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Demystifying the Parol Evidence Rule

An Analsys of the Parol Evidence Rule in American Contract Jurisprudence and the Lack thereof under the CISG

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Summary

The parol evidence rule is an integral doctrine of the common law contract jurisprudence. The rule was established in the 17th century English common law and has since spread amongst most of the common law jurisdictions. When the rule was first established it had a rather straightforward substantive character which forbid contracting parties who had reduced their agreement to a written instrument to vary, subtract from or add to the substance of the writing on the basis of evidence extrinsic thereto at a subsequent judicial process. Despite its initial simplicity the rule has developed into one of the most controversial, complex and misunderstood contract doctrines of the common law today. One of the primary sources of confusion regarding the rule is its name; the rule is not a rule of evidence, is does not apply solely to parol evidence and it is not a singular rule. This essay focuses on the parol evidence rule as it has developed in the U.S. common law during primarily the 20th century. During that period the rule changed considerably in terms of its substantive character, most importantly due to the scholarship of two of the most prominent contract scholars of the century, Professor Samuel Williston and Professor Arthur L. Corbin. As a consequence thereof it is proper to regard the parol evidence rule as existing in two significantly different versions within the U.S. contract law, a Williston and a Corbin version, albeit with the caveat that each respective jurisdiction has developed their own variation of either version. In this essay I analyze these two versions of the rule and thoroughly examine how and why they differ from each other, with the objective of dismantling the misconceptions commonly associated with the rule and facilitating a greater understanding of the rule's legal character. I also analyze the integration doctrine that developed alongside the parol evidence rule during the 20th century and has become integral to the jurisprudence of the parol evidence rule and fundamentally changed the rule's legal character. I also suggest that the integration doctrine has overtaken much of the legal relevancy of the parol evidence rule as the legal doctrine against which the substantive consequences of reducing an agreement to writing is judicially reviewed.

The jurisprudence of the parol evidence rule has also yielded a common contract clause developed and employed with the purpose of protecting written instruments from extrinsic impeachment at a possible subsequent judicial process. Such a clause is known as integration or a merger clause, which is also employed in contracts governed by civil law jurisdictions without a parol evidence rule. While the parol evidence rule has not spread amongst the civil law jurisdictions, the contract clause developed on the basis thereof, has. To understand the legal function of such clauses and how they achieve their principal purpose, an understanding of the legal doctrine from which it originated is beneficial. In this essay I attempt to provide with that.

In the second part of the essay I examine the controversial issue of whether the jurisprudence of the parol evidence rule overlaps with the jurisprudence of the CISG. That is an issue that has received considerable attention in the international legal doctrine, most importantly from American scholars. The issue is important not solely for the benefit of American practitioners, but also for the benefit of understanding how to safeguard the integrity of written contracts governed by the CISG. I also address the issue of how integration and merger clauses should be properly drafted to effectively protect written instruments from subsequent extrinsic variations and additions under the CISG.

Sammanfattning

The parol evidence rule är en central doktrin i den anglo-amerikanska kontraktsrätten. Regeln uppstod och utvecklades genom rättspraxis i början av 1600-talet i engelsk rätt och har därefter spridits till de flesta anglo-amerikanska jurisdiktionerna. När regeln först formulerades hade den en ganska enkel materiell karaktär som förbjöd avtalsslutande parter som upprättat en skriftlig representation av deras avtal att variera, subtrahera från eller lägga till innehållet i skriften på grundval av bevisfakta utanför dokumentets fyra hörn vid en efterföljande rättslig process. Trots sin ursprungliga enkelhet har regeln utvecklats till en av de mest kontroversiella, komplexa och missförstådda doktriner i den anglosaxiska kontraktsrätten idag. En av de främsta källorna till förvirring är dess namn, regeln är inte en bevisregel eller en processregel, den omfattar inte endast muntlig bevisning, och det är inte en regel med endast en materiell karaktär. Denna uppsats fokuserar på parol evidence regel som det har utvecklats i USA under främst 1900-talet. Under denna period förändrades regeln avsevärt i materiellt hänseende, framför allt på grund av att två av de mest framträdande professorerna inom amerikansk kontraktsrätt under århundradet, professor Samuel Williston och professor Arthur L. Corbin, skrev omfattande om regeln och hade diametralt olika uppfattningar därom. Som en konsekvens av detta är det lämpligt att betrakta parol evidence regeln som två väsentligt olika regler inom den amerikanska kontraktsrätten, en Williston och en Corbin version, dock med förbehållet att olika jurisdiktioner har utvecklat sin egen variant av endera version. I denna uppsats har jag analyserat dessa två versioner av regeln och grundligt utforskat hur de skiljer sig från varandra och varför, i syfte att klara upp de missuppfattningar som vanligen förknippas med regeln och ge läsaren en ökad förståelse av regelns rättsliga karaktär. Jag analyserar också integrations doktrinen som utvecklats parallellt med parol evidence regeln under 1900-talet i amerikansks rätt och har blivit en integrerad del av parol evidence regeln och dessutom fundamentalt förändrat regelns rättsliga karaktär. Dessutom argumenterar jag att doktrinen till stor del har underminerat den juridiska relevansen av parol evidence regeln som den rättsliga doktrin mot bakgrund av vilken de materiella konsekvenserna av att upprätta ett dokument av ett avtal bedöms.

På grundval av parol evidence regeln har också en vanligt förekommande kontraktsklausul utvecklats med syftet att skydda skriftliga instrument från efterföljande materiella tillägg eller förändringar vid en eventuell rättslig process. En sådan klausul är känd som en integration eller merger klausul, som också vanligen används i kontrakt som regleras av jurisdiktioner utanför de anglo-amerikanska utan en motsvarande parol evidence regel. Medan parol evidence regeln inte har spridits utanför de anglo-amerikanska jurisdiktionerna har emellertid de kontraktklausuler som utvecklats på grundval av regeln gjort det. För att förstå den rättsliga funktionen av sådana klausuler och hur de uppnår dess syfte, är en förståelse av den juridiska doktrinen från vilken de har sitt ursprung nödvändig. I denna uppsats analyserar jag funktionen av sådana klausuler i jurisdiktioner med eller utan en parol evidence regel.

I den andra delen av uppsatsen undersöker jag den kontroversiella frågan angående huruvida parol evidence regeln materiellt överensstämmer med CISG. Det är en fråga som har fått stor uppmärksamhet i den internationella doktrinen, huvudsakligen från amerikanska författare. Frågan är viktig inte enbart från ett amerikanskt perspektiv, utan är också nödvändig för att förstå hur man ska skydda integriteten av skriftliga kontrakt som regleras av CISG. Jag analyserar även hur integration eller merger klausuler bör formuleras för att vara effektiva även under CISG, trots avsaknaden av en uttrycklig parol evidence regel.

Abbreviations

CISG	United Nations Convention on Contracts for the International Sale of Goods
I.e.	Id est
U.C.C.	Uniform Commercial Code
ULIS	Uniform Law for the International Sale of Goods
ULF	Uniform Law on the Formation on Contracts for the International Sale of Goods
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

1 Introduction

The parol evidence rule is one of the most controversial, most litigated and most criticized legal doctrines of the Anglo-American (hereinafter the common law) contract jurisprudence. Yet, it remains, and has remained for more than four hundred years, an integral and seemingly indispensable contract law doctrine in the common law jurisprudence. Beyond the frontiers of the common law and some mixed jurisdictions, the parol evidence rule is, however, virtually unknown.[1]

In its most simple form, the parol evidence rule states that, absent fraud, mistake, duress or any other invalidation cause, the parties' final and complete written integration of their agreement[2] cannot be varied, contradicted or supplemented by evidence of prior or contemporaneous oral or written agreements, understandings or representations.[3] Through the process of integration, the parties make a written memorial not solely one source of the terms of their agreement, but the only source recognizable at law.[4] Despite its seemingly simple character however, the parol evidence rule has become one of the most litigated and controversial legal doctrines in American contract law.[5] In the late 19th century one Professor famously concluded; "Few things are darker than this, or fuller of subtle difficulties."[6]

The parol evidence rule deals with an issue of contract law that is perhaps one of the most fundamental issues of the whole field of law; what is the substance of a contract? Professor Eric A. Posner recently used a figure that effectively illustrates the legal issue that the parol evidence rule confronts. An agreement is ordinarily concluded after a period of negotiations, during which the respective parties discussed various terms, made various material statements, and reached certain mutual understandings. The parties eventually agree upon a subset of what was discussed during the negotiations. The contract, then, consists of C, which is a subset of S, which represents all that which the parties respectively said, suggested, insinuated or something of the like during the negotiations. The agreement is ordinarily memorialized in a written instrument, which usually does not embody the entire

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[1] Alberto Luis Zuppi, *The Parol Evidence Rule; A Comparative Study of the Common Law, the Civil Law Tradition, and Lex Mercatoria*, 35 Ga. J. Int'l & Comp. L. 233, 235-237 (2007).

[2] For the purpose of this essay, I use the term contract as an agreement between two or more parties to which legal obligations are attached by the force of the law. An agreement is therefore the factual equivalent of a contract insofar as it is enforceable or otherwise recognizable at law. Bryan A. Garner, *Blacks Law Dictionary*, (3d ed. 2006). See also the U.C.C. § 1-201(3)("'Agreement' means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-205 and 2-208)"). And compare with id. § 1-201(11) ("'Contract' means the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law."). Thus, a contract exists as a matter of law, an agreement exists as a matter of fact. This notion is also referred to as the concept of an "agreement in fact." Peter Linzer, *The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule,* 71 Fordham L. Rev. 799, 824 (2002). A 'written contract' is thereby, an agreement evidenced in writing. It is important, when reading this essay, to distinguish between the agreement, the written memorial thereof and the contract. See John E. Murray Jr., *The Parol Evidence Process and Standardized Agreements Under the Restatement, Second, Contracts*, 123 U. Pa. L. Rev. 1342, 1342 (1975). It is also worth to note that the total contractual obligations are comprised both of the agreement between the parties and of the obligations imposed by, or implied, in law. Helen Hadjiyannakis, *The Parol Evidence Rule and Implied Terms: The Sounds of Silence*, 54 Fordham L. Rev. 35, note 53 (1985). It should also be noted that for the purpose of this essay I will use the terms written instrument, writing, memorial, written contract and written agreement, to signify a written representation of an agreement.

[3] 11 Williston on Contracts § 33:4 (4th ed.).

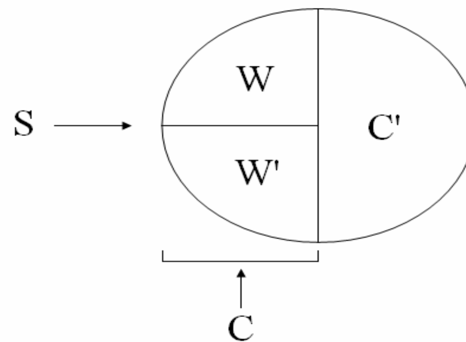
[4] Id.

[5] W. Richard West Jr., *Chief Justice Traynor and the Parol Evidence Rule*, 22 Stan. L. Rev. 547, 547 (1970).

[6] James Thayer, *The "Parol Evidence" Rule,* 6 Harv. L. Rev. 325, 325 (1893).

agreement however, it is costly to put everything in writing and at some point the marginal cost of writing down a detail of the agreement exceeds the marginal benefit thereof. Thus, ordinarily, the actual contract consists of a written memorial, W, complemented by a non-written part, W'. All that which was discussed in one way or another during the negotiations, but ultimately never agreed upon, consists of C', as illustrated in the figure below.[7]

Figure 1.[8]



After a lengthy period of negotiations that is concluded with an agreement that is either partially or completely reduced to a written instrument, there might exist a level of uncertainty among the parties regarding whether there is a non-written part to their agreement, W', and if so, what that part consists of. This uncertainty might induce an opportunistic behavior from either party. If a party can supplement W with terms that allegedly was agreed upon, but not included therein, that party has an incentive to propose self-serving terms during the negotiations not necessarily for the purpose of agreeing on them but with the intention of convincing a court or an arbitral tribunal to erroneously enforce such terms should a dispute relating to the contract between the parties later arise.[9] Alternatively, a party can suggest complementary terms to a written contract for the purpose of inducing the counterpart to sign, assuming that no such term is enforceable at law, because they are not included in the writing. Furthermore a party can purposely leave out terms of a written contract with the intention of using default rules to their favor to fill the gaps in the event of a dispute. There are a number of different types of opportunism related to the reduction of an agreement to a written instrument that either party can attempt to be the beneficiary of. Any such opportunism, however, is not a significant problem unless the parties end up in a dispute, at which point either party might argue that while there is an agreement, that agreement consists of only W, or maybe a bit of W' as well, or maybe only W', and maybe even some of C'. The court must thus resolve the issue of what, in a midst of all these representations of an agreement, does the contract actually consist of? The court will then turn to the doctrine of contract law that has been described as "a maze of conflicting tests, subrules, and exceptions adversely affecting both the counseling of clients and the litigation process."[10] The court will turn to the parol evidence rule.

At its core, the parol evidence rule deals with the legal significance and the legal consequences of reducing an agreement to writing. The parol evidence rule seeks to ensure judicial stability and certainty to written instruments, and attain predictability in the judicial

[7] Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. Pa. L. Rev. 533, 541-543 (1998).
[8] Id. at 542.
[9] Id. at 564-67.
[10] Justin Sweet, *Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule*, 53 Cornell L. Rev. 1036, 1036 (1967-1968).

review thereof. As the figure *supra* illustrates, the issue of what the contract actually consists of relative a written instrument might seemingly be an easy issue, but with a complicated set of facts, the legal review thereof is anything but straightforward. The parol evidence rule provides with the legal backdrop, against which courts resolve that issue, and it also provides the legal backdrop, against which contracting parties, ex ante, can take appropriate measures to safeguard the integrity of their written contract, and minimize the risk of a lengthy, costly and uncertain litigation process related thereto. Such measures most commonly include certain contract clauses that have been developed on the basis of the parol evidence rule, clauses that have come to be known as merger or integration clauses, which serve as a drafting tool to protect the integrity of a written contract. The drafting challenge, related to Posner's figure, is how to make W impervious to a subsequent contradiction, variation or complementation on the basis of evidence pertaining to W' or C', in the event of a dispute. Merger or integration clauses are used with high frequency in contracts today, particularly in business transactions.[11]

This essay is an attempt to demystify the parol evidence rule. I will examine the rule's origin in the English common law and thereafter explore the rule's development in 20th century American contract law. During that time the rule changed significantly, most importantly due to the scholarship of two of the most prominent contract scholars of the 20th century; Professor Samuel Williston[12] and Professor Arthur L. Corbin,[13] who held considerably different views of the rule. I will also examine the legal function of the contract clauses that originated from the parol evidence rule, namely integration or merger clauses. Finally I will examine the rather controversial question of whether the jurisprudence of the parol evidence rule comports with the jurisprudence of the CISG. This essay is both with regards to its descriptive and analytical part, of a de lege lata character.

1.1 Delimitation

The parol evidence rule is a common law doctrine, a version of the rule exist in most common law jurisdictions. This essay, however, focuses primarily on the U.S. common law version of the parol evidence rule. The purpose is to explore the rule's development in the U.S. common law during the 20th century, and enhance the understanding of the rule's legal character. This, however, mandates an exploration of the rule's origin in the English common law. The only codified version of the rule that I will address is the U.C.C. version, which is done to benefit the understanding of how the rule has developed in 20th century U.S. contract law.

1.2 Method

The subject of study in this essay is a common law contract doctrine. The research for this essay has thus been done pursuant to the sources of the common law, namely case law, legal treatises, law review and law journal articles and legal encyclopedias. Furthermore I

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[11] Posner, *supra* note 7, at 571.

[12] Samuel Williston, (1861-1963), Professor of Law, Harvard Law School. Has been called "the last of the great formalists." Scott J. Burnham, *The Parol Evidence Rule: Don't Be Afraid of the Dark*, 55 Mont. L. Rev. 93, 123(1994).

[13] Arthur L. Corbin , (1875-1967), Professor of Law, Yale Law School. Has been described as the "leading luminary of 20th century U.S. contract law." Harry M. Flechtner, *The U.N. Sales Convention (CISG) and MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.: The Eleventh Circuit Weighs in on Interpretation, Subjective Intent, Procedural Limits to the Convention's Scope, and the Parol Evidence Rule*, 18 J. L. & Com. 259, 282 (1999).

have used the First and Second Editions of the Restatement, published by the American Law Institute. As the only statutory versions of the parol evidence rule exist on a state by state level, I have purposely excluded any such versions of the rule, as it does not benefit the purpose of this essay. Because the sources are primarily from the U.S., I have cited in accordance with the Blue Book.

In this essay I will at times make reference to decisions from different courts of different jurisdictions within the U.S., and different sections and comments of the two editions of the Restatement. Whenever I use these sources it is strictly to illustrate a certain reasoning or approach to the parol evidence rule, and not as a way of asserting the current applicable version of the rule within a specific jurisdiction. As this essay attempts to explore and clarify the parol evidence rule as it is characterized within the American common law contract law as a whole, when I refer to case law, or either edition of the Restatement, it is solely to benefit that purpose.

1.3 Disposition

This essay is divided into two parts. In part I, I will explain the jurisprudence of the parol evidence rule as it has developed in American contract law during the 20th century. I will chronicle its origin in the English common law and thereafter focus on the two versions of the rule that have established themselves in the American contract law during the 20th century. I will also review these two versions in light of the legal philosophies to which they are related, to put the respective rules in a broader legal context. To facilitate a greater understanding of the rule I will also review its substantive limits by exploring the exceptions to the rule. Finally, I will discuss different drafting clauses that have been developed as means for invoking the parol evidence rule.

In part II, I will explore the issue of whether the jurisprudence of the parol evidence rule comports with the CISG and also address the issue of the functionality and validity of merger clauses in contracts governed by the CISG.

2 The Parol Evidence Rule in the Contract Law of the United States

The parol evidence rule has been the subject of a substantial amount of litigation in American contract jurisprudence for centuries[14] and has been regarded as "the source of endless confusion in contract law."[15] Contrary to what the name implies, it is not a rule of evidence, it does not deal with the method by which a fact can be proven, rather it is a rule of substantive law that dictates whether a certain fact is material for the purpose of establishing the substance of a contract.[16] Neither is the rule limited to parol evidence. The word "parol" usually connotes word of mouth, i.e. oral communication.[17] The term is however derived from the French and Italian terms for "word," which better describes the scope of the rule, as it applies equally to written as well as oral evidence, be it in the form of negotiations, representations, understandings or agreements.[18] Because the rule applies to all evidence, to avoid unnecessary confusion, the term 'extrinsic evidence' is commonly used in connection to the discussion of the rule, a term that includes all evidence irrespective of form, which arises outside of a written contract.[19]

The rule can also be said not to be an actual rule of law, more poignantly, it should be regarded as a cluster of legal concepts and doctrines,[20] all relating to the issue of how to distinguish the facts from which the substance of a contract is derived, from the facts that are immaterial for that purpose, relative a written instrument. As such, the parol evidence rule can be regarded as the legal framework, or body of doctrine,[21] in which the law identifies the legally operative agreement, i.e. the contract, in a midst of lengthy prior negotiations riddled with different proposals, tentative agreements, oral understandings and representations that concluded with a written instrument.[22] Thus, all of the words of the rule's unfortunate name lend themselves to sources of confusion to the actual nature and scope of the rule. [23]

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[14] Juanda L. Daniel, *K.I.S.S. The Parol Evidence Rule Goodbye: Simplifying the Concept of Protecting the Parties' Written Agreement*, 57 Syracuse L. Rev. 227, 228 (2007).
[15] Note, *The Parol Evidence Rule: Is It Necessary?*, 44 N.Y.U. L. REV. 972, 972 (1969).
[16] Daniel, *supra* note 14, at 235.
[17] Id. at 235. See also 11 Williston on Contracts § 33:7 (4th ed.).
[18] 11 Williston on Contracts § 33:7 (4th ed.).
[19] Arden J. Olson, *Parol Evidence in Washington: The Use of Extrinsic Evidence to Address the Integration and Interpretation of Writings*, 52 Washington L. Rev. 923, note 3 (1977).
[20] Burnham, *supra* note 12, at 99. See also Linzer, *supra* note 2, at 807 ("instead of a parol evidence "rule," there is a continuum of many different approaches, all using the same name and often using the same words.") and Id. at 805 ("What we call the parol evidence rule is better thought of as a spectrum.").
[21] *See* Edwin W. Patterson, *the Interpretation and Construction of Contracts*, 64 Colum. L. Rev. 833, note 36 (1964).
[22] It has been suggested that the rule was designed to solve the problem of "finding" the contracting parties' legally operative agreement. Burnham, *supra* note 12, at 100. In theory perhaps this should be an easy task, in practice, it is often anything but.
[23] Because of the unfortunately misleading name, many calls for a name change have been made, recently it was suggested that the name should be changed to "The Rule Against Contradicting Integrated Writings." Daniel, *supra* note 14, at 236.

The parol evidence rule is widely regarded a rule of substantive contract law[24] in that it prohibits a party from establishing certain legal facts altogether, which has the consequences that certain evidence that are introduced to establish such a fact, will be barred by the court.[25] As such, despite being widely regarded as a rule of substantive law, it has in actual practice been treated as a rule of admissibility.[26] The source of much confusion regarding the rule has to do with the fact that the rule is sometimes used by courts as an evidentiary rule to render extrinsic evidence inadmissible, making the rule a de facto rule of evidence, or at least operating as such. If the rule is regarded as operating to make certain legal facts immaterial, and thereby prohibits a party from establishing the fact altogether, the rule, on the contrary, operates as a rule of substantive law.[27]

While the parol evidence is widely regarded as a rule of substantive law, it should however be noted that in one sense the parol evidence rule is procedural.[28] The rule is often said to require the judge instead of the jury to determine whether a writing shall be regarded as the exclusive and complete integration of an agreement.[29]

It should be clearly stated that the parol evidence rule is limited in its application to any agreement or understanding, parol or written, that preceded an agreement reduced to writing. The rule has no effect whatsoever upon antecedent understandings or agreements thereto.[30]

In what has been called a classic formulation of the parol evidence rule,[31] the rule was defined in the following way;

"When parties reduce their contract to writing, the law presumes the instrument to be complete, to contain all their agreement, and it cannot be modified by parol evidence."[32]

Thus, the parol evidence rule provides in substance that, where the parties have reduced their agreement to writing as the final and complete expression of their agreement, evidence of prior or contemporaneous agreements may not be offered to contradict, vary, or subtract from the terms of the writing.[33] At its core,[34] the parol evidence rule deals with the legal significance and substantive consequences of reducing an agreement to writing.[35]

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[24] This has certain procedural consequences. For example, a failure to object to the introduction of certain evidence pursuant to evidentiary rules by a party is considered as an implicit waiver of that objection. On the contrary, objections pursuant to substantive rules are not waived because of a failure to raise them. The parol evidence rule is often invoked by courts even if such a request is not made by either party at trial. Daniel, *supra* note 14, at 235.

[25] 3 Arthur L. Corbin, Corbin on Contracts § 573 (1960).

[26] James L. Hartsfield, Jr., *The "Merger Clause" and the Parol Evidence Rule*, 27 Tex. L. Rev. 361, 362 (1949).

[27] Daniel, *supra* note 14, at 235.

[28] 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, note 47 (1993) ("From another perspective, the parol evidence rule seems primarily a rule of procedure -- i.e., it requires the judge rather than the jury to make the factual determination whether the parties intended to discharge prior or contemporaneous agreements that were not included in a writing.").

[29] That authority stems from the fact that the rule is substantive, and questions of law are reserved for the judge. *See* Olson, *supra* note 19, at note 20 (citing for example 9 J.Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 2430, (3d ed. 1940)).

[30] Arthur L. Corbin, *The Parol Evidence Rule*, 53 Yale L.J. 603, 606 (1944).

[31] 11 Williston on Contracts § 33:16 (4th ed.).

[32] 11 Williston on Contracts § 33:16 (4th ed) (citing Thiem v. Eckert, 165 Minn. 379, 206 N.W. 721 (1925)).

[33] The Supreme Court of Texas expressed it poignantly; "When parties have concluded a valid integrated agreement with respect to a particular subject matter, the rule precludes the enforcement of inconsistent prior or contemporaneous agreements." Hubacek v. Ennis State Bank, 159 Tex. 166, 317 S.W.2d 30, 31 (Tex.1958).

[34] Professor Wigmore in 1904 concluded the following regarding the rule; "This principle assumes that, by some provision of law, or by the parties' intent, the act effective in law is a single written memorial, and that no parol

Since the origin of the parol evidence rule it has been surrounded with confusion as to its substantive content.[36] The rule has never been a uniform rule, rather in each common law jurisdiction it has been applied with different variations. It is therefore more appropriate to talk of many different versions of the parol evidence rule. This is certainly true in the United States. Whereas all different versions of the rule regard the same substantive issue,[37] they deal with the issue differently.[38] It is therefore appropriate to say that the different versions of the parol evidence rule overlap primarily in the sense that they deal with the legal significance of reducing an agreement to writing, while differing significantly on how the law should approach that act, and why. To aid in the understanding of the rule, and how it has become a source of endless confusion in contract law, it is beneficial to explore where, when, how and why it first came to be.

2.1 The Origin of the Parol Evidence Rule

The parol evidence rule originated in the 17th century English common law. The rule stems from the traditional common law approach toward written instruments, in which written documents were afforded a privileged legal status as the superior or even exclusive evidence of the substance of an agreement.[39] When the rule was first established, it was designed to protect the stability and certainty of such written instruments, and ascertain predictability in the judicial review thereof.[40]

In the English common law there has been a judicial recognition of written documents as superior to other forms of evidence for the purpose of establishing the substance of an agreement since the mid second century.[41] This was not a matter of practicality,[42] but rather a superiority of a written document over other forms of evidence that was based not on its merited trustworthiness, but as a matter of substantive law, by default.[43] The parol evidence rule originated within a context of a broader shift in the English common law from oral to

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act is to be regarded as of any effect for the purpose…" Linzer, *supra* note 2, at 822 (Quoting 2 John H. Wigmore, Wigmore on Evidence § 1346 (1st ed. 1904)).

[35] Williston defined the parol evidence rule in the following way; The rule requires, in the absence of fraud, duress, mutual mistake, or something of the kind, the exclusion of extrinsic evidence, oral or written, where the parties have reduced their agreement to an integrated writing. 4 Williston, Williston on Contracts § 631 (3d ed. 1961). Corbin formulated the rule in a similar way; When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing. 3 Arthur L. Corbin, Corbin on Contracts § 573 (1960).

[36] Note, *supra* note 15, at 972.

[37] This is somewhat of an oversimplification, the rule can be regarded as dealing with two issues; one substantive; what is the substantive consequences of integrating an agreement in a written memorial, and one evidential; under which circumstances will evidence of prior agreements, understandings or representations be admitted when an agreement has been reduced to writing. The latter issue depends on the former however.

[38] Linzer, *supra* note 2, at 807.

[39] *See* Cole, Tony, *The Parol Evidence Rule: a Comparative Analysis and Proposal*, Un. Of New South Wales L. J. Vol. 26, 680, 684 (2003).

[40] *See* Daniel, *supra* note 14, at 232-234.

[41] *See* Cole, *supra* note 39, at 684.

[42] A document has several rather self-evident inherent advantages to testimony in establishing an agreement, or the substance thereof. Testimonies are commonly referred to as self-serving, flimsy and untrustworthy because of its dependence on memory. Lawrence M. Solan, *The Written Contract as Safe Harbor for Dishonest Conduct,* 77 Chi.-Kent L. Rev. 87, 92 (2001). This view can, of course, be disputed. *See* id. for an example. Be that as it may, the protection of written instruments from unreliable testimony was one of the main purposes behind the birth of the parol evidence rule. Daniel, *supra* note 14, at 232.

