Determining the Contractual Intent of Parties under the CISG and Common Law – A Comparative Analysis

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1. Introduction

The interpretation and application of multilateral treaties such as the United Nations Conventions on the International Sale of Goods (CISG) is a much-discussed problem. International conventions can only fulfill their mandate if the provisions within the treaty are applied uniformly. Article 7(1) requires courts to develop a "shared international methodology for interpreting the CISG as well as a sophisticated grasp of its provisions."[1] International jurisprudence unfortunately often reveals that "a sophisticated grasp" of the CISG has not yet been achieved. However, this does not mean that courts have not understood the mandate of the CISG. It can be argued that courts and tribunals are not yet confident enough to apply the CISG in a "holistic" manner. Uniformity in international trade pursuant to Article 7(1) demands that recourse, not only to domestic law, but also to interpretations, which are traditionally attributable to domestic law, must be avoided.[2]

This paper will investigate how the mutual contractual obligations of parties are determined. The intent of parties is regulated in Article 8, which states:

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what the intent was.
(2) If the preceding paragraph is not applicable, statements made by and other

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1 H. M. Flechtner, 'The UN 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' in (1999) 18 *Journal of Law and Commerce 259* 260.

2 C. M. Bianca and M. J. Bonell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Milan, Giuffré, 1987) 74.

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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.

It will be argued that Article 8 touches on subtle and difficult issues, especially as some domestic doctrines need to be reviewed or abandoned. Great care must be taken to isolate and discard principles within domestic law which are not compatible with the interpretation of Article 8. For this reason, a comparison of the interpretation and application of the principle of intent between the CISG and common law, in particular the principle of mistake, is used to point to different methods and approaches. A complete understanding of intent also requires knowledge of at least one or two approaches in civil law. For comparative reasons, only Swiss and German legislation is looked at to discover a possible "common" approach to the application and interpretation of intent.

It must be noted that the purpose of this paper is to investigate the "teasing out" of the intent of parties and hence to construct the contract. Therefore, the common law principle of mistake is only viewed from that point of view.[3]

2. Interpretation of Intent

(a) Introduction

Article 8 systematically sets out the steps and criteria by which statements and other conduct of a party need to be interpreted. Such statements and conduct are classified according to the knowledge which the other party has or ought to have. If a party knows or ought to know the intent of the other party, Article 8(1) is applicable. If that is not the case, the courts and tribunals will attempt to define such intent using the 'reasonable person' test, which is described in Article 8(2). Article 8(3) assists the courts in determining the intent of the party by listing matters to which the courts must direct their attention, such as 'the negotiations, any practices which the parties have established between themselves, usages, and any subsequent conduct of the parties.'[4] Importantly, Article 8(3) not only specifies some circumstances but also invites the court to give consideration 'to all relevant circumstances.'[5] The

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[3] No distinction is made between common mistake, mutual mistake or unilateral mistake.
[4] Article 8(3) CISG
[5] Ibid.

conclusion which can be drawn is that Article 8 is relevant as soon as a question of intent arises. In other words, if there is a real or perceived misunderstanding between the parties, Article 8 must be consulted to elicit the true intent.

What then is the mandate of Article 8? The *Landgericht Heilbronn* pointed to the fact that Article 8 is not only concerned with communications. The question is the following: what can a reasonable person in the same circumstances expect to have understood and hence how do they interpret the communication?[6] The *Landgericht Zwickau* put it similarly by pointing out that in a communication between parties 'the wording was clear and unambiguous and furthermore the meaning given to the words corresponds with those a "reasonable person" would attribute to those words.'[7] Such intent is in line with the desire of the CISG to keep the contract operative as long as it is possible to perform contractual obligations. This principle conforms with the attempts of uniform laws to overcome problems of distance, expense, and time and not to terminate a contract where in fact the contract can be executed if the principle of good faith is applied.

