). See also Anthony J. McMahon, *Note, Differentiating Between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of Goods: A Proposed Method for Determining "Governed By" in the Context of Article 7(2),* COLUM. J. TRANSNAT'L L. 992, 1012 (2006)

[26] *See* Jeremy Bentham. H.L.A. Hart (Ed.), Of Laws in General, Athlone Press, London (1970). See also J. Tidmarsh, *Procedure, Substance, and Erie,* 64 Vand. L. Rev. 877, 882 (2011) (stating that "some scholars date the rise of the distinction between procedure and substance to the late eighteenth century, tracing the dichotomy to Jeremy Bentham's 1782 work Of Laws in General."); Albert Kocourek, Substance and Procedure, 10 Fordham L. Rev. 157,160 (1941) (referring that "there is the orthodox view that "substance" and "procedure" can be clearly and sharply separated (Bentham)."). *See also* Thomas 0. Main, *The Procedural Foundation of Substantive Law,* 87 WASH. U. L. REV. 801, 804-05 (2010).

[27] *See* Chiara Giovannucci Orlandi, *Procedural Law Issues and Uniform Law Conventions,* 5 UNIF. L. REV. 23, 28 (2000); *see also* Collier, J. Substance and procedure. In Conflict of Laws, Cambridge University Press. (pp. 60-68) (2001) (explaining that "Matters of procedure are governed by the *lex fori,* English law, whatever be the *lex causae*, for example, the French governing law of a contract").

[28] *See generally* Richard Garnett. Edition: 1st ed. Imprint: Oxford, U.K.: Oxford University Press, 2012.

[29] *See, e.g., Zapata Hermanos Sucesores, S.A. v. Hearthside Baking* Co., 31.3 F. 3d 385,388 (7th Cir. 2002) ("The Convention is about contracts, not about procedure").

[30] *See e.g.,* Marco Torsello, *Common Features of Uniform Commercial Law Conventions,* 47 (2004).

laws bring to national systems changes for which the courts are not always prepared."[31] As a result, domestic courts will unavoidably be confronted with a wide range of potential conflicts between the uniform laws and relevant domestic rules, in which the most common problems are generally related to the issue of evidence.[32] Precisely, this is because "evidence" may have different meanings in various domestic legal systems, especially in those systems where evidence is not exclusively classified as part of the procedural rules.[33]

Specifically on the issue of the "extrinsic evidence" for the purpose of contract interpretation, and the interplay between the more liberal approach under CISG Article 8 and the different approaches under the domestic parol evidence rule, the conflicting rulings on the applicability of the US parol evidence rule to the CISG contracts were delivered by the two U.S. Circuit Courts. In *Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc,* the Fifth Circuit held that the domestic parol evidence rule, which generally operates to bar extrinsic evidence, should be applied, regardless of whether the contract is governed by the CISG or the US law, and despite the fact that the United States is a CISG Contracting State.[34] By contrast, in *MCC-Marble Ceramic Center, Inc v Ceramica Nuava D' Agostino S.p.A. ("MCC-Marble"),* the Eleventh Circuit held that, since both the CISG and the domestic parol evidence rule are substantive law, the CISG Article 8 prevailed over the domestic parol evidence rule, leading to the admissibility of the extrinsic evidence.[35]

The Eleventh Circuit's decision in *MCC-Marble* has widely been praised by many commentators, especially for advancing the Uniformity Principle of the Convention. Among others, Peter J. Calleo openly advocated that courts in the United States should follow the Eleventh Circuit's approach in precluding the application of the domestic parol evidence rule to contracts governed by the CISG, and equally, other CISG member countries "should look to the cogent the Eleventh Circuit's analysis as a model when they are confronted with interpreting not only Article 8 but also other provisions of the CISG."[36] Despite a *prima facie*

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[31] *See* Orlandi, *supra* note 27, at 26.

[32] *Id.*

[33] *Id.*

[34] *Beijing Metals v. Am. Bus.* Ctr., Inc., 993 F.2d 1178, 1182 n.9 (5th Cir. 1993). In addition, it should be noted that the United States became the forty-second nation to adopt the treaty in 1988. *See* Richard E. Speidel, *The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods,* 16 Nw J. Ibr'L L. & Bus. 165, 166 (1995).

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

[36] *See* Peter J. Calleo, *The Inapplicability of the Parol Evidence Rule to the United Nations Convention on Contracts for the International Sale of Goods,* 28 Hofstra L. Rev. 799, 833 (2000)

desirable outcome in applying the CISG Article 8 instead of the domestic parol evidence rule pursuant to the Uniformity Principle, the Eleventh Circuit's analytical methodology, relying heavily on the substantive-procedural dichotomy might still, nevertheless, be problematic. McMahon, for instance, proposed that, given the diversity in domestic laws, "affixing a label of either substance or procedure to a legal rule is trickier than normal in the context of the CISG", and, domestic courts are, as a consequence, advised to take caution when applying the substance-procedure analysis.[37]

Indeed, the substance-procedure analysis is "a popular target of scholarly criticism".[38] The CISG 1980 has tended to be analyzed largely from a substantive law point of view, with relatively limited clarifications on various procedural implications that may arise from its world-wide applications.[39] The substance-procedure dichotomy discourse is, therefore, a topic of endless implications in the international commercial disputes arena, and, for most part, an ongoing debate especially in the context of the CISG 1980.

The *central research* question for this study is whether domestic courts in the CISG Contracting States should rely on the substance-procedure analysis in confronting the issue of extrinsic evidence for the purpose of interpreting the contracts governed by CISG 1980? This legal doctrinal research proceeds on the *hypothesis* that domestic courts in the CISG Contracting States should not rely on the substance-procedure analysis, as this approach would be more complicated in the context of the CISG than in the traditional conflict of laws paradigm. Instead, in confronting the issue of admissibility of evidence for the purpose of interpreting the contracts governed by CISG, this study *recommends* that the courts in the CISG Contracting States should honor the duty to apply the CISG Article 8 through the lens of international law obligations, in the interests of legal certainty and uniformity in international sales law.

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[37] *See* McMahon, *supra* note 25, at 1008 (stating that "It is therefore important that courts undertake an autonomous analysis of whether a matter is substantive or procedural rather than merely falling back on the labels used in the forum.")

[38] *See* Main, *supra* note 26, at 801.

[39] *See* Orlandi, *supra* note 27, at 24.

The *main objective* of this study is to analyze the problems of the substance – procedure analysis as an interpretative methodology in the context of the CISG Article 8 and, to propose a more desirable international approach for domestic courts in Contracting States[40] when obligations of international law are at stake, in order to ensure that international sales law gravitates towards uniformity. The *methodology* adopted in this study is the documentary research approach, based on information both from primary and secondary sources, including, *among others,* the CISG legal texts, domestic legislations, judicial decisions, official reports, UNCITRAL CISG Digest, previous empirical studies, and the rich body of scholarly writings. The ultimate contribution of this study is the proposed international framework with certain legal, theoretical and practical or policy implications in the context of the CISG Article 8 and beyond, delivering a clear picture and promoting a better understanding of the CISG 1980. The discussion, analysis, and findings in this research can also provide a systematic framework as a *useful foundation* for country-specific research or other uniform law projects in the future.

III. The Conflicting Laws: The CISG Article 8 versus the US Parol Evidence Rule

"We are struck by a new world where there is...no parol evidence rule, among other differences."[41]

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[40] With the fundamental objective and intended contribution of this study, namely, to propose an international framework, rather than a country-specific solution, the scope or the *focus* of this study is therefore on the domestic courts in CISG Contracting States. Given that the issue of Article 95 and 96 Declarations would induce a number of variable factors, such as the outcome derived under the conflict of law rules to see, in light of Article 96 Declaration, which country's formality rule would then govern the contract in each case together with the relevant domestic legal environments; whether the places of business of seller and buyer is in the Counteracting States with the Article 96 Declaration (see CISG-AC Opinion No. 15, Reservations under Articles 95 and 96 CISG, Adopted by the CISG Advisory Council following its 18th meeting, in Beijing, China on 21 and 22 October 2013); as well as the fact pattern of the parties' contracting practices, for example. Hence, the issue of Article 95 and Article 96 would need a proper case by case basis analysis taking into account a specific fact pattern and the relevant legal conditions applicable to each scenario as a future country-specific research, in which this study, while aiming at proposing an "international framework", can provide a useful foundation for such future country-specific research. It should be noted that only a few out of 94 Countries have made each of the two Declarations. In addition, at the two hearings organized by the Ministry of Justice of Thailand in February and in September 2020 respectively, the same conclusion was reached which is that, like the majority of other CISG Contracting States, Thailand will *not* make any Declarations either under Article 96 or Under Article 95.

[41] *See* Murray, John E. Jr., *An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods,* 8 J.L. & Com. 11,12 (1988)

As a matter of law and policy, the basic operation of the domestic parol evidence rule is to protect "written contracts against perjured or otherwise unreliable testimony of oral terms"[42] and to ensure that the parties' expectations and understandings as recorded in written contracts will not be frustrated by extrinsic evidence.[43] "Extrinsic" means "outside", the term 'extrinsic evidence' refers generally to all the elements outside of the written contract, including, *among others,* prior negotiations or arrangements, communications between the parties, or the execution of the contract.[44]

Historically, the parol evidence rule was developed as a method for common law judges to control and prevent the juries from ignoring credible and reliable written evidence of the contract.[45] This general distrust toward the common law juries, was described as one of the main reasons for the adoption of the parol evidence rule,[46] making the rule become even more crucial in the United States than in other common law countries.[47] This is because, under the US law, there is the right to a jury trial in most civil cases,[48] guaranteed by the Seventh Amendment to the US Constitution.[49]

On this premise, the underlying rationale of the parol evidence rule is, therefore, "to preserve the integrity of written contracts,"[50] and, as a matter of policy, "to motivate parties to put their complete agreement in writing."[51] To this end, albeit subject to numerous

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[42] *See* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 137 (3d ed. 1987)).

[43] *See* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE ? 2-9 (2d ed. 1980) at 76.

[44] *See* PANHARD, Maxime. Admission of Extrinsic Evidence for Contract Interpretation: The International Arbitration Culture in Light of the Traditional Divisions, International and Comparative Law Review, vol. 18, no. 2, pp. 100–103 (2018).

[45] *See* Edward J Imwinkelried, *A Comparative Critique of the Interface between Hearsay and Expert Opinion in American Evidence Law,* 33, 34 *Boston College Law Review* 1 (1991); see also McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury,* 41 YALE L.J. 365, 370 (1932).

[46] *See* C. Valcke, Contractual Interpretation at Common Law and Civil Law: An Exercise in Comparative Legal Rhetoric [in:] J.W. Neyers, R. Bronaugh, S. G.A. Pitel, Exploring Contract Law, Oxford 2009, at 95.

[47] *See* Supreme Court, Kenneth R. Thomas, and Larry M. Eig. The Constitution of the United ... Centennial edition. Washington: U.S. Government Printing Office, 2013. See also Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446–47 (1830); Slocum v. New York Life Ins. Co., 228 U.S. 364, 377–78 (1913); Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935); Dimick v. Schiedt, 293 U.S. 474, 476 (1935).

[48] *See Galloway v. United States,* 319 U.S. 372, 397, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943) (Black, J., dissenting in part, concurring in part) ("trial by jury is a highly valued attribute of American government. It was regarded by the founders as 'an essential bulwark' of civil liberty.")

[49] *See* J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1757, 1762 (1833) ("[I]t is a most important and valuable amendment; and places upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases.")

[50] *See* Larry DiMatteo, *The Law of International Contracting,* 212 (2000).

[51] *See* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 137 (3d ed. 1987)).

qualifications and exceptions, the parol evidence rule generally operates to bar a party from introducing evidence of prior agreements or negotiations that are contradictory to the writings.[52] At the maximum, it has been pointed out that, under certain conditions, even "consistent additional terms" may not be admitted to supplement the writing, where that writing is deemed a "complete integration".[53]

Remarkably, the domestic parol evidence rule is inconsistent with Article 8(3) of the Convention.[54] According to both legislative history[55] and case law,[56] not only does the CISG Article 8[57] govern the interpretation of statements and conduct of the party, but also the interpretation of contract, including "the case where the document is embodied in a single document."[58] Nevertheless, unlike the parol evidence rule approach under the US law, the approach of contract interpretation taken by the CISG under Article 8(3) explicitly instructs the courts to take into account extrinsic evidence.[59] By making a clear instruction to courts

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[52] *See* I E. Allan Farnsworth, Farnsworth on Contracts § 7.3, at 431; RESTATEMENT (SECOND) OF CONTRACTS § 216(1).