[43] Cole, *supra* note 39, at 684.

written law during the mid second century, in which written legal acts instead of verbal[44] became the main evidentiary focus in the judicial practice.[45] Prior to this development, courts regarded written evidence as less trustworthy than testimony, even to such an extent that a written document was judicially recognized only if it was supported by testimony.[46] Perhaps the most important influence of the development whereby writings acquired a judicially privileged status in contract law was the use of the seal, a practice according to which a document was closed with wax and imprinted with designs of the contracting parties.[47] Initially, this practice was exclusively sanctioned by the King, but by the 13th century the practice had spread beyond the King's authority.[48] Any oral or non-sealed written agreement, made either prior to, or post the execution of a sealed instrument, could not judicially affect the substance of the parties' contract.[49] The instrument was regarded in law as constitutive of the parties' agreement, and as such, it protected itself from any attempts of either party to contradict or add to its substance on the basis of evidence outside of the actual document.[50] As such, sealed instruments were, in and of themselves, impervious to extrinsic evidence that contradicted or supplemented their substance.[51] When the use of the seal became common practice outside the King's authority, its privileged status was motivated along the lines of two main rationales.[52] Firstly, the parties' act of affixing their seal on the written instrument was regarded as a kind of waiver, according to which the parties were regarded as having already testified to its validity and accuracy in terms of embodying the parties' complete agreement.[53] The parties had thereby waived their right to introduce evidence to contradict the substance of a sealed document at trial because they were regarded as having already testified to its accuracy. Secondly, sealed instruments were regarded as superior in form to other types of evidence.[54] Sealed instruments were accorded a higher degree of merit above that of any other evidence, and could, as such, not be contradicted or varied by evidence of an inferior form, irrespective of the quality of that evidence or how poorly the sealed instrument may have represented the actual agreement between the parties.[55]

Eventually, when unsealed written instruments became common practice as a representation of an agreement, judges in the English common law approached such written instruments with an interest of establishing a similar respect for their integrity, as was afforded sealed instruments [56] Thus, sporadically, and without much legal basis, judges would refuse to allow testimony to contradict or vary the substance of a written instrument, even though it was not sealed.[57] In 1604 the Judges of the King's Bench, however, decided

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[44] This development is parallel to the rise of literacy, but the spread of literacy was merely one of the considerations behind the increasing judicial respect for written documents. Id. at 682

[45] Solan, *supra* note 42, at 92.

[46] John H, Wigmore,, *A Brief History of the Parol Evidence Rule*, 4 Colum. L. Rev. 338, 341-343 (1904).

[47] Id. at 343.

[48] Wigmore, *supra* note 46, at 343.

[49] Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 Fordham L. Rev. 427, 435 (2000).

[50] Id.

[51] Id.

[52] Before that, the mere fact that the King's seal was attached to the document was a strong assurance of the reliability of the document. Wigmore, *supra* note 46, at 342.

[53] Cole, *supra* note 39, at 683.

[54] Id. at 684 citing for example Sharington v. Strotton (1565) 75 Eng. Rep. 454 (K.B.) in which the court concluded that a sealed document was of a higher nature than other evidence.

[55] Id. See also Daniel, *supra* note 14, at 233.

[56] Thus the origin of the rule has been understood as stemming from "a primitive formalism which attached mystical and ceremonial effectiveness to the carta and the seal." Michael B. Metzger, *The Parol Evidence Rule: Promissory Estoppel's Next Conquest?*, 36 Vand. L. Rev. 1383, 1386 (1983). citing C. McCormick, Handbook of the Law of Evidence § 211, at 430 n.4 (1954).

[57] Daniel, *supra* note 14, at 234.

the first case in which such a legal doctrine was pronounced.[58] The actual origin of the parol evidence rule has thus been traced back to the year 1604 and a case referred to as the Countess of Rutland's case.[59] The case reporter, Sir Edward Coke, is credited with first pronouncing the actual rule and its name: "A written deed will bar parol evidence."[60] The case report explained the rationale for the rule as follows:

"It would be inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory. And it would be dangerous to purchasers and farmers, and all others in such cases, if such nude averments against matter in writing should be admitted."[61]

The rule was motivated along the lines of three rationales, all of which are not apparent from the case report. Firstly, the exclusion of certain evidence from consideration by the jury was a way for the judge to prevent the jury[62] from giving credence to testimony simply out of sympathy for one of the parties.[63] Judges' and legal practitioners' concern of the ability of juries to objectively and professionally review certain evidence, particularly testimony that is prone to sympathy, is a long-standing concern in the common law.[64] Judges would therefore reserve certain questions of fact for themselves, based upon substantive legal doctrines, as a way of controlling the jury.[65] Secondly, written evidence was viewed as inherently more reliable than testimony,[66] which may be the product of faulty memory, wishful thinking, or even an outright prevarication.[67] Thirdly, the rule recognized that there is something legally significant about the act or reducing an agreement to writing.[68] Such an act was not regarded solely as an evidentiary function, i.e. to create a trustworthy record of the parties' agreement, but also a way of establishing the writing as the exclusive expression of the agreement, and thereby discharging any agreement or understanding not included therein.[69] All of these

[58] Id. at 233.

[59] There is some controversy as to who should be credited for developing the rule, the Judges of the King's Bench, or the case reporter, Sir Edward Coke. Either way, Coke's report is regarded as the first instance in which the rule was pronounced. Daniel, *supra* note 14, at 233.

[60] Daniel, *supra* note 14, at note 43 (citing Hila Keren, *Textual Harassment: A New Historicist Reappraisal of the Parol Evidence Rule With Gender in Mind*, 13 Am. U. J. Gender Soc. Pol'y & L. 251, 266 (2005)).

[61] Countess of Rutland's Case, 77 Eng. Rep. at 90.

[62] In this regard the parol evidence rule was motivated by a reason unique to the common law system where a trial by jury is common in civil as well as in criminal cases. Of the common law jurisdictions the United States, more than any other, has maintained the trial by jury as the standard for civil cases. 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, 825 (2000).

[63] Daniel, *supra* note 14, at 232.

[64] Cole, *supra* note 39, at 684. The fear that allowing a jury to determine certain factual questions would result in uncertainty and unpredictability stems from the assumption that litigation often involves an economic underdog with whom the jury might sympathize with and therefore give unfounded credence to their evidence. This is commonly the situation in commercial litigation. McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 Yale L. J. 365, 366-69 (1932).

[65] "At an early date it was felt (and the feeling strongly remains) that writings require the special protection that is afforded by removing this issue from the province of unsophisticated jurors." J. Calamari & J. Perillo, Contracts § 3-2 (2d ed. 1977). While questions of fact are reserved for the trier, questions of law are reserved for the judge. In order to control the jury, some judges would therefore take great efforts to turn questions of fact into questions of law on the basis of different substantive legal theories, one of which was the parol evidence rule. *See* Grant Gilmore, the Death of Contract, at 107-108 (2d ed. 1995).

[66] Daniel, *supra* note 14, at 232.

[67] Solan, *supra* note 42, at 92.

[68] Daniel, *supra* note 14, at 238.

[69] In mid second century English common law, the judicial respect for written contracts became such that parties reducing and agreement to writing were regarded as having 'created' their contract thereby. The law thus

rationales were considered pivotal to ensure and safeguard certainty and stability in commercial and private transactions where written instruments were employed, and to facilitate an efficient resolution of disputes related thereto.[70] The underlying tenant of all the rationales is the notion that written contracts deserves some degree of protection from extrinsic impeachment at trial.[71]

In the English common law there was initially some confusion as to whether the rule would also bar parol evidence subsequent to the execution of a written instrument, similar to the legal effect of a sealed document. Eventually however, the rule developed to limit its application to evidence prior to or simultaneous with the execution of a written contract.[72]

The rule, as reported by Sir Edward Coke, was clearly limited to written contacts regarding real property transfers. Shortly after the Countess of Rutland's case however, the parol evidence rule expanded to encompass all written contracts.[73] Thus English courts began to hold that pursuant to the rule a written contract could not be varied or contradicted by oral agreements or understandings made prior to the written contract, which served as a substantive basis for barring any such evidence from being reviewed by the jury.[74] That was the rather straightforward substance of the parol evidence rule when it was first established in the English common law.

It is important to understand the origin of the parol evidence rule as being apart of a broader shift in the English common law whereby a written memorial was being recognized not as evidencing the agreement, but as constituting the agreement in itself.[75] This is not solely an issue of semantics but rather an important relationship between the agreement in fact, and the contract in law.[76] While it is today, in the American contract law, established that the agreement, the bargain, exists outside any representation thereof, such was not the consensus in the 17th century English common law.[77] The respect for written instruments that the original parol evidence rule articulates, should therefore be viewed as an expression of the broader judicial development in mid second century English common law, in which written evidence began to be judicially regarded as superior in form.[78] As a matter of law, different forms of evidence were not reviewed on the basis of their respective trustworthiness, but relative to a rigid hierarchy, in which inferior forms could not contradict evidence that was classified as superior.[79] As such, the traditional English common law regarded written instruments as an inherently superior representation of an agreement, even to such an extent that the memorial constituted the agreement, as opposed to merely evidencing it.[80] Thus, the

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recognized only the memorial, it constituted the contract and was thus not regarded as merely evidence thereof. *See* Cole, *supra* note 39, at 684.

[70] Solan, *supra* note 42, at 91.

[71] *See* Daniel, *supra* note 14, at 231.

[72] Id. at 233

[73] Id. at 234

[74] Id.

[75] Zuppi, *supra* note 1, at 237.

[76] This notion is contrary to that of an agreement in fact and contract in law. See *supra* note 1.

[77] Another important step in this direction in the English common law was with the enactment of the "Statute of Frauds," in 1677, that required that some contracts be in writing. This further established the notion of a written memorial as not solely a trustworthy evidence of an agreement, but embodying the agreement in itself. Any attempts at altering a writing by use of other forms of evidence was therefore, by default, futile. Wigmore, *supra* note 46, at 350.

[78] Cole, *supra* note 39, at 684.

[79] Daniel, *supra* note 14, at 233.

[80] Solan, *supra* note 42, at 92. It has therefore been noted that the parol evidence rule is based to some extent on "the mystery of the written word". Corbin, *supra* note 30, at 608.

parol evidence rule is rooted in and reflects the legal preference, if not legal primacy, that was historically afforded writings in the English common law.[81]

While simple and brief in its original form, within the American jurisprudence the parol evidence rule developed into a rule that is clouded with exceptions and uncertainties[82] as to its more detailed application.[83] The rule has become far more complex through the years and has made several substantive changes.[84] Rather recently, one Professor concluded; "In virtually every jurisdiction, one finds irreconcilable cases, frequent changes in doctrine, confusion, and cries of despair."[85] Furthermore, the parol evidence rule is generally regarded as the most litigated doctrine in American contract law,[86] and it has become somewhat of a tradition to attack the rule in American legal literature.[87] The confusion that keeps permeating the rule despite several efforts to clarify it, has not, however, led to its demise,[88] despite such suggestions being made on an almost regular basis.[89] The parol evidence rule has few friends, yet, despite being constantly criticized in the legal community,[90] despite being inherently confusing,[91] the parol evidence rule stubbornly refuses to die,[92] and continues to be a cornerstone of common law contract law.[93]

2.2 The Act of Integrating an Agreement

In its initial form the application of the parol evidence was premised upon the existence of an agreement reduced to a written instrument. This is still the case, however with a material addition. Within the American jurisprudence, the parol evidence rule has progressed in the sense that its application is triggered by such writings, written instruments or memorials that have been integrated by the parties thereto. This characterization of a writing holds many legal significances, one of which is that it triggers the application of the parol

[81] 11 Williston on Contracts § 33:1 (4th ed.)

[82] Similar concerns exists in all common law jurisdictions where a version of the parol evidence rule still remains. In England its abolishment has been suggested but not enacted for example. The Law Commission, Law of Contract, The Parol Evidence Rule 25, Working Paper No. 70 (1976).

[83] "The fact that the parol evidence rule may be stated simply belies a perplexing and confusing number of difficulties in its application." 11 Williston on Contracts § 33:4 (4th ed.). See also "To even the most courageous Pickwickian, the parol evidence rule must seem a trencherous bog in the field of contract law." Id. (citing Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 8 U.C.C. Rep. Serv. 783 (5th Cir. 1971))

[84] Daniel, *supra* note 14, at 228.

[85] Posner, *supra* note 7, at 540. Such "cries of despair" are frequently occurring in law reviews and journals in the U.S. For a recent example, see James Mooney, *A Friendly Letter to the Oregon Supreme Court: Let's Try Again on the Parol Evidence Rule*, 84 Or. L. Rev . 369 (2005).

[86] Daniel, *supra* note 14, at 238.

[87] Solan, *supra* note 42, at 93.

[88] The rule is on life-support in England, the Law Commission recommended its abolishment in 1976, but that was not carried out. *See* The Law Commission *supra* note 81. The rule has been "declared dead" in the state of California. Susan J. Martin-Davidson, *Yes, Judge Kozinski, There Is a Parol Evidence Rule in California--The Lessons of a Pyrrhic Victory*, 25 Sw. U. L. Rev. 1, 2 (1995).

[89] Such suggestions are in the abundance in American law reviews and law journals. See Daniel, *supra* note 14 for a recent example.

[90] William G. Hale, *The Parol Evidence Rule*, 4 Or. L. Rev. 91, 120 (1925). ("The avowed purpose of the parol evidence rule was to bring . . . certainty into business transactions. The promise was appealing; the fulfillment appalling. We were promised bread. We received a stone.").

[91] "The parol evidence rule long has been the deserving recipient of criticism - criticism aimed at the confusion surrounding its bases in policy, the inconsistencies in its formulation, and the vagaries in its application." Metzger, *supra* note 56, at 1466.

[92] Olympia Hotels Corp. v. Johnson Wax Development Corp., 908 F.2d 1363, 1373 (7th Cir.1990).

[93] "every person is born to be either a conservative or a liberal, so is everyone born to be either for excluding parol evidence or admitting it." Burnham, *supra* note 12, at 141.

evidence rule.[94] A writing is categorized as integrated if the parties intended the memorial to be a complete, accurate and final representation of their agreement. The term 'integration' was coined by Professor John H. Wigmore[95] in the late 19th century for the purpose of describing two contracting parties´ act of reducing their contractual terms to a single written memorial.[96] Reducing an agreement to a single written memorial[97] does not necessarily mean that the parties intended the terms contained therein to be a final nor a complete representation of their agreement, as related to a specific transaction or subject matter.[98] Many written memorials are ordinarily produced during the course of a negotiation with different terms, a memorial might thus represent only part of an agreement, or it might be merely tentative. For a written memorial of an agreement to be regarded as integrated, it must be concluded that the parties intended that memorial to be the final and accurate expression of the terms contained therein.[99] In more simple contracts,[100] a representation of the agreement is ordinarily accurate and final, and perhaps the only representation that was issued by either party to the transaction.[101] The question of integration is more at play when the contract is preceded by lengthy negotiations where many different terms are under consideration by the respective parties and several drafts are issued by the parties respectively. In such a situation the question of integration will address not only the question of what is the final expression of the agreement but also which terms that are apart of that final expression. The question of to what an extent a written contract can be supplemented by terms not included therein is also decided by determining the degree to which the parties have integrated the written contract.[102] All of these issues relate to the main function of the parol evidence rule; to find the legally operative agreement between the parties thereto, in the midst of multiple representations thereof.[103]

While the original version of the rule deemed certain evidence inadmissible because of their suggested inherent unreliability, and the suggested unpredictability in their judicial review, that notion have been largely replaced by deeming such evidence inadmissible, not because they are perceived to be unreliable, but because they have become immaterial as a

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[94] 11 Williston on Contracts § 33:15 (4th ed.).

[95] John H. Wigmore, (1863-1943), Professor of law in Northwestern University since 1893, and dean of the faculty of law in the same, since 1901.

[96] Olson, *supra* note 19, at note 5 (citing 9 Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 2400, (3d ed. 1940)).

[97] A written memorial is not regarded as the actual agreement in American contract law. The agreement itself consists of the bargain, i.e. whatever two or more parties agreed to, and exists outside any representation thereof. A written memorial is thus only a representation of the bargain. See *supra* note 1.

[98] Daniel, *supra* note 14, at 238-240.

[99] Id. at 239.

[100] I am thinking, for example, of the purchase of everyday products or the purchase of household products whereby a standardized purchase agreement is issued by the seller.

[101] Professor Daniel poignantly states that if it is determined that the writing is not the parties final agreement there is no contract to begin with. *See* Daniel, *supra* note 14, at 240. Thus the discussion of integration/finality becomes circular to the discussion of whether there is a contract to begin with. The Restatement Second defines an integrated agreement as "a writing or writings constituting a final expression." Restatement (Second) of Contracts § 235. During the drafting of the Restatement Second the Reporter took issue with the term "integrated agreement" and unsuccessfully sought a better phrase. Murray, *supra* note 2, at 1355. An agreement is, by definition, final. A writing, evidencing an agreement, on the other hand, is not, and can therefore be regarded as integrated without thereby engaging in any kind of circular reasoning that Professor Daniel suggests. Nevertheless, the term "integrated agreement" is unfortunate. See id. at 1353-1355. Only the writing, evidencing the agreement, can be regarded as integrated. The more appropriate term is therefore "integrated writing." But the term "integrated agreement" is still widely used.

[102] Daniel, *supra* note 14, at 242. See also *infra* section 2.3.1.

[103] Burnham, *supra* note 12, at 100.

consequence of parties superseding them in an integrated writing.[104] That which perhaps has been the subject of the most confusion and dispute both in legal doctrine as in judicial practice with regards to the substance of the rule, is how courts should decide whether a written instrument is to be legally regarded as such an integration.[105] The concept of integration was not a part of the initial parol evidence rule in the English common law, but has become the most important and the central notion of the rule within the American jurisprudence. The parol evidence rule has moved away from the notion that the writing becomes the contract as a matter of law and instead embraced the notion of integration, whereby the parties make the writing the final and exclusive evidence of their agreement, as opposed to this being imposed by default in substantive law. Thus, for an understanding of the parol evidence rule as it has developed into today, an exploration of the concept or doctrine of integration, and how that concept itself has developed, is necessary.

2.3 The Doctrine of Integration

The doctrine of integration is a common law doctrine developed alongside the parol evidence rule in the late 19th and 20th century. The doctrine dictates the legal significance of integrating an agreement in a written instrument, and, as such, it deals with the act that the application of the parol evidence rule is premised upon. As stated *supra*, the term itself was coined by Wigmore in the late 19th century, to signify the embodiment of a legal act in a single memorial.[106] The concept of integration lies at the heart of the parol evidence rule analysis,[107] the fact, or the finding of integration by a court has been said to "trigger" the parol evidence rule.[108] The parol evidence rule has therefore at times been referred to as the "integration rule"[109] or "the rule of total integration."[110] This doctrine is sometimes put forth as the substantive basis of the parol evidence rule, or at least, the rule as it has developed during the 20th century.[111]

The doctrine of integration provides that a writing intended to be the final and sole memorial of the parties' agreement, integrates into it all prior agreements, understandings or representations between the parties as related to the subject matter of the agreement.[112] Thus, as a matter of substantive contract law, the terms of the agreement are exclusively defined by the integrated writing.[113] As such, the doctrine dictates where the legally operative terms of a transaction are to be found, if multiple representations thereof exist, and one of which is a written instrument.[114]

The doctrine rests upon the intent of the parties, in the sense that a writing will be regarded as an integration only insofar as it was intended as such by the parties to the

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[104] Metzger, *supra* note 56, at 1390.
[105] *See* 11 Williston on Contracts § 33:16 (4th ed.).
[106] 9 Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 2400, (3d ed. 1940).
[107] Burnham, *supra* note 12, at 105.
[108] 11 Williston on Contracts § 33:15 (4th ed.).
[109] Antonio R. Bautista, Basic Evidence, at 36 (2004).
[110] Patterson, *supra* note 21, at 845-846.
[111] Olson, *supra* note 19, at 924-925. Because the doctrine of integration was not apart of the original parol evidence rule, that rule had a different substantive basis, obviously.
[112] Olson, *supra* note 19, at 924.
[113] Id.
[114] Id. at 949.

contract.[115] An integrated agreement[116] invokes the doctrine of integration, which thereby defines the terms contained therein as the exclusive legally material representation of the understandings and agreements that preceded the execution of the writing. The parol evidence rule thereafter renders all evidence of prior agreements and understanding, whether parol or in writing, on the basis thereof, immaterial for the purpose of their enforcement. Consequently, such evidence purporting to establish an immaterial fact, can be barred by a court.[117] Thus, the doctrine of integration defines the terms constituting a transaction, and the parol evidence rule, thereafter, operates to render all terms prior to the execution of the contract outside thereof unrecognizable in law insofar as they relate to that transaction.[118]

2.3.1 Partial vs. Complete Integration

When the term was first used to categorize a writing as of a certain legal character, integration meant that any prior agreement as related to the subject matter of the written agreement were made inoperative as a consequence thereof.[119] Today however, an integration means only that the writing is final with regards to the terms contained therein,[120] thus it is important to recognize that an integration, in addition to being final, can also be complete, with regards to the subject matter of the writing.[121] A writing does not have to be regarded as final in its entirety, such a determination is made on a term by term basis.[122] As a consequence of this definition of an integrated agreement, the parol evidence rule treats partially and completely integrated agreements differently, as such different degrees of integration has different legal consequences. A writing that is partially or incompletely integrated is a final expression of the parties' agreement only with regards to the terms contained therein. Extrinsic evidence will thereby be excluded only insofar as they are contradictory to those terms. The protection of a partially integrated agreement is thereby limited to the terms of the writing. Extrinsic evidence of any prior agreement that is supplemental to the writing is still admissible. This leaves the substance of a writing susceptible to material additions of prior agreements, understandings or representations, as long as they are not contradictory thereto. A complete integration, however, renders all evidence of prior agreements and understanding that add to the writing, in addition to such agreements that contradict or vary it, immaterial for the purpose of their enforcement. They

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[115] 9 Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law §§ 2450-2453, (3d ed. 1940).

[116] Despite perhaps insinuating to the contrary, an integration does not require any kind of formal writing, any kind of written memorial will suffice. Furthermore, the integration does not have to be reflected in one single document. 11 Williston on Contracts § 33:14 (4th ed.). An integration does not have to be in writing, any type of representation of an agreement can be regarded as an integration thereof. *See* Corbin, *supra* note 30, at 606. The parol evidence rule's application is premised upon the existence of a valid agreement reduced to writing however, but the rule applies to any evidence extrinsic thereto.

[117] Olson, *supra* note 19, at 925.

[118] Id. at note 11 (citing 4 S. Williston, Contracts § 631 (3d ed. 1961)).

[119] Restatement (First) of Contracts (1932) § 237, reads as follows: "Except as stated in §§ 240, 241, the integration of an agreement makes inoperative to add to or to vary the agreement all contemporaneous oral agreements relating to the same subject-matter; and also, unless the integration is void, or voidable and avoided, all prior oral or written agreements relating thereto. If either void or voidable and avoided, the integration leaves the operation of prior agreements unaffected." See also id. cmt b to § 237: "An integration by definition contains what the parties agreed upon as a complete statement of their promises."

[120] The Restatement (Second) of Contracts § 235(1) defines an "Integrated Agreement" as one or more writings "constituting a final expression of one or more terms of an agreement."

[121] *See* Restatement (Second) of Contracts §§ 236(1)-(2).

[122] To avoid such evidentiary problems whereby either party claims that only some of the terms contained in a writing are final, clauses known as merger clauses, with the purpose of establishing finality and completeness to the writing, are very common. See *infra* section 2.9 for more on such clauses.

have been superseded by the subsequent complete integration. A complete integration is thereby an act by which all prior agreements or understandings not contained in the writing, but relating to the subject matter of the agreement, are discharged and displaced. As such, a writing that completely integrated the parties' agreement makes the writing the exclusive evidence of the agreement and any extrinsic evidence related to the subject matter of the writing is thereby inadmissible, insofar as such evidence is introduced for the purpose of establishing a prior understanding or agreement that have become immaterial as a consequence of the subsequent integration. A completely integrated agreement is thereby protected against subsequent extrinsic impeachment to the greatest extent possible pursuant to the doctrine of integration and the parol evidence rule.

2.3.2 Contradictory vs. Supplemental Terms to a Partially Integrated Writing

A partially integrated written contract can, as stated *supra*, be supplemented but not contradicted. While seemingly an easy judicial issue, different courts approach the process by which this is determined differently. Some courts opine that a term outside the writing must directly conflict with an express term of the writing to be held contradictory. Other courts use a broader view of a contradictory term, according to which a any term that contradict express as well as implied terms are contradictory to the written contract.[123] The absence of an express term allows, depending on the intention of the parties, for default rules to fill the gaps. Such implied terms cannot be contradicted in a partially integrated agreement under the latter approach, pursuant to which implied terms are regarded as being as much a part of the writing as the express terms.[124]

2.4 The Merger Doctrine

Another legal doctrine that is similar to the integration doctrine and that is considered an "analogue" of the parol evidence rule is the merger doctrine.[125] The doctrine was employed in opinions of contract cases in the American law as early as the 19th century and is widely recognized today.[126] It was originally developed as a doctrine in security law whereby a security for a debt was extinguished because of it being replaced by a new security of a higher degree. A merger operates as a dissolution, not of the debt, but of the original security, as a consequence of it being replaced by a higher security.[127] With regards to the law of contracts today however,[128] a merger refers to the broader notion of an absorption of one agreement into a subsequent one which thereby extinguishes the earlier agreement.[129] A

[123] Daniel, *supra* note 14, at 248-249.
[124] This issue is dealt with in greater detail in section 2.10.4 *infra*.
[125] Fish v. Tandy Corp., 948 S.W.2d 886, 898 (Tex. App. 1997).
[126] See for example the Circuit Court of Appeals, Eighth Circuit in 1899 concluding the following with regards to the doctrine of merger; "A subsequent contract completely covering the same subject-matter, and made by the same parties, as an earlier agreement, but containing terms inconsistent with the former contract, so that the two can not stand together, rescinds, supersedes, and is substitute for the earlier contract, and becomes the only agreement of the parties on the subject." Housekeeper Publishing Co. v. Swift, 38 C. C. A. 187, 97 Fed. 290 (8th Cir. 1899).
[127] Paul M. Coltoff, Sonja Larsen, & Carmela Pellegrino, Corpus Juris Secundum Contracts, § 416 (2008).
[128] The doctrine is perhaps most commonly applied in real estate transactions where the terms of the underlying contract for the sale of land are merged into the deed and thereby become extinguished and unenforceable upon execution of the deed. *See* Dobrusky v. Isbell, 740 P.2d 1325, 1326 (Utah 1987).
[129] Paul M. Coltoff, Sonja Larsen, & Carmela Pellegrino, Corpus Juris Secundum Contracts, § 416 (2008).

merger, pursuant to the merger doctrine, occurs when the same parties to an earlier agreement subsequently enter into a new agreement covering the same subject matter.[130]

The doctrine is founded upon the privilege, which parties to a contact always possess, of changing their contractual obligations by subsequent agreements, prior to performance. Generally, a subsequent agreement in conflict in its terms with an earlier agreement supersedes the earlier agreement by default.[131] As such, a merger can occur without it necessarily being in accordance with the parties' intentions, as such a merger differs from an integration, which is solely based upon intent. A merger can either occur by default, as it would in the situation just mentioned, or by intent. If two parties intend for a later agreement to merger into it previous agreements that are not in conflict with the later agreement, the previous agreement will be invalidated because of its merger into the later agreement, as a consequence of that intent. The merger doctrine is closely aligned with the parol evidence rule, and is usually applicable when the parol evidence rule is.[132] The merger doctrine as well as the parol evidence rule effectuates the presumption that a subsequent written contract is of a higher legal nature than preceding statements, negotiations, understandings or agreements relating thereto, by deeming such expressions to have been merged into the written instrument.[133] It has also been suggested that the exclusion of prior agreements from being established in a judicial proceeding pursuant to the parol evidence rule is based on a "theory of merger."[134]

The merger doctrine is a common law doctrine, but is somewhat similar to the doctrine of novation in the civil law.[135] A novation occurs when a creditor releases a debtor from his/hers/its obligations in exchange for the obligations being assumed by another party.[136] The original contract is thereby extinguished, because it has been substituted by a subsequent one.[137] The two doctrines thereby express the same notion[138] of how one contract is discharged or extinguished because it is substituted by a subsequent contract covering the same subject matter.[139] They are both premised upon the same notion, namely that one contract is rendered legally unenforceable as a consequence of the creation of another.