In contrast to Article 8(1), common law lawyers do not favor the subjective test in ascertaining the intent of the parties. Lord Diplock, however, alluded to the fact that the subjective intent is contained in the objective theory. He referred to the intention of each party:

> As it has been communicated to and understood by the other (even though that which has been communicated does not represent the actual state of mind of the communicator) should coincide.[8]

More often it is stated that the interpretation of a legal text – including contracts – must be based on its nature and context. 'It cannot aim to discover what the parties to a contract ... subjectively intended.'[9] In addition, the view is expressed that the reason not to take the subjective intent into consideration is that the 'subjective desires of the parties will be divergent.'[10]

Arguably, Article 8 overcomes the problem of a 'divergent desire of parties,' as subjective intent must be communicated or the 'other party knew or could not have been unaware what the intent was.'[11] Importantly, Article 8 demands that a tribunal step back to the beginning of the contractual dealings and review the total process, whereas common law in general only looks at the outcome of the contractual dealings, namely the text of the contract.

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[6] *Landgericht Heilbronn*, 15 September 1997, 3 KfH 653/93, at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/562.htm>.

[7] *Landgericht Zwickau*, 3. *Kammer für Handelssachen*, 19 March 1999, 3HKO 67/98, at <http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/519.htm>.

[8] *Paal Wilson & Co. A/S v. Partenreederei Hannah Blumenthal* (1983) 1 AC 854, at p. 915.

[9] B. Markesinis (ed.), *The Clifford Chance Millennium Lectures, the Coming Together of the Common Law and the Civil Law* (2000) at p. 80.

[10] Ibid. p. 81.

[11] Article 8(1) CISG.

In effect, the question is as follows: does the text of the contract express the subjective intent of the parties correctly? Article 8 explains how such intent is discovered and places a burden on both parties to follow reasonable steps either to know or at least not to be unaware of what the intent was.

(b) The Determination of Intent – A Comparison

The approaches of two authors to the problem of intent can be used to highlight perceptions and understandings amongst common law lawyers in relation to the CISG. The main difference between the two authors is that Murray views the CISG as the central legislation in the international sale of goods. On the other hand, in his analysis of English and American sales of goods legislation and the CISG, Carter appears to view the CISG as a mere 'adjunct' to municipal law, which on some occasions may need to be followed. He focuses his attention on party autonomy as a means to exclude the CISG. He notes that:

> [not to exclude the CISG is] a missed opportunity to adopt English law as the proper law [which] might prejudice a party's right and attract unwelcome legal consequences for the adviser.[12]

However, the importance of Carter's analysis lies more in the fact that he mistakenly analyzes the CISG with the language and terminology of common law in mind, an approach rejected by Article 7. Carter's analogy misses the point that the CISG must be read with the mandate of Article 7 firmly in mind. He notes that:

> It appears that no one has yet considered the relation between [Article 6] and the common law approach to the classification of terms. As will be explained the familiar treatment of terms in sale contracts as conditions is invariably justified on the basis of actual or presumed intention. In fact the reality is that most cases are justifiable only on the basis of presumed intention.[13]

It is no wonder that no one has considered the classification of terms. Such a distinction is not within the mandate of the CISG. Carter does indicate that 'presumed intent' is an important criterion in determining contractual obligations. However, it must also be noted that Carter appears to link the 'presumed intent' to conditions within the contract, which will decide the outcome of any possible litigation. The CISG, on the other hand, does not follow such a path. Party autonomy allows a party to introduce terms into the contract. How these terms are to be interpreted in case of a dispute is regulated by Article 8. The question is not whether a term is or is not a condition. The question is what the intent of the parties was. Such an approach appears to be far simpler than the one proposed by Carter.

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[12] J.W. Carter, 'Party Autonomy and Statutory Regulation: Sale of Goods' in (1993) 6 *Journal of Contract Law* 104.

[13] Ibid. p.106.