[53] It should be noted that different methods are used under the US law to determine whether a writing is completely integrated. *See* Peter Linzer, "The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule," 71 Fordham L. Rev. 799, 805-06 (2002); *see also* RESTATEMEN T (SECOND) OF CONTRACTS § 216(2)(b) and UCC ? 2-202.

[54] *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, 57 (1991).

[55] United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 18.

[56] CLOUT case No. 303 [Court of Arbitration of the International Chamber of Commerce, 1994 (Arbitral award no. 7331)]

[57] Article 8, under Paragraphs 1 and 2 respectively, provides two sets of criteria with a prescribed hierarchical order between the two: where the "subjective test" as prescribed by Article 8 (1) has to be applied before resorting to the objective test as provided under Article 8 (2). CISG Article 8 states in full as follows:

"(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 that 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."

[58] United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 18. For case law, see Appellate Court Helsinki, Finland, 31 May 2004; CLOUT case No. 877 [Bundesgericht, Switzerland, 22 December 2000].

[59] CISG Article 8(3) states in full as follows: "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."

and tribunals to consider "all relevant circumstances", including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties[60]—without making any exceptions for the situations where the parties embodied their agreement in a writing, Article 8(3) bars certain traditional applications of the parol evidence rule.[61] As Professor Flechtner put it, "the Convention rejects any special methodology, such as the parol evidence rule, for determining the parties' intent as to the effect of a writing."[62]

To sum up, it is particularly noteworthy that the parol evidence rule, based on the objective theory of contract interpretation,[63] essentially operates to limit the admissibility of extrinsic evidence, whereas the CISG Article 8(3) does not. The CISG's liberal approach has a number of important implications for the judicial methodologies when confronting with the international sales contract governed by the CISG 1980. One of the most vital implications of Article 8(3) is that the CISG affords to extrinsic evidence the same opportunity as written evidence to be considered by the courts for the purpose of contract interpretation.[64] Thus, at least in theory, courts are more likely to consider the contradictory evidence under the CISG than under the US parol evidence rule. Since the parol evidence rule has not been incorporated into the CISG 1980,[65] the methodological difference between the two approaches potentially poses an "interpretative challenge" for the US courts.

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[60] *Id. See also* HONNOLD, UNIFORM LAW § 110, at 170-71.

[61] *See e.g.,* Ronald A. Brand & Harry M. Flechtner, *Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention,* 12 J.L. & COM. 239, 251, 252 (1993) (suggesting that "Article 8(3) does overrule certain traditional applications of the parol evidence rule"). Nevertheless, it should be noted that, among a few, one commentator making serious attempt to reconcile the parol evidence rule with the CISG. *See* David H. Moore, Note, The Parol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc., 1995 BYU L. REV. 1347.

[62] *See* Hany M. Flechtner, *More U.S. Decisions on the U.N. Sales Convention: Scope, Paro1 Evidence, Validity and Reduction of Price Under Article* 50, 14 J.L. & COM. 153, 158 (1995).

[63] *See e.g.,* Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation,* 69 Fordham L. Rev. 427 (2000).

[64] *See* HONNOLD, supra note 60, at 164-65. For the discussion on the drafting process. *See also* JOHN 0. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 3-10 (4th ed. 2009).

[65] *See* CISG Advisory Council Opinion No. 3: Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, 17 Pace Int'l L. Rev. 61 (2005).

IV. The Interpretative Dilemma Faced by the US Courts: the MCC-Marble Decision as a leading case

The question as to whether the US courts should apply their domestic parol evidence rule to the contracts governed by the CISG 1980 emerged in *Beijing Metals & Minerals Import/ Export Corp. v. American Business Center ("Beijing Metals").*[66] In *Beijing Metals,* the District Court, relying on the parol evidence rule, refused to hear at trial a testimony concerning alleged oral agreements,[67] and subsequently awarded summary judgment in favor of the Chinese seller.[68]

On appeal, the US buyer sought to introduce the two previous oral agreements as a defense to its obligations under the contract, arguing on the basis that the contract was governed by the CISG 1980.[69] Despite this, the Court of Appeals for the Fifth Circuit held that "[w]e need not resolve this choice of law issue because our discussion is limited to the application of the parol evidence rule, which applies regardless."[70] On this premise, the Fifth Circuit subsequently went on to apply the parol evidence rule under Texas law, regardless of whether the Texas law or the CISG was the governing law of the international sales contract, leading to the rejection of the testimony of the alleged oral terms as extrinsic evidence in that case.[71] Against the claim of oral agreements, the District Court held and the Fifth Circuit affirmed in Beijing Metals that the US buyer "was barred by the parol evidence rule from introducing extrinsic evidence to alter the terms of the written agreement."[72]

In the aftermath of *Beijing Metals,* the Fifth Circuit's opinion was severely criticized by several scholars for showing an intense homeward trend, the tendency of jurists to project domestic law, where the court's decision was also deemed incorrect.[73] The court's methodology in this decision was also characterized as "the somewhat bizarre and abstruse

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[66] *Beijing Metals v. Am. Bus.* Ctr., Inc., 993 F.2d 1178, 1182 n.9 (5th Cir. 1993).

[67] In *Beijing Metals,* a Chinese equipment manufacturer (Beijing) signed an agreement with American Business Center (ABC), stating that ABC would pay according to a schedule for overdue payments on Beijing's prior shipments. Crucially, ABC insisted that parties had also orally agreed that Beijing's defective shipments would have corresponding price reductions. See *Id.* at 1180.

[68] *Id.*

[69] *Id.* at 1182.

[70] *Id.* at 1182-83 n.9.

[71] *Id.* at 1183-84.

[72] *Id.* at 1184.

[73] *See e.g.,* Hany M. Flechtner, More U.S. Decisions on the U.N. Sales Convention: Scope, Parol Evidence, Validity and Reduction of Price Under Article 50, 14 J.L. & COM. 153, 158 (1995).

methods for determining intent associated with the parol evidence rule."[74] The widespread criticisms of the Fifth Circuit's ruling also fueled the concern that the "uniform application of CISG could be seriously threatened by the enforcement of domestic *procedural rules*."[75]

Six years later, in *MCC-Marble,* the U.S. District Court for the Southern District of Florida again exhibited apparent judicial ignorance of the interpretative methodology specified by Article 8(3) of the CISG, even when both parties mutually agreed that the CISG governed their international sales contract.[76]

In *MCC-Marble,* MCC (the US buyer) negotiated an agreement to purchase ceramic tiles from D'Agostino (the Italian seller). After the negotiation in which the parties verbally agreed to several terms of the sales agreement, the parties then signed the Italian seller's standard, pre-printed order form,[77] containing a number of pre-printed terms on the reverse side.[78] A dispute subsequently arose when the US buyer withheld payment for tiles, arguing that the tiles delivered were not of the quality specified in the contract, whereas the Italian seller refused to deliver any further shipments of tiles, claiming that it was entitled to cancel the contract for nonpayment, relying on the pre-printed terms on the reverse of the signed order form.[79]

At trial, the US buyer sought to prove that the parties never intended the terms printed on the reverse to apply to the contract by offering extrinsic evidence—including three affidavits, all of which unanimously confirmed that, although the pre-printed form was signed by the buyer's representative, no one intended to be bound by the clause printed on the reverse of the form.[80]

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[74] *See* Schlechtriem pointed out that: "... [Domestic rules of interpretation are also overridden in so far as they recognize only written declarations and do not permit proof that something else was agreed orally or some other meaning intended. Any (additional) oral agreements are valid under Art. 11; determination of what the parties wished or intended to express through their declarations is governed by Art. 8(3) and cannot be restricted by domestic law – e.g., by a "parol evidence rule" such as in ? 2-202 UCC ...]" See Orlandi, *supra* note 27, at 34.

[75] *Id.*

[76] *See MCC-Marble, supra,* note 35.

[77] The front side of the form, just below the signature line, contained the following statement: "[T]he buyer hereby states that he is aware of the sales conditions stated on the reverse and that he expressly approves of them with special reference to those numbered 1-2-3-4-5-6-7-8." *See Id* at 1386.

[78] These terms included Clause 4, which required complaints regarding any defects in the tile to be made by certified letter within ten days of receipt, and Clause 6(b), which gave D'Agostino the right to cancel the contract for failure to make timely payment. *Id.*

[79] *Id.*

[80] The three affidavits included the affidavit from Monzon (i), buyer's representative who negotiated and signed the form on behalf of the buyer, claiming that MCC had no subjective intent to be bound by those terms and that D'Agostino was aware of this intent; and affidavits from Silingardi (ii.) and Copelli (iii.), D'Agostino's representatives at the trade fair, supporting Monzon's claim that the parties subjectively intended not to be bound by the terms on the reverse of the order form. *Id.*

The magistrate judge explicitly rejected the US buyer's argument, holding that those affidavits were barred by the parol evidence rule, and recommended that the District Court grant summary judgment in favor of the Italian seller, since "the affidavits, even if true, did not raise an issue of material fact regarding the interpretation of the terms of the written contracts."[81] Accepting this recommendation, the District Court subsequently awarded summary judgment in favor of the Italian seller. The US seller filed an appeal.

On appeal, the key question before the Eleventh Circuit was whether the parol evidence rule "plays any role in cases involving the CISG."[82] Remarkably, the U.S. Court of Appeals for the Eleventh Circuit explicitly held that, the language of Article 8(3) explicitly rejects the application of the parol evidence rule "which would otherwise bar the consideration of evidence concerning a prior or contemporaneously negotiated oral agreement."[83] Since the CISG precludes the application of the parol evidence rule, whereas the District Court's decision, resting on the terms incorporated on the reverse of the standard order form signed by the US buyer's representative, effectively rejected extrinsic evidence, the Eleventh Circuit, therefore, reversed the District Court's grant of summary judgment.

Interestingly, in reversing the District Court's findings, amounting to an express rejection of the judicial statements made by the Fifth Circuit in *Beijing Metals,* marking the new era of the judicial application of the CISG in the US legal history, the Eleventh Circuit also unusually placed "a great weight" on academic commentaries from several scholars in the *MCC-Marble* decision.[84] To a certain degree, this might be a positive sign of judicial awareness and fidelity to the international interpretative methodology set forth in Article 7(1)

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[81] *Id.* at 1387

[82] *Id.* at 1388.

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

[84] For the list of these CISG commentaries cited by the Eleventh Circuit, *see id.* at n. 17(including, among others, "HONNOLD, UNIFORM LAW § 110, at 170-71; LOUIS F. DEL DUCA ET AL., SALES UNDER THE UNIFORM COMMERCIAL CODE AND THE CONVENTION ON INTERNATIONAL SALE OF GOODS 173-74 (1993); Henry D. Gabriel, A Primer on the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code, 7 IND. INT'L & COMP. L. REV. 279, 281 (1997); HERBERT BERSTEIN & JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG IN EUROPE 29 (1997); Harry M. Fletchner, Recent Developments: CISG, 14 J.L. & COM. 153, 157 (1995); John E. Murray, Jr., An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods, 8 J.L. & COM. 11, 12 (1988); 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, 57 (1991).")

of the Convention. Contrasting with the Fifth Circuit's decision in *Beijing Metals,* the Eleventh Circuit's ruling in *MCC-Marble* meaningfully helped to lay the foundation for American jurisprudence on the interplay between the CISG and the US parol evidence rule.[85]

V. The Analysis: The Substance-Procedure Dichotomy as a Solution to this Dilemma?

Unquestionably, the *MCC-Marble* decision has been widely praised by CISG scholars, especially for the judicial application of the CISG, remedying the unintended homeward trend bias[86] that threatened to undermine the intended purpose of the Convention. A deeper question that deserves a closer look from legal scholars, especially into its potential impact and wider implications for international approach to the CISG, however, is whether the Eleventh Circuit's approach relying heavily on the substance-procedure dichotomy, leading ultimately to the rejection of the US parol evidence rule, could be potentially problematic.[87] The following part of this research paper adds another level to the methodological examination by providing some in-depth review of literature and analysis in order to demonstrate why the substance-procedure dichotomy, employed by the Eleventh Circuit, might be a problematic solution to such judicial dilemma.

According to Professor Garnett, "[a]s the most preliminary phase of judicial analysis in private transnational litigation, the substance-procedure distinction plays a key role in determining the identity of the law to be applied.[88] Likewise, in the *MCC-Marble* case, the Eleventh Circuit began its analysis by observing that "the parol evidence rule, contrary to its title, is a *substantive* rule of law, not a rule of evidence."[89] To this end, the court

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[85] To illustrate, in light of the *MCC-Marble* decision, a number of the US courts have subsequently followed the court's ruling in this case, including, among others, the District Court in *Mitchell Aircraft Spares Inc v European Aircraft Service AB* (1998) 23 F Supp 2d 915, 920-21 (ND Ill ED), and in *Shuttle Packaging Systems LLC v Jacob Tsonakis).* Similarly, several domestic courts in other CISG cases also essentially delivered a similar ruling in line with the MCC-Marble, even though they did not explicitly cite to the case. For instance, in *Calzaturificio Claudia v Olivieri Footwear,* the Court held that "contracts governed by the CISG are freed from the limits of the parol evidence rule and there is a wider spectrum of admissible evidence to consider in construing the terms of the parties' agreement." *See* CLOUT case 413, U.S. [Federal] District Court for the Southern District of New York.