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[130] Fish v. Tandy Corp., 948 S.W.2d 886, 898 (Tex. App. 1997).

[131] Paul M. Coltoff, Sonja Larsen, & Carmela Pellegrino, Corpus Juris Secundum Contracts, § 416 (2008).

[132] Steven W. Feldman, James A. DeLanis, *Resolving Contractual Ambiguity in Tennesee: A Systematic Approach*, 68 Tenn L. Rev. 73, 88-89 (2000).

[133] 11 Williston on Contracts § 33:1 (4th ed.).

[134] James D. Gordon III, *Teaching Parol Evidence*, 1990 B.Y.U. L. Rev. 647, 647 (1990).

[135] Paul M. Coltoff, Sonja Larsen, & Carmela Pellegrino, Corpus Juris Secundum Contracts, § 417 (2008).

[136] Generally, in civil law, a novation can occur in three different ways, see for example The Supreme Court of the United States applying the Law of the State of Louisiana (the only state based on the civil law) from 1851; "'A novation takes place in three ways' (Louis. Code, art. 2185.) '1st. When a debtor contracts a new debt to his creditor, which new debt is substituted to the old one, which is extinguished. 2d. When a new debtor is substituted to the old one, who is discharged by the creditor. 3d. When, by the effect of a new engagement, a new creditor is substituted to the old, with regard to whom the debtor is discharged." Union Bank v. Stafford, 12 How. U. S., 327. (1851).

[137] Paul M. Coltoff, Sonja Larsen, & Carmela Pellegrino, Corpus Juris Secundum Contracts, § 417 (2008).

[138] See for example the Supreme Court of Tennessee concluding the following in 1876; "The doctrine of novation in the civil law is but the doctrine of merger in the common law--"the substitution of a new obligation for an old one, which is thereby extinguished."" Sharp v. Fly, 68 Tenn. 4 (1876).

[139] The basic difference between a novation and merger is that in a merger, one security for a debt is extinguished for another security, and in a novation, one debt is extinguished for another debt. Merger was originally a question of law, and novation a question of intent. See Jones v. Johnson, 3 Watts & Serg. 276 (Pa. 1842) ("In the first of them, the original security is extinguished, but the debt remains: in the second, the debt, as well as the security, is extinguished by the acceptance of another debt in payment of it. Extinguishment by merger takes place between debts of different degrees, the lower being lost in the higher; and, being by act of the law, it is dependent on no particular intention; extinguishment by satisfaction takes place indifferently

2.5 Same Name - Different Rule - The Two Parol Evidence Rules

The most uncertain and controversial aspect of the parol evidence rule is how to decide whether, and to what extent, a writing has been integrated.[140] It is well established that the application of the parol evidence rule is premised upon the existence of an integrated writing, less established how courts shall determine that threshold issue, i.e. how to conclude that a writing shall be legally recognized as, or deemed an integration. The rule itself is not sufficiently self-executing in this regard, it does not include a method for determining the finality and completeness of a writing, it only dictates the legal consequences thereof.[141] Thus courts and commentators are free to devise their own tests. There is no shortage of such attempts.[142]

In American contract law, two major schools of thought have established themselves in the 20th century as to how courts should approach the issue of integration. Each of these two approaches has been named after the renowned contract scholar who advocated and contributed to the scholarship of each respective approach.[143] The traditional has been dubbed the Williston approach/rule after Professor Samuel Williston, the latter, modern approach the Corbin approach/rule after Professor Arthur L. Corbin.[144] While both approaches seek to identify the intentions of the contracting parties with regards to the issue of integration,[145] they differ significantly in terms of the method by which the intentions are derived.[146]

It has never been appropriate to talk of one uniform parol evidence rule,[147] but in the context of American contract law, it is appropriate to talk of two distinctly different parol evidence rules, the Williston Rule and the Corbin Rule. Unfortunately, these contradictory

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between securities of the same degree or of different degrees; and being by act of the parties, it is the creature of their will.”).

[140] 11 Williston on Contracts § 33:16 (4th ed.).

[141] Note, *supra* note 15, at 973.

[142] Because the question of integration is preliminary to the actual application of the rule itself, it could be argued that the issue of how that question should be determined is beyond the substantive reach of the rule and not a part thereof. See Restatement (Second) of Contracts §§ 209(2), 210(3) "Whether there is an integrated agreement" and "whether an agreement is completely or partially integrated is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule." Nonetheless, that rather small issue of semantics has not deterred the issue from being regarded as part of the rule itself in doctrine as well as in judicial practice.

[143] “There is no uniform parol evidence rule. Rather, there are at least two rather dissimilar rules which, for convenience, may be denominated the Corbin Rule and the Williston Rule.” John D. Calamari & Joseph M. Perillo, *A Plea For a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 Ind. L.J. 333, 343-44 (1967) (footnotes omitted).

[144] Professor Posner dubbed the approaches the “hard parol evidence rule” and the “soft parol evidence rule.” Posner, *supra* note 7, at 534. On a more sarcastic level, the two versions have been distinguished in the sense that in the traditional view of the world, “people think before they act,” in the modern view, “people screw up.” Burnham, *supra* note 12, at 141-142.

[145] Because both methods focus on the intention but with a different approach of deriving the intention, the Corbin approach has been described as the “actual intention” test, whereas the Williston approach has been described as the “fictitious intention” test. Murray, *supra* note 2, at 1348.

[146] 11 Williston on Contracts § 33:16 (4th ed.). The contrasting rules of Professor Williston and Professor Corbin is an infamous disagreement between the two scholars that has been described as “the classic Williston/Corbin dichotomy.” Michael A. Lawrence, *The Parol Evidence Rule in Wisconsin: Status of the Law of Contract, Revisited*, 1991 Wis. L. Rev. 1071, 1079 (1991). In fact, Williston and Corbin “held antithetical points of view on almost every conceivable point of law.” Gilmore, *supra* note 65, at 66.

[147] Or, at least not since a few years after 1604.

rules are expressed in the same terminology, which has not decreased the level of confusion commonly associated with the rule.[148] I begin with Williston's approach.[149]

2.5.1 The Williston Rule

The Williston rule, like the original parol evidence rule, affords a particular legal significance to the act of reducing an agreement to writing.[150] Under this approach the question of whether there was an integration is to be determined solely from the face of the written instrument itself, and the court should focus solely on whether the instrument appears, on its face, to be a complete integration of the parties' agreement.[151] Thus, the approach is primarily focused on objectively manifested intent as evidenced exclusively in a written instrument.[152] According to Williston, if parties reduced their agreement to a writing, the law effectuates a presumption that the writing was intended as the sole operative representation of the parties' agreement, and, consequently, only if the writing appeared incomplete or merely tentative on its face, should the court admit extrinsic evidence of additional or contradictory terms thereto.[153]

Williston meant that the act of reducing an agreement to a writing was, in itself, an implicit intention of the parties to make the writing the sole enforceable agreement, i.e. it is also an act of creating the contract.[154] Consequently, any representations of the agreement apart from the writing itself, are not legally recognizable; a complete integration has occurred by a default operation at law.[155] Williston was thereby less concerned with whether the writing was intended to be an integration of the parties' agreement, and more concerned with whether the writing was intended as a creation of the contract.[156] If the parties', by reducing an agreement to writing, thereby also implicitly or explicitly intended for that act to be the creation of the legally enforceable agreement, i.e. the contract, then everything extrinsic thereto would be immaterial. If, in addition, the parol evidence rule effectuates a substantive presumption to that effect, then, suggested Williston, it would be natural for a court to hold otherwise only insofar as the writing, on its face, clearly suggested that.[157] As such, for

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[148] Linzer, *supra* note 2, at 807.
[149] "No difficult question in contract law should be answered without first consulting Professor Williston's work." Arthur L. Corbin, *Book Review*, *The Law of Contracts. By Samuel Williston, New York, Baker Voorhis & Co. 1920, In Four Volumes, Vol. I, pp, XXIII, 1155,* 29 YLJ 942, 945 (1920).
[150] *See* 11 Williston on Contracts § 33:16 (4th ed.).
[151] Id.
[152] Id. at § 33:5.
[153] Id. at § 33:16.
[154] Martin-Davidson, *supra* note 88, at 13.
[155] A good example of this view is the reasoning of The Supreme Court of Pennsylvania in a case from 1858, whereby the Court concluded the following; "In all cases, the express contract, written or not, is the paramount law of the parties, and, if complete, must be exclusive; and, if not complete, it must be conclusive so far as it goes, supposing it to be free from mistake and fraud. And where they have provided against all forgetfulness and misconception by putting their own definition of this relation into writing, it is of the very nature of the act that the writing, while it exists, is the exclusive evidence of those relations; for it admits of no uncertainty, and perpetuates the very terms of their agreement, which oral testimony cannot do." Miller v. Fichthorn, 31 Pa. 252, 259 (1858). See also Thompson v. Libby, 34 Minn. 374, 26 N. W. 1 (1885), in which the Court concluded; "The only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself." Id. at 377, 26 N. W. at 2.
[156] Martin-Davidson, *supra* note 88, at 13.
[157] Williston's approach has been described as an "objectivist" approach because it does not emphasize on the parties actual intentions with regards to issue of integration. *See* Linzer, *supra* note 2, at 839. However, such characterization is rather unfortunate because it does not involve a total disregard of subjective intent, only a presumption that the writing is the most pragmatic factual source thereof.

Williston, the substantive basis of the rule was similar to that of the traditional rule in the sense that the act of reducing an agreement to writing was presumed in law to also be the act of creating the sole legally recognizable and enforceable agreement, i.e. the contract. It was not regarded as merely the act of evidencing the agreement therein.

Williston motivated his approach on the basis of what Williston referred to as the 'classic principle' inherent in the classic formulation of the parol evidence rule, namely the principle according to which the law presumes not only that a written instrument represents the final agreement with regards to the explicit provisions therein, but also that it contains the complete agreement in regard to the matter to which it is related.[158] The evidentiary consequence of that legal presumption was for Williston one of practical necessity; if either party to a writing were allowed to rebut a presumption of complete integration by introducing extrinsic evidence of an agreement or representation not contained in the writing, the only question would then be whether such an agreement was in fact made, because the sole existence of such an agreement would establish that the writing did not constitute a complete integration.[159] Therefore, if evidence extrinsic to the writing is admissible, it would greatly impair the practical value of the rule because it would make the legal presumption largely ineffectual. Thus, if ascertaining certainty and predictability to written instruments was the purpose of the rule, it would be necessary to bar extrinsic evidence before the legal facts such evidence are entered to establish, were even considered by the court.[160] Thus, the parol evidence rule effectuates the substantive presumption that the writing makes ineffectual all prior agreements extrinsic thereto, and this presumption can only be rebutted if intentions to that effect are apparent on the face of the writing.[161] As such, the parol evidence rule stipulates, as a matter of substantive contract law, that if the parties have chosen to reduce their agreement to writing, their contract is exclusively to be found therein, unless the writing clearly suggests otherwise.[162]

Williston argued that the law simply did not recognize intent unless it was memorialized in the writing that embodied the agreement, either expressly or impliedly.[163] As such, the Williston test of establishing the parties' intentions has been characterized as fictitious rather

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[158] 11 Williston on Contracts § 33:16 (4th ed.).
[159] Id.
[160] Logic was an integral value in Williston's scholarship. See Samuel Williston, *Repudiation of Contracts (Part II)*, 14 Harv. L. Rev. 421, 438 (1901) ("The law is not important solely or even chiefly for the just disposal of litigated cases. The settlement of the rights of a community without recourse to the courts can only be satisfactorily arranged when logic is respected.").
[161] Martin-Davidson, *supra* note 88, at 13.
[162] 11 Williston on Contracts § 33:16 (4th ed.). There is little difference between this view and the view that the writing constitutes the contract, and is not solely evidence thereof, i.e. the view that reducing an agreement to writing is also the act of creating the contract, i.e. the portion of the parties' agreement that is recognizable and enforceable in law. If the writing constitutes the whole contract, a claim of an additional agreement outside the writing would, while possibly being true in fact, inevitably be an immaterial fact in law. It would thus be of no value to admit such evidence. While Williston holds that integration is an issue of intent, that intent is presumed in law when an agreement is reduced to writing, and can only be rebutted by the writing itself. It seems that the difference between that view, and the view that the writing constitutes the whole contract insofar as the writing does not clearly suggest otherwise, is a difference in semantics primarily, albeit that the latter view operates without any assumption of intent. Indeed, the rationale for decisions where courts purported to apply the parol evidence rule sometimes reflect the notion that a writing does not solely evidence the parties' agreement, but constitutes it; See for example Williston on Contracts § 33:3 (4th ed.) (citing In re Gaines' Estate, 15 Cal. 2d 255, 100 P.2d 1055 (1940)("The rule as applied to contracts is simply that as a matter of substantive law, a certain act, the act of embodying the complete terms of an agreement in a writing (the 'integration'), becomes the contract of the parties. The point then is, not how the agreement is to be proved, because as a matter of law the writing is the agreement.")).
[163] Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 Geo. L.J. 195, 200 (1998).

than actual.[164] Thus, the Williston's approach to the parol evidence rule did not emphasize on giving effect to the parties' actual intentions but only their intentions as expressed within the four corners of the writing,[165] insofar as it ascertains the parties' intent solely on the basis of the written instrument.[166] Thereby a written agreement could be enforced even though that would be contrary to the parties' actual intentions,[167] insofar as those intentions were not expressed in the writing.[168] This makes a factual inquiry as to the intentions of the parties with regards to the issue of integration, beyond an examination of the actual writing itself, unnecessary. If it is presumed, in law, that in the act of reducing an agreement to writing lays a mutual intention, or a mutual assent of the parties, to integrate their agreement completely therein, there is no need to factually establish such intentions. Under Williston rule, a writing became a complete integration by default, as a consequence of the presumption thereto, as dictated by the parol evidence rule. Thus, there was no need for a court to make a factual inquiry, the issue was a question of law, to be decided solely by the judge, without admitting any evidence aside from the writing. As such, the Williston approach affords writings a special substantive status,[169] in the sense that a writing is regarded not as the superior evidence, but the only evidence to derive the intent of the parties,[170] which is consistent with the original rule. It has thus been said that the Williston rule serves to limit the court's inquiry before the fact, in the sense that there was no legal fact needed to be established, aside from the admittance of a written instrument of the parties' agreement, before the court could bar all other evidence pursuant to the parol evidence rule, insofar as they were introduced for the purpose of varying or contradicting the writing.[171] This reflects, although it does not fully embrace, the old common law notion of a writing not solely evidencing an agreement, but constituting it in itself.[172] Consequently, the legal review of the completeness of a written instrument was not done pursuant to the rules of evidence, but pursuant to the substantive parol evidence rule, which dictates that the evidentiary inquiry was to be limited to the writing itself. Thus, the Williston rule has some obvious evidentiary limits, but those limits are not to be perceived as an infringement of the applicable evidentiary rules to questions of fact, but rather as evidentiary limits dictated by substantive law to a question of law. Thus, although the Williston rule does not purport to be a rule of evidence, it limits the court's evidentiary inquiry rather extensively as pertaining to the issue of integration, although these evidentiary limitations rest upon a substantive basis and solely pertains to a question of law. It is, however, in light thereof understandable that the rule has been regarded as a rule of evidence at times.

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[164] Murray, *supra* note 2, at 1348.

[165] This is sometimes referred to as the "four-corners" rule, according to which the written instruments, with its four corners, is the sole source of the parties' agreement. Zuppi, *supra* note 1, at 239. The rule, strongly advocated by Williston, is also applied with regards to extrinsic evidence for the purpose of interpretation. Linzer, *supra* note 2, at 805. In that regard, the "four-corners" rule is similar to the plain-meaning rule. See *infra* section 2.8.5.

[166] 11 Williston on Contracts § 33:16 (4th ed.).

[167] This was not foreign to Williston's general perception of contract law; See Samuel Williston, A Treatise on the Law of Contracts, § 95, (3d ed. 1961) ("It is even conceivable that a contract may be formed which is in accordance with the intention of neither party. If a written contract is entered into, the meaning and effect of the contract depends on the interpretation given the written language by the court."). See also *infra* section 2.6.2 for a further discussion.

[168] Martin-Davidson, *supra* note 88, at 12-13.

[169] Solan, *supra* note 42, at 87.

[170] Metzger, *supra* note 56, at 1395.

[171] 11 Williston on Contracts § 33:5 (4th ed.).

[172] The difference being that pursuant to the original common law notion the writing was the contract by default, under the Williston rule, there is merely a strong substantive presumption to that effect.

The purpose of the Williston rule is therefore to protect writings from being contradicted or supplemented by prior agreements outside its four corners, which mandated a substantive presumption of their completeness and finality,[173] its rationale is one based upon a necessary degree of practicality and certainty of writings, its legal consequence is that the issue of integration, which would ordinarily be a question of fact, is turned into a question of law, which results in certain evidentiary limitations, all of which is dictated by the substantive rule of law that is the parol evidence rule.[174]

2.5.2 Criticism of the Williston Rule

The Williston Approach became the subject of heavy criticism on both a principle and a practical level during the first half of the 20th century. The approach was heavily criticized for having little relationship with reality.[175] Its assumption, that a writing reflects the parties' final and complete agreement, that parties are aware that by use of a written instrument, they thereby distinguish anything extrinsic thereto, has been criticized for being a too idealistic a view of contracting.[176]

The Williston Approach has also been criticized for assigning to great a value to a written instrument in determining the substance of an agreement. If contractual obligations flow not from the words of a writing, but from the intentions of the parties, which cannot be derived solely by looking at the written instrument, it would be inappropriate to accept such evidentiary limitations that the Williston rule dictates.[177]

It has also been criticized for allowing businesses to use the parol evidence rule to renegade on oral agreements with unsuspecting consumers.[178] In its rigid evidentiary approach, it can and has resulted in several cases of gross injustice.[179] By making ineffectual all agreements, representations and understandings outside a written instrument, the rule has been criticized for assigning too great a power to the party holding the pen, and creating a safe harbor for unethical business practices.[180]

2.5.3 The Corbin Rule

Corbin's scholarship on different issues of the law of contracts have been very influential and praised.[181] His take on the parol evidence rule is no exception. Unlike Williston, Corbin harbored little affection for the rule, he was not particularly impressed with its intricacies and

[173] Martin-Davidson, *supra* note 88, at 13.
[174] Thus, in Posner's figure *supra* section 1, Williston's position is that whether W was intended as an integration of C is to be decided on the basis of W exclusively, to the effect of excluding C' and W'.
[175] Burnham, *supra* note 12, at 129.
[176] See for example Professor Linzer concluding; "Rather than indulging in a fantasy of certainty, we should opt for a world of reality, however untidy it may be." Linzer, *supra* note 2, at 839.
[177] Id. at 815.
[178] Professor Sweet questions the rationale of predictability and certainty: "How clear is the need to protect writings from gullible or soft hearted juries or judges? In an era dominated by adhesion contracts, inequality of bargaining power and the pervasive use of liability limitations and exculpations, such commercial certainty should be subordinate to the protection of reasonable expectations. The law should be more concerned with protecting the actual agreement of the parties than with protecting a written agreement that appears to constitute the entire agreement." Sweet, *supra* note 10, at 1056.
[179] This is something that has inclined courts to use their equitable authority to create numerous exceptions to the rule, which has been an important reason for the increased intricacies of the rule and the high level of inconsistency in its application. Corbin, *supra* note 30, at 609-610.
[180] Solan, *supra* note 42, at 87.
[181] Professor Gilmore, for example, called Corbin's treatise "Corbin on Contracts" the "greatest law book ever written." Gilmore, *supra* note 65 at 63-64.

legal tradition.[182] He thought of it as having little substantial legal basis, rather he thought of it as being founded upon something intellectually dissatisfying as "the mystery of the written word."[183] Corbin did not think there was anything particularly mystical about paper and ink.[184]

Corbin alleged that the legal substance of the parol evidence rule was merely a part of the ordinary substantive law of contracts, namely that all contracts, whether written or oral, can be discharged by a substituted agreement, whether written or oral.[185] However, the subsequent agreement, even though it is in writing, does not discharge the previous oral agreement if it is not agreed upon by the parties that it shall do so or if it is inconsistent therewith.[186] Corbin expressed the rule as follows; When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.[187] As such, the purpose of the rule is to protect integrated writings from being varied or contradicted by antecedent agreements not contained therein.[188] The rule does not purport to have any operation at all unless a writing has been characterized as an integration.[189]

Corbin lamented the name of the rule, and assigned some of the blame for its confusing nature to the fact that it is stated as a rule of evidence, which distracted the attention from the real issues that the rule revolves around.[190] According to Corbin, the rule principally deals with three issues; (i) Have the parties made a contract? (ii) Is that contract void or voidable because of illegality, fraud, mistake or any other reason? (iii) Did the parties assent to a particular writing as the complete and accurate integration of that contract?[191] Corbin rejected the notion that in law it shall be presumed that parties, by reducing an agreement to writing, intends for the memorial to be the complete integration of their agreement. Instead, he regarded the parties' actual intentions as the only basis for the rule's application,[192] i.e. whether the parties had, as a matter of fact, assented to the writing as the complete and accurate integration of their agreement. After that intent has been established, the parol evidence rule protects the completely integrated writing from being varied or contradicted by anything extrinsic thereto.[193] That issue, argued Corbin, cannot be determined by exclusively looking at the writing itself.[194] At the heart of Corbin's approach, is the notion that

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[182] *See* Corbin, *supra* note 30, at 608.
[183] Id.
[184] He, perhaps somewhat ironically, suggested that the rule should be called "a paper and ink rule." *See* Id. at note 6. His scholarship regarding the parol evidence rule has been characterized as an "all out attack on the parol evidence rule." Linzer, *supra* note 2, at 824. See also Grant, Gilmore, *Legal Realism: Its Cause and Cure,* 70 Yale L.J. 1037, 1048 (1961) ("Law cannot be, since society never is, stable. A system which works well for a generation or a century must sooner or later come in for repairs.").
[185] Corbin, *supra* note 30, at 607-609.
[186] Id. Thus Corbin: "today may control the effect of what happened yesterday; but what happened yesterday cannot change the effect of what happens today." Id. at 607.
[187] Id. at 603.
[188] *See* Id. at 610.
[189] Id.
[190] *See* Id. at 603.
[191] Corbin, *supra* note 30, at 603.
[192] *See* Flechtner, *supra* note 13, at 274 ("The facet of the parol evidence rule is merely a specific application of the most fundamental doctrine of contract law, that the intentions of the parties govern their contract.").
[193] Corbin, *supra* note 30, at 610.
[194] Corbin argued that a writing cannot, by itself, prove its own character as a partial or complete integration, "…however long and detailed it may be, however formal, and however many may be the seals and signatures and assertions." Id. at 603. Professor Wigmore was of the same opinion; "the conception of a writing as wholly and intrinsically self-determinative of the parties' intent to make it the sole memorial of one or seven or twenty-

contractual obligations are created on the basis of the actual intentions of the parties, not the mere appearance of such intentions in a written instrument, or the assumption of such intentions in law.[195] The traditional approach reduces the issue of the parties' intention to integrate, either completely or partially, to an assumption in law, and only insofar as a contrary intention is apparent on the face of the writing, will evidence beyond the writing be admitted. This is what Corbin referred to as being the notion of 'the mystery of the written word,' a notion he wholly rejected.[196]

Thus, Corbin strongly criticized[197] the exclusionary part[198] of the original and the Williston parol evidence rule.[199] He alleged that the parol evidence rule does not exclude any evidence whatsoever. Instead of excluding any evidence of facts, the rule makes certain legal facts immaterial, the jural effect of that which happened yesterday, has been nullified by that which happened today.[200] After a court has established the terms of a new valid agreement of today, it would be unreasonable for that court to waste time in further admitting evidence of a prior agreement or prior negotiations of yesterday, which the court has just held to have been discharged by and replaced with the new agreement.[201] Insofar as the purpose of that evidence is the enforcement of the discharged agreement.[202] Therefore it does not matter how credible or how convincing the evidence of a prior agreement may be because the fact itself has been deemed legally immaterial by the parties themselves.[203] For a court to allow such evidence to be heard would therefore be a waste of time.[204] Therefore, for Corbin, the rationale of the rule is not to exclude certain evidence due to their unreliability or to control the jury from giving unfounded credence to certain evidence out of sympathy, but that certain facts are made legally immaterial by consequence of a subsequent integration and evidence thereof should therefore be barred. While the consequences of the jural application of the parol evidence rule will have certain exclusionary effects, that does not mean that the rule itself excludes anything, it is only a consequence of its application.[205] Corbin thereby

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seven subjects of negotiation is an impossible one." 9 Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 2431, (3d ed. 1940).

[195] Linzer, *supra* note 2, at 824.

[196] *See* Corbin, *supra* note 30, at 629.

[197] Corbin's lack of admiration for the rule can also be noted in his insistence to refer to it as the "parol evidence rule." See Corbin, *supra* note 30, throughout his essay.

[198] The parol evidence rule is sometimes characterized as an "exclusionary rule." Patterson, *supra* note 21, at 845.

[199] The exclusionary aspect of the original rule has been characterized as a "mysterious legal ban" on parol evidence. McCormick, *supra* note 64, at 369.

[200] Corbin, *supra* note 30, at 604.

[201] Id. at 611.

[202] Prior agreements and understandings can still have an effect with regards to the interpretation of the terms of the new contract, and are ordinarily admitted for that purpose while being barred for the purpose of their enforcement. That is, however, an issue that the plain-meaning rule deals with. See *infra* section 2.8.5.

[203] Professor Wigmore was of the same opinion; "It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved . . .. What the rule does is to declare that certain kinds of fact are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at all." 9 Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 2400, (3d ed. 1940).

[204] "A court having determined the making and the terms of the new agreement of today, it is not reasonable to expect it to waste time in listening further to evidence of an antecedent agreement or antecedent negotiations which the court has just held to have been discharged and displaced." Corbin, *supra* note 30, at 611.

[205] There is commonly an evidentiary rule against admitting evidence for the purpose of proving an immaterial fact pursuant to the applicable rules of evidence, which can serve as the legal basis for barring such evidence. I.e. the parol evidence rule makes legal facts immaterial for the purpose of establishing the parties' contract, an evidentiary rule forbidding the introduction of evidence purporting to establish an immaterial fact is the legal basis for barring the evidence that is entered to establish such facts. *See* Martin-Davidson, *supra* note 88, at 11. *See* also Corbin, *supra* note 30, at 611.

distinguished between the exclusionary effect, and the substance, of the rule.[206] The perception of the parol evidence rule as being in any way an evidentiary, procedural or exclusionary rule, is thus, argued Corbin, an incorrect understanding of the rule's legal character. Rather, Corbin characterized the rule, in what he called its "only true operation,"[207] as "a rule of discharge, a discharge of previous understandings by mutual agreement, a discharge the nullification of which requires the assent of both parties."[208] On the basis of that logic, a court should admit all relevant evidence to determine whether a written instrument was actually intended as a complete and final integration of their agreement.[209] A court should not dodge the determination of the weight of any evidence by use of the parol evidence rule and hold that an integration exists when evidence, other than the actual memorial, is offered to prove that it does not. Of course, that is not to say that such evidence must be believed, but they should be admitted.[210] Written instruments are naturally persuasive evidence of the substance of an agreement, but Corbin rejected any substantive notion that they were to be regarded as conclusive or presumed to be.[211] In this regard, Corbin clearly denies writings a special treatment[212] in deriving the intention of the parties, as they are afforded under the traditional approach.[213] As Williston pointed out, one efficient way to disqualify a written instrument's character as a complete integration, is to prove that one or more additional terms not included in the writing, but related thereto, were agreed upon and not thereafter discharged. Such a fact, argued Corbin, is material to the issue of integration and should therefore not be held inadmissible by the court. Any such term, not displaced by the written contract, will effectively challenge the integrity of the written contract and will not be barred by the parol evidence rule.[214] Thus, while Williston lamented the admittance of such evidence, Corbin encouraged it.