Carter reviewed party autonomy and managed to discuss this issue without once mentioning Article 8, which is specifically included into the CISG to describe the intent of parties. Considering that his intention was to look at 'Party Autonomy,' the whole discussion in the article reviews the regime for rejection and termination of contracts. It is puzzling to find that party autonomy is linked only to the above principle, which is well defined within the CISG. It is therefore not surprising to note that Carter wrote:

> [It] would throw the whole scheme of the Convention provisions on avoidance into total confusion if courts, in, say Australia were to treat an implied agreement that a term is to be a condition as sufficient to exclude the operation of the fundamental breach requirement.[14]

Such an observation indicates that an attempt has been made to explain functions of the CISG with domestic principles in mind. The above observation is wrong on two counts. First, the CISG does not distinguish between conditions and warranties. Unless it imports domestic principles into the CISG, a court cannot 'throw the whole scheme of the Convention ... into total confusion.'[15] Secondly the intent of parties, by which Carter no doubt means 'an implied agreement,' is regulated in Article 8. If the subjective intent cannot be ascertained, the objective intent is determined by the court, taking all necessary evidence as described in Article 8(3) into consideration.

In sum, Carter attempts to show that intentions of the parties apply to the question whether particular terms are warranties and conditions, and in doing so misunderstands the convention. The CISG has no principles expressed in such a terminology. What Carter perhaps envisaged is that if the intent of parties cannot be established, the problem becomes one of validity, which is specifically excluded by the CISG, in which case domestic law will decide the issue.

It appears that Carter's views are by no means isolated. Perhaps, they represent a typical response based on common law culture and principles. A recent Australian Supreme Court decision in Queensland in essence repeats the above arguments. In *Downs Investment Pty Ltd. v. Perwaja Steel SDN BHD*,[16] the standard form contract stipulated that the seller must get approval from the buyer before a ship can be chartered. In subsequent discussion, the buyer said in effect that:

> Wanless had made so many shipments previously that it knew the nature of the vessel Perwaja wanted and that it was unnecessary for Wanless to worry about submitting to Perwaja for its approval vessel details.[17]

Clearly, Article 8 is relevant but instead of referring to Article 8, J. Ambrose noted that 'there was arguably [a] technical breach of the shipment clause.' He dismissed

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[14] Ibid.
[15] Ibid.
[16] [2000] QSC 421 (17 November 2000) .
[17] Ibid. n. 7.

the claim by pointing out that it was not a breach of an essential term.[18] As a matter of fact, there was no breach at all under the CISG and the question of 'an essential term' is of no importance, since pursuant to Article 8, the establishment of the intent of the parties is the only relevant consideration. Pursuant to Article 8(1), the subjective intent of the parties is clear; there is no need to submit vessel details to Perwaja for approval. The standard form clause has been substituted by subsequent events. Neither the parol evidence rule nor the question of terms is of relevance. The only question is the intent of the parties.

Murray, on the other hand, shows far better insight into the workings of the CISG and supplies us with an interesting example where he notes the following:

> The First and Second Restatement of Contracts contain the following hypothetical: A says to B, I offer to sell you my horse for $100. B knowing that A intends to offer to sell his cow for that price, not his horse, and that the word 'horse' is a slip of the tongue, replies I accept. Restatement (First) of Contract article 71 illust. 2 (1932); Restatement (Second) of Contracts article 20 illus. 5 (1981). Neither Restatements finds a contract for the sale of the horse. The first Restatement also finds no contract for the sale of the cow, but the Second Restatement concludes that there is a contract for the sale of the cow.[19]

If the above example would be analysed according to the CISG, Article 8(1), one would come to the same conclusion, namely that there is a contract for the sale of the cow. The principle that 'the other party was not unaware' of what the intent was would determine the issue. Despite previous indications that the common law lawyer discarded any attempts to discover the subjective intent of a party'[20] the United States legislation arrives at exactly the same conclusion as the CISG. A 'meeting of minds' test may be foreign to common law, but it is also not used in the CISG.