[86] For the discussion on the "homeward trend bias", *see e.g.,* Andersen, C. The CISG in National Courts. In L. DiMatteo (Ed.), *International Sales Law: A Global Challenge* (pp. 63-76). Cambridge: Cambridge University Press (2014).

[87] *MCC-Marble, supra,* note 35, at 1388-89.

[88] *See* Richard Garnett. Edition: 1st ed. Imprint: Oxford, U.K.: Oxford University Press, (2012).

[89] *MCC-Marble, supra,* note 35, at 1388-89.

explicitly cited Professor Farnsworth's famous classification of the nature of the law, as either *substantive or procedural*.[90]

Relying on Professor Farnsworth's classification, the Eleventh Circuit stated in its decision that the parol evidence rule "does not purport to exclude a particular type of evidence as an 'untrustworthy or undesirable' way of proving a fact, but prevents a litigant from attempting to show the fact itself – the fact that the terms of the agreement are other than those in the writing."[91] After engaging in this thorough analysis, the Eleventh Circuit then concluded that the parol evidence rule is a substantive rule of law,[92] and because the rule is inconsistent with the CISG Article 8, the court cannot apply the parol evidence rule in cases involving the CISG.[93]

Although the final outcome delivered by the Eleventh Circuit's application of substance-procedure analysis seems to be teleologically satisfactory, especially in comparison with the *Beijing Ceramics* decision, the wider application of the judicial methodology relying on substance-procedure dichotomy beyond the *MCC-Marble* context, can, nevertheless, be problematic. This interpretative methodology is problematic because, to be adopted worldwide, it can, at worst, produce outcome-determinative effect and, hence, the inconsistencies within the system of CISG. The following section provides some further explanation of this problematic scenario.

Assuming that the substance-procedure analysis was a satisfactory approach and to be adopted worldwide for the disputes governed by the CISG 1980, the interpretative methodology in line with this approach is likely to operate as follows:

(a.) If a given relevant domestic rule was to be classified as a rule of substantive law (such as the case of the US parol evidence rule in *MCC-Marble* case), and, if that rule was also inconsistent with the CISG Article 8, then the court would not apply that domestic rule, as the CISG is already a substantive law governing international sale contracts;

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[90] *Id.* (quoting E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.2 (3d ed. 2004).). "[A] rule of evidence is the result of a policy decision and seeks to bar the use of a particular method of proving a fact—It does not, however, bar proof of fact itself. On the other hand, the parol evidence rule raises a bar to proving the fact itself, specifically that certain things were said or done during contract negotiations."

[91] *Id.*

[92] In other words, the District Court cannot simply apply the rule as a procedural matter, *Id at 1389-90.*

[93] *Id.* at 1391.

(b.) On the contrary, if the given relevant domestic rule was to be classified as a rule of *procedural* law, then, under the same logic, that rule would be treated as a gap-filler for the procedural matters. As the CISG is generally a substantive law, then the court would apply that relevant domestic procedural rule instead of the relevant CISG provision(s).

There is no doubt that scenario (b.) would be dangerous or undesirable from the uniform law standpoint. To clarify, while there might be nothing wrong with applying this methodology to the normal scheme of *purely* international private law matter, to apply this traditional approach to the special matters govern also by public international law obligations however, might be a different story. Indeed, the fear among CISG supporters, that the "well-recognized goal of promoting uniformity in international trade and the great efforts made to achieve an independent set of substantive rules would be nullified by the application of arcane or outdated domestic procedural rules," is legitimate.[94] A number of literature also revealed the real risk that the efforts to harmonize and modernize international sales law can be diluted by the inevitable diversities in domestic laws present in various countries.[95]

In the United States, as pointed out by Professor Corbin, and as formally endorsed by the Eleventh Circuit, the parol evidence rule is "not a rule of evidence...it is now most commonly described as a rule of substantive law."[96] Hence, under this scenario, the application of substance-procedure analysis by a US court, should also lead to the outcome that is in line with the Eleventh Circuit's decision in *MCC-Marble*, when the same fact pattern is presented. This means that the US courts are, on this premise, unlikely to apply its domestic parol evidence rule. Instead, the CISG Article 8, as a substantive law governing the international sales contract, will be applied and the extrinsic evidence will, accordingly, be considered in light of a similar fact pattern as in the *MCC-Marble* case.

Additionally, under the substance-procedure analysis, a similar outcome should also be expected in other common law jurisdictions where the parol evidence rule is domestically labelled as a rule of substantive law in those countries. For instance, under

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[94] *See* Orlandi, *supra* note 27, at 26.

[95] *Id.*

[96] Arthur L. Corbin, The Interpretation of Words and the Parole Evidence Rule, 50 CORNELL L.Q.. 161, 181 (1965) (stating that "This is a rule of substantive contract law, not a rule of evidence").

the contract law of Australia which is also a CISG Contracting State, the parol evidence rule is, similar to the US system, domestically classified as a substantive common law rule.[97] In this scenario, the judicial application of the substance-procedure approach, should also lead to a consistent outcome in the Australian courts.

Nevertheless, even among the common law countries themselves, the judicial application of the substance-procedure approach might still be problematic, and can give rise to an unsatisfactorily inconsistent outcome within the system of international sales Convention. Potentially, this scenario can be the case where the parol evidence rule, under some common law jurisdictions, might be classified as a domestic procedural law in particular, or even when it can be reconciled with the CISG Article 8, due to numerous exceptions, it might, nevertheless, make judicial determination unnecessarily complicated.

Taking Singapore as an example, notwithstanding that Singapore is also a CISG Member State and, at the same time, a common law country like the United States, the parol evidence rule in Singapore can, however, be considered as a domestic procedural law, historically codified in the Evidence Ordinance of 1893 and currently contained in the Singapore Evidence Act.[98] As affirmed in the famous *Zurich Insurance* case,[99] after pointing out the decline of the parol evidence rule under English law, the Singapore's Court of Appeal also explained, nevertheless, that relevant aspects of the parol evidence rule continue to apply in Singapore under section 93 and section 94 of the Evidence Act.[100] Interestingly, in *BQP v BQQ*,[101] the court held that national rules concerning admissibility of evidence, including the *Zurich* criteria, are *procedural* in nature.[102] Similarly, the Singapore High Court in this case also

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[97] For the discussion on Australian parol evidence rule, *see e.g.,* Mercantile Bank of Sydney v Taylor (1891) 12 LR (NSW) 252.

[98] Evidence Act (Cap. 97, 1997 Rev. Ed.) of Singapore.

[99] *Zurich Insurance Singapore Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] SGCA 27.

[100] *See* Zurich Insurance; The New Contractual Interpretation in Singapore: From Zurich Insurance to Sembcorp Marine Goh Yihan [2013] Sing JLS 301 (Dec). In addition, in *Yap Son On v Ding Pei Zhen* [2016] SGCA 68, the Singapore Court of Appeal "reaffirmed the two-step approach in Zurich Insurance regarding the issue of extrinsic evidence that the Court first considers whether extrinsic evidence is to be admitted as a matter of evidence, and then interprets the contract as a matter of substantive law. On the first step, the Court reaffirmed the starting point that when the parties intended the document to represent the complete agreement between them, then section 94 of the *Evidence Act* (Cap 97, 1997 Rev Ed) ("*EA*") operates to bar extrinsic evidence from being used to contradict, vary, add to, or subtract from that contract." Reported by Leong Hoi Seng Victor (Justices' Law Clerk, Supreme Court, Singapore) & Zhuang Changzhong (Practice Trainee, Harry Elias Partnership LLP, 20 Feb 2017).

[101] *BQP v BQQ* [2018] SGHC 55 (judgment rendered on 14 March 2018).

[102] *See* Darius Chan, Interpreting Contracts under Singapore Law in International Arbitration — The Sequel, The Singapore Law Gazette, July 2018 available at https://lawgazette.com.sg/

made it clear that the question of the admissibility of pre-contractual negotiations in construing written agreements, as established by the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*,[103] was a question of evidence or *procedural* law and not a question of contract law which governs the substantive rights of the parties."[104]

In addition, given the considerable similarities, both legally and historically, between the evidence law doctrines contained in the Evidence Act 1872 of India,[105] and those under the Evidence Act of Singapore,[106] the problem of inconsistency might also persist in India, assuming the judicial adoption of the substance-procedure analysis. Indeed, such an inconsistency in the outcomes as a potential consequence of applying the substance procedure analysis based on domestic classification, as inherent in the Eleventh Circuit's methodology, is an indication of an "upgraded" homeward trend, which is unsatisfactorily paradoxical. Given the wider adoption of the substance-procedure approach beyond the US jurisdictions, it would be even more puzzling especially when one is reminded that, like the United States, Singapore, or even India, are likewise a fellow of the common law traditions and also, at the same time, a CISG Contracting State.

Regarding the civil law traditions, although it was once indicated that, in relation to the concept of parol evidence rule, "no study was made of civil law jurisdictions", it was, nevertheless, also pointed out that certain jurisdictions, such as Japan, do not seem to have a parol evidence rule.[107] Similarly, the CISG Advisory Council Opinion No. 3 also pointed out that the civil law traditions generally do not have jury trials in civil cases[108] and, therefore, do not place limits on the kind of evidence admissible to prove contractual terms between merchants.[109] In addition, this study also found that whilst the French Civil Code incorporates a version of the parol evidence rule for ordinary contracts, there is no such rule with regards

[103] *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193.

[104] *Id.* at 122.

[105] It should be noted that India is also a CISG Contracting State.

[106] *See* Chen, Siyuan,"REVISITING THE SIMILAR FACT RULE IN SINGAPORE: Public Prosecutor v. Mas Swan Bin Adnan and Another." Singapore Journal of Legal Studies, 2011, pp. 553–563. *JSTOR,* available at www.jstor.org/stable/24871189.

[107] *See* Report of the Law Reform Committee on the Review of the Parol Evidence Rule, Nov. 2006; Creator: Singapore Academy of Law. Law Reform Committee, available at https://www.sal.org.sg/ *See also Kaufman, Gregory Laurence and Others v Datacraft Asia Ltd [2005]* SGHC 174, Judith Prakash J, at 34.

[108] CISG Advisory Council Opinion No. 3, *supra* note 65, at 64.

[109] *See id.* at 66-67. *See also* Heinstein, "Comparative Law-Its Functions, Methods and Usages,"22 Ark. L. Rev. 415, 422 (1968).

to commercial contracts, and, hence, all forms of proof are generally available in the context of merchants.[110] In Germany, no parol evidence rule exists either for civil or commercial contracts, although, like Japanese law and Scandinavian laws, German law presumes that the writing is "accurate and complete."[111]

After suggesting the general absence of the parol evidence rule for the case of commercial contracts in many civil law countries, most literature on the CISG Article 8, including the CISG Council Opinion No. 3, usually concludes that, the parol evidence rule, based on the objective theory of contract interpretation,[112] has not been incorporated into the CISG, [113] and stopped their analysis at this point. On this basis, since the US courts, including the Eleventh Circuit, declared that "the parol evidence rule is a rule of substantive law",[114] by the application of substance-procedure analysis, the CISG Article 8, accordingly, prevails over the US parol evidence rule, simply because the CISG is also a substantive law, and is the governing law of international sale contracts. Along this line, it was also proposed that the common law parol evidence rule does "not exist and are likely not to be understood in civil law countries",[115] before similarly concluding that Article 8 serves "to erase this discrepancy by adopting into the CISG the civil law system's admission of evidence that would otherwise be blocked by the common law's parol evidence."[116]

In a sense, propositions of this kind might lead to a general perception that, in light of the substance-procedure analysis, the civil law courts should not have the problem of inconsistency when applying the CISG Article 8, since, unlike the common law jurisdictions, for instance, "France is the only major civil law country that has a version of the parol

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[110] *See id. See also* C.Civ. (Fr.) Art. 1341 (1); C.Comm. (Fr.) Art. L. 110-3.

[111] *See id. See also* Otto PALANDT (Helmut Heinrichs), Burgerliches Gesetzbuch, § 125 BGB Rn. 15 (64th ed., Munich 2005).

[112] *See e.g.* Joseph M Perillo, 'The Origins of the Objective Theory of Contract Formation and Interpretation' (2000) 69 *Fordham Law Review* 427.