Under the Corbin approach, the parol evidence rule, contrary to the Williston approach, comes into play after the fact.[215] Under the Williston approach, there is no or a strictly limited factual inquiry with regards to the integration issue, rather, the rule is applied for the purpose of avoiding a factual inquiry of extrinsic evidence - it is applied before the fact. For Corbin, the rule comes into play only after a factual determination had been reached in this regard – it is applied after the fact.[216] Thus, contrary to the traditional rule, Corbin's version is not applicable in an evidentiary sense, it does not limit the court's factual inquiry, because it is applied only after such an issue has been determined pursuant to the applicable rules of evidence. As such, Corbin turned the issue of integration from a question of law under the

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[206] Corbin, *supra* note 30, at 611. Such a distinction, though perhaps rather apparent, is pivotal for a proper understanding of the legal character of the parol evidence rule.
[207] Id. at. 610
[208] Id.
[209] Due to Corbin's strong emphasis on actual intent and his notion of admitting all relevant evidence to determine it with regards to the issue of integration, his approach has been called a "subjectivist" approach. Linzer, *supra* note 2, at 809. Along the same lines, the approach has also been called the "intent test." Olson, *supra* note 19, at 932.
[210] "No relevant evidence should be declared inadmissible, but the flimsy and improbable should be treated as flimsy and improbable." Corbin, *supra* note 30, at 642.
[211] "In the light of the habits of men, paper and ink may be strongly evidential of assent and of completeness and finality; but they do not constitute conclusive evidence." Corbin, *supra* note 30, at note 6.
[212] Indeed, in Corbin's world, there is nothing mystical about paper and ink, although he recognized that there still existed such a view in American contract law; "The mystery of the written word is still such that a paper document may close the door to a showing that it was never assented to as a complete integration." Id. at 629
[213] Metzger, *supra* note 56, at 1395.
[214] Corbin, *supra* note 30, at 641.
[215] 11 Williston on Contracts § 33:5 (4th ed.).
[216] Id.

Williston approach, to a question of fact, to which no limitations are dictated by the substantive parol evidence rule.

Corbin, in the mid 20th century, argued that there was ample judicial authority for the position that the court should admit parol evidence when deciding the issue of integration.[217] In fact, he suggested that most of the decisions where a court barred parol evidence it had first admitted such evidence and thereby found that there was a complete and accurate integration in writing.[218] After having admitted parol evidence and, on the basis thereof, found that there written agreement was a complete and accurate integration of the agreement, that very same evidence becomes immaterial for the purpose of varying or contradicting the integrated agreement.[219] The extrinsic evidence was material to the issue of whether there was a complete and accurate integration of the agreement in the writing, but that same evidence is thereafter immaterial to the issue of varying or contradicting the integrated agreement. Thereby, barring that evidence is a consequence of the courts decision with regards to the issue of integration, and not a consequence of the parol evidence rule. The extrinsic evidence becomes immaterial on the basis of the legal effect of the integrated agreement, because the parol evidence rule deems them as such.[220]

Thus, the Corbin parol evidence rule strips from the traditional rule its notion that written instruments are to be presumed to be complete integrations of the parties' agreement. It further strips from the traditional rule an evidentiary limitation on the determination of the integration issue. Instead, that issue is to be regarded as a question of fact, that is determined not pursuant to the parol evidence rule, but solely pursuant to the applicable rules of evidence.[221] According to Corbin, the substance of the parol evidence rule is not particularly complicated nor mystical, but perhaps the most straightforward notion of contract law; "Today may control the effect of what happened yesterday; but what happened yesterday cannot change the effect of what happens today."[222]

2.5.4 Criticism of the Corbin Rule

Corbin's approach has been the subject of much criticism. Corbin stripped from the rule its traditional exclusionary approach towards extrinsic evidence in determining whether a writing is integrated, and in his "all-out attack," it can, and has been argued, that he all but did away with the rule in doing so.[223]

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[217] Corbin, *supra* note 30, at 631.
[218] Id.
[219] This makes the parol evidence rule circular, Corbin noted for example; "The evidence that the rule seems to exclude must sometimes be heard and weighed before it can be excluded by the rule." Corbin, *supra* note 30, at 630. Wigmore also noted this and rather persuasively defended the paradox; "Thus the apparent paradox is committed of receiving proof of certain negotiations in order to determine whether to exclude them; and this doubtless has sometimes seemed to lower the rule to a quibble. But the paradox is apparent only. The explanation is that these alleged negotiations are received only provisionally. Although in form the witnesses may be allowed to recite the facts, yet in truth the facts will be afterwards treated as immaterial and legally void, if the rule is applicable." 9 Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 2430, (3d ed. 1940).
[220] Corbin, *supra* note 30, at 628-631. With regards to decisions where different courts had nevertheless barred such evidence, and employed the rule as an exclusionary rule of evidence, Corbin argued that such decisions should be "disapproved." Id. at 615-617.
[221] Thus, in Posner's figure *supra* section 1, Corbin's position is that whether W was intended as an integration of C is to be decided on the basis of W, W' and C', and any other relevant evidence.
[222] Corbin, *supra* note 30, at 607.
[223] 11 Williston on Contracts § 33:4 (4th ed.).

The approach has been criticized for being seemingly tautological in that it first admits that which it later bars.[224] As such, the mere admission of extrinsic evidence can be regarded as a violation of the rule to begin with,[225] or it can be regarded as a circumvention of the rule itself.[226] In order for the parol evidence to be applied and thereby render certain evidence inadmissible, the court must first look at all relevant evidence to determine whether or not to exclude part of the very same evidence. The court has thereby in doing so already violated the parol evidence rule.[227] Corbin was, however, well aware of this apparent paradox, and did not consider it an impediment to his rule.[228]

Corbin's rule sought to recognize the actual intentions of the contracting parties as the paramount law between them, not the written instrument. In this regard, Professor Eric A. Posner criticizes Corbin for prioritizing one actual intention over another. It can be argued that parties by reducing or evidencing their agreement in writing, thereby also express an intention with regards to how, or on the basis of what evidence, courts should evaluate their agreement in the event of a dispute related thereto.[229] The parties might, either expressly or implicitly, have anticipated the application of the parol evidence rule by a court in a potential dispute and thereby assumed that the court will limit its evidentiary inquiry exclusively to the writing when determining their contract.[230] Corbin's emphasis on enforcing the actual intentions of the parties and admitting all relevant evidence to establish those intentions might thereby override the parties' intention that the court should limit its evidentiary sources exclusively to the writing in doing so.[231] If the parties actually intended to limit the courts evidentiary inquiry to the writing, in admitting extrinsic evidence to establish their contract in a dispute would thereby override one actual intention, in the search of another.

In a more practical sense, the Corbin approach has been criticized for undermining the integrity of the written contract and thereby decreasing the level of certainty[232] and predictability often suggested as pivotal to the law of contracts, particularly in commercial transactions.[233] The Corbin approach has also been criticized for undermining courts'

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[224] Id. at § 33:5.

[225] See Justice Berk's dissent in Masterson v. Sine where he suggest that allowing a party to resort to extrinsic evidence to add to a seemingly complete writing is a direct violation of the parol evidence rule, and that "a clearer violation" of a substantive rule of law "would be difficult to conceive…" Masterson v. Sine, 436 P.2d 561 (Cal.1968) (Berk, J., dissenting).

[226] As such it has been characterized as being "maddeningly circular" 11 Williston on Contracts § 33:16 (4th ed.) and that its reasoning "partakes of a bedeviling circularity." Id. at § 33:4.

[227] Posner, *supra* note 7, at 570-573.

[228] See *supra* note 219 and text thereto.

[229] Posner, *supra* note 7, at 570-571.

[230] Id.

[231] Any such expressed intention in the form of a contract clause to that effect in the writing does not seem to have become common practice however. See Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 Tex. L. Rev. 1581, 1599-1600 (2005) ("Contracting parties who do not want the court to stray even this far from the written word can provide in their contract that the court should base its interpretation solely on the words of the contract, although I have not found a case in which such a provision was mentioned.").

[232] This was a price Corbin was ready to pay however; "Certainty in the law is largely an illusion at best, and altogether too high a price may be paid in the effort to attain it." Corbin on Contracts § 609, (1960).

[233] Judge Kozinski poignantly expressed such rather harsh criticism in the case Trident Center v. Connecticut General Life Ins. Co. where he took the opportunity to strongly criticize the Corbin inspired approach that was established in California by Chief Justice Traynor of the California Supreme Court in a case referred to as 'Pacific Gas' in the following: "Under Pacific Gas, it matters not how clearly a contract is written, nor how completely it is integrated, nor how carefully it is negotiated, nor how squarely it addresses the issue before the court; the contract cannot be rendered impervious to attack by parol evidence. If one side is willing to claim that the parties intended one thing but the agreement provides for another, the court must consider extrinsic evidence of possible ambiguity. If that evidence raises the specter of ambiguity where there was none before, the contract language is displaced and the intention of the parties must be divined from self-serving testimony offered by

reliance on a written instrument as the exclusive expression of an agreement, which is often desired by parties to commercial transactions.[234]

Recently it has been suggested that Corbin's approach is not suitable for business contracts, because a Willistonian approach is more appropriate to promote efficiency and maximizing the joint gains of a transaction because it dictates a more simple dispute resolution.[235] It has also been suggested that the Corbin approach discourages parties to be careful and precise when drafting a written contract, because it allows for the parties to add to or vary it in a subsequent judicial process.[236] If so, it would promote litigation and decrease the level of efficiency in private, as well as commercial transactions.

Much of the criticism of the Corbin approach revolves around the notion that Corbin liberalized the parol evidence rule at the expense of certainty of written instruments, which the Williston rule took great measures to safeguard. Corbin was, however, well aware of such contentions, he simply did not share the belief in the premise of such criticism, thus Corbin; "My analysis of that "rule" and its operation gives great offense to the "illusion of certainty," beloved of many. But I have read all the Contract cases for the last 12 years; and I know that "certainty" does not exist and that the illusion perpetrates injustice."[237]

2.6 The Williston and Corbin Rule and Legal Philosophy

2.6.1 Legal Formalism vs. Legal Realism

The different approaches of Williston and Corbin should be understood in context with their respective adherences to different theories or philosophies of law, namely legal formalism and legal realism. I will not thoroughly delve into this field of law, but a shorter explanation heightens the level of understanding of why and how the two rules differ from each other. It also relates the evolution of the jurisprudence of the parol evidence rule during the 20th century to the broader legal thought of the time.

Legal formalism was the dominant legal thought in American contract law in the early 20th century.[238] Williston was one of the most central scholars in the formalist movement,[239]

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partisan witnesses whose recollection is hazy from passage of time and colored by their conflicting interests." Trident Center v. Connecticut General Life Ins. Co. 847 F.2d 564, 569 (9th Cir. 1988).

[234] In a dissent to a case applying a Corbin inspired approach to the rule Justice Mosk expressed such concerns; "Given two experienced businessmen dealing at arm's length, both represented by competent counsel, it has become virtually impossible under recently evolving rules of evidence to draft a written contract that will produce predictable results in court. The written word, heretofore deemed immutable, is now at all times [sic] subject to alteration by self-serving recitals based upon fading memories of antecedent events. This, I submit, is a serious impediment to the certainty required in commercial transactions." Delta Dynamics, Inc. v. Arioto, 446 P.2d 785, 789-90 (Cal.1968) (Mosk, J., dissenting).

[235] See Curtis Bridgeman, *Why Contracts Scholars should Read Legal Philosophy: Positivism, Formalism, and the Specification of Rules in Contract Law,* 29 Cardozo L. Rev. 1443, 1449 (2008).

[236] Mark O. Morris and Elizabeth Evensen, *What's Happening to the Parol Evidence Rule? More Holes In the Dike*, 67 Def. Couns. J. 209, 219 (2000).

[237] Joseph M. Perillo, *Twelve Letters from Arthur L. Corbin to Robert Braucher*, 50 Wash. & Lee L. Rev. 755, 772 (1993).

[238] Formalism was the dominant legal thought in American contract law for about half a century after 1870, a period often referred to as the formalist era. Mark L. Movsesian, *Formalism in American Contract Law: Classical and Contemporary*, 12 IUS Gentium 115, 116 (2006). Formalism is similar to and sometimes equated with the "classical legal theory." Thomas C. Grey, *Modern American Legal Thought, Patterns of American Jurisprudence. By Neil Duxbury*, 106 Yale L.J. 493, 495 (1996).

[239] Bridgeman, *supra* note 235, note 4.

and his approach to the parol evidence rule is consistent with the tenants thereof. Formalism regards the law as a set of systematically organized logical abstractions of reality.[240] The practice of law is regarded as a process of deduction whereby rules of law are applied in an almost scientific fashion,[241] in which concerns of fairness and justice are largely displaced by an obligation of the courts[242] to fit the facts of reality into a system of logical rules of law.[243] Formalists generally regard such a logical and organized character of a legal system[244] as a necessity in order to promote stability, efficiency and predictability therein.[245] Occasional injustice rendered by courts abiding to such an approach is, thus, a necessary casualty to maintain certainty and predictability in the legal system as a whole.[246]

Corbin, on the other hand, was one of the most influential scholars in the advancement of legal realism, which was developed in the first half of the 20th century, as a reaction to the established formalism,[247] which had become the subject of much judicial criticism in the early 20th century.[248] As such, the realist movement has been characterized as an "assault on formalism across the law."[249] Legal realism purports that the emphasis on categorizing the law as a set of abstract logical rules and the application of them as a process of deduction hid the reality of law, that legal outcomes depended too much on an untidy reality that cannot be organized into predictable logical categories.[250] Realists argued that rules of law should be created not to fit a systemized logical abstraction of reality, but rather reality itself, which rarely lends itself to such an abstraction.[251] Law should conform more closely to the facts of reality.[252] In over-generalizing rules of law, a too formalistic approach is too simplistic and thereby not proper for the complexities of reality, because it largely excludes such circumstances in the practice of law.[253] Rules of law should only be as broad in their structural character as reality allows for them to be.[254] Formalism should thereby be replaced by a greater sense of realism with rules of law being more flexible and the practice thereof being more adherent to the complexities of reality.[255] Realists, however, similarly to formalists, argued that legal conclusions are to be expressed as deductions from rules of law, not as deductions from observed facts.[256] In its antithetical approach to formalism, realism also purports that the practice of law should be more sensitive to, and take into account, a

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240 Grey, *supra* note 244, at 495-497. See also Gilmore, *supra* note 65, at 74-75.
241 This is also referred to as "mechanical jurisprudence," for which Williston allegedly was an early purveyor. Bridgeman, *supra* note 235, at 1449.
242 Legal formalism, unlike legal realism, is critical of courts having too much discretion when applying legal rules to facts. Grey, *supra* note 244, at 495-496.
243 Id. at 495-497.
244 Because of its heavy focus on logic the system has been characterized as a"logician's dream of heaven." Gilmore, *supra* note 65, at 107.
245 *See* Mark L. Movsesian, *Rediscovering Williston*, 62 Wash. & Lee L. Rev. 207, 224 (2005).
246 *See* Grey, *supra* note 238, at 495-497.
247 Corbin has, in this sense, been described as a "non-establishment revolutionary", although "he never quite joined the realist movement." Gilmore, *supra* note 65, at 66-67.
248 See for example Justice Benjamin N. Cardozo, an avid "realist" in Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 91, 118 N.E. 214, 214 (1917) ("The law has outgrown its primitive stage of formalism…") See also Benjamin N. Cardozo, The Nature of the Judicial Process at. 153-154 (2005) ("… a spirit of realism should bring about a harmony between present rules and present needs.").
249 Bridgeman, *supra* note 235, at 1444.
250 Movsesian, *supra* note 245, at 272-273.
251 Grey, *supra* note 238, at 500-502.
252 Movsesian, *supra* note 245, at 273.
253 Id.
254 Id.
255 Bridgeman, *supra* note 235, at 1444.
256 Gilmore, *supra* note 65, at 110.

sense of fairness and social justice, as opposed to being a mere process of deduction wherein moral concerns are largely absent.[257]

Similar to formalism, the Williston version of the parol evidence is motivated to establish certainty and stability to written instruments. For this to be efficiently achieved, there needed to be rather extensive substantive limits on the extent to which a court could inquire about whether the parties actually intended for the written instruments as an integration of their agreement. While thereby increasing the possibility of rendering decisions contrary to the actual intentions of the parties, that was a price Williston regarded as necessary to facilitate the functionality and certainty of written instruments.

Corbin's approach to the parol evidence rule is, on the other hand, consistent with his realist approach to law in general. Corbin regarded the actual intentions of the parties as the paramount law between them, and any limitations on the courts evidentiary inquiry to establish them was thereby inappropriate. Corbin did not regard certainty in contracting as a realistic value for the law to attempt to achieve, the risk of rendering unjust decisions was a price Corbin was not ready to pay. Corbin's rule has been strongly criticized for being tautological, it lacks in logical consistency. Such criticism, however, did not impress Corbin, his rule may be seemingly tautological, but his rule is more adept to rendering just decisions, and that, is simply more important. Williston, on the other hand, regarded such a tautological approach as an impediment to the practical value of the rule and saw such an approach as reducing a strict logical rule to nothing but a quibble. For Williston, courts' barring of extrinsic evidence when determining the integration issue was a matter of logical and practical necessity, for Corbin, admitting the same evidence was a matter of realistic and fair necessity.

With that broader context in mind it is perhaps not too surprising that the less formalistic version of the parol evidence rule was developed by realists such as Corbin and Wigmore, during a time when the established legal formalism was being criticized by those two commentators in particular as well as the realism movement in general. The realist movement has been described as an assault on formalism,[258] however one describes it, the traditional parol evidence rule was one of its casualties. Williston has been credited with being one of the protagonists in establishing formalism in American contract jurisprudence.[259] Corbin, on the contrary, has been called an "engineer of its destruction."[260] With regards to traditional parol evidence rule, Corbin was precisely that.

2.6.2 Subjectivism vs. Objectivism

The Williston and Corbin rules bear traits of two diametrical approaches to contract formation, namely a subjective approach[261] and an objective approach. It should be emphasized however, that the parol evidence rule deals with a separate intention than the intention to enter into an agreement. The application of the parol evidence rule is premised upon the existence of a valid contract,[262] the intention to enter into an agreement is already established. The rule focuses on the intention to be bound exclusively, partially, or not at all

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[257] *See* Grey, *supra* note 238, at 495-497.
[258] Bridgeman, *supra* note 235, at 1444.
[259] Gilmore, *supra* note 65, at 63.
[260] Id.
[261] Also referred to as the "meeting of the minds" theory or the "actual intent theory" or "will theory." Ricketts v. Pennsylvania R. Co., 153 F.2d 757, 760-761 (2d Cir.1946). Please take note that I do not make reference to "the" approach. There is a myriad of different subjective and objective approaches in contract law.
[262] See section 10.1 *infra* for more on this subject.

to the undertakings evidenced in a written instrument.[263] The focus of the rule is thereby not on whether the parties intended to enter into a contract, but to what they entered into.

Williston avidly adhered to the objective theory of contracts,[264] according to which the subjective intentions of the parties, insofar as they were not manifested objectively, are irrelevant to the court when deciding whether a contract was formed, and what it consists of.[265] The Williston approach can be regarded as a buttress[266] of an objective approach to contract law in the sense that it subordinates the intentions of the parties to a contract to the appearance of intentions as reflected in a writing.[267] In light of such a perception of intentions as related to a written instrument, a court, when deciding the issue of integration, would naturally admit extrinsic evidence only insofar as the writing itself would be inconclusive in that regard. For a strong objectivist such as Williston,[268] his approach is consistent with that perception and, insofar as it privileges the appearance of intention over actual intention, it can be regarded as a buttress of an objective approach to contract law.[269] It is however less rigid that the traditional common law approach toward contracts under seal where the parties' intentions and their contract were exclusively derived from the substance of the sealed document irrespective of how inaccurately the document represented the parties' actual agreement.[270] The original parol evidence rule was consistent with the objective theory of contract in that it regarded a writing as the final and exclusive integration of the parties' agreement by default, irrespective of whether the parties had such intentions. The Williston approach, relaxed the objective character of the rule somewhat as it holds a writing integrated if it appears as such on its face. In doing so, the Williston approach rejects the notion of integration by default, and embraces the notion of integration by intent, but limits the inquiry of such intent primarily to the four corners of the writing.

Williston regarded the parol evidence rule as inherently objective, he even perceived the logic of the rule an argument, in itself, against a subjective theory of contracts.[271] Under the subjective theory, objective expressions are regarded as evidence of a subjective intent. But under the parol evidence rule, insofar as it is a substantive rule of law and not a rule of evidence, the objective expressions as pertained in a writing, are regarded not as evidence of subjective intent, but as the exclusive source of the parties' agreement. The parol evidence rule then, when being regarded as substantive, makes subjective intent immaterial to establish the terms of a contract. This being the central notion of the objective theory, Williston seemed to interpret the parol evidence rule as one that would verify his objective approach to

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[263] Murray, *supra* note 2, at 1353-1354.
[264] In fact, he was called "the leader of the objectivists." Ricketts v. Pennsylvania R. Co., 153 F.2d 757, 762 (2d Cir.1946).
[265] This theory is judicially expressed poignantly in a famous case decide by Judge Learned Hand, a former student of Williston's; "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party when he used the words intended something else than the usual meaning which the law imposes on them, he would still be held, unless there were mutual mistake or something else of the sort." Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911).
[266] "Another of the principal buttresses of an objective approach to contract law was and still is the parol evidence rule." Perillo, *supra* note 49, at 444.
[267] Id. at 435.
[268] Id. at 440.
[269] The traditional parol evidence rule been said to be "Philosophically based on the objective theory of contracts." 11 Williston on Contracts § 33:5 (4th ed.).
[270] Perillo, *supra* note 49, at 434-435.
[271] *See* Gilmore, *supra* note 65, at 48.

contract law.[272] This was, of course, before Corbin's all out attack on it.[273] The objective theory is consistent with formalism, in the sense that it aims to establish certainty, simplicity and predictability in the legal system[274] by focusing exclusively on objective manifestations which can be reviewed in a much more logical, simplistic and scientific fashion than can subjective, internal intentions. As such, the objective theory has been criticized for the same reasons as legal formalism.[275] Although, the objective theory is well established in American contract law and less debated than the ever-ongoing debate between formalists and realists.

On the contrary, the Corbin approach advocates that only the parties' actual intentions to integrate their agreement in a writing, irrespective of such appearing to be the case on the face of the writing, can be the basis for a court's application of the parol evidence rule. As such, the Corbin approach, in the sense that it favors actual intentions over apparent or fictitious intentions, can be regarded as somewhat of a subjective approach. The subjective theory of contract formation basically holds that "man is not bound by a contractual duty unless he willed it so."[276] The theory, in its purest form, therefore requires a finding of mutual subjective intent and not the mere objective manifestation of the same, in order for a contract to have been formed, hence the expressions meeting of the minds and consensus ad idem.[277] A manifestation of intent was only legally binding if it was subjectively intended as such. In contrast, under the objective theory, manifestations are regarded as legally binding irrespective of the subjective intent behind the manifestation. An objective manifestation that is generally regarded as a manifestation of intent will be held as such in law, irrespective of whether it was actually so in the mind of the individual making the manifestation. Thus, the subjective theory regards outward manifestations of intent as evidence of subjective intent, which, if the subjective intent is established by objective means, creates the contract. On the contrary, the objective theory regards manifestations of intent as binding in and of themselves, and not because they are regarded as evidence of subjective intent. Corbin, however, did not suggest that the issue of whether the parties had assented to a writing as the complete and exclusive integration thereof should be determined in accordance with the subjective theory of contracts, although that is rather apparent. Rather, his approach is more "subjective" in the sense that Corbin suggests that the writing alone will not suffice as the sole manifestation of intent. In that sense, Corbin's approach is more subjectively sensitive than is the Williston approach. Williston was comfortable with the notion of enforcing a writing as the sole memorial of parties' agreement despite an uncertainty as to whether the writing reflected the parties actual intent in that regard, Corbin, in contrast, was not comfortable with such an uncertainty.

As such, it is correct, as Williston pointed out, that the original parol evidence rule in its most rigid form, was inherently objective. Integration occurred by default, irrespective of the parties' intentions. The Williston approach as well as the Corbin approach, are both, however, somewhat subjective. A writing, as an objective manifestation of the agreement, will be regarded as integrated only if an intent to that effect is established, i.e. if they assented to

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[272] Thus Williston: "Doubtless the law is generally expressed in terms of subjective assent, rather than of objective expressions, the latter being said to be "evidence" of the former, as, for example in the so-called parol evidence rule; but when it is established that this is no rule of evidence but rather a rule of substantive law, the whole subjective theory which is sometimes rather ludicrously epitomized by the quaintly archaic expression "meeting of the minds," falls to the ground." Gilmore, *supra* note 65, at 48 (quoting 13 Williston, Contracts 32-34, 36 § 153b (Confusion Concerning Nature of Assent in Contract) (1970)).

[273] Corbin's version cannot be regarded as inherently objective, and thus, cannot be used in a similar argument.

[274] *See* Ricketts v. Pennsylvania R. Co., 153 F.2d 757, 761 (2d Cir.1946).

[275] See for example Judge Frank's concurring opinion in Ricketts v. Pennsylvania R. Co., 153 F.2d 757, 757 (2d Cir.1946) in which he articulated criticism of objectivism: "But the objectivists also went too far. They tried (1) to treat virtually all the varieties of contractual arrangements in the same way, and (2), as to all contracts in all their phases, to exclude, as legally irrelevant, consideration of the actual intention of the parties or either of them, as distinguished from the outward manifestation of that intention". Id. at 761. He continued, "Fortunately, most judges are too non-sensible to allow, for long, a passion for aesthetic elegance, or for the appearance of an abstract consistency, to bring about obviously unjust results." Id. at 764.

[276] Arthur L. Corbin, Corbin on Contracts § 106 (1952).

[277] Id.

the writing as such.[278] The two approaches differ in how to establish such assent. but nevertheless, they both embrace the notion of integration occurring only as a consequence of intent, and not by default. While the objective theory places a legal significance to manifestations irrespective of intent, it seems, that both the Williston and the Corbin approach regards a writing as exclusive and final expression of an agreement, only insofar as such intentions can be established. Therefore, the legal significance of an objective manifestation, the written instrument, with the regards to the issue of integration, will be determined by an inquiry of whether the parties assented to it as an integration, i.e. an inquiry into the parties' intentions. Such assent must have been objectively manifested to be legally operative however, and as such, both approaches are objective.[279] Consequently, neither approach can be regarded as completely subjective or objective.[280] While the Williston approach subordinates intention to the appearance of intention in a writing, the Corbin approach makes no such subordination. The Corbin approach is thereby more focused on finding the parties actual or true agreement, the Williston approach less so. As such, the Corbin approach can be regarded as subtly subjective, because of its emphasis on the actual agreement, not the appeared agreement.[281]

The core difference between the two approaches lies not in a difference in contract theory, it is not whether the parties' intentions should be established, but how they are best established. Either such intentions are to be presumed in order to safeguard the sanctity and certainty of written instruments, or they are solely to be factually inferred by looking at all relevant evidence, to safeguard the parties' true agreement. Therein lays a difference not only in method, but also in values and priorities, which are consistent with those of legal formalism and legal realism, and those of objectivism and subjectivism.