This may explain why Murray quotes *Raffles v. Wichelhaus*[21] when he analyses the objective versus subjective indications. In brief, the facts are that both parties made a mutual mistake. Cotton was to be sent by the *SS Peerless* from Bombay. In actual fact, there were two ships called the *Peerless*. Neither of the parties was aware of this fact. The English court found that due to mutual mistake there was no contract – the existence of agreement cannot be presumed.[22] Murray notes that 'Article 8 would certainly appear applicable to a "Peerless" situation.'[23]

Before analysing the '*SS Peerless*' under the CISG, the principles involved must be first examined. Both examples quoted by Murray, as 'any month-old student of

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[18] Ibid. n. 66.
[19] Ibid. fn. 163.
[20] Ibid.
[21] (1864) 159 E.R. 375.
[22] P. Latimer, *Australian Business Law* (CCH 2001, 20th Ed.) at p. 327.
[23] Murray, *supra* note 10.

contract law knows,'[24] fall under the principle of mistake. Mistake is a question of validity of contract and hence should be governed by Article 4, not 8. This observation is only partially correct. No doubt many common law lawyers have fallen into the trap of viewing the CISG through the lenses of municipal law. The principle of intent, and not a question of mistake, is of importance. Mistake as such is not a principle of the CISG and is linked to Article 4, if it affects the formation of a contract only. However, Article 8 does not only look at the formation of a contract. The purpose of Article 8 is to determine the intent of the parties. Whether the question of intent is in relation to the formation of a contract or whether it relates to terms within a contract remains immaterial.

This again highlights the importance of Article 7. The first mandate of Article 7 is what is described as the autonomous approach to the interpretation of the CISG. That is, interpretation is done without recourse to domestic law or principles, which can sometimes be functionally similar. Article 7 contains the obligation to approach the interpretation of the CISG in a 'holistic way.' Put simply, every interpretation must first exhaust all possibilities of applying the CISG. Only when such an endeavor becomes impossible, that is, when an external gap is discovered or proved to exist, can domestic law be applied.

In relation to the '*SS Peerless*,' Article 8(1) would need to be consulted as the starting point for any analysis. The facts of the case indicate that each party did not know the actual or subjective intent of the other. Hence, no subjective intent is established. If the parties subjective intention is one-sided, meaning it does not coincide with the views of the other party, the objective meaning must be elicited. Article 8(2) prescribes that the statements or conduct in question must be interpreted by the courts and tribunals by using the 'reasonable person' test. In other words the hypothetical or objective intention of the parties has to be elicited by the courts.

Applying the 'reasonable person test' would indicate that the objective intent cannot be established either. The subjective intent of each party is clear but neither party knew or could not have been aware of the other party's intent. There is simply no commonality of intent, subjectively or objectively. As the intent cannot be established, Article 8 is not applicable.

The inability to establish either a subjective or objective intent would result in a failure to form a contract. In such a case, Article 4 must be consulted. It states that the convention is not concerned with the validity of a contract. Therefore, pursuant to Article 7(2), municipal law must be applied.

The conclusion is that if the intent is not clear, Article 8 must be used to elicit such intent. If Article 8 fails to do so, a contract cannot be formed and Article 4 applies.

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[24] Ibid.

c) An Approach in Civil Law

The hypothetical or objective intention of contractual parties is also well known in civil law countries such as Article 18 of the Swiss Law of Obligations (OR)[25] or Articles 1362/1371 of the Italian Civil Code (*Codice Civile*). In German Law, the interpretation of the intent of the parties is regulated in Articles 133 and 157 of the *Bürgerliches Gesetztbuch* (BGB).[26] Article 133 notes that in order to elicit the real intention of the parties, a court must look beyond the literal expressions contained within the contract.[27] The first step is to find out whether an intention has been expressed within the contract. The intention as expressed by the parties cannot be clear and unambiguous, or otherwise a subjective intent could be discovered. Secondly, there has to be a need for interpretation (*auslegungsbedürftig*) and, as well, the expressed intention must be capable of being interpreted (*auslegungfähig*).[28] The linkage of Article 157 of the BGB to Article 133 is interesting. Article 157 notes that 'contracts are to be interpreted in good faith and with consideration to customary norms.'[29] The precondition of applying this article is that a gap needs filling. However, there has to be a basis for filling the gap. The hypothetical will of the parties has to be determined by taking into consideration the purpose of the contract by applying good faith and customary norms.[30] In essence, the Swiss Law of Obligations reflects the German legal structure. Article 18 is also linked to Article 2 of the Swiss Civil Code (ZGB), which notes that 'everybody executing their rights has to act in good faith.' Furthermore, this mandate is strengthened by Article 2(2), which states that 'a misuse of a right is not supported by law.'