[113] See *id.*

[114] *See Electric Distrib., Inc. v. SFR,* Inc., 166 F.3d 1074, 1082 n.3 (10th Cir. 1999); *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").

[115] *See McMahon, supra note 25,* at 1026.

[116] *See id.*

evidence rule" which, nevertheless, does not apply to the merchants.[117] Leaving aside its merits, this perception largely relies on the traditional observation that; the civil law system adopts subjective theory of contract interpretation,[118] whereas the common law traditions feature the parol evidence rule as a manifestation of the objective theory, which is subsequently precluded by the CISG Article 8.[119] Whilst most literature tends to focus on the conclusion that leads to the inapplicability of the parol evidence rule to the contracts governed by the CISG, with some discussions on certain aspect the civil law traditions in a *more or less* comparative manner, there is, nevertheless, still a *missing jigsaw* in the picture.

Indeed, such a conceivable perception, focusing heavily on the substantive law strand, even when leaving aside its merits, fails to take into account the overall picture of a legal system. Crucially, the missing jigsaw here could be the procedural law aspects of some civil law countries. Arguably, some features of the common law parol evidence rule might, in fact, have been incorporated into some civil law jurisdictions, albeit on the side of domestic

[117] *See* John E Murray Jr, 'An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods' [1998] *Journal of Law and Commerce* 8, at n 154.

[118] Unlike the common law traditions, civil law rule concerning contract interpretation essentially prioritized a *subjective theory* of interpretation before an *objective theory* of interpretation. For instance, Article 1188 of the *French Civil Code* of 1804 provides that "[t]he contract is interpreted according to the common intention of the parties *rather than in the literal sense of its terms—where such intention cannot be ascertained,* the contract shall be interpreted in the sense to be given to it by a reasonable person in the same situation." *The French civil code* encourages judges to search for and prioritize the common intent of the contracting parties, the circumstances of its formation and how it might have been executed (see Code Civil [French civil code] art. 1188.), and not just merely or exclusively rely on the literal meaning of the written terms of the contract. (FLOUR Jacques, AUBERT Jean-Luc, SAVAUX Eric, Les obligations, 1. L'acte juridique, Dalloz editions, 2014 at 414.) Similarly, the *Spanish civil code* provides that in determining the parties' intent, the court should take into account their conducts which are "contemporary and subsequent" to the contract. Further, in case of inconsistencies or contradictions between the parties' intent and the written terms of the contract, here, the parties' intent should prevail. (Codigo Civil Español [Spanish Civil Code], art. 1281-82). A similar approach is also found in Italian law, where the Italian *Civil Code* provides that the contract shall be interpreted in accordance with the parties' intent, rather than the literal meaning of the written terms of contract. (Italian Codice Civile [Italian Civil Code], art. 1362).

[119] *See e.g., William Tetley, Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified), 60 La. L. Rev. (2000)* (explaining that "The common law objective contract theory dictates those contractual promises be interpreted according to the reasonable expectation of the promise (an objective standard). Civil law, which is based on the autonomy of free will, requires actual consent (a subjective standard), but presumptions of fact are available to the trial judge").

procedural law, such as the Code of Civil Procedure.[120] Therefore, if the substance-procedure methodology is to be adopted by the civil law courts where its domestic procedural law contains similar characteristics to that of the common law parol evidence rule, the problematic substance-procedure analysis, if adopted by the courts, might similarly generate inconsistency in the system of the uniform law. To a lesser degree, even where numerous exceptions of a domestic procedural rules[121] might be able to reconcile with the CISG Article 8, and the inconsistent outcome could ultimately be avoided, the judicial adoption of such substance-procedure analysis might, nevertheless, render the judicial problem-solving process unnecessarily complicated and counter-productive.

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[120] As *a prima facie* example only, Section 94 of the Code of Civil Procedure of Thailand, not yet but potentially a next CISG Contracting State, contains certain aspects, albeit not perfectly identical, of the common law parole evidence rule. For instance, an article written by a Judge of the Central Intellectual Property and International Trade Court of Thailand, suggested that: "For parol evidence rule or (PER), under the Civil Procedure Code section 94: Where evidence in writing is required by legislation, oral evidence is not admissible instead of documentary evidence or for adding and varying its content, even opposing parties give consent.") *See* Sirilak Arunpraditkun, *The Legal Appropriation of the Kingdom of Thailand on The United Nations Convention on Contracts for the International Sale of Goods 1980, 1989 (CISG),* Central Intellectual Property and International Trade Court, at page 10 available at https://ipitc.coj.go.th/th/content/category/detail/id/14/cid/10378/iid/98742 Despite this, as previously pointed out, it should be emphasized again that, according to Prof. Jaran Pukditanakul, Section 94 of Thai law is not exactly identical to the common law parol evidence rule, although the rule has some historical influence on this Section. *See* Sansern Aiemsuttiwat, *Guideline on the Solution to the Problems Concerning the Exclusionary Rule of Witness in Civil and Commercial Cases,* (2016) available at https://repository.au.edu/handle/6623004553/18053. More importantly, to see the precise effect of the interplay between the CISG Article 8 and the Section 94 of Thailand's Code of Civil Procedure after Thailand has become a CISG Contracting States would require a country-specific analysis as it will depend on several variable factors (e.g. the issue of Article 96 Declaration and the outcome under the conflict of law rules, the contracting practices and the fact pattern of the case, the interpretative approach on the notion of domestic public policy, and the most important one is the judicial approach ultimately employed by the Thai courts). What can be ascertained, at least, is that to adopt a traditional substance-procedure approach would make, at the minimum, the judicial methodology unnecessarily more complicated than to adopt the international framework through the lens of international law obligation as recommended in Part VI of this research paper. Equally, if Thailand becomes a CISG Contracting State without making the Article 96 Declaration, which is likely to be the case according the public hearing hosted by the Ministry of Justice in 2020, the chance that the CISG Article 8 will be interfered by the Section 94 of the Thai law would be much lower, given the provision of the CISG Article 11. Ultimately, it would still depend on the judicial willingness to honor the international law obligation to apply the CISG provisions, and treat the CISG as a Thai *lex specialis* law for international sales contracts and depart from the strict substance-procedure dichotomy, for instance. This study, while aiming at proposing an international framework, should also help to provide a useful foundation for a country-specific analysis.

[121] According to the Eleventh Circuit, relying on the rule's numerous exceptions, Professor Moore was the "only one commentator" making "any serious attempt to reconcile the parol evidence rule with the CISG", yet, was explicitly rejected by the court, as appeared in the MCC-Marble opinion, on the ground of legal certainty in the interest of parties to an international contract for the sale of goods. *See MCC-Marble, supra,* note 35, at 1390-91.

Unlike the typical cases of international contract disputes that would generally involve a normal application of domestic conflict of laws rules, and whilst the Convention itself is the international effort to harmonize an area of private international law, the judicial obligations to apply the CISG Article 8 by the courts in the Contracting States however, is formally and legally a matter of public, not private, international law obligations.[122] Under this legal basis, the judicial application of the traditional substance-procedure analysis to answer the question—whether the Article 8 of the Convention or the relevant domestic law rules should apply to the issue that is already and explicitly governed by the Convention—is, thus, problematic and unsatisfactory.[123]

In traditional scenario of the rules of private international law (or the conflict of laws rules), the so-called *lex fori regit processum* doctrine has proclaimed for centuries that procedural matters shall be governed almost exclusively by the domestic law of the forum ('lex fori').[124] Hence, in a typical international commercial dispute, the traditional view of conflict of law rules usually holds that, in practice, "when a court labels a rule "procedural" for choice-of-law purposes, the court applies local law"[125] and "questions relating to the admissibility of evidence, as a general rule, should be determined by the local law of the forum."[126]

Despite this, for domestic courts in Contracting States, the application of the CISG is correctly *not* a matter of applying a foreign law that would *otherwise* involve general application of conflict of law rules, but, rather, is a matter of public international law obligation, officially and legally transformed into the law of the land of the Contracting States.[127] On this legal basis, domestic courts in the CISG Contracting States should, therefore,

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[122] For the discussion of this international law obligation to apply the CISG in light of the issue of "tacit waiver" analyzing the tension between domestic procedural law and the CISG Article 6, *see* Lisa Spagnolo, Iura Novit Curia and the CISG: Resolution of the Faux Procedural Black Hole (2010) at 192 in I. Schwenzer & L. Spagnolo (eds), Towards Uniformity: the 2nd Annual MAA Schlechtriem CISG Conference, Eleven International Publishing, The Hague, (2011).

[123] *See* CISG Article 7.

[124] *See* Richard Garnett, Substance and Procedure in Private International Law (Oxford University Press, 2012) 1, 5–6.

[125] *See e.g.,* PETER HAY ET AL., CONFLICT OF LAWS: CASES AND MATERIALS 404 (12th ed. 2004).

[126] *See e.g.,* RESTATEMENT (SECOND) OF CONFLICT OF LAWS ? 138 (1971). ("questions relating to the admissibility of evidence, whether oral or otherwise, should usually be determined by the local law of the forum. The trial judge must make most evidentiary decisions with dispatch if the trial is to proceed with reasonable celerity. The judge should therefore, as a general rule, apply the local law of his own state.")

[127] For instance, since the United States is a CISG Contracting States, thus, the CISG is the law of the land of the United States, see e.g., *Asante Technologies, Inc. v. PMC-Sierra, Inc.,* 164 F.Supp. 2d 1142, 1149-50 (N.D. Cal. 2001.)

treat the CISG as a matter of applying a domestic lex *specialis* law, governing the sphere of international sales contracts. This means that the applicability of the CISG provisions *does not* depends on the traditional conflict of laws rules approach but, rather, on the conditions legally set forth in the Convention itself, especially under Article 1 of the CISG,[128] giving rise to international law obligations, binding upon the Contracting States, and the domestic courts.[129] In other words, in the courts of Contracting States, the CISG is "applicable by operation of law", namely the treaty law that has been transformed into domestic law.

To evaluate the approach taken by the Eleventh Circuit through the lens of international law obligation, in terms of the outcome, the court's decision is a good example of a domestic court delivering the outcome in observance of the uniformity principle under Article 7; in terms of methodology, however, the court erred in performing a substance-procedure analysis in reaching such an outcome.[130] In *MCC-Marble*, the Eleventh Circuit's opinion is based on the finding that the parol evidence rule was a substantive rule of law, and because it conflicted with a provision of the CISG, the parol evidence rule could not be applied.[131] The underlying logic of the court's substance-procedure analysis is that if the court determines that a domestic rule is *procedural*, it should be applied, regardless of whether a CISG provision governs the matter. This approach is, at worst, incorrect, and, at best, unsatisfactory, opening the gate for improper application of the CISG if it is to be adopted worldwide.

Fundamentally, another problem associated with the substance-procedure analysis in the context of a contract governed by the CISG is that such an approach is based on a potentially flawed assumption that "the Convention is about contracts, not about

[128] To illustrate, pursuant to Article 1(1)(a), this Convention applies to contracts of sale of goods between parties whose places of business are in different States, when the States are Contracting States.

[129] This notion has also been confirmed by the UNCITRAL officers responsible for the matter of the CISG in a meeting organized by the Head of UNICTRAL RCAP as part of the "UNCITRAL Asia Pacific Day" event at Faculty of Law, Chulalongkorn University, in December 2019.

In addition, for the proposition that the CISG is applied as a matter of public international law obligation, with the example of the legal authority to support the notion that the international obligations have to be performed by the domestic courts in the context of domestic procedural laws and the issue of tacit waiver under the CISG, *see e.g.* Spagnolo, *supra* note 122.

[130] *See* McMahon, *supra* note 25, at 1012.

[131] *MCC-Marble, supra,* note 35, at 1391.

procedure”,[132] and, hence, the CISG is a substantive law, therefore, procedural matters fall outside of the scope of the CISG. In other words, in light of the substance-procedure dichotomy, this traditional view often treats the procedural issues as a gap or matter not governed by the CISG.