2.7 The Williston/Corbin Dichotomy – the Aftermath

There is no simple answer to the question of which of these two approaches that has become the more established in American contact law. Corbin's approach has been very influential in American contract law, but many jurisdictions still adhere to the Williston approach.[282] Of course, each jurisdiction, while generally adhering to either of the two, typically has created their own unique variation of either version. Clearly, there has been a development during the 20th century whereby courts have become much less restrictive in admitting extrinsic evidence for the purpose of determining the issue of integration.[283] Cases from before the 20th century generally applied a traditional, stricter version.[284] The traditional Williston approach had a wide jurisdictional support in the U.S. among courts in the 19th century and during the first half of the 20th century.[285] After that, Corbin's criticism gained an increasing support among legal commentators who progressively began to support his view, and from judges who began to relax the stricter Williston rule, often by making reference to

[278] Assent and intent are basically the same, at least they are commonly treated as such. The two theories are sometimes referred to as the subjective or objective theory of assent.

[279] Both approaches are thereby consistent with the so called modern objective theory of contract formation which holds that intentions create contracts, but only objectively manifested intentions. For an extensive exploration of that theory, see Perillo, *supra* note 49.

[280] It is of course rare that a doctrine of contract law can be regarded as wholly subjective or objective in every respect.

[281] Which is why the approach has been called a "subjectivist" approach. See Linzer, *supra* note 2, at 809.

[282] *See* Ross & Tranen, *supra* note 163, at 203-207.

[283] *See* Metzger, *supra* note 56, at 1398 where Metzger identifies the "modern trend toward liberality in applying the parol evidence rule…"

[284] Paolo Torzilli, *The Aftermath of MCC-Marble: Is this the Death Knell for the Parol Evidence Rule?*, 74 St. John's . Rev. 843, 847 (2000).

[285] Id.

Corbin's scholarship.[286] A significant testament to Corbin's influence is the formulations of the rule under the Restatement Second and the U.C.C., both of which largely adopted his approach.[287] The notion that the parol evidence rule somehow sanctifies a writing as the exclusive evidence of the parties agreement have been significantly undermined in judicial practice as in doctrine during the latter half of the 20th century. Nonetheless, many courts still effectuate the substantive presumption of completeness and finality to written instrument that both the Williston rule and the original parol evidence rule embraced to varying extents.[288] The notion of written instruments as being of a higher evidentiary nature than oral agreements is, however all but gone in the U.S. common law today.[289]

With regards to who, the judge or the jury, that shall determine the issue of integration there is a broader consensus in the legal doctrine as in judicial practice that this issue is to be determined by the judge. Despite Corbin's insistence that this was purely a question of fact to be determined by the jury, few courts have adopted that approach. Instead, the issue of integration is to be concluded by the judge as a matter of law.[290] Nevertheless, this process is characterized as an evidentiary process, as it obviously involves a process of weighing evidence.[291] However, this is only true insofar as the judge determines that the writing was an integration and thereby bars extrinsic evidence to the contrary. If the judge makes the contrary determination, extrinsic evidence will be admitted and the jury can override the judge's decision as a matter of law, if they find that, as a matter of fact, the writing was the final statement of the agreement. If integration is not established as a matter of law by the judge, it thereby becomes a matter of fact for the jury.[292]

In general, courts have a tendency to be more restrictive in admitting extrinsic evidence with regards to parties with a greater bargaining power and drafting skill, particularly if the parties had legal representation.[293] It has, thus been suggested that the judicial approach to the rule is less liberal, i.e. less likely to admit extrinsic evidence with regards to the integration issue, in cases involving formal contracts that has been negotiated between sophisticated parties, than in cases lacking in such characteristics.[294]

2.7.1 Restatement First vs. Restatement Second

The broader development in American contract law with regards to the parol evidence rule during the 20th century is well exemplified by the two editions of the Restatement. The Restatement largely shifted from a Williston approach to a Corbin approach between the first and the second edition.[295] The Restatement Second has more or less adopted Corbin's view whereas the first edition embraced Williston's.[296] The second restatement rejects the tenant of

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[286] Metzger, *supra* note 56, at 1396. See also Justice Traynor's reference to the scholarship of Corbin and Wigmore in one of the most famous Corbinesqu parol evidence rule decisions; Masterson v. Sine 68 Cal. 2d 222, (1968).
[287] Metzger, *supra* note 56, at 1396.
[288] *See* Flechtner, *supra* note 13, at 278-279. For an exploration of the decreasing judicial respect for written contracts, see George I. Wallach, *The Declining "Sanctity" of Written Contracts -- Impact of the Uniform Commercial Code on the Parol Evidence Rule,* 44 Mo. L. Rev. 651, 651 (1979).
[289] *See* Corbin, *supra* note 30, at 607.
[290] Martin-Davidson, *supra* note 88, at 20-22.
[291] "Because the goal has been defined as precluding the jury from even hearing the evidence of the prior agreement, the court's ultimate finding that the writing is final and complete is properly characterized as an evidentiary process." Murray, *supra* note 2, at 1347.
[292] Martin-Davidson, *supra* note 88, at 20-22.
[293] Posner, *supra* note 7, at 560.
[294] Metzger, *supra* note 56, at 1402-1403.
[295] *See* Ross & Tranen, *supra* note 163, at 203-207.
[296] *See* Id.

the Williston approach, the notion of a substantive presumption of complete integration to a seemingly complete written instrument, which was embraced by the first edition.[297]

The Restatement Second approach to the parol evidence rule instead embraced the tenants of Corbin's rule; the notion that a writing itself cannot prove its own completeness,[298] and that the law does not dictate a substantive presumption of complete integration to an agreement reduced to a writing.[299] Thus, all relevant evidence should to be admitted to establish whether a writing is integrated, and whether an integration is partial or complete.[300] Furthermore, the rationale of the parol evidence rule under the Restatement Second, is, as Corbin argued, simply that a later agreement discharges prior agreements within its scope.[301] Thus, the rule can be characterized as a rule of discharge under the Restatement Second.

2.7.2 The U.C.C. version of the Parol Evidence Rule

The U.C.C. codified a version of the parol evidence rule and the version therein represents the only codified version of the rule that I will address in this essay.[302] Contrary to the jurisprudence of the common law, the rule in the U.C.C. is self-executing and relatively uncomplicated, as such, an examination of it illustrates an oft forgotten point; the rule does not have to be a "maze of conflicting tests, subrules, and exceptions."[303]

The Uniform Commercial Code modified the common law doctrine of the parol evidence rule somewhat. The Code's version of the parol evidence rule was intended to liberalize the rule and rejected the traditional presumption that a writing constitutes a complete integration.[304] It has been suggested that the U.C.C. almost did away with the common law parol evidence rule.[305] The U.C.C. version of the rule was heavily influenced by Corbin's criticism of the traditional version and liberated it somewhat from its prior formalistic restraints.[306] Under the U.C.C., extrinsic evidence may not be used to contradict a writing that was intended by the parties as a final expression of their agreement. Even though the U.C.C. does not use such terminology, a writing intended as final is treated as a partial integration, and a writing that is intended to be final as well as complete, is regarded as a

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[297] See Restatement (First) of Contracts § 240(1)(b) cmt d and compare with Restatement (Second) of Contracts § 216(1). The fact that the Restatement First adopted Williston's approach is, however, not that surprising, he served as Chief Reporter. Gilmore, *supra* note 65, at 66. Corbin was not personally involved in the formulation of the Restatement (Second) of Contracts, his scholarship was an important source however. Murray, *supra* note 2, at 1356.

[298] Restatement (Second) of Contracts § 210 cmt b.

[299] Restatement (Second) of Contracts § 216(1).

[300] Id. § 214 1-b. See also id. at § 235 cmt c. ("Whether a writing has been adopted as an integrated agreement is a question of fact to be determined in accordance with all relevant evidence.").

[301] Id. § 213. For an excellent analysis of the the parol evidence rule under the Restatement (Second) of Contracts and Corbin's influence thereon, See Murray, *supra* note 2.

[302] The U.C.C. Section 2–202 reads; Final Written Expression: Parol or Extrinsic Evidence.
Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
(a) by course of dealing or usage of trade (Section 1–205) or by course of performance (Section 2–208); and
(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

[303] Sweet, *supra* note 10, at 1036.

[304] *See* Ross & Tranen, *supra* note 163, at note 42 (citing Michael Schiavone & Sons, Inc. v. Securalloy Co., 312 F. Supp. 801, 804 (D. Conn. 1970)). See also UCC Official cmt 1 (a) - § 2-202.

[305] Bridgeman, *supra* note 235, at 1453-1454.

[306] Professor Karl Llewellyn, a former student of Corbin and an avid "realist," served as Chief Reporter. Bridgeman, *supra* note 235, at 1453-1454.

complete integration, and may, thus, not be contradicted or supplemented by extrinsic evidence. Thus far, the U.C.C. does not differentiate itself from the common law rule. It is more the process by which a court should determine this issue, where the U.C.C. embraces Corbin's approach. The official comments to the U.C.C. directs courts to admit extrinsic evidence to determine whether the writing was agreed upon as a partial or complete integration of the parties' agreement. Only thereafter can any such evidence be excluded.[307] In its all inclusive approach towards evidence, the official comments explained that the U.C.C. was intended to enable courts the identify the parties' "true understanding."[308] As such, the parol evidence rule of the U.C.C. can be regarded as 'realist' in its method, and 'subjectivist' in its ambition. The U.C.C. approach has been praised for providing courts with both a clear substantive rule, and a clear method for how to apply it.[309]

2.7.3 The Future of the Williston/Corbin Dichotomy

Despite both the Restatement Second and the U.C.C. it is important to emphasize that with regards to the parol evidence rule, a conclusion is rarely mandated. It is fair to say that Corbin's approach has been the more influential approach in the latter part of the 20th century, but whether a Corbin or a Williston approach is more likely to be applied in any given case, is a question that can only be answer with regards to each jurisdiction respectively.[310] Even within the same jurisdiction it is, however rather common to find contradictory cases.[311] American contract law is, and has never been, a uniform body of law but rather an ever changing jurisprudence.[312] Williston's formalistic scholarship has undergone somewhat of a resurgence recently in American contract law.[313] It has also been argued that American contract law experience generational shifts between formalism and realism.[314] Consequently, which version of the parol evidence rule that is considered good law in each jurisdiction can be answered only with reference to a certain point in time. As time changes, so does the parol evidence rule. The parol evidence rule has not been uniform or consistent for a longer period of time in 400 years, that is not likely to change.

2.8 Exceptions

There are a few exceptions to the parol evidence rule that are commonly discussed in doctrine and are frequent issues in court proceedings relating to the rule. These exceptions are, however, not necessarily exceptions to the rule itself, but rather certain legal acts that either are beyond the scope of the rule's application, or such legal acts that prevent the rule

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[307] U.C.C. § 2-202 cmt. 3.
[308] U.C.C. § 2-202 cmt. 2.
[309] Zuppi, *supra* note 1, at 240.
[310] For example, the state of New York basically adheres to the traditional Williston approach whereas the state of California basically adheres to the modern Corbin approach. Linzer, *supra* note 2, at 810-817.
[311] "Perhaps most states are consistently erratic." Calamari & Perillo, *supra* note 143, at 343-44. See also Posner, *supra* note 7, at 540. ("In virtually every jurisdiction, one finds irreconcilable cases, frequent changes in doctrine, confusion, and cries of despair.").
[312] Gilmore, *supra* note 65, at 111-112. It has been eloquently suggested that in the common law, "change is the only constant." Gilmore, *supra* note 184, at 1048 ("Law, like a radioactive substance, renews itself through a process of continual decay. The disease which threatens to destroy the *corpus juris* sets in motion the antibodies which enable it to survive. In the nature of things, crisis, after a period of repose, can be succeeded only by crisis. Change is the only constant.") (emphasis in original).
[313] Movsesian, *supra* note 245, at 211-212. See also Movsesian, *supra* note 238, at 115.
[314] Bridgeman, *supra* note 235, at 1483-84. American contract law is sometimes characterized as swinging pendulum of legal thought between formalism and realism. Gilmore, *supra* note 65, at 112.

from being applicable to begin with.[315] As such these exceptions do not add anything of substance to the rule, but clarifies the outer limits of its substantive scope.

2.8.1 Avoidance Doctrines

Attempts to establish that the purported written contract is unenforceable on the basis of any avoidance doctrines such as mistake, fraud, illegality or unconscionability by use of extrinsic evidence are always allowed, in spite of the parol evidence rule.[316] This concept is commonly referred to as an exception to the rule whereas, in fact, the application of the rule is premised upon the existence of a valid and enforceable written contract. In the absence of such an agreement the rule never comes into play.[317] Nevertheless, this concept is still referred to as an exception, which may have its origin in the fact that contracts under seal, the doctrine from which the parol evidence rule developed, were originally not susceptible to any claims of unenforceability at all.[318]

Along the same reasoning, extrinsic evidence will always be admitted to show that the written contract never came into existence due to the inoccurrence of an extrinsic condition. To complicate this straightforward notion however, some courts make a distinction between conditions of formation and conditions of performance. Extrinsic evidence of the former is always admitted whereas some courts bar the admission of extrinsic evidence of the latter. The difference of the two being that the inoccurrence of a condition of performance does not make the entire contract unenforceable but merely the performance, whereas the inoccurrence of a condition of formation establishes that the contract never became operable to begin with. An extrinsic condition of performance, not contained in a completely integrated written agreement, will thereby add to it because the contract is still partly valid.[319]

2.8.2 Collateral Agreements

After a written instrument has been concluded by a court to have been intended as either a partial or a complete integration, that writing does not deprive an entirely separate agreement between the same parties, consistent with the substance of the integrated agreement, of its legal validity.[320] Such agreements are commonly referred to as collateral.[321] A collateral agreement is usually defined as an agreement that is (i) independent of and not inconsistent with the express and implied terms of the integrated written agreement and (ii) of a subject matter not ordinarily expected to be included in that contract.[322] There is thus an inherent limit to what a complete integration of an agreement can accomplish in terms of discharging prior agreements. That outer limit of a complete integration, and thereby the

[315] Daniel, *supra* note 14, at 249.
[316] Daniel, *supra* note 14, at 254-55.
[317] Id. Professor Eric A. Posner suggests that the fraud exception “swallows” the parol evidence rule. Posner, *supra* note 7, at 536. This is true with regards to the Williston rule. If the exception is recognized by the court, a party whose extrinsic evidence has been barred, can always argue that the evidence should be admitted because it purports to show that the contract is void on the basis of an avoidance doctrine. Thus, pursuant to the fraud exception, the court would have to admit the evidence it had previously barred.
[318] *See supra* section 2.1 regarding contracts under seal.
[319] Daniel, *supra* note 14, at 256-57.
[320] Perhaps the most common situation where this ”exception” is at play is with regards to terms of an integrated writing that are normally not included in the writing, for practical or other reasons. The issue is thus, if, despite a writing being held as a complete integration, it can, nevertheless, be supplemented by consistent terms.
[321] Daniel, *supra* note 14, at 249.
[322] Id. at 250-51.

substantive limit of the parol evidence rule, is defined by the collateral agreement exception.[323]

If a term is omitted from an integrated writing a party attempting to introduce evidence thereof can argue either that the writing is only a partial integration and thus the term should be admitted because it does not contradict the writing, alternatively the party can argue that even though the writing is a complete integration, evidence of the terms should be admitted because it was natural to omit and is thus to be regarded as a collateral agreement. Thus, after a court has determined that the parties intended a writing to be a complete integration, the court has to determine the scope of the writing, i.e. to what an extent it discharges and displaces other agreements between the same parties.[324] That which falls outside that scope, is to be regarded as collateral to the writing and not affected thereby, and thus beyond the substantive scope of the parol evidence rule. This inquiry is in part an issue of examining the intent of the extent to which the parties have integrated the writing. If the parties intended to have one single written memorial as an integration of their entire legal relation to one another, then any agreement related to any subject matter would not fall under the collateral agreement exception. However, the definition or test of a collateral agreement includes a determination by the court as to whether the agreement might be ordinarily or naturally expected to be made as a separate agreement outside the writing for parties situated under similar circumstances.[325] In that sense, its definition bares traits of an objective test, insofar that a court should consider whether the agreement in question would ordinarily be expected to have been included in the writing, or kept as a separate agreement. This introduces a test that, unlike both the Williston and the Corbin approach, focuses not on what the parties did, but what would have ordinarily been done in their place.[326]

It is commonly noted in doctrine, that the process by which courts approach this exception is similar to the way in which a court determines the issue of partial versus complete integration.[327] The notion of a collateral agreement is similar to the notion of a partial integration in the sense that they both address the same issue, namely, the extent to which an integration discharges an additional agreement. A finding of partial integration precludes only agreements that are contradictory to the writing, a finding of a complete integration permits only evidence of collateral agreements to be introduced for the purpose of their enforcement. The difference, however, is significant as to how courts generally approach these two issues. While the issue of complete vs. partial integration is primarily one of intent, the issue of the extent of a complete integration is partially one of intent, partially an issue of what is regarded as natural. The law dictates an inherent legal limitation to the act of integration, insofar as the parties' intentions in this regard cannot be established, which is

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[323] In Posner's figure *supra* section 1, a collateral agreement would be defined as an agreement outside the circle. The scholarship regarding this exception thus has to do with how courts should define the limits of the circle.

[324] This issue is also closely related to how the parties has drafted a possible merger clause, see *infra* section 2.9 for more on this.

[325] "This test is commonly known by the adverbs used by the courts which apply it, and might be variously called the "naturally" test, the "naturally and normally" test, the "ordinarily" test, or any of a host of words used by the courts to indicate that parties similarly situated might reasonably have believed it appropriate to keep the two agreements separate." Williston on Contracts § 33:25 (4th ed.) (footnotes omitted). See also Restatement (First) of Contracts 240(1)(b) for the same view. Corbin, however, suggested that even in situations where it would have been unnatural to make the alleged collateral agreement, evidence thereof should still be admitted and if it is established that the agreement was actually made and the parties actually intended it to survive the subsequent integration, it should be upheld. Corbin, Contracts § 485 (1960). As such, Corbin's definition of a collateral agreement was entirely dependant upon actual intent, not on an objective test. His view on this issue has however not been as influential as his similar view of the integration issue.

[326] Olson, *supra* note 19, at 935.

[327] Daniel, *supra* note 14, at 252-53.

defined by that which is considered as natural, or any other term that characterizes the definition of the limit as one that exists outside the realm of what the parties' actually did, but what would ordinarily have been done in their place.[328]

2.8.3 Implied in Law Agreements

A rather complicated but important issue is whether the parol evidence rule will bar extrinsic evidence for the purpose of rebutting a term that is not contained in the writing but is to be presumed or implied in law.[329] An implied term is one that is imposed by the court to fill a gap in the agreement, hence the judicial process is commonly referred to as gap filling.[330] The situation in which this peculiar issue would arise is one that is not particularly uncommon. Assuming the parties orally agree on a term during the negotiations, for example a warranty, a time of performance or delivery or something of the like, but does not include that term in the writing for whatever reason, and agrees upon a complete integration of their agreement in that writing. Should a dispute arise regarding that omitted term, the term will be implied in law, because of the gap in the writing. Will then, pursuant to the parol evidence rule, the prior oral agreement be regarded as immaterial and can as such not be used to fill the gap. The situation is rather peculiar because if such is the case, the court would hold the parties to an agreement contradictory to the one they actually made, albeit not included in the writing. This situation is not likely to occur under the Corbin approach however, as the oral agreement, if not disputed by either party,[331] will make it virtually impossible for the writing to be regarded as a complete integration. As such, the term not included in the writing and not contradictory to the substance thereof, will be admitted. Under the Williston approach however, the situation could easily arise, because evidence of the oral agreement would not even be considered if the court held the writing to be a complete integration if it appeared as such on its face. The court would then be faced with the following issue; does the parol evidence rule protect only the express terms of a writing, or implied terms as well? The same issue, alternately stated would be; does the parol evidence rule exclude implied terms from being supplemented a completely integrated writing as it does with express terms to the same? This issue is also important with regards to whether the legal obligations of parties to a completely integrated writing can be derived from implications in law, or exclusively from the writing. If an implication in law is permitted, parties to a completely integrated contract cannot be assured that their only legal obligations are those expressed in the writing.[332]

Unfortunately there is little consistency in the ways in which courts from different American jurisdictions approach this issue. Some courts regard implied terms as being as much apart of the contract as express terms and will consequently supplement a completely integrated writing with implied terms and bar evidence of prior oral agreements contradicting such implied terms.[333] Thus, for example, where a writing is silent with regards to the time

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[328] 11 Williston on Contracts § 33:25 (4th ed.).
[329] Martin-Davidson, *supra* note 88, at 16.
[330] Hadjiyannakis, *supra* note 2, at 41.
[331] Under the Corbin approach, the situation could arise if either party claimed that the integration was intended as complete and therefore the prior oral agreement was rescinded. If the prior oral agreement has been rescinded as a consequence of the subsequent integration, it cannot rise from the dead to fill a gap in the writing. As such, the court would have to resort to implied in law terms, and as such, the issue is not particularly complicated, or at least relatively uncomplicated, under the Corbin approach.
[332] Hadjiyannakis, *supra* note 2, at 37..
[333] "It is a well-settled principle that that which is implied by law becomes as much a part of the contract as that which is therein written, and if the contract is clear and complete, when aided by that which is imported into it by legal implication, it cannot be contradicted by parol in respect of that which is implied any more than in respect of that which is written." Standard Box Co. v. Mutual Biscuit Co., 10 Cal. App. 750, 750-751 (1909).

for performance of a contract, but a reasonable time is implied in law, evidence of an agreement by the parties that the time for performance is other than that implied in law time would not be admissible.[334] Other courts regard a complete integration as an intention to exclude implied terms.[335] Some courts will avoid implying terms only if the parties explicitly agreed to do so.[336] Other courts allow for extrinsic evidence of prior agreements to rebut that which the court would otherwise imply by operation of law.[337] Given the inconsistent judicial approach to this issue, an attempt at a conclusion is unwarranted.[338] However, it is clear that, to the extent parties to a written contract want to be assured that courts will not imply terms where the memorandum is silent, the parties should expressly agree upon that and draft a clause to that effect. An agreement of a complete integration will not necessarily have that effect, consequently, neither will a merger clause.[339]

2.8.4 Implied in Fact Agreements

Terms on which an integrated writing is silent, but which are implied in fact, are generally not regarded as though they were apart of the writing.[340] Writings being implied in fact as integrations cannot be contradicted however,[341] which is to be expected, because an implication of fact is based on an inference of intention, unlike an implication in law.[342] If it is shown as an implication in fact that the writing is a complete integration, that implication itself cannot be contradicted by prior agreements. Consequently, a writing between sophisticated parties represented by counsel will be more likely to be regarded as an integration because they are presumably aware of the parol evidence rule when drafting the writing and the rule could thus be implied in fact, whereas parties presumably unaware of the

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[334] California Drilling & Mach. Co. v. Crowder, 58 Cal. App. 529, 532-33, 209 P. 68, 69 (1922).

[335] See Conservative Fed. Sav. & Loan Ass'n v. Warnecke, 324 S.W.2d 471, 478 (Mo. Ct. App. 1959)("When parties reduce their agreements to writing it is presumed that the instrument contains their entire contract, and the court will not read into it additional provisions unless this be necessary to effectuate the intention of the parties as disclosed by the contract as a whole.").

[336] In Tyus v. Resta 328 Pa.Super. 11, 476 A.2d 427, 434 (Pa.Super.1984) the court stated the following with regards to whether the court should imply terms by operation of law to an integrated writing; "Such an exclusion, if desired by the parties to a contract… …should be accompanied by clear, unambiguous language, reflecting the fact that the parties fully intended such result.".

[337] See Masterson v. Sine 68 Cal. 2d 222, (1968) "The fact that there is a written memorandum, however, does not necessarily preclude parol evidence rebutting a term that the law would otherwise presume."

[338] For an extensive take on this issue, see Hadjiyannakis, *supra* note 2. It has, therein, rather persuasively and poignantly I think, been argued that because implied agreements or terms arise by operation of law and not by virtue of the parties' intentions, such agreements or terms are not to be regarded as such agreements that were agreed upon prior to the execution of an integrated writing. As such, they should neither be held to have been excluded thereby. See Id. at 72-73.

[339] A merger clause could however have that effect if it is worded in such a way that it contains such an expressed intention. But, given that merger clauses generally do not contain such language, they generally do not have that effect. See Hadjiyannakis, *supra* note 2, at 75-76. For an in-depth analysis of merger clauses and the parol evidence rule, see *infra* section 2.9.

[340] Hadjiyannakis, *supra* note 2, at 81.

[341] See for example Restatement (First) of Contracts, § 240 cmt c (1932), where this issue is addressed; "Even where the extrinsic agreement is not in terms contradictory of the integration, there may be a clear implication of fact from the writing that it fully expresses the whole bargain in regard to the matter in question. To contradict such an implication of fact by extrinsic evidence is no more permissible than to contradict the direct words of the writing. In either case the writing is inconsistent with the oral agreement. An implication, however, that is not based on an inference of actual manifestation of assent must be distinguished from an implication made by the law to fill a gap in what has been expressed .... An oral agreement if it comes within the statements in the Section is operative to establish an obligation at variance with an implication of the latter sort; and this is true wherever it may fairly be said that the oral agreement adds to and explains the writing rather than contradicts it."