The difference between the German law and the Swiss law is that Article 18 of the Swiss Law of Obligations notes that 'in examining a contract not only to its form but also to its content, the true intent of the parties needs to be established.' Furthermore, the legislator points out that only the true intent, and not the one which is based on error of the parties or by an expression which hides the true intent, is to be taken into account. In effect, the Swiss Law of Obligations invites the judge or arbitrator to elicit the 'true will' of the parties instead of taking note of the wrong (*unrichtige*) terminology or expression of intent. It can be argued that the Swiss Law of Obligations defines the subjective as well as hypothetical will of the parties and in conjunction with Article 1 of the ZGB, which allows the courts in case of doubt to act like law makers, achieves the same result as the CISG. The BGB, on the other hand, is more 'elegant' in its description, but in effect introduces the same concepts. As pointed out above, Article 8(1) and (3) does correspond more with civil law practices than does common law in the interpretation of the intention and conduct of contractual parties.

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[25] *Obligationenrecht*.
[26] Bürgerliches Gesetzbuch.
[27] Author's translation.
[28] Jauernig, O. (ed, *Bürgerliches Gesetzbuch* (5th ed, 1990, C.H. Beck, München), 75.
[29] Ibid. p. 104.
[30] Ibid. p. 105.

The above cannot be applied directly to the CISG, due to the autonomous mandate pursuant to Article 7(1). However, the socialization process must be elicited, which can become a useful tool to understand Article 8. The methodology of establishing "*auslegungsbedürftigkeit und auslegungsfähigkeit*" of the party's intentions is important. In other words, is there a need to interpret the expressed intention at all and is that intention capable of being interpreted?

A summary of an arbitrage case from Switzerland[31] is noteworthy. The award concerned the validity of the arbitration clause to 'submit the dispute to international and trade arbitration organization in Zurich, Switzerland.'[32] One party contended that the Zurich Chamber of Commerce was the applicable institution, whereas the other party argued that, since the name of the institution was not mentioned, the whole arbitration agreement was invalid. The arbitrator referred to Article 18(1) of the Swiss Law of Obligations, which lays down rules to elicit the true intent of the parties, as well as to Article 2 of the Swiss Civil Code, which refers to the principle of good faith. The arbitrator interpreted the subjective as well as the objective intent of the parties and came to the conclusion that the arbitration clause was valid. However, to prove that the interpretation and conclusion reached through domestic law reflects an international consensus, the arbitrator also referred to the UNIDROIT Principles of International Contract (PICC) Article 4.1 and 4.2.[33] It can be said that the arbitrator recognized – and took into consideration – that PICC has been established 'by a large international working party consisting of specialists in contract law selected from different parts of the world.'[34]

3. The Common Law Principle of Mistake and the CISG

If we examine mistake as a principle in common law, it must be noted that courts are reluctant to set aside a contract merely because one or both parties made a mistake.[35] It appears that the principle of mistake allows considerable scope for judicial creativity. However, such a statement must be tempered with the observation that common law 'objectifies intention by erecting barriers to evidence of what parties really intended as opposed to what they said or wrote.'[36] It is that particular 'barrier

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[31] ICC Arbitration Case No. 7645, March 1995, in (2000) 11 *ICC International Court of Arbitration Bulletin* [ACAB] Zurich Chamber of Commerce, 25 November 1994, case no 16.

[32] Ibid.

[33] The same result could also have been achieved by using Article 8 CISG.

[34] Ibid.

[35] Latimer, *supra* note 22 at n. 32, 323.