Despite this, a bright line *cannot* be drawn.[133] As explained in a world-renowned Commentary on the CISG, “some matters which may be labeled as “procedural” by the domestic laws could in fact already be governed by an explicit provision of the CISG.”[134] On this premise, according to Professor Schlechtriem in particular, Article 11, which unequivocally allows a contract to be proved by any means including witnesses, “overrides even where rules as to the form of evidence are classified by domestic law as procedural.”[135] Similarly, there are several other provisions of the CISG 1980, in which certain procedural matters have been included, both explicitly and implicitly, such as the matter of the distribution of the burden of proof and a shift of the burden between the parties, for example.[136] Since the application of the CISG is a matter of international law obligation, it is of utmost importance that courts in Contracting States refrain from using a substance-procedure analysis in the case where CISG does already and directly govern the matter.[137]

Affirmatively, on the issue as to whether domestic courts have to consider extrinsic evidence—such as the affidavits, discussing the preliminary negotiations, reporting that the parties’ subjective intent not to apply certain terms of the written contract, like in the *MCC Marble* case—is already governed by the provision of the CISG Article 8. This is because Article 8 already provides an explicit instruction to the tribunals on this matter. Explicitly, Article 8(1) requires domestic courts to consider evidence of a party’s subjective intent. Equally, Article 8(3) is “a clear instruction to admit and consider extrinsic or parol evidence

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[132] For exam, Judge Posner once stated, although with subsequent criticisms, that the CISG governs substantive issues and “the Convention is about contracts, not about procedure...Thus when applied to actual disputes the Convention resembles an island of international rules surrounded by an ocean of still-applicable national law.” See Zapata Hermanos Sucesores v. Hearthside Baking. United States Court of Appeals, Seventh Circuit. Nov 19, 2002. 313 F.3d 385 (7th Cir. 2002).

[133] *See* COMMENTARY ON THE U.N. CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 96 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005) at 71-72.

[134] *Id.*

[135] *See id. See also* Article 11 of the CISG states in full as follows: “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.” *See CISG* Article 11.

[136] *See e.g.,* Articles 25, 35,36, 39 and 74 of the CISG.

[137] It should be noted however that the substance-procedure analysis could be relevant in the case where there is a gap in the convention. See generally, McMahon, *supra* note 25.

regarding the negotiations to the extent they reveal the parties' subjective intent."[138] Hence, once the matter is already governed by the CISG, that relevant provisions of the CISG "are applicable regardless of whether the courts apply a procedural or substantive label to them."[139]

The conclusion that Article 8 is a rejection of the domestic parol evidence rule also finds support in the Convention's legislative history.[140] Indeed, at the time of the drafting of the CISG, it was determined that the courts should not be restricted from reviewing all evidence, since the drafters' rationale behind the CISG Article 8 was for the intention of the parties to take priority over the contract.[141] Hence, taking into account, *among others*, the negotiations, previous practices and even subsequent conducts of the parties can assist the courts in determining the parties' real intention and understanding of the contract. Historically, this interpretative trend was also emerged at the time when the common law

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[138] *See MCC-Marble, supra,* note 35., at 1389.

[139] *See McMahon, supra* note 25, at 1013.

[140] The brief history of the CISG, it can be explained as follows: "During the seventh meeting of the First Committee, the Canadian representative proposed the addition of a new paragraph to current article 11. *See* U.N. Conference on Contracts for the International Sale of Goods, 1st Comm., 7th mtg., 1 82, at 270, U.N. Doc. AKONF.97119 (1980), in JOHN 0. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 2-4 (1989) at 491. The new paragraph would have restricted the admissibility of testimony contradicting a written contract. Report of the First Committee, U.N. Conference on Contracts for the International Sale of Goods, 1st Comm., art. 10, 1 3, at 90, U.N. Doc. A/CONF.97119 (1980), in HONNOLD, DOCUMENTARY HISTORY at 662. The proposed paragraph read: Between the parties to a contract of sale evidenced by a written document, evidence by witnesses shall be inadmissible for the purposes of confuting or altering its terms, unless there is prima facie evidence resulting from a written document from the opposing party, from his evidence or from a fact the existence of which has been clearly demonstrated. However, evidence by witnesses shall be admissible for purposes of interpreting the written document. *Id.* The Japanese representative objected to this proposal because he believed it to be essentially a "restatement" of the rigid and difficult to apply parol evidence rule. U.N. Conference on Contracts for the International Sale of Goods, 1st Comm., 7th mtg., 1 84, at 270, U.N. Doc. AlCONF.97119 (1980), in HONNOLD, DOCUMENTARY HISTORY, at 491. Though at least two representatives favored the amendment, the Canadian proposal "did not seem to command wide support" and was not adopted by the Committee. *Id.* 1 86. From this it might be assumed that the parol evidence rule was rejected by the drafters of C.I.S.G. However, the limitation on testimony proffered by the Canadian representative was triggered by the mere existence of a writing. Id. 'j[84. Because the U.S. parol evidence rule, in contrast, is triggered by the integrationist intent of the parties, that rule was not explicitly rejected by the Committee along with the Canadian proposal." See David H. Moore, Note, The Parol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc., 1995 BYU L. REV. 1349.

[141] *See* Müller-Chen in I Schwenzer (ed), Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG), 4th edn (Oxford University Press , 2016) at 195. In addition, even in a domestic law context, some Thai legal scholars similarly call for an abolition of the Section 94 of the Thailand's Code of Civil Procedure which is historically influenced by, albeit not identical to, the common law parol evidence rule. For the thorough discussion and interesting proposal on this matter, see e.g. Sansern Aiemsuttiwat, *Guideline on the Solution to the Problems Concerning the Exclusionary Rule of Witness in Civil and Commercial Cases,* (2016) available at https://repository.au.edu/handle/6623004553/18053

parol evidence rule had been the subject of constant criticism, where Professor Honnold famously stated that; “this rule has been an embarrassment for the administration of modern transactions.”[142] Similarly, even in light of the CISG Article 11, the Secretariat Commentary justified the liberal approach excluding a writing requirement on the ground that “many international sales contracts are concluded by modern means of communication which do not always involve a written contract.”[143]

Legally, given that the international law obligations as well as the legal certainty which is a vital interest for parties from different Contracting States in international trade are at stake, the administration of justice can be hindered by the ‘incorrect’ application of the governing law.[144] To recognize and apply the court’s own domestic rules at the expense of the explicit provisions of the CISG, without justifiable grounds legally permissible under the Convention, is to recognize a change in the governing law of contract against legitimate expectation of both the private parties and other CISG Contracting States, potentially in a violation of international law obligations. Strategically, in terms of practical implications, the substance-procedure analysis, relying on a rigid classification of various domestic rules, can also generate discrepancy in the judicial application of the CISG, weakening the international effort of harmonization and the uniformity principle, in a manner that might induce forum shopping and strategic behaviors.[145] Thus, giving effect to the approach of CISG Article 8’s provision seems to embrace the legal, historical and practical justifications.

Indeed, when domestic laws and local concepts are different from jurisdiction to jurisdiction, it is sensible to conclude that relying on such a rigid classification under the substance-procedure analysis in the context of cross-border litigations involving international law obligation such as the CISG is, at worst, incorrect, and at best, counterproductive. As Professor Flechtner put it,[146] “perhaps the single most important source of non-uniformity

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[142] *See* J.O. HONNOLD, *supra* note 60 at 121. See Orlandi, *supra* note 27, at 26.

[143] *See* J. ZIEGEL, Report to the Uniform Law Conference of Canada on the Convention on Contracts for the International Sale of Goods (1981).

[144] *See* L. Spagnolo, ‘A Glimpse through the Kaleidoscope: Choices of Law & the CISG’, 13 Vindobona Journal of International Commercial Law & Arbitration 137, 148 (Table 3) (2009).

[145] In light of the “the two-pronged substance-procedure test” test, it was explained that “affect the result” factor is to determine whether the rule would provide a *tactical advantage* to a party such that it would lead to forum shopping). *See* PETER HAY ET AL., CONFLICT OF LAWS: CASES AND MATERIALS 404 (12th ed. 2004); see also RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 59 (4th ed. 2001); McMahon, *supra* note 25 at 1005-1006.

[146] addressing a similar concern about the uniformity principle, albeit in the context of Article 31 of the CISG.

in the CISG is the different background assumptions and conceptions that those charged with interpreting and applying the Convention bring to the task."[147]

With the diversities in domestic laws and local concepts at the backdrop, the judicial reliance on the substance-procedure distinction in the context of the International Sales Law Convention or the CISG is "easier said than done". Classification of a law as *substantive* or *procedural* is, philosophically and legally not a straight forward task but unnecessarily complicated matter, even for the CISG litigations in general, beyond the context of CISG Article 8. Such complication stems from the truth that the clear-cut line is not usually easy to be drawn. In the Italian legal system, for instance, the rules of evidence feature both in the Civil Code and in the Code of Civil Procedure, respectively dealing with the admissibility of evidence and the taking of evidence.[148] Likewise, certain CISG provisions may receive a "procedural" label in some jurisdictions.[149]

Even within the same country featuring federal system like the United States, there was also evidence of internal inconsistency or conflicting rulings regarding the issue of "attorney fees" in the light of the CISG's damages provision under Article 74 following the application of the substance-procedure analysis: "Drawing again, initially, from U.S. court decisions, these courts treat the governing instrument authorizing the recovery of attorneys' fees as *substantive* in some instances and *procedural* in other instances. U.S. courts classify a single statute authorizing the recovery of attorneys' fees as *procedural* in some contexts and *substantive* in others. For example, the Tenth Circuit Court of Appeals decided, 'attorney's fees are a *substantive* issue in the litigation even though they may be treated as *procedural* in another litigation. The widely criticized *Zapata* case from the Seventh Circuit Court of Appeals, to the contrary, deemed attorneys' fees as *procedural*." [150]

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[147] *See* Harry M. Flechtner, The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1), 17 J.L. & COM. 187 (1998).

[148] *See* Orlandi, *supra* note 27, at 26.

[149] *See* McMahon, *supra* note 25, at 1007.

[150] For the discussion on the diversities on the issue of damages among different States under the US jurisdiction in the context of the CISG 1980, *see* Damages under CISG: Attorneys' Fees and Other Losses in International Commercial Law, 29 J. Transnat'l L. & Pol'y 1 (2019-2020) (stating that "The U.S. Seventh Circuit Court of Appeals, in its widely criticized Zapata decision, held that the recovery of attorneys' fees incurred through litigation is a procedural matter governed by the law of the forum and does not constitute recoverable losses under Article 74's damages provisions"). *See id.* at 50.

Additionally, supposing however that the court determined that the evidence issue and the domestic parol evidence rule were both procedural matters, one might argue that even when the substance-procedure analysis in this supposed situation could lead to the application of the parol evidence rule, this might not necessarily generate an inconsistent outcome, compared to the case under the judicial application of the CISG Article 8 pursuant to the international law obligation. Hence, as one might argue, the extrinsic evidence might equally be considered under this scenario. This argument essentially relied on the numerous exceptions to the parol evidence rule developed by the courts over the years in order to mitigate the possible injustice caused by the rule.[151] For instance, having attempted to reconcile the parol evidence rule with the CISG Article 8, Professor Moore argued that the rule is often in harmony with the principles of the CISG.[152] According to the Eleventh Circuit, however, Professor Moore was the "only one commentator" making "any serious attempt to reconcile the parol evidence rule with the CISG", yet, was explicitly rejected by the court, as appeared in the *MCC-Marble* decision, on the ground of legal certainty in the interest of parties to an international contract for the sale of goods.[153]

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[151] To certain extent, this scenario might apparently, at least, touch on with the situation under Section 94 of the Civil Procedure Code of Thailand, potentially a future CISG Contracting State. The precise effect would, however, require a separate country-specific research in the future, due to a number of variable factors involved in such a context, including, *among others,* the issue of Article 96 Declaration which might relatively lead to a higher chance of the applicability of Section 94 than without such a declaration. Nevertheless, the precise effect of this scenario would still, in turn, depend on other variable circumstances such as the outcome derived under the conflict of law rules to see which country's formality rule would then govern the contract in each case (see CISG-AC Opinion No. 15, Reservations under Articles 95 and 96 CISG, Adopted by the CISG Advisory Council following its 18th meeting, in Beijing, China on 21 and 22 October 2013); the places of business of the seller and the buyer in relation to the Article 96 Declaration; the notion of "domestic public policy" attached to Section 94 (see e.g. Thai Supreme Court case No.2521/2559) albeit in light of the international sales law Convention; the willingness of the courts to treat the Convention as a matter of *lex specialist* law, as well as the fact pattern of the parties' contractual practices, for instance. Hence, this topic would need a proper case by case basis analysis taking into account specific fact pattern and the relevant legal conditions applicable to each scenario as a future country-specific research, in which this study, while aiming at proposing an "international framework", can provide a useful foundation for such future country-specific research. Last but not least, it should be noted that, at the two hearings organized by the Ministry of Justice of Thailand in February and in September 2020 respectively, the same conclusion was reached which is that, like the majority of other CISG Contracting States, Thailand will *not* make any Declarations either under Article 96 or Under Article 95.

[152] *See* David H. Moore, Note, The Parol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc., 1995 BYU L. REV. 1347-63.

[153] *MCC-Marble, supra,* note 35., at 1390-91.