[342] Martin-Davidson, *supra* note 88, at 16.

rule will draft the writing without anticipating its application in a potential subsequent judicial proceeding.[343]

2.8.5 Interpretation – the Plain Meaning Rule vs. the Parol Evidence Rule

The plain meaning rule and the parol evidence rule are often regarded, in doctrine as in practice, as closely related.[344] They seem to be so intertwined that some courts have difficulty separating them in terms of their respective applicability. The parol evidence rule, as a substantive rule of law, deals with the judicial process of defining the parameters of an agreement, which is separate from the process of interpreting the agreement.[345] It is, however, not settled among courts or commentators whether the parol evidence rule deals solely with the former issue, or includes the latter as well. According to Corbin, the parol evidence rule is not, and does not purport to be, a rule of interpretation or a rule that would affect the admission of evidence for the purpose of interpretation.[346] While the plain meaning rule and its effect of barring the use of extrinsic evidence under certain conditions is similar to the parol evidence rule,[347] the two rules nevertheless deal with different and separate substantive issues. On the other hand, both rules deal with the same procedural or evidentiary issue, namely under what circumstances can extrinsic evidence be used as a supplement to a written contract.[348] This similarity seems to have been the basis for claims that there are two parol evidence rules, one that deals with defining the terms of a contract, and one that deals with interpretation.[349] The parol evidence rules governs exclusively the issue of determining what terms will be regarded as binding between two parties, i.e. what does the contract consist of, as related to a written instruments and prior agreements.[350] As such, the parol evidence rule is not a rule of interpretation but still relates thereto, because it identifies what is the proper subject matter of interpretation,[351] or, to use another phrase, the "theme of the interpretation."[352] The rule defines the contents of the parties' contract,[353] not the meaning of the content. In contrast, the plain meaning rule, as a rule of interpretation, governs the process by which the terms or the content of an agreement is given a certain meaning for the purpose of their enforcement.[354] The plain meaning rule relates exclusively to contract interpretation and is another traditional common law rule that developed out of the limits inherent in the strictly literal approach traditionally followed in the common law with respect to the interpretation of written contracts.[355] The plain meaning rule and the traditional Willistonian

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[343] Note, *supra* note 15, at 983-84.
[344] Professor Perillo calls the plain meaning rule "a close relative" to the parol evidence rule. Perillo, *supra* note 49, at 444.
[345] Daniel, *supra* note 14, at note 28.
[346] Corbin, *supra* note 30, at 622.
[347] Professor Linzer is of the opinion that they are "conjoined like Siamese twins." Linzer, *supra* note 2, at 801.
[348] Posner, *supra* note 7, at 534.
[349] Martin-Davidson, *supra* note 88, at note 266.
[350] West Jr., *supra* note 5, at note 5 (quoting Murray, *The Parol Evidence Rule: A Clarification*, 4 Duquesne L. Rev. 337, 343 (1965-66)) ("A significant cause of confusion is the failure to distinguish between the parol evidence rule on the one hand, and interpretation on the other. The parol evidence machinery will determine only one question: whether the parties intended their final writing to be integrated. No matter how this question is decided, the meaning of the writing does not automatically become unambiguous.").
[351] 11 Williston on Contracts § 33:2 (4th ed.).
[352] Restatement (Second) of Contracts § 212 cmt. a (1981).
[353] 11 Williston on Contracts § 33:3 (4th ed.).
[354] Daniel, *supra* note 14, at 258.
[355] Michael Joachim Bonell, *The UNIDROIT Principles and CISG – Sources of Inspiration for English Courts?* 19 Pace Int'l L. Rev. 9, 15 (2007).

parol evidence rule are similar in there respective focus on the text of a written contract rather than the intent that lay behind the text.[356] The process of interpretation is, however, different from a party attempting to contradict or complement a written contract with extrinsic evidence of agreed terms that are not integrated therein.[357] That party is thereby not trying to assign meaning to the terms of the written contract, but rather trying to add to it or vary by offering evidence of a separate legal act not contained therein, such as a different agreement or representation. Should the meaning of this legal act be uncertain, the court would have to establish its meaning through the process of interpretation. It is thereby important to recognize that the parol evidence rule can only bar evidence of extrinsic agreements for the purpose of their enforcement. If the same evidence if offered for any other purpose, the court may or may not bar them, but any such exclusion cannot be based on the parol evidence rule. This confusion seems to stem from the notion that the parol evidence rule is an evidentiary,[358] rather than a substantive rule of law. As such it has been applied to render certain evidence inadmissible for other purposes than for the contradiction or complementation of an integrated writing. It is widely agreed upon by scholars today that the rule has no application to such evidence, yet some courts and commentators, although in minority, continue to hold that there is no such limitation.[359]

A term often seen in connection to the discussion of the integrity of written contracts is the term "the four corners."[360] This approach is an expression of a traditional common law approach towards the interpretation of written contracts, according to which a written contract has to be interpreted exclusively in accordance to the ordinary grammatical meaning of the words used therein.[361] Albeit pertaining to interpretation, the method is similar to the Williston approach to the parol evidence rule in its extensive reliance on the written word, and has thus become a term that is commonly used in reference to the Williston rule.[362]

2.9 Drafting the Parol Evidence Rule - Merger and Integration Clauses

The underlying tenant of the parol evidence rule is the notion that written contracts deserve some degree of protection from extrinsic impeachment at trial. As such, the rule provides a legal framework against which parties, ex ante, can make their written contract impervious to subsequent material additions or variations in a judicial proceeding, by making it impossible for either party to argue that the written instrument was the subject of additions or variations prior to its execution.[363] Contract clauses with such a purpose are known as merger or integration clauses, and they have become very common, particularly in business

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[356]Perillo, *supra* note 49, at 444.

[357] This is however not a particularly clear proposition; a party attempting to contradict a plain meaning of a term contained in a writing with extrinsic evidence can thereby also be regarded as contradicting the writing. To decide whether a part is attempting to contradict or vary the content of a written instrument, that content must first be given a meaning. That issue will be decided on the basis of rules of evidence, of which the plain meaning rule is one. Hence, it is understandable that the plain-meaning rule and the parol evidence rule are sometimes dealt with simultaneously in the legal doctrine. They are indeed intertwined.

[358] Up until the latter half of the 20th century, most text writers on rules of evidence felt obliged to deal with the parol evidence rule. See Olson, *supra* note 19, at note 12.

[359] Sweet, *supra* note 10, at 1048-1050.

[360] *See* Linzer *supra* note, 2 at 805.

[361] *See* Bonell, *supra* note 362, at 16.

[362] Linzer, *supra* note 2, at 805. See also Daniel, *supra* note 14, at 242-243.

[363] In Posner's figure *supra* section 1, it would be to protect the written instrument from arguments to that effect based upon evidence from W' or C'.

transactions.[364] Such clauses have a close relationship with the parol evidence rule, and their protection of written instruments is effective because they work in tandem with the rule.[365] Merger or integration clauses were originally employed in contracts governed by the American common law.[366] They have since, however, become widely employed in international commercial contracts as well.[367]

Generally, a merger or integration clause is used to describe an express provision of a written contract to the effect that the terms of the writing constitute the entire agreement[368] between the parties to the exclusion of any prior or contemporaneous agreements, representations, or understandings.[369] The purpose of such a clause is generally to characterize the writing as the complete integration of the parties' agreement so as to aid in invoking the parol evidence rule to protect the integrity of the writing in which it is contained.[370] The purpose is not to create a rule of evidence, according to which either party is forbidden to introduce extrinsic evidence in the event of a dispute related to the written instrument. A properly drafted merger or integration clause, will, however, have that effect. The provisions of such clauses range from rather simple statements to the effect that the writing contains the parties' entire agreement, to more comprehensive and elaborate statements in which seemingly every conceivable agreement, understanding or representation preceding the execution of a written instrument is characterized as non-binding between the parties.[371] In protecting the integrity of the writing, a merger or integration clause has to accomplish two things. Firstly, it has to establish finality to the terms contained in the writing, as such the writing mergers into it all prior agreements as related to the terms therein. Secondly, to protect the writing from claims that a prior agreement, representation or understanding did not merge into the writing, the clause must establish completeness to the writing, i.e. make the writing a complete integration, so as to make anything not contained in the writing but related thereto, discharged thereby.

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[364] Elisabeth Peden & John Carter, *Entire Agreement - and Similar – Clauses*, The University of Sydney, Sydney Law School, Legal Studies Research Paper No 07/53 at 1 (2007). See also Posner, *supra* note 7, at note 70 ("it is clear that they are extremely common.") ("they" referring to merger clauses, my note).

[365] One commentator for example suggested that attorneys "can practice preventive law by remembering the parol evidence rule not when they write their appellate briefs, but when they draft their contracts." Burnham, *supra* note 12, at 143.

[366] *See* Rod N. Andreason*, MCC-Marble Ceramic Center: The Parol Evidence Rule and Other Domestic Law Under the Convention on Contracts for the International Sale of Goods*, 1999 Byu L. Rev. 351, 371 (1999).

[367] Which is to be expected as most international commercial contracts are drafted on the basis of English or American common law contract models. Giuditta Cordero Moss. *International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith*, Global Jurist: Vol. 7: Iss. 1 (Advances), Article 3 at 1. (2007) ("It cannot be overseen that international commercial contracts are often written on the basis of Common Law contract models. Not only are they written in the English language, they frequently also adopt the Common Law legal terminology and legal structure.").

[368] Another common name is "entire-agreement clause." Peden & Carter, *supra* note 364, at 1.
These clauses are not to be confused with so called no-oral modification clauses, which deals solely with what happens after the execution of a contract, which is beyond the scope of the parol evidence rule, and also merger, integration or entire agreement clauses.

[369] Hartsfield, *supra* note 26, at 361.

[370] "A manifest purpose of these provisions is to lend such completeness to the writing as will preclude resort to familiar escape-valves which let down the bar of the Parol Evidence Rule." Hartsfield, *supra* note 26, at 361.

[371]Hartsfield, *supra* note 26, at 361. The common element of all variations seem to be the characterization of the writing as representing the parties' final and complete agreement. See Id. In its most simple form, the clause states something like "this contract constitutes the final and complete agreement between these two parties." Andreason, *supra* note 366, at 371.

2.9.1 The Origin, Purpose and Function of Merger Clauses

Merger clauses were historically associated with contracts executed by an agent on behalf of a principal.[372] Under such circumstances a merger clause serves the purpose of limiting the agent's effect of pre-contractual representations made during the negotiation that were not sanctioned by the principal and not included in the final writing.[373]

The merger clause stems from the notion that a written agreement merged into it all prior agreements as related to the subject matter of the contract, and is as such essentially a memoralization of the merger doctrine.[374] Similarly, the integration clause was presumably[375] coined and modeled after Wigmore's notion of an integration as the legal act of integrating or embodying all prior agreements and understandings into one sole memorial. As was discussed *supra*, the integration doctrine and the doctrine of merger are similar, but not identical doctrines of common law contract jurisprudence. Today it is, however difficult to make any substantive distinction between the two clauses. They seem to have become different names for the same clause.[376] Both a merger and an integration clause have the effect of stipulating that the written memorial is an exclusive expression of the parties' agreement as related to its subject matter.[377]

Against the backdrop of their respective legal doctrines however, it would be inaccurate to treat them as legal equivalents. A merger clause, if drafted pursuant to the merger doctrine, would have the effect of stipulating that one agreement merges into it one or more prior agreements, understandings or representations between the same parties.[378] The prior agreements, understandings or representations that were merger therein are thereby displaced and distinguished, as dictated by the merger doctrine. A merger assumes the existence of a valid prior agreement, or understanding, which was later merged into a subsequent agreement, either by default insofar as the subsequent agreement is inconsistent with the previous, or by intent insofar as the subsequent agreement is not inconsistent with any previous agreement.

Somewhat differently, an integration clause, if drafted pursuant to the integration doctrine, has the effect of stipulating that a written memorial is a complete or partial integration of the parties' agreement. As such, the writing, as dictated by the integration doctrine, becomes the sole legally recognizable representation of the parties' agreement as related to its subject matter.[379] Thus, the written memorial will be deemed an integration,

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[372] 11 Williston on Contracts § 33:21 (4th ed.).

[373] Id.

[374] See Sunchase Apartments v. Sunbelt Serv. Corp., 596 So. 2d 119, 122 (Fla. App. 1992) ("merger clause" is "a clause which states that all oral representations or agreements are merged into and subsumed by the written document of which the clause is a part.").

[375] I haven't been able to trace the name "integration clause" to the doctrine of integration. But given how they share not only the name but also the substantive content and are both of common law origin, I dare to suggest that the integration clause was modeled on the basis of the legal doctrine of the same name.

[376] They are frequently referred to as the same clause, see for example CISG-AC Opinion no 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, 23 October 2004 at note 54. See also 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, 45 (1988).

[377] A merger clause does not, however, affect the interpretation of the written memorial. See for example The Second Restatement which concludes that a merger clause does not control the interpretation of the written terms of the contract. Restatement (Second) of Contracts § 261 cmt e.

[378] Peden & Carter, *supra* note 364, at 10.

[379] "When a contract contains a merger clause, the agreement is deemed to be an "integrated agreement," such that evidence of prior or contemporaneous agreements shall not be admitted to contradict the terms of the agreement." Ex parte Palm Harbor Homes, Inc., 798 So. 2d 656 (Ala. 2001).

either partial or complete,[380] and as such, an integration clause serves the purpose of contractually stipulating the legal fact of integration with regards to the written memorial in which it is employed.[381] In doing so, an integration clause contractually invokes the parol evidence rule to be applied to the written memorial.[382] The clause can, as such, be regarded as a trigger of what would otherwise be the rule upon a finding of either partial or complete integration.[383] Thus, an integration clause works in tandem with the parol evidence rule to make the written instrument unsusceptible to subsequent material variation or addition at trial. As such, an integration clause assures the full application of the parol evidence rule, but does not purport to import a protection of a written instrument that goes beyond the limits set forth under the rule.[384] The clause can, thus, not protect the integrity of a written contract to a greater extent than what the parol evidence rule can, i.e. the exceptions to, and the limits of the rule still applies. Thus, for example, an integration clause will not prevent a party from showing facts that prevent the writing from constituting a contract, like the parol evidence rule, a merger clause comes into play only after it has been established that the writing in which it is contained is a valid contract.[385]

Despite the fact that these two clauses originated from different legal doctrines, they have become a name for a clause that is substantively more closely related to the integration doctrine because such a clause generally stipulates or characterizes the writing in which it is contained as the entire agreement between the parties, i.e. a complete integration. Such a stipulation has significant legal implications pursuant to the integration doctrine and the parol evidence rule, less implications pursuant to the merger doctrine. Hereinafter I will, nonetheless, refer to such a clause as a merger clause.

2.9.2 A Statement of Fact vs. a Separate Agreement – Merger Clauses under the Williston and the Corbin Rule

A merger clause can be regarded as either a statement of fact, i.e. that it characterizes the writing in which it is included is either a partial or a complete integration, or as an agreement, in itself between the parties to the contract to discharge all previously made agreements and understandings related to the subject matter of the writing.[386] This is perhaps a subtle difference, but one that has important consequences with regards to the extent to which they respectively protect the integrity of a written instrument, and their respective dependence on the parol evidence rule to do so.

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[380] Of course, the writing could be regarded as an integration without a merger clause. The factual inquiry by the court may very well lead to that conclusion, be it after an all-inclusive Corbin approach, or a restricted Williston approach, despite the lack of such a clause in the written instrument.
[381] The Restatement (Second) of Contracts § 242 cmt e suggest that a merger clause "if agreed to is likely to conclude the issue whether the agreement is completely integrated."
[382] 11 Williston on Contracts § 33:21 (4th ed.). See also for example Jarecki v. Shung Moo Louie, 95 N.Y.2d 665, 669 (2001) ("The purpose of a merger clause is to require the full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to alter, vary or contradict the terms of the writing. The merger clause accomplishes this purpose by evincing the parties' intent that the agreement 'is to be considered a completely integrated writing."). See also Ritter v. Grady Automotive Group, Inc., 973 So. 2d 1058 (Ala. 2007) ("A merger clause invokes the parol evidence rule, which precludes a court from considering extrinsic evidence of prior or contemporaneous agreements in order to change, alter, or contradict the terms of the integrated contract."). See also Hartsfield, *supra* note 26, at 374.
[383] 11 Williston on Contracts § 33:22 (4th ed.).
[384] *See* Id. at § 33:21.
[385] Hartsfield, *supra* note 26, at 373.
[386] Martin-Davidson, *supra* note 88, at 33.

If a merger clause is employed as a statement of fact, i.e. that the writing represents the entire/complete agreement, then such a statement can be easily challenged by either party establishing that there are indeed representations, understandings and/or agreements that were made but not included in the writing, assuming such evidence will be admitted pursuant to the Corbin rule. That would establish that the writing is not a complete integration of their bargain, and anything that is not contrary to the substance of the writing remains unaffected.

However, an integration clause that functions not as a characterization of the writing as a complete representation of the agreement but as a separate agreement to discharge prior agreements, understandings and representations between the parties can be however extensive in its scope as that agreement stipulates. A merger clause, as a statement of fact, is, however it is drafted, limited to the subject matter of the writing to the effect that a court must determine whether an asserted prior agreement is within the scope of the writing, and not collateral thereto, by consequence of the scope of a complete integration being defined by the collateral agreement "exception" to the parol evidence rule. Consequently, a statement of fact that the writing represents the complete agreement and that there are no other agreements, understandings or representations related thereto functions as a mean for the protection of the writing only if the court adheres to a strict Willistonian parol evidence rule. Otherwise, as Williston highlighted, the mere showing of an additional agreement outside the writing shows that such a statement is, in fact, inaccurate. If such evidence is admitted, a party arguing that there is an additional term to the contract,[387] would only have to establish that that term was agreed upon, at which point the merger clause would be proven inaccurate and thus unenforceable, and the term can and should be enforced. Thus, a merger clause as a statement of fact is an effective mean of protecting the writing only under to the Williston rule, as it depends on the strict evidentiary approach thereof, i.e. it works in tandem therewith. If the determination of completeness of the writing is done by resorting to extrinsic evidence, a merger clause as a statement of fact will not affect any actual agreements, understandings or representations insofar as they can be established. On the contrary, a merger clause as a separate agreement is not dependant on such an evidentiary limitation. According to Corbin, a clause in a written contract that states that there are no previous understandings or agreements not contained in the writing is a way for the parties to express the intention to nullify antecedent understandings and agreements.[388] Thereby, any antecedent warranty, wavier or any other extrinsic understandings is discharged by the written agreement.[389] Depending on the wording of such a clause, the parties may have intended to exclude only express understandings, and not such that are implied in law, such as warranties that are attached to the contract on grounds of public policy. The coverage of the clause, like any other, is a matter of interpretation.[390] With regards to a merger clause employed as a separate agreement, the only material issue for the court would be whether that separate agreement to discharge any prior agreement, understanding or representation between the parties, was actually made.[391] If that is established, it does not matter if any prior agreements, understandings or representations were in fact made, or how credible the evidence thereof may be, because, if the subsequent agreement to discharge them was made, they have become immaterial as a consequence thereof. And, like Corbin pointed out, it

[387] In Posner's figure *supra* section 1, that would be an additional term on the basis of evidence pertaining to W' or C'.

[388] Corbin, *supra* note 30, at 620-622.

[389] Id.

[390] Id. at 621.

[391] Thus, in Posner's figure *supra* section 1; if it is in W agreed upon to discharge W' and C', all evidence relating thereto becomes immaterial.

would thereafter be a waste of time for a court to hear evidence purporting to establish an immaterial fact.

2.9.3 The Legal Review of Merger Clauses

The judicial review of a merger clause will be significantly different by a court adhering to the Williston[392] relative to the Corbin rule.[393]

Corbin argued that a writing itself cannot prove its own completeness and finality. Even if the writing contains a merger clause to that effect, that does not necessarily make it true.[394] If either party challenges the accuracy of the clause in the sense that the writing in which it is contained is in fact not an integration of the parties' agreement, or that it was agreed that the clause would cover only part of the writing, the court must, of course, determine whether the clause is an accurate characterization of the writing, and if so, to what extent. Because Corbin rejected to notion of written instruments being the sole evidence of the parties' intentions to integrate their agreement therein, the accuracy of a merger clause will be reviewed in light of all relevant evidence. Thus, a merger clause, pursuant to the Corbin rule, has the effect of being merely persuasive evidence that the written contract is, in fact, integrated.[395] Thus, a merger clause is only one of many factors that a court will consider when deciding the integration issue in a Corbin jurisdiction. Other factors commonly include a comparison of the extent of the prior negotiations and the writing and the level of detail of the written contract.[396] Of course, even if the clause was in fact assented to, the clauses, like any other, can be deemed unconscionable, and thereby unenforceable.[397]

On the contrary, in a Williston jurisdiction, by consequence of the limited evidentiary approach with regards to the issue of integration as dictated by the Williston rule, a merger clause in the written memorial will be regarded as conclusive evidence with regards to whether the writing is integrated. The sole criteria for the court to conclude that the writing is a complete integration, is for the writing to appear as such, on its face. A merger clause will greatly facilitate such an appearance, and will therefore be more than sufficient in such an inquiry.[398] Thus, a merger clause will be treated distinctly different under the two rules: as conclusive under the Williston approach,[399] and as persuasive under the Corbin approach.[400] Of course, under both approaches the parties can argue that they never assented to the clause, a merger clause does not protect itself, or the writing in which it is contained, from an argument that it never came into existence.[401] Consequently, courts from both jurisdictions

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[392] "The merger clause is not merely a factor to consider in deciding whether the agreement is integrated for purposes of the parol evidence rule; it proves the agreement is integrated." Country Cove Development, Inc. v. May, 143 Idaho 595, 150 P.3d 288 (2006).

[393] "Under the majority rule, the presence of an integration clause or merger clause is merely presumptive evidence of a parties' intention as to integration." Travelers Cas. and Sur. Co. of America v. U.S., 75 Fed. Cl. 696 (2007) (majority rule is a reference to the Corbin rule, my note).

[394] "An agreement that we do now discharge and nullify all previous agreements and warranties is effective as long as it is not itself avoided. But paper and ink possess no magic power to cause statements of fact to be true when they are actually untrue." Corbin, *supra* note 30, at 620.

[395] "Merger clause creates presumption that writing represents integrated agreement of parties." Harbor Village Home Center, Inc. v. Thomas, 882 So. 2d 811 (Ala. 2003).

[396] *See* Heath & Son v. AT & T Information Systems, 9 F.3d 561, 569 (7th Cir.1993).

[397] *See* Franklin v. White, 493 N.E.2d 161, 165 (Ind.1986).

[398] "A written contract that contains a merger clause is complete upon its face for purposes of the parol evidence rule." Howard v. Perry, 141 Idaho 139, 106 P.3d 465 (2005). See also Daniel, *supra* note 14, at 242-243.

[399] Assuming, of course, that the writing does not clearly suggest its own incompleteness in any other way.

[400] Assuming the clause itself is not held void on the basis of any avoidance doctrine.

[401] 11 Williston on Contracts § 33:22 (4th ed.).

have held merger clauses invalid when either party was not given an opportunity for genuine assent to it, or did not properly understand the legal effects of the clause.[402]

The commonality of the merger clause[403] and its standardized wording[404] has somewhat undermined its intended legal function.[405] As a mean for protecting the integrity of a written memorial it has thus been suggested that a standardized provision is easily susceptible to subsequent challenge on the basis that it was not understood or never assented to.[406] It would therefore be inefficient to employ it without wording it so that it can easily be understood by the average layman, and inserting it into the writing so that both parties must read and assent to them before signing.[407] Furthermore, with regards to the scope of a merger clause, it should address whether the clause is restricted to express terms, or whether it should encompass such terms that will be implied in law as well. A standardized merger clause can ordinarily not be expected to exclude that which would be implied in law, in the event of a gap in the written instrument.[408]

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[402] Id.

[403] Id. at §33:21 ("merger clauses are becoming far more common, and are now ubiquitous in standard form contracts.").

[404] Merger clauses are rarely the subject of negotiation with regards to their terms, many large international law firms have standard merger clauses that are routinely included in most contracts. Peden & Carter, *supra* note 364, at 2 and 10. Professor Mooney exemplifies the rather lighthearted way in which merger clauses are ordinarily employed in written instruments: "two or more teams of attorneys meeting in a walnut-paneled conference room overlooking the Willamette River, saying to each other something like, "O.K., this is it, right?" "Right." "We agree this is our entire deal?" "Absolutely." "Then let's both initial the merger clause in paragraph 33, just to be on the safe side." "Sure, no problem. By the way, how's the new granddaughter?" Mooney, *supra* note 85, at 382.

[405] Circumstances such as when a contracting party was rushed into signing or lacked an opportunity for genuine assent to the clause, or did not fully understand it have been used by courts as invalidating grounds. 11 Williston on Contracts § 33:22 (4th ed.).

[406] Hartsfield, *supra* note 26, at 374.

[407] Id.

[408] Peden & Carter, *supra* note 364, at 15.

3 Analysis Part I

In this part I will primarily address and analyze six aspects of the parol evidence rule: (i) Its development in American contract law during the 20th century, (ii) its relation to the integration and merger doctrines, (iii) the influence of legal formalism and realism, (iv) the evidentiary aspect of the parol evidence rule, (v) its relation to merger clauses and how merger clauses should be drafted properly within a jurisdiction with or without a parol evidence rule, and finally (vi) how Wigmore's notion of integration may have displaced and discharged the parol evidence rule.

3.1 Regarding the Development of the Parol Evidence Rule in 20th Century American Contract Law – The Law and the Act of Reducing an Agreement to Writing

The parol evidence rule has developed significantly in many different respects during its 400 year tenure. The original English common law parol evidence rule mentioned nothing with regards to the concept of integration. As have been noted *supra*, that term was coined by Wigmore in the late 19th century. While the original rule was premised upon the execution of a writing, during the 20th century the applicability of the parol evidence rule became limited to what has become known as 'integrated writings.' The parol evidence rule thereby also shifted from being a rule that would exclude any prior agreement outside the four corners of the writing because such were the imposed legal consequences of reducing an agreement to writing by the law, to excluding only that which had been rendered immaterial as a consequence of the act of integration. It is no longer the act of reducing an agreement to writing that is the focus of the rule's operation, but the act of integrating an agreement in a writing. By premising the parol evidence rule on the existence of an integration, the rule operates to discharge only such prior agreements that are deemed as such as a consequence of the act of integration itself, as dictated by the doctrine of the same name. In doing so, the parol evidence rule, in American contract law, effectively abandon the notion of superiority of a written agreements over oral agreements. It is no longer the superiority of the writing, or the act of reducing an agreement to writing, that makes anything outside thereof unenforceable at law. Even if the parol evidence rule remains, the mystery of the written word, that the original rule was largely premised upon, is all but abolished. Williston did his best to preserve some of that mystery in his rule, but the doctrine of integration, which he recognized and regarded as integral to his rule, has seemingly done away with that mystery.

Under the original English common law rule, complete integration was imposed in law to a written instrument. As such, integration occurred by default. It did not matter if the writing misrepresented the actual agreement, and it did not matter whether the parties had actually made additions or variations to the writing during the negotiations, the writing was deemed the sole recognizable instrument at law. The American common law approach to the act of reducing an agreement to writing, has, however, changed considerably since then. While under the Williston approach, integration was only presumed and if that presumption was not rebutted by examining the face of the writing, it was concluded as such. Under the Corbin approach, no presumption of integration exists, it is entirely an issue of intent as derived by looking at all relevant evidence. A written instrument has, in that regard, pursuant to the parol

evidence rule, become significantly undermined. Under the original rule the parties intentions to make the writing the sole memorial of their agreement was irrelevant, the writing became a complete integration in law, independent of any factual evidence to the contrary. Consequently, it was only natural to bar any extrinsic evidence upon the introduction of a written instrument, simply because no such evidence was recognized as material with regards to the issue of what the contract consists of, after a written instrument has been established. The legal approach toward written instruments has thus developed considerably in the American common law; from being imposed as a complete integration by default, to being presumed as such at law, to, finally, being nothing but paper and ink.

One important distinction between the Williston and the Corbin approach is their different views on the substantive foundation of the parol evidence rule. While for Williston, reducing an agreement to writing makes the writing the contract which by necessity makes the writing a complete integration of all prior agreements by default of substantive law. Only insofar as the writing, on its face, appeared to be incomplete, was extrinsic evidence admitted of any prior agreement. This approach might suggest that Williston was uninterested in the parties' intentions, but that is not a proper conclusion. Williston was interested in a different intention than Corbin. Williston was merely interested in whether the parties intended the writing to be their contract. As a legal consequence thereof, all prior agreements were discharged. For Corbin, that same discharging of prior agreements occurs only as a consequence of that being the intention of the parties, i.e. the intention for the writing to integrate prior agreements.

3.2 Regarding the Parol Evidence Rule and the Integration and Merger Doctrines

If a party to a written contract argues that a term therein was varied prior to the execution of the contract, a court can rule that the prior agreement has merged into the subsequent written contract and has thus, pursuant to the merger doctrine, been displaced by default. The prior oral agreement may have been actually made, but, assuming the subsequent written agreement is not void, it has been displaced at the moment the subsequent written instrument was executed. Evidence of such a prior oral agreement can thus be barred on the basis that it attempts to establish an immaterial fact. Such a holding can be based upon the merger doctrine, and it is not necessary to involve the parol evidence rule as a substantive basis for such a ruling. Similarly, it can be held by the court that the written instrument integrated into it the prior oral agreement, which thereby, insofar as it is inconsistent with any prior oral agreement, discharged the oral agreement. Thus, it does not matter if the oral agreement was in fact made, because it has been discharged as dictated by the doctrine of integration. The court can thereafter bar any evidence attempting to establish it. Neither in that situation does the court need to invoke the parol evidence rule as the substantive basis for such a ruling.