[36] J.M. Perillo, 'Editorial remarks on the manner in which the UNIDROIT Principles may be used to interpret and supplement CISG Article 8' at <http://www.cisg.law.pace.edu/cisg/principles/unit8.html>, last updated on 22 October 1998.

to evidence' as expressed in the parol evidence rule which sets common law apart from the CISG, as Article 8(3) allows a court to take into consideration 'all relevant circumstances of the case.' Generally speaking, the common law treatment of the interpretation of intent is based on case law and is not readily distinguishable from rules of evidence and rules about mistake.[37]

In brief, only operative mistakes can have the effect of vitiating a contract, and remedies will not only be determined by common law but also through equity.[38] In common law, the interpretation of intent is in reality a 'case of construction.'[39] J. Steyn explained the process of construction in *Associated Japanese Bank International Ltd. v. Crédit du Nord S.A.*[40] He noted that:

> Logically, before one can turn to the rules as to mistake ... one must first determine whether the contract itself ... provides who bears the risk of the relevant mistake. Only if the contract is silent on the point is there scope for invoking mistake.[41]

Lord Hoffman in essence advocates a similar approach. He summarized five principles in *Investors Compensation Scheme Limited v. West Bromwich Building Society*.[42] Two of the principles are of importance within the context of this paper:

> '(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of he contract.'[43]

At first glance, Article 8 of the CISG appears to convey the same requirements as common law in ascertaining the intent of the parties. However, the difference is that common law only gives consideration to knowledge available 'at the time of the contract.' Such knowledge being subject to the parol evidence rule would in essence exclude some expressions of intent, namely those expressed outside 'the time of the contract.' Furthermore, Lord Hoffman notes that the meaning of the document, that is, the contract, is of importance, whereas the CISG in Article 8(3) prescribes that negotiations, usage, and subsequent conduct of the parties must be taken into consideration to find the true intent.

In principle three, Lord Hoffman explains and clarifies what he terms the 'admissible background knowledge.' He states:

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[37] O. Lando and H. Beale (eds.), *Principles of European Contract Law: Parts I and II* (2000) at p. 290.
[38] Any textbook can supply further information. For example, *see* J. W. Carter and D. J. Harland, *Contract Law in Australia* (Butterworths 1996, 3rd ed.).
[39] *McRae v. Commonwealth Disposals Commission* (1951) 84 CLR 377, 402.
[40] [1988] 3 All ER 902.
[41] Ibid. p. 912.
[42] [1998] 1 WLR 896.
[43] Ibid. pp. 912H–913E.

> '(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes the distinction for reasons of practical policy and, in this respect only, legal interpretation differs from he way we should interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.'[44]

The divergence of Article 8 and common law could not be expressed more succinctly. The admissible background knowledge in common law acts to exclude, whereas the CISG is inclusive and admits all 'relevant circumstances of the case.' Under common law, a party trying to establish intent only has a small window of opportunity. The intent must be found in the contractual document, and furthermore, the expressed intent needs to be understood by a reasonable person. The CISG, on the other hand, invites an investigator to look at all relevant circumstances starting at the negotiation stage until the completion of the contractual relationship. Common law, by contrast, views the contractual document as the culmination and expression of the intent of the contractual parties. In sum, the CISG recognizes that not all contractual obligations are included in a contractual document. By analogy, a letter writer will not include in his letter facts which are known by the recipient. Article 8 correctly phrased that knowledge as conduct which the other party knew or of which they could not have been unaware.

Common law does not totally reject subjective intent. In an action for rectification, evidence as to the subjective intent of parties is admitted. It indicates that certain contracts are unworkable unless the subjective intent of parties is taken into consideration. However, in order for rectification to be effective, a partial abandonment of the parol evidence rule is also essential.

If the admissibility of subjective intent were crucial to achieve justice, a court would need to reject the common law approach to mistake and adopt the principle of rectification or possibly estoppel. Equity, being in reality only an extra legal decision-making principle compared to common law, cannot achieve the same outcome as rectification. Arguably, the need to indulge in 'legal gymnastics' indicates that outcomes in relation to mistake depend on whether judges allow for rectification to proceed or whether they choose to apply common law principles.