To sum up, the crucial point here is that even when the extrinsic evidence would also be ultimately considered under the judicial application of the relevant domestic law, if the courts begin the analysis with the substance-procedure analysis like in the Eleventh Circuit in the *MCC-Marble* case however, the judicial process can be counter-productive. This is because judicial adoption of the traditional substance-procedure approach despite the international law obligation to apply the CISG, can unnecessarily distract the courts away from the "real issue", steering the courts away from applying the "correct" governing law, in expense of legal certainty for the parties in international business environment. This is particularly unwarranted for the courts in the CISG Contracting States, given, first and foremost, that the international law obligation to apply the CISG is at stake.[154] This means that the applicability or the force of CISG does not depend on the traditional application of conflicts of law rules which, in turn, usually rely on the notion of substance-procedure dichotomy, but rather on the conditions set forth under CISG itself, such as the CISG Article 1 in particular.

On balance, the substance-procedure analysis might not be helpful in resolving the issue of extrinsic evidence in light of the CISG Article 8 and even for most part of the Convention, largely due to the unavoidable truth that domestic courts both within and outside of the United States may have no consensus as to the substantive and procedural categorizations. Consequently, the substance-procedure approach can be problematic, because it can either make the judicial analysis either unnecessarily complicated, or, at worst, produce inconsistent outcomes, undermining the international effort to provide uniformity and predictability in international sales law.

VI. The Proposed Solution: How Should the Courts Proceed?

At a higher level of abstraction, the semantics of the so-called substance-procedure dichotomy is undeniably a classic problem of every system of private international law, leading to a widespread recommendation that "one should abandon the common terminology which contrasts substance and procedure, since it disguises the real issue."[155] Indeed, as legal scholars frequently put it, "substantive law is also inherently procedural…

[154] *See* Spagnolo, *supra* note 122, at 185 (discussing the notion of international law obligation to apply the CISG in the context of CISG Article 6 and the "tacit waiver" in domestic law).

[155] *See* ILLMER, MARTIN, 'Neutrality Matters - Some Thoughts about the Rome Regulations and the So-Called Dichotomy of Substance and Procedure in European Private International Law' 28 Civil Justice Quarterly, 237 (2009).

those procedures are embedded in the substantive law and, if not applied, will lead to over- or under-enforcement of the substantive mandate."[156] This notion also enlightens the real issue behind the judicial application of the CISG Article 8, and provides the key to the proposed solution.

Given that the substance-procedure dichotomy is itself paradoxical, potentially involving philosophical and legal classifications under different jurisdictions, the dividing line between substantive law and procedural law becomes complicated and even unnecessary in some context, reaching its limits in various areas of laws,[157] including the CISG as previously demonstrated. Having analyzed and highlighted the flaws of substance-procedure analysis where it might be problematic, the proposed solution in this study is that the courts in Contracting States should, instead, honor international law obligations to apply the provisions of the CISG in order to promote predictability and uniformity in international sales law.

It should be reminded that, legally, when the court is in a Contracting State, the CISG is not a foreign law, and despite the fact that the CISG is "simultaneously a treaty, it forms part of the domestic law of the jurisdiction",[158] being a domestic *lex specialis* law for international sales contracts. In addition, this also means that, becoming a CISG Contracting State should not affect the legal regime of the domestic sales law, leaving, say, the provisions of Civil and Commercial Code in the context of domestic sales contracts and litigation untouched. Unquestionably, in Contracting States, when the litigation is a matter of *international* sales contracts governed by the CISG, how the forum treats foreign law is, therefore, irrelevant, i.e., "its applicability and content are a question of law, not fact. Any *default rule* regarding substitution of domestic for a foreign law has no place in the process."[159]

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[156] See Main, *supra* note 26 at 801.

[157] For example, for the analysis and critics of the substance-procedure dichotomy in the area of conflict of laws and also criminal justice, *see* Ofer Malcai and Ronit Levine-Schnur, Which Came First, the Procedure or the Substance? Justificational Priority and the Substance—Procedure Distinction, *Oxford Journal of Legal Studies,* Volume 34, Issue 1, Spring 2014, Pages 1–19.

[158] For the discussion of this proposition in light of the principle of *iura novit curia* ("the court knows the law") in the context of CISG Article 6, see Spagnolo, *supra* note 122.

[159] *See id.* at 195-196. Notably, in the future, this notion should also apply to Thailand's Act on Conflict of Laws, B.E. 2481 (1938), once Thailand has become a CISG Contracting State. This notion has also been confirmed by the UNCITRAL officers responsible for the matter of the CISG in a meeting organized by the Head of UNICTRAL RCAP as part of the "UNCITRAL Asia Pacific Day" event at Faculty of Law, Chulalongkorn University, in December 2019.

On this legal basis, a Contracting State, without permissible grounds under the Convention, arbitrarily relying on domestic laws to ignore the provisions of the Convention would be in a direct violation of that State's international obligations to apply the CISG, and such an international obligation also encompasses the application of the Convention by the domestic courts.[160] This legally desirable judicial protocol is also in line with the Vienna Convention on the Law of Treaties (VCLT)1969, which states in its Article 27 that: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[161] Indeed, even domestic procedural rules themselves often recognize the need to modify default rules in light of international obligations,[162] otherwise it might lead to "over- or under-enforcement of the substantive mandate."[163]

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[160] In this regard, *Fothergill v. Monarch Airlines Ltd* [1981] AC 251 (U.K.) can provide a useful example of the authority highlighting the binding effect of a ratified Convention on the domestic courts. In light of Article 32 of the Vienna Convention on the Law of Treaties and consultation of *traveaux préparatoires* by English courts in interpretation of a treaty, Lord Diplock stated in this case as follows: "By ratifying that Convention, [the] Government has undertaken an international obligation on behalf of the United Kingdom to interpret future treaties in this manner and since under our constitution the function of interpreting the written law is an exercise of judicial power and rests with the courts of justice, that obligation assumed by the United Kingdom falls to be performed by those courts." Here, the House of Lords was dealing with the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air, as amended (1955), implemented in the Carriage by Air Act (1961) (U.K.). *See id.*

[161] *See* Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331. It was even suggested that neither a Constitutional mandate nor the enactment of a statute provides an excuse for a treaty violation. *See* William W. Park and Alexander A. Yanos, Treaty Obligations and National Law: Emerging Conflicts in International Arbitration, 58. Hastings L.J. 251 (2006). If this interpretation is correct, this means that the domestic courts cannot even rely on the domestic implementing legislation that was drafted in a *contradictory manner* with the obligations under the Convention or not allowed under the permissible Declarations contained in CISG 1980, for instance. Hence, the future Contracting States, like Thailand, should ensure, *among others,* that the implementing legislation has been properly enacted in light of international law obligations. In addition, for the discussion on the customary law status of the VCLT 1969, see also Mark E. Villiger-Commentary on the 1969 Vienna Convention on the Law of Treaties-Brill (2009) 375 ("Even for nations that did not sign or ratify the Vienna Convention on the Law of Treaties, it is widely believed that Article 27 is "solidly based on customary international law."); GM Grant, 'The CISG Applies When it Says it Does, Even if Nobody Argues It: Why the CISG Should Be Applied Ex Officio in the United States and a Proposed Framework for Judges' (SSRN, 2015) at page 18; see also Spagnolo, *supra* note 122, at 191.

[162] For example, it has been suggested that the *Swiss default rule* substituting the *lex fori* for foreign law may not apply where application is pursuant to an international obligation. In addition, Article 142(2) 1986 General Principles of the Civil Law, China provides that to the extent of any inconsistency, treaty obligations prevail over substantive civil laws, unless China has made a reservation. See Spagnolo, supra note 122, at n.73; T.C. Hartley, 'Pleading and Proof of Foreign Law: The Major European Systems Compared', 45 Int'l & Comp. L. Q. 271, at 277-288 (1996).

[163] *See e.g.,* France Cour de Cassation, *Société Muller Ecole et Bureau v. Société Federal Trait* (2001); Austria Supreme Court, *4 Ob 179/05 k* (2005).

Affirmatively, the status of being a CISG Contracting State means that the CISG is applicable by the operation of law pursuant to Article 1 of the Convention in particular,[164] bypassing even the typical application of the forum's conflict of laws rules.[165] As asserted by Professor Grant, "it is also important for the judicial approach to note that being the courts in the CISG member states, means that CISG applies ex *officio* where the CISG article 1 displaces States' conflicts of laws and choice of law rules of the forum."[166]

In recognizing the international law obligation to apply the CISG for instance, French Cour de cassation (French Supreme Court) held that: "The lower court misapplied the applicable law by not considering the Vienna Convention of 11 April 1980 (CISG) ex *officio*...a French Judge must apply the Vienna Convention unless there is a reservation as to its exclusion, as per Article 6 CISG."[167] Similarly, albeit in the context of the domestic law on "tacit waiver" and the CISG, the US Court of Appeals stated that: "These foreign courts, including leading CISG scholars, have commonly accepted...that the CISG is applicable *ex officio*, and that the only escape from it is when parties exercise their rights under Article 6 of the Convention and exclude its application.[168]

Notably, as also evidence in the above judicial statements, where the CISG is applicable in accordance with the Convention framework under Article 1,[169] the principle of

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[164] In brief, in monist Contracting States, a theory of unity of legal systems and primacy of international law ensures that international treaty obligations directly bind national courts without 'transformation'. In dualist Contracting States, the courts' obligation to apply the CISG indirectly and technically arises as a matter of domestic law. See B. Conforti, International Law and the Role of Domestic Legal Systems, 25 (1993); *see* Spagnolo, *supra* note 122, at 190-198.

[165] For examples of the court decisions ruling that the CISG is applicable by the operation of law See e.g., Tribunale Civile di Cuneo, Italy, 31 January 1996; Georgia Pacific Resins, Inc. v. Grupo Bajaplay, S.A. de C.V, Baja California, Fourth Panel of the Fifteenth Circuit Court [Federal Court ofAppeals]. "The obligation to apply the CISG ex officio arises from the CISG itself, not from any domestic procedural principle." *See* Grant, supra note 161, at 5.

[166] *See* Grant, *supra* note 161, at 9.

[167] *See Société Muller Ecole et Bureau v. Société Federal Trait* (Decision of the French Cour de Cassation on 26 June 2001). See Grant, *supra* note 161, at 14-15.

[168] This statement is derived from The US Court of Appeals for the Second Circuit in *Rienzi & Sons, Inc. v. N. Puglisi & F. Industrial Paste Alientary (2016),* albeit, on the issue of domestic waiver and the CISG. Nevertheless, despite of this judicial awareness that the CISG was mandatory unless the parties expressly opt out, the Court of Appeals ultimately departed from these assertions, potentially attracting the widespread criticisms. *See e.g.;* F. Ferrari, Remarks on the UNICITRAL Digest's Comments on Article 6 CISG, 25 J. L. & Com. 13, at 30–31 (2005); The Center for Transnational Litigation, Arbitration, and Commercial Law, New York University, *opting-Out of The United Nations Convention on Contracts for the International Sale of Goods (CISG) Through Conduct in Litigation: What US Courts Need to Know about the CISG,* JANUARY 23, 2017; France Cour de Cassation, *Société Muller Ecole et Bureau v. Société Federal Trait* (2001); Austria Supreme Court, *4 Ob 179/05 k* (2005).; Spagnolo, *supra* note 122, at 195.

[169] Under Article 1(1)(a), for instance, this Convention applies to contracts of sale of goods between parties whose places of business are in different States, when the States are Contracting States.

party autonomy is, nevertheless, still entrenched in the CISG Article 6,[170] which permits the parties to agree to exclude its application, or even derogate from or vary the effect of any of its provisions.[171] Undoubtedly, the right to vary the effects of any of the Convention's provisions under Article 6 is placed in the hands of the parties to international sales contracts (i.e., the seller and the buyer at the private level). On the contrary, there is no discretionary power expressly granted to domestic courts to exclude or vary the effect of the Article 8 of the Convention. Equally, whereas the CISG Article 28[172] explicitly exempts that a court is not bound to enter a judgement for specific performance in case of inconsistency with its own law, there is no such thing as Article 28's exemption in relation to the court's duty to apply the CISG Article 8.[173] Hence, in accordance with the Convention's provisions and legal framework, the next question therefore is: "how should a court proceed?"

Explicitly, Article 7(1) requires the courts to interpret the Convention autonomously, with regard to "its international character and to the need to promote uniformity in its application",[174] rather than referring to domestic law for a definition.[175] This fundamental principle of interpretation paves the way for greater and more predictable uniform application of the CISG, enhancing the fundamental aim of the Convention in contributing to "the removal of legal barriers" and the development of international trade.[176]

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[170] *See* CISG-AC Opinion No. 16, Exclusion of the CISG under Article 6, Rapporteur: Doctor Lisa Spagnolo, Monash University, Australia. Adopted by the CISG Advisory Council following its 19th meeting, in Pretoria, South Africa on 30 May 2014.

[171] Article 6 of the CISG states in full as follows: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions." *See* CISG Article 6.