If a party to a written contract attempts to make a material addition to the written instrument on the basis of a prior agreement, that addition will be valid and enforceable if it has not been discharged by the written contract. The oral agreement will have been discharged only if the parties intended the written instrument to be a complete integration, i.e. to integrate into it all agreements, understandings and representations related thereto. If it is established that the parties did in fact intend for the written instrument to be a complete integration, the prior agreement has been discharged as dictated by the integration doctrine. Such a discharging effect of the written instrument cannot be held as one of default, because the merger doctrine, which unlike the integration doctrine operates by default, makes inoperative only that which is inconsistent with the written instrument. In this situation there

is no merger doctrine that can be invoked by the court. That leaves the integration doctrine, which operates only if mandated by the intentions of the parties, be it actual intentions or fictitious intentions. But if such intentions are established, the prior oral agreement, complementary to the written instrument, has been discharged by the parties, and any evidence thereof is immaterial for the purpose of their enforcement. The court does not need to invoke the parol evidence rule as the substantive basis for such a ruling. The integration doctrine is the substantive basis.

3.3 Regarding the Parol Evidence Rule and Legal Formalism and Realism

The debate as to which version of the parol evidence rule that is the more appropriate one is by no means dead, and it is likely to continue for an indefinite time. Arguments for its abolishment as well as a return to the traditional formalistic version are regularly expressed in this on-going debate. This is understandable. The two versions of the rule represents not solely a choice between the intricacies of a rule of contract law, but also a broader choice between different priorities of contract law, and, in an even broader sense, a choice between the legal philosophies of formalism and realism. Consequently, it is perhaps not surprising that Corbin and Williston disagreed on not just the parol evidence rule, but, rather on almost every conceivable point of law. Neither is it surprising that the parol evidence rule and its versions, is a debate as lively and as ever-continuing as the one between legal realism and formalism. On the same note, it is understandable that the countless doctrinal and judicial attempts to establish one version over the other once and for all, have largely been unsuccessful, and those who have succeeded, are heavily critiqued and are faced with the prospect of being overthrown in due time anyway. The prospect of uniformity of the parol evidence rule is simply not realistic. Not because the rule cannot be uniform body of contract law, but because its two versions are predicated on contrasting legal priorities and contrasting legal philosophies that cannot be uniform or reconciled.

3.4 Regarding the Evidentiary Aspect of the Parol Evidence Rule

Much of the controversy surrounding the parol evidence rule stems from the notion that it is a rule of evidence, or, at least that its application has evidentiary consequences insofar that is purports to render extrinsic evidence inadmissible, i.e. the rule operates as an exclusionary rule. This is, however, an incorrect perception of the nature of the rule. What the rule does, on the basis of certain facts, is rendering certain other facts immaterial. This is articulated in the integration doctrine. Thus, any exclusion of evidence pursuant to the parol evidence rule is based on courts finding that such evidence purports to establish an immaterial fact. The notion that the parol evidence rule is an exclusionary rule is thus simply not correct.

After Wigmore dismantled the original English common law rule's operation as one of default, and instead mandated the rule's operation on the finding of intent to either partially or completely integrate the parties' agreement in the writing, much of the controversy surrounding the rule has to do with how courts should establish that intent. The original rule dictated a complete ban on extrinsic evidence after the admittance of a written instrument at trial. That only makes sense, if it is assumed in law that the act of reducing an agreement to writing is also the act of creating the contract, to the effect that anything outside thereof is

unrecognizable and unenforceable at law. Thus, the rule's operation is not premised upon the parties' intentions, complete integration occurs by default. That was the legal approach toward written instruments when the rule was created. Under such an approach, it would be only natural to bar anything extrinsic to the writing, because while there might in fact exist a parol agreement, it is not recognizable in law. When Wigmore introduced the notion of integration as the trigger of the rule, the rule mandates its application on the parties' intentions. Under such circumstances, it would seemingly be only a question of time until it was argued, like Corbin forcefully did, that if the intentions triggers the rule, why settle for fictitious intentions. A bar on extrinsic evidence in that regard becomes mysterious, in the sense that it seemingly lacks a reasonable substantive basis. Then, once it was settled that intentions mandated the rule's operation, the rule's evidentiary limitations were, at the same time, dismantled. While Corbin was the scholar who most forcefully and successfully argued to that effect, his argument was premised upon Wigmore's doctrine of integration.

Corbin's version of the parol evidence rule strips from the rule that which is most controversial and also that which is traditionally most associated with the rule, the barring of extrinsic evidence. The traditional parol evidence rule was applied before it was factually established that the writing was agreed upon as the complete and final integration of the parties' agreement, rather it was applied when that was presumed to be the case based on the face of the writing. As such, the traditional rule is partly evidential. The modern rule, however, is not, in any sense, an evidential rule. It is applied only after a determination of integration has been concluded by the court, and places no evidentiary limits on the threshold issue on which the application of the rule depends. The Williston rule is simultaneously a substantive, a procedural and an evidential rule of law; substantive in the sense that it renders immaterial anything extrinsic to a completely integrated written instrument, procedural in the sense that it dictates that the issue of integration be decided by the judge instead of the jury as a question of law, and evidential in the sense that it precludes admitting extrinsic evidence to decide the question of integration insofar as the writing appears complete on its face. The question of integration was also to be decided with the benefit of a substantive presumption of completeness and finality of written instruments. Corbin, however, stripped from the rule everything but its substantive core; today controls the jural effect of what happened yesterday, but yesterday cannot control the jural effect of what happens today.

The parol evidence rule has thus developed considerably in American contract law with regards to its evidentiary aspect. Under the original version, the rule was seemingly outside the realm of evidentiary rules altogether, in the sense that the only necessary finding of the court was a written instrument, at which point no further evidentiary inquiry was permitted, as dictated by the substantive rule of law that is the parol evidence rule. Williston conceded that the court must establish intent for the writing to be a complete integration before the rule could be applied, but insisted that that evidentiary approach be limited extensively to the writing to safeguard the certainty and predictably of written instruments. Corbin however, insisted that the issue of intent is a question of fact, to which it would be impractical for a substantive rule of law to dictate limitations on. If the purpose is to find the intentions of the parties, why limit the evidentiary inquiry to do so. Thus, the parol evidence rule, under Corbin, does not dictate any evidentiary limitations. Although the parol evidence rule itself is not evidential, the determination of its threshold issue is limited in an evidentiary sense under the Williston rule, not under the Corbin rule.

3.5 Regarding Merger Clauses and the Parol Evidence Rule

Merger clauses were designed for the Williston version of the parol evidence rule. The clause was first employed against a legal approach toward written instruments in which they where regarded as complete if they merely appeared as such on their face. A merger clauses stating simply that the writing represents the parties' entire agreement facilitates such a conclusion, and is as such an efficient way of ensuring that the writing will not be the subject of extrinsic impeachment at trial. Pursuant to the Williston rule and the original parol evidence rule, the court will not admit any evidence extrinsic to the writing that would suggest that the appearance of the writing as the parties' complete agreement, despite a clause to that effect, is inaccurate. As such, a simple standardized statement of a written instruments' completeness is sufficient to render it impervious to extrinsic challenge in a potential subsequent dispute. This was, however, only achieved because the clause functioned in tandem with the substantive presumption of the completeness of writings that the Williston rule affords them, and the strict evidentiary approach according to with extrinsic evidence was barred if the writing did not clearly rebut that presumption.

Thus, while the parol evidence rule has been revised in many jurisdictions, merger clauses have not necessarily followed suit. Protecting the integrity of a written contract is a very important aspect of contract drafting to assure a sense of certainty regarding the terms of the contract and minimizing the risk of costly litigation. Standardized merger clauses are, however, much less effective without the benefit of a rigid parol evidence, and are thereby almost deceiving to the parties to the contract who expects a merger clause to close the door on a subsequent extrinsic impeachment of the writing.

A merger clause that simply characterized the writing as a complete representation of the parties' agreement is an efficient protection of the integrity of the writing solely in a Williston jurisdiction. Pursuant to the evidentiary limitations dictated by the Williston rule, the court will not admit any evidence that would suggest that the writing was not a complete integration, and the merger clause would have a conclusive effect. If, extrinsic evidence is admitted however, the merger clause as a statement of fact can easily be undermined and even proven false by either party establishing that there were in fact additional or contradictory terms agreed upon prior to the execution of the contract. Such terms or side-agreements can be proven by email, recorded negotiations or other forms of evidence as opposed to merely testimony to that effect. If such a side-agreement is established, it will prove that a clause in the writing stating that there are no such agreements made, is false and thereby unenforceable. Thus, the original merger clause functioned effectively as a mean for protecting the writing from extrinsic impeachment only in tandem with the evidentiary limits dictated by the original and the Williston approach to the parol evidence rule. It is also in that way that a merger clause will have the effect of facilitating a court's barring of extrinsic evidence. But the merger clause excludes nothing in itself, it only facilitates the courts finding of the necessary fact, i.e. a complete integration, which triggers the application of the parol evidence rule, which has the consequence of rendering extrinsic evidence inadmissible.

However, a merger clause as a separate agreement functions effectively in a Corbin jurisdiction as well. The practical value of the parol evidence rule that Williston perceived to be much impaired if parties to a writing were allowed to introduce evidence of prior agreements outside the writing, can be savored if parties do not stipulate integration as a matter of fact, but agree upon integrating their writing as an agreement in itself. As such, the only question for a complete integration to be established and the parol evidence rule to be triggered, would be whether the parties assented to that separate agreement and not whether

they in fact did make an agreement extrinsic to the writing. There can be any number of prior agreements made that were not included in the writing, but if an agreement to discharge them has been made thereafter, it would not make a difference. Williston's concern for the practicality of the rule was valid, and it still is valid, but it can be rather easily addressed by a proper drafting of the merger clause of the writing. The only way to invalidate the effect of a merger clause as a separate agreement, is to invoke an avoidance doctrine, which is a much greater judicial challenge than to merely establish that a material representation, understanding or agreement not contained in the writing was in fact made.

It would therefore be proper to do away with the name merger or integration clause in any jurisdiction without a parol evidence rule. It would be more effective and less confusing if it was simply called 'an agreement to discharge and displace..' and then insert whatever it is that have been discharged and displaced. That would be easier for the parties to the contract to understand, and it would, perhaps more importantly, be easier for a court or arbitral tribunal to approach and judicially review, than to engage in a complex discussion of what a merger clause really is and how its function is largely dependant on a substantive rule of law that has largely been displaced. It has proven almost impossible to do away with the parol evidence rule in American contract law; perhaps it is easier to do away with the original standardized drafting of the clause it yielded instead.

3.6 Regarding the Parol Evidence Rule and Wigmore - How Wigmore's Doctrine of Integration May Have Displaced and Discharged the Rule

Wigmore noted in 1904, with regards to what he called the principle of integration, that this principle assumes that, by law or by the parties' intent, when an agreement has been integrated into a single written memorial, the act effective in law is that memorial and that no parol act is to be regarded is material for the purpose of their enforcement. This exemplifies an important development of the parol evidence rule since its origin 300 years earlier. While at first the act of expressing the parties' agreement in a single written memorial, by consequence of law, resulted in that being the exclusive evidence of their agreement. During the 19th century, much due to the influence of Wigmore and Corbin, the fact of integration no longer occurs by default in law, but rather by consequence of the intentions of the parties. Wigmore expressed the act of integration as being on that operates only if mandated by the parties' intentions. By emphasizing that the intentions of the parties to the writing was the trigger of the legal operation to discharge and displace prior agreements, understandings and representations, he also fundamentally changed the parol evidence rule. Its application is not premised upon the mere reduction of an agreement to writing, not the mere usage of written instruments, but exclusively the intentions of the parties for a writing to have that effect. The original notion of a written memorial being, by definition in law, the exclusive expression of the parties' agreement is thus all but foregone pursuant to the parol evidence rule. One such written memorial can only become effective as an integration in law, by consequence of such being the intention of the contracting parties.

What is then left of the parol evidence rule after one has stripped from it the integration doctrine and/or the merger doctrine? The integration doctrine has been said to trigger the rule. But what substantive legal effect does the parol evidence rule have after a court has applied the integration doctrine? What does the rule really add? It seems that the parol evidence rule has been largely outplayed substantively by the integration doctrine.

If one strips away from the parol evidence rule the substance of the integration doctrine and the merger doctrine there is seemingly little of substance left of the actual rule. It is thus understandable that Corbin's version of the rule is regarded by many as doing away with the rule altogether. That is, however, an exaggeration. Even if one embraces Corbin's rule, there is still much of the jurisprudence of the parol evidence rule that is important if not crucial for the integration doctrine to function properly as a doctrine of contract law. What has been perhaps somewhat misleadingly referred to as exceptions to the parol evidence rule, defines the inherent limits of integrating an agreement, either completely or partially, in a written instrument. Just like the parol evidence rule, the integration doctrine is rather simple in theory, but anything but simple in practice. Thus, the cluster of legal doctrines that have been included under the umbrella of the parol evidence rule represents an important legal backdrop against which the validity and the integrity of written contracts can be protected. While the parol evidence rule is complex and subject to many exceptions, so is the very issue of the integrity of written contracts. The parol evidence rule is a carefully developed and nuanced legal doctrine developed primarily for the purpose of protecting, if the parties' so choose, the integrity of written contracts. It is important for the law to provide a framework for the protection of the integrity of written instruments. The parol evidence rule was intended for that purpose, but has not been particularly successful. The integration doctrine, however, could seemingly be the doctrine that provides a similar protection, without the inherently confusion substantive baggage.

It seems then that the most significant contribution to the demise of the parol evidence rule as a contract doctrine for the protection of written contracts, was the introduction of the integration doctrine to contract law. The integration doctrine was not a part of the original parol evidence rule as it was developed in the English common law in the 17th century. There existed a notion similar to the notion of integration insofar as a evidencing an agreement in a sealed document was regarded as an implicit act of attesting to the documents accuracy and completeness as a representation thereof, which rendered subsequent testimony contrary thereto immaterial for the purpose of contradicting or varying the substance of the document. Similarly, the doctrine of integration does not operate by default when parties choose to reduce an agreement to writing, it is not a legal doctrine imposed by the law. On the contrary, it operates solely if mandated by the intent of the parties to make the writing the sole memorial of their agreement. If such is the intention of the parties, the law deems the writing the sole material evidence of their agreement, which renders any other memorial thereof, whatever the form, immaterial in a court's search of the parties' contract. As such, the integration doctrine can be regarded as the legal doctrine which mandates and protects the intentions of parties' to create a sole memorial of their agreement, which, is of course a crucial aspect of contract law to maintain a high level of stability and certainty in contracting.

Suggestions for the abolishment of the parol evidence rule are made on a regular basis. All these attempts have, however, been made with meager success. If the rule will even become irrelevant in legal practice, it will probably not be because there was ever a broader judicial attempt to abolish it, but rather that the rule was replaced by another doctrine with the same purpose and function, but without the inherent confusing characteristics of the parol evidence rule. This doctrine seemingly already exists. If so, the foremost engineer of the destruction of the parol evidence rule was not Corbin, but rather Wigmore. Perhaps the ultimate and most influential blow to the legal relevancy of the parol evidence rule has not been the numerous attacks the rule has endured over the years, not the countless ridicule it has been the subject of, not the international disdain it has received, but rather the mere introduction of a legal operation called integration. The parol evidence rule will probably never be abolished, but it has become gradually less legally relevant during its 400 year

tenure, and that is not because the legal issues it deals with are less relevant, but because it has become increasingly displaced and discharged by the integration doctrine.

4 The Parol Evidence Rule and the CISG

4.1 An Introductory History of the CISG

The origins of the CISG can be traced back to the early 1930s when the International Institute for the Unification of Private Law (UNIDROIT) appointed a group of European scholars to begin the process of drafting a uniform set of laws for the sale of international goods. Partly due to the interference of World War II the work was not done until 1964 when two conventions were finalized.[409] These two conventions were the Uniform Law for the International Sale of Goods (ULIS) and the Uniform Law on the Formation on Contracts for the International Sale of Goods (ULF).[410] These two conventions were primarily ratified by European nations and never obtained worldwide support, partly due to the fact that it was primarily drafted by European scholars.[411] However, these two conventions provided a natural starting point for another attempt at creating a uniform body of international law.[412] To address the concerns of other nations, the United Nations established the United Nations Commission on International Trade Law (UNCITRAL) in 1966.[413] The Commission appointed a group of legal scholars from fourteen different states of different legal traditions to prepare a text that would harmonize the different demands of international commercial law to create a convention with wide international support.[414] The work was finalized in 1980 when the United Nations Convention on Contracts for the International Sale of Goods, the CISG, was presented for signature.[415] The CISG has been described as one of history's most successful attempts at creating a uniform body of international commercial law.[416] A testament to its success is the high number of countries that have ratified the convention to this day.[417]

The CISG is a substantive law and as such it preempts the otherwise applicable domestic law.[418] It is not a procedural law and therefore does not affect the procedural or evidentiary rules of the applicable forum. The CISG applies automatically to contracts of sale of goods between parties whose place of business is in contracting states or when the rules of private international law lead to the application of the law of a contracting state.[419] Consequently the CISG does not for its application require it to have been agreed upon as the governing law of the contract if the prerequisites of its application are at hand.

An issue that was the subject of much debate during the drafting of the CISG was how to approach the problem of gap-filling, i.e. how to solve substantive issues not regulated in the

[409] Calleo, *supra* note 62, at 801.
[410] Id.
[411] Id. at 801-802.
[412] Karen Halverson Cross**,** *Parol Evidence Under the CISG: The "Homeward Trend" Reconsidered*, 68 Ohio St. L.J. 133, 139 (2007).
[413] Calleo, *supra* note 62, at 802.
[414] Id.
[415] Id.
[416] Cross, *supra* note 420, at 133.
[417] As of June 1, 2009, 74 countries were parties to the CISG. A notable exception is the United Kingdom. For a regularly updated list of signatory countries, see http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.
[418] Flechtner, *supra* note 13, at 283-284.
[419] CISG art. 1 (1)(a-b).

Convention. Two approaches are usually adopted in this regard, either the issue is resolved by resorting to domestic law or general principles underlying the Convention. The CISG adopted a compromise between the two approaches[420] whereby general principles would be the primary source and insofar as they proved inadequate, domestic law applicable by virtue of the rules of private international law would resolve the issue.[421]

4.2 The Parol Evidence Rule under the CISG

The issue of the parol evidence rule, or rather the issue of whether there should be any evidentiary limits for a party when attempting to introduce evidence to the effect of contradicting or supplementing a written contract, was subject of debate during the drafting sessions in 1980 when one of the representatives for Canada proposed an amendment to what is currently Article 11[422] that sought to establish a limitation on admissible evidence[423] in cases where the contracting parties had chosen to reduce their agreement to a written instrument.[424] The amendment sought to include a version of the parol evidence rule that is similar to the Williston approach. This suggestion was however met with much criticism, especially from a few delegates of civil law nations because it was viewed as conflicting with evidentiary principles of the civil law, according to which a court is permitted to review all evidence.[425] The Austrian delegation opposed it because it sought to limit the principle of free appreciation of evidence by the judge which was considered a "fundamental principle of Austrian law."[426] The Japanese representative opposed it because they believed the rule to be too rigid and difficult to apply, partly due to the fact that it lacked a uniform body of law even in the common law countries.[427] The proposed amendment did not receive much support and was rejected by the Committee upon vote.[428] In light of the legislative history of the CISG it is thus clear that the exclusionary aspect of the Willistonian parol evidence rule was explicitly rejected by the drafters of the CISG, and it is also clear, however, that the different versions and aspects of the parol evidence rule were not considered when the amendment was rejected.

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[420] The ULIS exclusive relied upon filling gaps by resorting to general principles, which was subsequently heavily criticized by commentators and members of the UNCITRAL. Cross, *supra* note 420, at 143.
[421] CISG art. 7.
[422] Article 11 reads; A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses. CISG art. 11. It is worth to note that this article is a clear rejection of a statute of frauds requirement. Because of a complete absence of formality requirements for contracts, the CISG is based on the principle of "formality freedom." Petra Butler, *The Doctrines of Parol Evidence Rule and Consideration -- A Deterrence to the Common Law Lawyer?* Collation of Papers at UNCITRAL -- SIAC Conference 22-23 September 2005, Singapore at 56. (2005).
[423] The suggested amendment read as follows; "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." John O. Honnold, Documentary History of the Uniform Law for International Sales at 662 (1989).
[424] Id.
[425] *See* Honnold, *supra* note 423, at 491.
[426] Id.
[427] *See* Id.
[428] Id.

Another important Article of the CISG, which has come to play an important role in how the parol evidence rule has been approached by commentators and courts is Article 8, which deals with the interpretation[429] of statements and other conduct by of a party. Article 8 reads;

(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.[430]

The first part of this article is a clear suggestion that subjective intent of the parties is to be the primary interpretative source, but only insofar as the other party knew or could not have been unaware what that intent was. When this approach is insufficient, the Article dictates that an objective test, the understanding of a reasonable person, shall be applied.[431] Article 8 is, then, an adoption of the modern objective theory of contract formation as it focuses solely on subjective intent insofar as that intent was clearly communicated to the other party. This approach is well established in American contract jurisprudence.[432]

Furthermore, Article 8(3) directs courts to give "due consideration" to "all relevant evidence" in the interpretation process under (1) and (2). This is a clear rejection of any limits to what types of evidence a party can argue along the lines of in this regard. Article 11 in tandem with Article 8(3) can thereby be said to establish a general principle that written evidence of contracts does not enjoy a special status substantively, other than having inherent practical evidentiary advantages. Accordingly, the CISG does not effectuate a presumption that a writing constitutes an integration, either partial or complete.[433] Of course, written contracts may be held in higher regard, relative to oral contracts, pursuant to the applicable rules of evidence, which, according to the general international private law principle, will be governed by the law of the forum, not the CISG.[434] However, the CISG, as a substantive contract law, does not make any such stipulation.

4.2.1 The United States Court of Appeals for the Eleventh Circuit Court Weighs in

In 1998 the Court of Appeals for the Eleventh Circuit (hereinafter the Eleventh Circuit) decided a case, MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.,[435] that has subsequently been described as "the leading case"[436] with regards to the

[429] It is important to note that the term interpretation under the CISG is used in a broad sense relative to how the term is generally used in American contract jurisprudence. It regards not solely how to assign meaning to ambiguous language of a contract but also how to assign legal consequences to different acts by the parties, i.e. how the terms of a transaction are to be found, not solely how they are to be understood. Thus, if there existed a parol evidence rule under the CISG, it would presumably be regarded as a rule of interpretation.
[430] CISG art. 8.
[431] Murray, *supra* note 376, at 48.
[432] Murray, *supra* note 376, at 48.
[433] Flechtner, *supra* note 13, at 280.
[434] Butler, *supra* note 422, at 56.
[435] 144 F.3d 1384 (11th Cir. 1998).
[436] CISG-AC Opinion, *supra* note 376, at 2.6.

issue of whether there is a parol evidence rule under the CISG. Thus, an examination of the facts of this case the reasoning of the Eleventh Circuit is warranted.

In 1990, the president of a Florida retailer of ceramic tile, MCC-Marble Ceramic, Inc. (hereinafter MCC), attended a trade show in Italy where he met the director of an Italian tile manufacturer, Ceramics Nuova D'Agostino (hereinafter D'Agostino).[437] The two representatives entered into an agreement according to which D'Agostino should deliver products to MCC.[438] The parties negotiated and agreed orally upon the price, quantity and other key terms. MCC's president thereafter signed a pre-printed D'Agostino order proposal form, in Italian, according to which the buyer was required to give written notice of defects in the merchandise within 10 days after delivery, and that default or delay in payment would permit the seller to cancel all contracts with the buyer.[439] The order form also stated that the buyer was aware of and approved the provisions on the reverse of the form. In the following months, D'Agostino made several deliveries.[440] The parties also, according to MCC, entered into a verbal requirements contract for tile after the execution of the written contract. MCC then, allegedly, complained orally about the quality of some of the delivered tiles, but did not give written notice pursuant to the order form, and thereafter withheld payments.[441] D'Agostino therefore refused to ship further tile orders. Because of D'Agostino's refusal to continue deliveries, MCC filed suit in federal district court (Southern District of Florida) for alleged defects in the received tile, and for breach of the alleged oral requirements contract by failing to continue deliveries.[442] D'Agostino counterclaimed, and argued that, pursuant to the provisions of the order form, the buyer's failure to give written notice of defects within ten days of receiving the goods precluded it from claiming that the tile shipments were non-conforming.[443] D'Agostino further argued, also pursuant to the provisions of the order form, that it were within its rights to refuse further delivery of tile shipments because of MCC's failure to pay for the shipments already made.[444] MCC, in response, submitted affidavits[445] from its own president, from the D'Agostino director[446] who negotiated the agreement on D'Agostino's behalf and from a D'Agostino agent who had acted as the translator in the negotiations, asserting that the parties did not intend to be bound by the provisions on the reverse of the order form. The affidavits did not indicate, however, that the parties had in fact objectively manifested such an intention. Thus, the parties shared the intention of not including the reverse side of the order form as part of their agreement, but neither party manifested that intent.[447]

The district court held that, despite the subjective intentions of the parties, the reverse of the order form applied and the written contract was a complete integration which precluded

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[437] MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A., 144 F.3d at 1385.
[438] Id. at 1385-1386.
[439] Id.
[440] MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A., 144 F.3d at 1385-1386.
[441] MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A., 144 F.3d at 1385-1386.
[442] Id.
[443] Id.
[444] Id.
[445] A type of sworn statement.
[446] The director was no longer employed by D'Agostino by the time the dispute arose, which might explain why he agreed to submit an affidavit containing evidence contrary to the interests of his former employer in the dispute.
[447] MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A., 144 F.3d at 1385-1386. Consequently, MCC's argument depended upon the opposing party admitting that same subjective intent.

any resort to extrinsic evidence, and granted summary judgment[448] in D'Agostino's favor, although without making reference to the parol evidence rule by name.[449]

The Eleventh Circuit, in contrast, held that the affidavits submitted by MCC established that even though neither party had objectively manifested the intention of not being bound by the reverse side of the order form, the director of D'Agostino, admittedly, was aware of the president of MCC's subjective intent not to be bound thereby.[450] As such, the facts of the case puts it squarely within article 8(1) whereby the conduct of the president of MCC is to be interpreted according to his intent.[451] Consequently, the district court should have considered the offered evidence of the parties' subjective intent pursuant to article 8(1) when interpreting the contract. MCC has therefore raised an issue of material fact concerning the parties' subjective intent to be bound by the terms on the reverse of the order form, which precludes a summary judgment. Accordingly, the Eleventh Circuit reversed the grant of summary judgment and remanded the case for further proceedings consistent with their opinion.

Had the Eleventh Circuit court stopped there however, the case would not have become the leading and highly regarded[452] case it is considered as today. The court took the opportunity to address a question of first impression, namely "whether the parol evidence rule… …plays any role in cases involving the CISG." The court began by concluding that because the parol evidence rule is a substantive rule of law, as opposed to a rule of evidence, the CISG preempts its application. As such, a court cannot apply the rule as a procedural matter,[453] but only insofar as it is apart of the CISG.[454] The applicable rules of evidence or rules of procedure can thereby not allow for a possible in-road for the parol evidence rule when the rule is absent in the applicable substantive law.[455] The court proceeded by concluding that the CISG contains no express statement similar to the parol evidence rule. The CISG is, however, comfortable with the concept of permitting parties to rely on oral as well as written contracts alike, pursuant to article 11.[456] The court then focused on article 8(3) as the main legal basis for its rejection of the parol evidence rule as apart of the CISG. Article 8(3) expressly directs courts to give "due consideration ... to all relevant circumstances of the case including the negotiations ..." to determine the intent of the parties. The court considered that article to be a clear instruction for it to admit and consider extrinsic evidence regarding the negotiations, to the extent they reveal the parties' subjective intent.[457] This reading of

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[448] A summary judgment is granted prior to an actual trial and can be granted on a claim or defense about which there is no genuine issue of material fact and upon which the mover is entitled to prevail as a matter of law. Fed.R.Civ.P. 56(c).