[172] Article 28 of the CISG states in full as follows: "If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention." *See* CISG Article 28.

[173] In the context of "specific performance", the court's discretion has been explicitly allowed by the text of the Convention itself, thus, judicial derogation in such a manner as legally permitted under Art. 28 and to exercise such discretion (for example, by refusing to enforce the remedies in the form of specific performances will not constitute a violation of international obligation by the domestic courts. Article 28 states as follows: *"If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention."*

[174] The need to promote uniformity in the CISG's interpretation is described by Schlechtriem as a 'maxim': Uniform Sales Law 1986, at 38, §IVA.

[175] For the notion of uniformity, see CISG Digest, *supra* note 12, at art. 7 ("According to a number of courts, article 7 (1)'s reference to the Convention's international character forbids fora from interpreting the Convention on the basis of national law; instead, courts must interpret the Convention "autonomously". Some courts even expressly state that their domestic solutions are to be disregarded, as they differ from those of the Convention.) *Id.* at 42.

[176] United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 18.

As the Eleventh Circuit correctly stated in *MCC Marble*, CISG Article 8(3) is a "clear instruction" that expressly directs courts to give "due consideration…to all relevant circumstances of the case including the negotiations…".[177] Hence, the courts in Contracting States have the duty to *consider* extrinsic evidence, such as the three affidavits in the case of *MCC-Marble,* despite the discrepancies between the extrinsic evidence and the written contract, as well as the apparent divergences between the CISG Article 8 and the domestic rules, such as the parol evidence rule.[178]

The underlying rationale for the proposition that the extrinsic evidence should be considered is not, however, based on the same rationale as relied on by the Eleventh Circuit, namely the substance-procedure analysis which is already proved to be potentially problematic. As Professor Orandi put it, "[n]aturally, since procedural rules vary, the traditional view has the potential to foster divergent outcomes…hence, all abstract distinctions between substantive and procedural laws become redundant, if not harmful, especially when the parties turn to the courts for equal enforcement of their contractual rights pursuant to these uniform bodies of rules."[179] Methodologically, to employ a substance-procedure analysis is to open the door for the possibility that a CISG provision will unsatisfactorily be displaced by, for instance, a local rule affixed the "procedural" label, despite the fact that such matter is in fact settled in the provisions of the CISG.

Rather, the proposed solution in this study is for the courts in Contracting States, through the lens of international law obligation, to honor this duty to apply the CISG when its provisions explicitly govern the issues, as in the case of Article 8(3) and the role of extrinsic evidence, regardless of the substance-procedure analysis. Therefore, to honor the treaty-based obligation under the doctrine of autonomous interpretation, uninfluenced by domestic labels, when the contracts are governed by the CISG, the courts should commence the judicial determination by examining first whether the matter is indeed already governed by the provisions of the CISG 1980.

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[177] *See* CISG Article 8(3), see also *MCC-Marble, supra,* note 35.

[178] *See* HERBERT BERSTEIN & JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG IN EUROPE 29 (1997) ("[T]he CISG has dispensed with the parol evidence rule which might otherwise operate to exclude extrinsic evidence under the law of certain Common Law countries").

[179] *See* Orlandi, *supra* note 27, at 25. *See also MCC-Marble, supra,* note 35.

Indeed, both legislative history and case law assert that once a contract is governed by the Convention, Article 8 governs, among others, the matter of "the interpretation of the contract, even when the document is embodied in a single document."[180] To prevent any possible exaggerating effects of the CISG Article 8 however, it should also be clarified that, even when the CISG Article 8 governs such matter, the court's "duty to consider" extrinsic evidence under Article 8(3) does not mean that the extrinsic evidence are a "conclusive proof" of the parties' intention.[181] Rather, Article 8(3) merely refrains the courts from rejecting to consider extrinsic evidence outright by unduly relying on the court's own inconsistent domestic rules. Indeed, to prevent the undesirable effect of the extrinsic evidence, once giving them "due consideration", the court can still determine how to evaluate the evidence presented by the parties, including how much *weight* should be given to each evidence.[182]

So far, this study assumed that the contract is legally governed by the CISG, and hence the CISG is, by default, a governing law from the outset pursuant to the conditions set forth under CISG Article 1 in particular. Despite this, it should be added that, as Professor Spagnolo put it, "once in, the only way out is via the CISG's own rules."[183]

Under the CISG's "own rules", the ability to choose to exclude or vary the effects of the provisions of the CISG is controlled by Article 6, placing the freedom of contract in the hands of parties to international sales contracts. Accordingly, extrinsic evidence should, by default, not be excluded given the legal effect of the CISG Article 8, unless the parties exercise their right under CISG Article 6 to vary the effect of the Article 8's provision in respect of the extrinsic evidence for the purpose of interpretation of contract. To this end, in case where the parties wish to limit the roles of extrinsic evidence, parties are advised to, for

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[180] United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, 18; in case law see Appellate Court Helsinki, Finland, 31 May 2004, English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 877 [Bundesgericht, Switzerland, 22 December 2000]

[181] *See MCC-Marble, supra,* note 35, at 1391 ("This is not to say that the affidavits are conclusive proof of what the parties intended. A reasonable finder of fact, for example, could disregard testimony that purportedly sophisticated international merchants signed a contract without intending to be bound as simply too incredible to believe and hold MCC to the conditions printed on the reverse of the contract.").

[182] To illustrate, a German court's decision in *OLG Hamm* case shows "how CISG Article 8(3) may be construed to allow a court to consider but ultimately reject extrinsic evidence that cannot be reconciled with the terms of a final writing." *See* Oberlandesgericht Hamm, 19U 97/91, Sept. 22, 1992; see Karen Halverson Cross, Parol Evidence Under the CISG: The "Homeward Trend" Reconsidered, 68 OHIO ST. L.J. 133, 156-157 (2007). In addition, regarding the issue of "weight" to be given to evidence, albeit in the context of damages under Article 74, see also CLOUT case No. 1506 [Cour d'appel de Nancy, France, 6 November 2013] (implicit solution). *See* CISG Digest 2016 at 337-338.

[183] *See* Spagnolo, *supra* note 122, at 206.

instance, insert a well-drafted "merger clause"[184] or "entire agreement clause" that clearly manifests the parties' intention to exclude prior agreements and understandings not expressed in writing.[185]

Although Article 6 permits the parties to derogate from and vary the effect of the provisions of the Convention e.g., by utilizing merger clauses, however, every term of the contract, including the merger clause itself, must still be interpreted in accordance with the CISG rules on contract interpretation which is Article 8.[186] Hence, in order to ensure that the international law obligation will properly be discharged in the judicial process, i.e. the court does not improperly dismiss the extrinsic evidence against any provisions of the Convention, the court should make a formal ruling regarding the satisfaction of Article 6 and also Article 8 of the CISG.

According to several courts, Article 6 generally requires "a clear, unequivocal and affirmative agreement of the parties",[187] and Article 8, as discussed, requires, for example, the courts to consider all relevant circumstances, including the extrinsic evidence such as the parties' negations under Article 8(3). In this scenario, the courts should attempt to establish the intent of the parties that is "clear and unequivocal" by proceeding to examine all relevant circumstances including extrinsic evidence to determine whether the merger clause itself clearly manifests the parties' intent, before giving effect to such clause.[188]

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[184] For sample merger clause, see e.g., Timothy Murray, Murray Hogue & Lannis, The Practical Guidance Journal: The Misunderstood but Critically Important Merger Clause, 2019 available at https://www.lexisnexis.com/lexis-practical-guidance ("The parties intend this statement of their agreement to constitute the complete, exclusive, and fully integrated statement of their agreement. As such, it is the sole expression of their agreement, and they are not bound by any other agreements of whatsoever kind or nature. The parties also intend that this agreement may not be supplemented, explained, or interpreted by any evidence of trade usage or course of dealing. The parties did not rely upon statements or representations not contained within the document itself").

[185] A merger clause (also named "integration clause", "entire contract clause", "entire agreement clause" and "whole agreement clause") is described in Black's Law Dictionary as "[a] contractual provision stating that the contract represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract." See Black's Law Dictionary, second pocket edition, 2001. In the context of the CISG, it was proposed that "A Merger Clause when in a contract governed by the CISG, derogates from norms of interpretation and evidence contained in the CISG. The effect may be to prevent a party from relying on evidence of statements or agreements not contained in the writing. Moreover, if the parties so intend, a Merger Clause may bar evidence of trade usages." *See* CISG Advisory Council Opinion No. 3, *supra* note 65, at 62.

[186] CISG ADVISORY COUNCIL OPINION NO 13 Inclusion of Standard Terms under the CISG, Rapporteur: Professor Sieg Eiselen, College of Law, University of South Africa, Pretoria, South Africa. Adopted by the CISG Advisory Council following its 17th meeting, in Villanova, Pennsylvania, USA, on 20 January 2013. *See* also Schmidt-Kessel in Schlechtriem/Schwenzer Commentary Art 8 para 49.

[187] *See* CISG Digest, *supra* note 12, at 33.

[188] CISG Advisory Council Opinion No. 3, *supra* note 65, at 74-77.

Therefore, it should be noted that merger clauses in the context of the CISG are probably not "silver bullets" like in many American jurisdictions, and, by the application of Article 8, if the courts find that " either party had a contrary intent, the merger clause between them would have no effect."[189]

On balance, it can be seen that certain legal instruments can help to limit the undesirable use of extrinsic evidence, where the judicial application of the CISG can still be in line with the international law obligations and the Convention legal framework, so long as the CISG litigation has been properly proceeded. As discussed, these legal tools can technically and legally be the use of effective merger clauses by private parties which clearly evidence the parties' intention pursuant to the provisions of Article 6 and Article 8; and, to a certain extent, the attribution of weight to each strand of evidence by the courts, albeit only and strictly after the "due consideration" has been given.

Overall, the corollary of honoring the duty to apply the CISG through the lens of international law obligations, is that, where the provisions of the CISG cover an issue at dispute, those provisions take precedence over any domestic laws—regardless of the homeward classification of a rule as procedural or substantive—which would otherwise "interfere with the fulfilment of that duty by the court."[190] Evidentially, this principle is reflected in, for example, Singapore's methodology on national implementing legislation of the Convention. Once Singapore has become a CISG Contracting State, the country is bound by the CISG at international law, in which Singapore's implementing statute incorporated the CISG as part of Singapore law under the Sale of Goods (United Nations Convention) Act (Cap 283A, 1996 Rev Ed).[191] On the legal relationship between CISG and Singapore law, Section 4 of the Sale of Goods Act clearly states that: "The provisions of the Convention shall prevail over any other law in force in Singapore to the extent of any inconsistency."[192] Likewise, a similar implementation approach can also be found in Australia, where Section 6 of Australia's Sale of Goods (Vienna Convention) Act 1985 similarly makes clear that:

[189] *Id.* at 57. See e.g. U.S. District Court, Southern District of New York, United States, 23 August 2006; see also Timothy Murray, Murray Hogue & Lannis, The Practical Guidance Journal: The Misunderstood but Critically Important Merger Clause, 2019. Available at https://www.lexisnexis.com/lexis-practical-guidance

[190] *See* Spagnolo, *supra* note 144, at 196 (discussing the notion of international obligations in light of the CISG Article 6).

[191] *See* the Sale of Goods (United Nations Convention) Act (Cap 283A, 1996 Rev Ed) ("Implementing Act"). The CISG came into force in and for Singapore on 1 March 1996.

[192] *See id.* at section 4. *See also* Singapore Academy of Law's Law Reform Committee Report: "United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) - Should Singapore Ratify?"10 August 1994. Available at https://www.sal.org.sg/

"The provisions of the Convention prevail over any other law in force in Australia to the extent of any inconsistency."[193]

As an additional observation, compared to the US system where the CISG is a self-executing treaty without the need for implementing legislation,[194] and hence, no chance "to make it clear" statutorily from the outset, the absence of such statutory provision in the US system might technically contribute to the unclarified legal relationship between the CISG and the US domestic laws, such as the parol evidence rule. In other words, the absence of such statutory clarification might contribute to the methodological problems in the CISG jurisprudence. On this basis, another possible recommendation for future dualist Contracting States, is to consider adopting a similar clause or provision, like the approach taken by Singapore and Australia into national implementing legislation. Thus, rather than increasing the chance of opening the door to a substance-procedure analysis which can be either counter-productive or even unsatisfactory, this approach of implementing legislation can help to allow a great chance for the future Contracting States to statutorily clarify the relationship between CISG and domestic laws in the case of inconsistency. To this end, in a more efficient way, this type of provision once contained in a national implementing legislation can act as a very useful tool in providing a clear guidance or legal instruction to the courts in Contracting States when confronted with any future dilemma, embracing other situations even beyond the sphere of Article 8 and is permissible under the CISG.