[449] MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A., 144 F.3d at 1385-1391.

[450] Id. at 1388-1393.

[451] Absent D'Agostino's admittance to an awareness of that intent, the case would have been decided in accordance with Article 8(2) whereby MCC would have been held to be bound by the reverse of the order form. The court notes this in note 11 and calls the admittance a "crucial acknowledgement." The court also acknowledged that this situation, where both parties admit a lack of subjective intent not manifest objectively, Is rare and thus most cases like this will be decided on the basis of objectively manifested intent exclusively, pursuant to Article 8(1).

[452] Calleo, *supra* note 62, at 833.

[453] The applicable forum will determine which procedural and evidentiary rules that will be applied. In this dispute, there was no choice of forum clause in the agreement.

[454] Flechtner, *supra* note 13, at 283.

[455] This is a rather straightforward conclusion, however, given that there is much confusion as to whether the parol evidence rule is a rule of evidence or a rule of substantive law, it is an understandable argument. See for example Butler, *supra* note 422, at 56.

[456] I.e. the CISG does not contain any statute of frauds provision, which, for example, the U.C.C. does. (See U.C.C. § 2-201 which precludes the enforcement of oral contracts for the sale of goods involving more than $ 500).

[457] Another U.S. court had interpreted article 8(3) similarly and observed that the article "essentially rejects ... the parol evidence rule." Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1238 (S.D.N.Y. 1992).

article 8(3) as a rejection of the parol evidence rule is in accordance with most of the academic commentary on the issue.[458] The court made reference to a number of commentators who similarly had concluded that the language of Article 8(3) whereby due consideration is to be given to all relevant circumstances of the case is a clear indication that the CISG adopts an all inclusive approach towards all kinds of relevant evidence and would thereby preempt any domestic substantive rules that would limit the admittance of any evidence.[459]

Seemingly somewhat concerned with the effect the court's decision would have on the reliability and integrity of written contracts, the court pointed out that ordinarily un-manifested subjective intentions of a party will rarely be given any legal effect, partially because the counterpart is rarely aware of them, partially because the counterpart will rarely be as cooperative as the director of D'Agostino was. Thus, issues of contract formation will more commonly be decided against the backdrop of article 8(2), under which objective evidence will be the sole material evidence in this regard, rendering the un-manifested subjective intent immaterial. Furthermore, the court pointed out that to the extent parties wish to avoid parol evidence problems they can do so by including a merger clause in their agreement that extinguishes any and all prior agreements and understandings not expressed in the writing. The Court thereby suggested that merger clauses would be similarly as effective under the CISG as in American contract jurisprudence, this conclusion has, however, been criticized for lacking somewhat in substantive grounds.[460] The Eleventh Circuit's conclusion that there is no parol evidence rule under the CISG, has also been criticized for treating the parol evidence rule as a uniform body of law, and thereby failing to recognize its different versions, which makes a rather straightforward conclusion of applicability somewhat incompatible with the complex nature of the rule.[461]

4.2.2 CISG Advisory Council Weighs in - CISG Op. No 3

After the MCC-Marble decision the Association of the Bar of the City of New York Committee on Foreign and Comparative Law made a request to the CISG Advisory Council (hereinafter, the Council) for a clarification with regards to whether there is a parol evidence rule under the CISG. The Association was concerned with "an unnecessary degree of uncertainty in the drafting of contracts" as a result of the Eleventh Circuit decision.[462] They were worried that if that rule prevailed, "there is no certainty that the provisions of even the most carefully negotiated and drafted contract will be determinative."[463] The Association also asked a question of the effectiveness of merger clauses under the CISG, by inquiring whether a merger clause would "invoke" the parol evidence rule.[464]

The Counsel responded with an opinion issued on the 23 October 2004. The opinion reaffirmed the Eleventh Circuit opinion by concluding that the CISG includes "no version" of the parol evidence rule,[465] and that there is no gap in the CISG with regards to the questions governed by the parol evidence rule, and as such, the rule cannot be invoked through the

[458] See for example Murray, *supra* note 376, at 44: Calleo, *supra* note 62, at 833.
[459] See MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A., 144 F.3d at note 17 for a list of these commentators.
[460] Andreason, *supra* note 366, at 372. (Suggesting that practitioners should "ignore the MCC-Marble court's reference to merger clauses as a catch all solution to evidentiary problems.").
[461] *See* Flechtner, *supra* note 13, at 286.
[462] CISG-AC Opinion, *supra* note 376, at note 2.
[463] Id.
[464] Id.
[465] Id. at 2.1.

process of gap-filling.[466] The Counsel motivates the conclusion on the basis of the same Articles as the Eleventh Circuit, namely Articles 8 and 11,[467] and the Convention's legislative history as explained *supra*.[468] The Counsel also affirmed the notion that Article 8 in tandem with Article 11 express the general principle that written instruments shall not, under the CISG, be presumed to be integrated, i.e. not final nor complete.[469]

The notion that a merger clause "invokes" the parol evidence rule is well established in American contract jurisprudence.[470] It is believed that the protection of the integrity of a written contract by use of a merger clause works best in tandem with the parol evidence rule. A merger clause is dependant upon a substantive legal framework, such as the parol evidence rule, to have any evidentiary effect, namely to bar evidence extrinsic to the written instrument.[471] Whether or not a merger clause "invokes" the parol evidence rule is not answered directly by the Counsel, but the answer is one of default; if there is no rule, no rule can be invoked without derogating from the Convention itself. It is clear however, that insofar as a merger clause constitutes a derogation, pursuant to Article 6, from Articles 8 and 11, its effect is to be judged against the backdrop of the substantive law that the parties replace Articles 8 and 11 with, which would presumably be the substantive law of a common law jurisdiction with a version of the parol evidence rule.[472] On the issue of what effect a merger clause will have under the CISG, i.e. without derogation from it, the Counsel's opinion is rather unclear.[473] The Counsel states that the objective[474] of a merger clause is to bar extrinsic evidence that would otherwise supplement or contradict the terms of the writing.[475] Despite the Counsel's affirmation of the non-existence of the parol evidene rule under the CISG, the Counsel suggests that a merger clause will have the effect of barring

[466] Id. at 2.5.This is an important conclusion, had there been a gap, it would have been filled pursuant to Article 7 of the CISG, and a parol evidence rule could have sneaked its way in.
[467] Id.
[468] Id. at 2.3.
[469] CISG-AC Opinion, *supra* note 376, at 2.8.
[470] See *supra* section 2.9 on merger clauses.
[471] The same can be said of any clause. Everything that exists as a matter of fact, is dependant upon a recognition in law to be effective therein.
[472] The Counsel suggests that a merger clause may derogate from the rules of interpretation of the CISG and thereby bar extrinsic evidence. CISG-AC Opinion, *supra* note 376, at 4.1 This is rather straightforward when the substantive law that is applied instead of Articles 8 and 11 of the CISG contains a Willistonian version of the parol evidence rule. In such a jurisdiction the parol evidence rule's strictly limited evidentiary approach takes precedent over the applicable rules of evidence which would otherwise admit such evidence. However, barring evidence is a procedural or evidentiary matter, i.e. regulated against the backdrop of the rules of the forum. If such rules does not allow for the parties to contractually agree upon the barring of certain evidence, the effect of the merger clause will nevertheless be undermined. Thus, if the purpose of a merger clause is to bar evidence, such an agreement will only be effective insofar as the rules of the forum allows it, or if a substantive rule of law such as a Willistonian parol evidence rule dictates the same. Professor Murray makes a similar practical suggestion with regards to merger clauses under the CISG. If the parties want a merger clause to be effective in a contract governed by the CISG, they should explicitly derogate from Article 8 through Article 6 and, in addition, expressly refer to a parol evidence rule of another substantive law to be applied instead of Article 8. See Murray, *supra* note 376, at 45-46.
[473] It has recently been noted that "Whether a merger clause in a contract governed by the Convention would preclude parol evidence remains an open question under U.S. case law dealing with the CISG." Christine E. Nicholas, *Teach an Old UCC Dog New Tricks, An Overview of the U.N. Convention on the International Sale of Goods*, at 3, Business Law Today, Vol. 18 N. 1 (2008).
[474] The Counsel also discussed a second objective, namely to prevent recourse to extrinsic evidence for the purpose of contract interpretation. CISG-AC Opinion, *supra* note 376, at 4.1 Insofar as it relates to the process of assigning meaning to the content of a contract that falls outside the scope of this essay, hence I have excluded that part.
[475] CISG-AC Opinion, *supra* note 376, at 4.1.

extrinsic evidence under the CISG.[476] As I have stated *supra*, it is widely regarded that a merger clause is not agreed upon for the purpose of establishing a certain procedural rule under which the parties are forbidden to introduce certain evidence into a judicial proceeding. The purpose is to discharge any prior agreements or understandings as related to the subject matter of the written contract. Whether evidence of such agreements or understandings are barred, i.e. not the subject of a judicial review whatsoever, can only be decided upon by resorting to the procedural rules of the forum of the contract.[477] Because the CISG is not a procedural rule or a rule of evidence, the issue of barring evidence is an issue that is outside its scope. If the objective of a merger clause is to bar certain evidence, the issue of whether a court should recognize and enforce that objective is a procedural issue. Thus, the Counsel's understanding of a merger clause as procedural, also defines it as being outside the scope of the CISG, at which point the Counsel's suggestions as to its validity under the CISG becomes incompatible to their initial conclusion. The Counsel's affirmation of the exclusionary effect as being valid under the CISG, is therefore a conclusion that seem to be reached without substantive merit. The Counsel's reference to the MCC Marble case as an authority for that conclusion[478] appears similarly without merit. The Eleventh Circuit exclusively concluded that a merger clause that extinguishes all prior agreements and understandings not contained in the writing will "avoid parol evidence problems."[479] The Eleventh Circuit thereby regarded a merger clause as of another objective than the Counsel did.[480] Furthermore, the Eleventh Circuit did not suggest that extrinsic evidence would be barred as a consequence, but only that such problems would be avoided. If a legal fact is rendered immaterial, it would not likely cause many judicial problems, but that is quite different from suggesting that any evidence thereof would be completely barred from judicial review. Using the opinion as authority for the validity of the latter procedural effect of a merger clause, is thereby seemingly lacking in merit, as it is a misunderstanding of the Eleventh Circuit opinion. The Counsel did not discuss the effect of a merger clause as understood in the manner in which the Eleventh Circuit did.

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[476] "Under the CISG there is authority for the proposition that a properly worded Merger Clause bars the consideration of extrinsic evidence. However, extrinsic evidence should not be excluded, unless the actually intended the Merger Clause to have this effect." CISG-AC Opinion, supra note 376, at 4.5. The authority that the Counsel mentions is for example MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A., 144 F.3d at 1391, John Honnold, Uniform Law for International Sales § 110 (3rd ed. 1999) and Bernard Audit, La vente internationale de marchandises 43 n. 3 (1990). CISG-AC Opinion, supra note 376, at note 54. The latter two are conclusions reached by interpreting a merger clause as a derogation from the CISG pursuant to Article 6. As such, those two sources are not authority for the proposition that a merger clause bars certain evidence under the CISG itself, i.e. without derogation from it.

[477] The version of the parol evidence rule that bars evidence, i.e. the Williston approach, preempts the procedural rules that would otherwise allow such evidence. The Williston approach, while being a rule of substantive law, works as a way of barring evidence because that effect is recognized under procedural rules.

[478] CISG-AC Opinion, supra note 376, at note 54.

[479] MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A., 144 F.3d at 1391.

[480] The Eleventh Circuit concluded that "to the extent parties wish to avoid parol evidence problems they can do so by including a merger clause in their agreement that *extinguishes* any and all prior agreements and understandings not expressed in the writing" Id. at. 1391 (my emphasis). The Eleventh Circuit regards the function of the merger clause as "extinguishing" prior agreements and understandings, whereas the Counsel regards the function as "barring" evidence of anything not contained in the writing.

5 Analysis Part II

In this analysis I will address two issues; (i) regarding the lack of a parol evidence rule under the CISG, and (ii) regarding merger clauses in contracts governed by the CISG.

5.1 Regarding the Lack of a Parol Evidence Rule and the CISG

To conclude that the CISG does not contain a parol evidence rule is a conclusion which is difficult to question, there is simply nothing in the CISG itself, or in its legislative history that would suggest otherwise, but approaching to issue without recognizing the different versions and aspects of the rule that are well established in the U.S. common law, is an approach that, on the contrary, can be criticized. Because of the numerous approaches to the parol evidence rule, differences in its substantive doctrine and other nuances in its application it is not a well defined doctrine that lends itself to be either wholly rejected or accepted under a body of law. Such an approach seemingly promotes uncertainty with regards to the integrity of written contracts where none is needed. It is thus not the conclusion that the CISG does not contain a parol evidence rule that can be readily criticized, but rather the simplicity of the question, that simply asks whether the CISG adopts or rejects the parol evidence rule that can be criticized.[481] The two main authorities on the issue, the Council's opinion and the Eleventh Circuit opinion, both fall short in that regard. And by falling short in exhaustively resolving the rather complex issue of to what extent the jurisprudence of the parol evidence comports with the CISG, it invites uncertainty. The Council, however, suggested that "there is nothing to be gained, as some scholars have attempted, by deciding which of the various aspects of the Parol Evidence Rule comports with the basic principle of the CISG."[482] The Council, on the contrary, concluded; "Instead, the particular interpretive method of the CISG must be developed from the text and purposes of the CISG itself."[483] This is correct, insofar as the inquiry is made as an attempt to introduce some of the jurisprudence of the parol evidence rule to the CISG. But, there is, on the contrary, much to be gained by deciding to what extent the jurisprudence of the parol evidence rule overlap with the CISG, insofar as the inquiry is done pursuant to the text and legislative history of the CISG. Protecting a written instrument from subsequent extrinsic impeachment at trial is an important concern in any transaction, particularly in business transactions, and perhaps even more so in international transactions. As a legal doctrine regarding that issue, the parol evidence rule provides the legal framework against which the parties can achieve such ends.[484] Under the CISG it has become increasingly difficult, ex ante, to address such concerns. Due to the lack of a parol

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[481] Professor Flechtner has made some excellent points along the same lines: "The diversity of approaches to parol evidence questions within the United States confirms the idea that asking simply whether the CISG adopts or rejects "the parol evidence rule," as U.S. courts have tended to do to date, is a misleading way to pose the issue. The parol evidence rule is not a single well-defined doctrine that the Convention has to accept or disavow wholesale; it is, rather, a complex of several substantive and procedural aspects toward which different U.S. authorities take different (and sometimes inconsistent) approaches, and which have varying degrees of consistency with the CISG." (footnotes omitted). Flechtner, *supra* note 13 at 283-284.
[482] CISG-AC Opinion, supra note 376, at note 37.
[483] Id.
[484] See Linzer, *supra* note 2, at 806 ("The parol evidence rule serves a legitimate end. We enter into written contracts to avoid disputes in the future, and if every contract were simply the beginning point in a testimonial battle, we would gain little by writing things down.").

evidence rule initially, but perhaps more importantly, due to the lack of a thorough analysis of the parol evidence rule's possible overlap of the CISG thereafter. In the following, I will make such an attempt.

The CISG does not contain any substantive presumption of a superiority of written instruments over testimony as means of evidencing an agreement or establishing intent thereto. Rather, the CISG is founded upon a principle of formality freedom, whereby contracts are not subject to any formal requirements, an agreement is equally recognizable and enforceable under the CISG independent of form, pursuant to Article 11. Reducing an agreement to writing does not implicate a substantive presumption as to the instruments' completeness or finality, rather the instrument will be reviewed without the benefit of a presumption to either effect. There are neither any evidentiary preferences as to how the contracting parties' intentions can be established. Pursuant to Article 8, the CISG directs courts to admit all relevant evidence when establishing the parties' intentions and interpreting the parties' agreement, and thereby clearly rejects any notion of favoring intent evidenced within the four corners of a writing. Instead, the parties' intentions should be established by looking at all relevant evidence, whereby the writing is only one of many circumstances. The CISG is thus, a clear rejection of the tenants of the Williston version of the parol evidence rule. However, its reasoning clearly resonates with the tenants of the Corbin version.[485] It is thus unfortunate that the legislative history of the CISG and the Council's opinion regarding the parol evidence rule focused solely on the rule's mysterious ban on extrinsic evidence, which was viewed as directly conflicting with the established civil law principle of free admissibility of evidence.

The parol evidence rule deals only with the issue of how different agreements, when one is reduced to writing, between the same parties, made at different moments in time legally relate to each other. The parol evidence rule will, if applicable, render the fact of one agreement legally immaterial for the benefit of another, and thus forbids the fact itself from being established, whereby evidence thereof can be barred. The legal approach toward that issue under the CISG is indistinguishable from the Corbin approach to the parol evidence rule. Although, the CISG does not contain a parol evidence rule, the jurisprudence of the Corbin rule is in accordance with the jurisprudence of the CISG, which does not mean that the CISG contains the Corbin rule, but it means that an argument on the basis of that rule will render the same result as an argument on the basis of the CISG. It is presumably not a too controversial a notion to suggest that under the CISG, that which happened today can control the jural effect of what happened yesterday, but that which happened yesterday cannot control the jural effect of what happens tomorrow.

However, as was suggested *supra*[486] the integration doctrine has largely displaced the parol evidence rule as the legal framework against which the legal consequences of a written instrument will be judicially reviewed. The pivotal question then becomes; how does the CISG comport with the doctrine of integration?

The CISG lacks any explicit reference to an integration doctrine. Thus, the mere act of integrating an agreement in a writing does not necessarily trigger the legal consequence of discharging and displacing any omitted terms thereby, as dictated by the integration doctrine. However, given that the integration doctrine operates by consequence of the parties intentions to that effect, it is consistent with the Convention's emphasis on the actual intentions of the

[485] Although Article 8 uses no such terminology, the Council suggests that the article provides that contracts are to be interpreted according to "actual intent." CISG-AC Opinion, supra note 376, at 2.2.

[486] See *supra* section 3.1.

contracting parties as being the primary interpretative source pursuant to Article 8.[487] Thus it appears rather straightforward that the act itself would be recognized under the Convention, even though it lacks a legal framework to that effect, which the U.S. common law has developed pursuant to both the parol evidence rule and the integration doctrine. The Council has however made a reference to the act of integration when they suggested that prior negotiations and other extrinsic circumstances should not be considered during contract interpretation if the parties reduced their agreement to writing and intended their writing as the sole manifestation of their obligations.[488] The Council, in the same paragraph, reiterated that writings, however, are not to be presumed to be "integrations."[489] As the Council mentions the act itself by name, and the substance thereof, it is important as the first explicit recognition of its legal validity under the CISG. However, while the act of integration itself is rather self-explanatory, the more detailed legal consequences in terms of implied in law, or implied in fact agreements, collateral agreements and the pivotal distinction between partial and complete integration, are less straightforward and the judicial review of such issues pursuant to the CISG lacks a body of law against which such issues can be resolved. That gap can be a cause for concern for parties attempting to protect the integrity of their written contract on the basis of an integration, or perhaps more importantly, the nuances of the doctrine's legal implications as developed in U.S. common law.

Thus far the lack of an explicit parol evidence rule under the CISG and the Council's opinion reiterating that absence has yielded a rather clear substantive approach toward written instruments under the Convention, an approach that is consistent with the Corbin approach to the parol evidence rule. Unfortunately, that clarity was distorted somewhat in a few concessions regarding the Convention's approach toward written instruments that the Council did in opinion no. 3, that I will discussed in the following. The Council reiterated that the CISG dictates a non-presumptive approach of finality and completeness toward written instruments. However, in spite thereof, the Council concedes that a writing, under the Convention, constitutes an "important fact of a transaction – it must be presumed to fulfill a function," and that "a contractual writing will often receive a special consideration under the CISG."[490] That begs the following questions; what is the function a writing is presumed to fulfill pursuant to the CISG? And what is the special consideration that writings will receive under the CISG? The Council, unfortunately, does not give any such answers. With regards to what function a writing should be presumed to fulfill under the Convention the answer might seem obvious. But, in light of the jurisprudence of the parol evidence rule and the traditional common law approach toward written instruments, it is not a suggestion to which the legal implications are self-explanatory. Is the presumed function merely that the writing is a practical mean for evidencing an agreement, or part thereof; or is the function similar to that which it is presumed to fulfill under the original parol evidence rule, namely not just evidencing the agreement, but constituting it, or alternatively, to exclusively evidence the parties agreement as related to the subject matter of the writing, to the effect that anything extrinsic thereto is rendered immaterial? The Council has stated that writings are not to be presumed to be "integrations" under the CISG. That is, writings are not to be presumed to be either a final nor a complete representation of the parties agreement, i.e. there is no presumption of either partial or complete integration of written instruments. Thus, if writings are not presumed to fulfill the function of evidencing the parties final agreement, i.e. they are

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[487] Professor Flechtner suggest the same: "Some aspects of the parol evidence – specifically the core substantive doctrine that parties can, if they so intent, discharge prior agreements by omitting them from a later writing… …appear to remain valid under the Convention." Flechtner, *supra* note13 at 284.
[488] CISG-AC Opinion, supra note 376, at 2.8.
[489] Id.
[490] Id. at 2.7.

to be determined as either final or tentative without an initial presumption of either, and neither presumed to be a complete representation of the parties agreement, then what presumption is there left for a substantive body of law to impose on writings? Of course, it is rather straightforward to presume that writings are complete integrations, which is the precise presumption that the parol evidence rule effectuated as a matter of substantive contract law when it was first developed. But the Council has clearly repudiated that "any version" of the parol evidence rule exist under the CISG, and that writings are to be presumed to be "integrations." Thus it seems that the Council's suggestion that writings must be presumed to fulfill a function flirts with the substance of the rule it had just explicitly rejected.

Similarly confusing is the suggestion that writings will receive "special consideration" under the CISG. What, pursuant to a substantive body of contract law, does that implicate for the legal review of written instruments under the CISG? Does it mean that writings are should be regarded as more reliable than testimony? If so, then once again the Council flirts with the inherent notion of the parol evidence rule, namely that written instruments deserve some degree of protection from parol impeachment, which, by some, is regarded as flimsy, self-serving and improbable. Of course, writings may generally be afforded a higher degree of reliability relative to testimony pursuant to the applicable rules of evidence, but that is beyond the scope of the CISG.[491] There is thus seemingly little special consideration left to be afforded writings when the Council has just clearly rejected the rule that was designed to achieve precisely that as a matter of substantive law. As such, this suggestion seems inherently confusion as well. Both the suggestions discussed in the foregoing unfortunately allude to the notion of the mystery of the written word that was inherent in the jurisprudence of the original and the Willistonian parol evidence rule. It seems peculiar and unnecessary, that the basic notion of the rule the Council clearly rejected, is alluded to in the same opinion. Such suggestions should best be left without consideration in the legal review.

5.2 Regarding Merger Clauses and the CISG

Merger clauses were first employed against a legal environment in which a writing was regarded as the complete integration of the parties' agreement if it appeared as such on its face. The function of the merger clause was to facilitate such an appearance of the writing. The CISG clearly rejects such a presumptive substantive approach toward written instruments. Instead the legal significance of a writing will be reviewed without the benefit of a substantive presumption as to its finality or completeness, by admitting and reviewing all relevant evidence. Thus, the legal framework against which the original merger clause was first drafted is significantly different with respect to the substantive approach toward written instruments. As such, it is not surprising that the issue of the functionality and effectiveness of merger clauses under the CISG has been the subject of much controversy, especially because the Council concedes that merger clauses can be effective under the CISG, while simultaneously rejecting the legal framework against which such clauses were originally designed.[492]

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[491] Although writings are not to be presumed to either final or complete under the CISG, many characteristics associated with a formally executed writing will be persuasive evidence of intent to that effect. The written word will not itself be persuasive, but the characteristics associated with the written word will. As such the evidentiary inquiry under the CISG will be similar to that within a Corbin jurisdiction, where writings are not substantively presumed to be integrations of the parties' agreement, and the issue of integration is decided as a question of fact to which only rules of evidence apply. See *supra* note 404 and text thereto.

[492] The Council's suggestion with regards to merger clauses under the CISG was discussed *supra* under section 4.2.2.

First of all, it should be reiterated that merger clauses are generally not evidentiary or procedural, in the sense that they purport to forbid either party from introducing extrinsic evidence in the event of a dispute relating to the contract. The purpose is to make the writing the sole source of the parties' agreement, which, if successful, renders any representation of an additional or contradictory agreement immaterial in the judicial determination of what the parties' contract consists of.[493] Any evidence purporting to establish an immaterial fact will not likely be admitted into any judicial proceeding. As such, an effective merger clause facilitates a less complicated dispute resolution, in an evidentiary sense, but the clause does not accomplish this by forbidding either party to introduce certain evidence of prior agreements, but by making the same agreements immaterial for the purpose of their enforcement.[494]

A merger clause as a statement of fact is dependant upon the parol evidence rule to have an effect of protecting the integrity of the writing. Such a clause must invoke the parol evidence rule to function and thereby the parties must derogate from the CISG under Article 6 with a reference to another substantive law with the parol evidence rule to be effective.[495] A merger clause as a separate agreement, on the contrary, does not depend on the parol evidence rule to effectively protect the writing from extrinsic impeachment. Thus, such a merger clause does not need to contain an explicit derogation from Article 8(3) through Article 6, but will be as effective under the CISG as it would be pursuant to the substantive law of a jurisdiction lacking in a parol evidence rule or containing a Corbin inspired version. As was explained *supra*,[496] the notion that a merger clause is effective because it invokes the parol evidence rule, is true only if the merger clause is employed as a statement of fact.

Because the integration doctrine is dependant upon intent, parties who wish to commit themselves exclusively to the writing must facilitate the finding of such intent, within the four corners of the writing. A simple merger clause that states that the writing constitutes the parties complete and final agreement does not involve an explicit intention of the parties to discharge any prior agreements, and completely integrate their agreement therein. Rather, it is a statement that characterizes the writing as a complete integration of the parties agreement related to a specific transaction or subject matter. The validity of such a statement will be reviewed in light of all relevant evidence, and if an extrinsic agreement is thereby established, the statement will be false and unenforceable. Thus, instead of facilitating the mere appearance of completeness and finality of a written instrument, a merger clause should be drafted to facilitate the necessary finding upon which the integration doctrine is premised, namely the actual intent to integrate, either partially or completely, the parties' agreement in

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[493] Thus, an effective merger clause can be regarded as the drafting tool with which the parties establishes what in midst of agreements of various forms, parol or written, entered into at various times, is to be regarded as the actual contract. Many agreements may very well exist, but the merger clause defines the contract as encompassing only part of those agreements, rendering everything extrinsic thereto unenforceable.

[494] If merger clauses were employed as a way to forbid either party from introducing evidence of agreements extrinsic to the writing, it would presumably be an easy task to render such a clause unenforceable on the basis of an avoidance doctrine. If the parties enter into extrinsic agreements but one party then introduces a clause in the writing which forbids the counterpart from introducing evidence of agreements that were actually made in context with the transaction, it would constitute fraud in the inducement. Such a practice could furthermore rather easily be rendered unconscionable. Furthermore, assuming such a clause is enforceable, its validity of barring of evidence must be reviewed on the basis of the applicable procedural rules or the rules of evidence. The CISG is neither.

[495] This is the suggested measures needed according to Professor Murray to ensure the effectiveness of merger clauses under the CISG. Murray *supra* note 376, at 45-46. See also Anita Esslinger & Bryan Cave, *Fundamentals of International Business Transactions, Contracting in the Global Marketplace: The UN Convention on Contracts for the International Sale of Goods and the Limitation Period in the International Sale of Goods*, SN056 ALI-ABA 63, 80-81 (2008) for a similar suggestion.

[496] See *supra* section 2.9.2.

the written instrument. To integrate is an act, a merger clause should be drafted accordingly, if it is be effective in contracts governed by the CISG.

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