VII. Conclusions and Recommendations

As stated by Professor Schlechtriem, "The question is often phrased as a problem of the borderline of substantive (CISG) rules and the procedural law of the forum, but this is avoiding the real issue in favor of a conceptual approach, resulting in solutions quite different from country to country."[195] Likewise, the question of admissibility of extrinsic evidence in the context of the CISG 1980 when confronted by domestic courts in the CISG Contracting

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[193] *See* the Australian Sale of Goods (Vienna Convention) Act 1986.

[194] *See* Bailey, James E. (1999) "Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales," Cornell International Law Journal: Vol. 32: Iss. 2, Article 1. at 282. *See also United States v. Verdugo-Urquidez,* 939 F.2d 1341, 1358, n. 17 (9th Cir. 1991) (stating that "[a] self-executing treaty is one which, of its own force, confers rights on individuals, without the need for any implementing legislation.") See also Breard v. Pruitt, 134 F.3d 615, 622 (4th Cir. 1998) (stating that "[t]he Vienna Convention is a self-executing treaty - it provides rights to individuals rather than merely setting out the obligations of signatories.")

[195] *See* Peter Schlechtriem, Non-Material Damages—Recovery Under the CISG? 19 PACE INT'L L. REV. 89, 96–97 (2007)

States should not be resolved through a substance-procedure analysis as employed by the Eleventh Circuit in the *MCC-Marble* decision. This is fundamentally because, whether the matter is considered substantive or procedural can vary from jurisdiction to jurisdiction, hence applying such an approach can bring into play another variant of the "homeward trend" problem.

Indeed, the CISG 1980, even when it is usually considered as an instrumental body of substantive law, like most substantive law however, the Convention "has an associated procedure that must be applied by the enforcing court if the substantive law is to achieve the level of deterrence its drafters intended. To apply any other procedure leads to over- or under-enforcement of the substantive mandate."[196] Hence, to recognize domestic rules, either procedural or substantive, that can change the "substance" of the Convention, would be to recognize a change to the governing law of the contract outside legally permissible grounds within an international legal framework, and despite existing as a Contracting State with international obligations. The absurdity of this situation provides the key to its resolution. Given that international law obligations and the legal certainty which is a vital interest for parties from different Contracting States in international trade are at stake, the administration of justice could be hindered by the 'incorrect' application of the governing law, or unnecessarily counter-productive litigation,[197] if the substance-procedure analysis is applied.

Instead, the proposed solution in this study is for the courts in Contracting States, through the lens of international law obligations, to honor their duty to apply the CISG when its provisions explicitly govern the issues, as in the case of Article 8(3) and the role of extrinsic evidence, regardless of the substance-procedure analysis. Therefore, in order for domestic courts to honor the treaty-based obligations under the doctrine of autonomous interpretation, uninfluenced by domestic labels, when the contracts are governed by the CISG, such courts should commence their judicial determination by examining first whether the matter is indeed already governed by the provisions of the CISG 1980. This proposed international framework, with certain legal, theoretical and practical or policy implications, can provide useful guidance for litigation concerning the CISG Article 8 and beyond in order to promote predictability and uniformity in international sales law.

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[196] *See* Main, *supra* note 26, at 803.

[197] *See* Spagnolo, *supra* note 144, at 148.

In a sense, this patch of the interpretative methodology through the lens of public international law instead of applying the substance-procedure analysis, can even be astonishingly reconciled with a classic doctrine under the conflict of laws, namely the outcome-determinative test.[198] This is especially the case when applying substance-procedure analysis in the context of the CISG Article 8 as it might have the outcome-determinative effect on the admissibility of extrinsic evidence, for instance, when the fact pattern like in *MCC-Marble* is present. In this scenario, whether to admit such extrinsic evidence, and hence, whether the parol evidence rule is substantive or procedural, may well be the decisive factor dictating who wins and who loses and would potentially lead to unsatisfactory and uncertain outcomes. Hence, the substance-procedure analysis may not be appropriate given "the likelihood that the forum's rule will change the outcome in a manner that induces forum shopping."[199]

Supposing further the scenario under the ordinary regime of the conflict of law principles, rationally, the CISG should also be applied, because the CISG provisions can be easily identified by the courts,[200] given its international status and the abundant availability of the CISG database.[201] Yet, it should be noted that this is just a hypothetical illustration, precisely because, for the courts in CISG Contracting States, the CISG is indeed *not* a foreign law, hence the substance-procedure analysis as well as certain ordinary treatments and criteria under the normal scheme of the conflict of laws rules should be substantially irrelevant. This illustration might, however, offer some useful thoughts for the courts in non-Contracting States where there is no obligation under international law to apply the CISG, and the applicability of the Convention will depend on the operation of the relevant conflict of laws rules. At a theoretical level, such a hypothetical illustration can, at

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[198] *See* Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

[199] *See* HAY ET AL., *supra* note 125, at 404. *See also* McMahon, *supra* note 25, at 1024.

[200] Compared to methodological approach under the "two-pronged substance-procedure test queries" in the context of the traditional conflict of law rules as follows:

"(1) the "difficulty of finding and applying the foreign rule"; and (2) "the likelihood that the forum' s rule will change the outcome." "The more inconvenient it would be to find and apply a foreign rule and the less likely it is that the rule will affect the result, the greater the justification for a 'procedural' label." Affixing the procedural label would not be appropriate, however, if the foreign rule is not particularly difficult to identify and apply and there is a probability that the rule may affect the outcome." See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 59 (4th ed. 2001).

[201] The Eleventh Circuit also interestingly resorted to the internet database as explicitly stated in the *MCC-Marble* decision: "[T]*he 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]." See MCC-Marble, supra,* note 35 at 1390.

least, demonstrate that the proposed international framework in this study can also be reasonably reconciled with certain doctrines under the ordinary conflict of laws principles. In addition, this proposed international framework is also in line with, for instance, the domestic law on "pleading of foreign law" in Switzerland, another example of a CISG Contracting State, where the "Swiss default rule", which generally operates to substitute the Swiss law for foreign law, may, nonetheless, not apply, when the application of that foreign law is pursuant to an international obligation.[202]

The real impact or practical implication is also at the heart of this study. Under this proposed international approach, sellers and buyers in international sales transactions should receive equal protection and equal enforcement of their rights through the legal certainty of the uniform sales law. Yet, if domestic courts each apply their own domestic concepts in light of the substance-procedure analysis, despite the fact that certain provisions of the Convention already address that legal matter, this problematic approach can undermine the uniform interpretation and application of the CISG Article 8 and beyond, which has to be interpreted non-nationalistically. Even at a practical level, the substance-procedure approach can unsatisfactorily render the judicial process unnecessarily complicated, leading to an increase in aggregate adjudication costs in the long run, undermining the efficiency of enforcing rights in foreign courts and the parties' interests in predictability, increasing time and costs of international commercial business and litigation.[203]

At a normative level, there are good policy reasons for domestic courts to apply the uniform law Convention even when the courts have to forego the more familiar domestic laws, including even the housekeeping measures under domestic procedural law. This is because such judicial perspective can "further the very aims to which domestic procedural rules aspire", namely, proper administration of justice, development and clarity of the law, and judicial efficiency,[204] albeit from the aggregate international standpoint of international

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[202] Discernably, the application of the substance-procedure analysis might have a relatively "higher risk" of rendering varying outcomes, depending on the domestic labels in each classification process, potentially inconsistent with this domestic doctrine, compared to the outcome derived from the application of the international framework proposed in this study. For the discussion on the "Swiss default rule", *see* T.C. Hartley, 'Pleading and Proof of Foreign Law: The Major European Systems Compared', 45 Int'l & Comp. L. Q. 271, 277 (1996) (U.K.).

[203] For the discussion on efficiency perspectives and the CISG, *see e.g.,* DiMatteo, Larry A. and Daniel Ostas, 'Comparative Efficiency in International Sales Law' American UInt'l LJ 26 (2011). *See also* Grant, *supra* note 161, at 34.

[204] For the discussion on such inspiration or policy reasons behind domestic procedural laws, see Spagnolo, *supra* note 122 at 197.

business communities. As Professor Hartnell put it, "the goals of the Convention are to provide a 'better law' for international commercial transactions, and thereby achieve greater fairness in international trade, and to increase the predictability of international commerce and thereby facilitate the process of negotiation and alleviate the complexities of transnational dispute resolutions."[205]

After all, given the problem of inconsistencies potentially stemming from the inappropriate application of the substance-procedure dichotomy in the context of extrinsic evidence and the CISG Article 8, one might raise a forward-thinking question: Do we need another global harmonization project of procedural law? The answer to this concern might be "No". As we should all recognize and admit by now that the CISG 1980, as an international sales law, already operates and functions within a pluralist context, and the concretization of another global uniform law project, harmonizing divergent domestic procedural laws might not seem to be warranted and practical since a more cost-efficient approach is still available. Instead, a better question should be how to manage such pluralism in this context. According to John Felemegas, "uniformity in the international sales law cannot be achieved merely by the universal adoption of uniform rules, but by the establishment of a uniform interpretation of these rules universally."[206] Hence, judicial adoption of the uniform international framework as proposed in this study seems to be a better way to prevent problematic inconsistencies, as well as strategic behavior of lawyers and parties in a cost-effective manner.[207]

Together with the recent publication in 2020 of "the Tripartite Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts (with a focus on sales)", jointly developed by the UNIDROIT, the UNCITRAL, and the HCCH,[208] we should now begin to hope for a more accurate international approach towards international sales law in the wake of some inspiring developments in the recent years.

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[205] H.E. Hartnell, Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods, 18 Yale J. Int'l L. 1, 3(1993).

[206] *See* John Felemegas,"The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation", *Pace Review of the Convention on Contracts for the International Sale of Goods (CISG),* Kluwer Law International (2000-2001) at 115-379.

[207] For a discussion on the litigation cost in light of the "tacit waiver" and the CISG, see Grant, *supra* note 161, at 39.

[208] As explained on the UNIDROIT website, "it aims at creating a roadmap to the existing uniform law texts in the area of international sales law prepared by each organization [...]. It is an effort to clarify the relationship among them, promoting uniformity, certainty and clarity in this area of the law" *See* The Tripartite Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts (with a focus on sales) available at https://www.unidroit.org/instruments/commercial-contracts/tripartite-legal-guide

Looking at past experience from a wider international perspective should help us find the path of uniform application of CISG 1980. The celebration of the CISG's 40th anniversary, including the "Tripartite Legal Guide" project, should serve to provide more clarity on the questions concerning the judicial application of the Convention, hence the international communities including the domestic courts should be encouraged to see "the fading of abstract distinctions between substance and procedure, which, if inappropriate, have often favored the prevalence of the homeward trend",[209] at least, in the context of the CISG, and, hopefully, in other areas of uniform law projects.[210]

As explicitly pointed out at the Diplomatic Conference, the expressed concern was that "uniform law would be rendered ineffective if courts were too quick to find exclusion."[211] In this study, a deeper aim of the proposed solution, and, hence, its ultimate contribution, goes even beyond recommending the judicial observance of international law obligation in the context of CISG Article 8. Rather, this study also demonstrates how the domestic courts' approach can proceed in the interests of legal certainty and international businesses communities, by ensuring that the international sales law and, perhaps, other international efforts on unification of laws, progress towards uniformity. As stated in a letter of the then President of the United States, "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."[212] Hence, the judicial application of the uniform international approach transcending domestic perspectives, will play the key role in ensuring that the CISG's objective, in providing not only "textual uniformity" but also "practical uniformity", will not be diminished, advancing modernization and progressive harmonization of international sales law.

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[209] *See* Orlandi, *supra* note 27, at 39.

[210] It was even argued that "the so-called dichotomy of substance and procedure is a classic problem *of every system of private international law." See* M Illmer, "Neutrality matters – some thoughts about the Rome Regulations and the so-called dichotomy of substance and procedure in European private international law" (2009) 28 Civil Justice Quarterly 237. For the concern on substance-procedure dichotomy in the context of ISDS reforms, see e.g., Anthea Roberts, *UNCITRAL and ISDS Reforms: Agenda-Widening and Paradigm-Shifting,* the European Journal of International Law September 20, 2019 available at https://www.ejiltalk.org/ ("Some other states share this concern over the substance-procedure dichotomy"). At a philosophical level, regarding the realist attack on the substance-procedure dichotomy, see e.g. *See* Thurman Arnold, The Rôle of Substantive Law and Procedure in the Legal Process, 45 HARV. L. REV. 617, 643, 645 (1932).

[211] Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980, UN Doc. A/CONF.97/19, at 17.

[212] *See* Letter of Transmittal from Ronald Reagan, President of the United States, to the United States Senate, reprinted at 15 U.S.C. app. 70, 71 (1997).