If we consider that Bentham and his positivist followers valued certainty and predictability above all else,[45] the less than formalistic approach advocated by Lord Hoffman does not contribute to certainty. On the other hand, neither is it an invitation for judges to abandon established habits:

> '[and substitute] legally reasoned decisions [with] an unanalytical incantation of

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[44] Ibid.

[45] H. K. Lücke, 'Good Faith and Contractual Performance' in *Essays on Contract* (P. D. Finn (ed.)) (1987) at pp. 155 and 157.

> personal values which would lead to idiosyncratic and inconsistent decision making.'[46]

Lord Hoffman himself attempts to draw a distinction between legal interpretation and 'interpretation of utterances in ordinary life.' He suggests that the 'boundaries are in some respects unclear.' However, is it not that these 'utterances in ordinary life' are in many cases the foundation of a business relationship which leads to a contractual relationships? It is precisely the notion of subjective intent which drives business and creates business contacts. In sum, it leads to the formation of contracts. Whatever technological or legal advances we may have made, the selling and buying of goods is still a personalized people activity. It is argued that the CISG has recognized this particular function and through Articles 7, 8 and 9 has specifically introduced the mechanism in which the legal framework can and will facilitate personalized contractual relationships.

Arguably, Article 8 of the CISG supplies a clear rule because subjective as well as objective intent have to be taken into consideration in all cases and not just in cases where certainty and predictability are difficult to reconcile with justice and fairness. The action of rectification also suggests that a clear distinction between interpretation and evidentiary rule is difficult to maintain. The fact that the parol evidence rule needs to be relaxed is an argument that this specific rule is a hindrance to business, specifically business that crosses international boundaries.

The difference in 'mind-set' between common law and the CISG is illustrated in *Mannai Limited v. Eagle Star Assurance Company Ltd.*[47] A tenant wanted to exercise his option and terminate the lease. He had to do so on 13 January. He wrongly named the date as being 12 January. Under the CISG Article 8, the court would have examined the intent of the parties. It is evident that the subjective intent of the tenant was to terminate on 13 January. Furthermore, the other party knew or could not have been unaware of the intent of the tenant. Hence, a valid termination had taken place. The English court came to the same conclusion. However, it was a majority decision and 'the decision is regarded by some as controversial.'[48] The acknowledgment in the CISG that a subjective intent is of such importance that it is vital to the contract has not received the same acknowledgement in common law. Arguably, the difference between the CISG and common law stems from the fact that the CISG views the contract as an expression of the intent of parties. Common law, on the other hand, treats the contract as essentially viewed by the informed bystander applying established legal principles.

Under the CISG pursuant to Article 8, the teasing out of the intention of the parties is the 'key stone' in the interpretation of the contractual obligations in a sale of goods. The first question the courts would ask is the following: what is each

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[46] Ibid. p.165.
[47] [1997] AC 749.
[48] Markesinisis, *supra* note 9 at p. 83, Lord Steyn.

party's understanding of the statements or conduct of the other party? The court, in *M. Caiato Roger v. La Société française de factoring international factor France "S.S.F." (SA)*, looked at the prolonged dealings between the parties and found it impossible for the seller to deny knowledge of the fact that the goods were destined for the French market and that hence had to comply with French marketing regulations.[49] It would be unusual for common law to view silence as a valid expression of intent. However, the CISG can inquire into all relevant circumstances specifically taking the principle of good faith pursuant to Article 7 into consideration. Good faith arguments would also prevent an insistence on a technical aspect of a contract where the intent clearly indicates otherwise.

To illustrate the above point, *Couturier v. Hastie*[50] is instructive. The facts are simple. A cargo of corn on board a ship was the subject of a contract. Unbeknownst to the parties, the captain of the ship had sold the cargo. Due to bad weather, the corn fermented and was in a dangerous state. The vendor relied on the provision concerning 'payment upon handing over shipping documents' and insisted on payment. Such an argument would be unsustainable under the CISG. It would be impossible to deny that the intent of the parties was that the handing over of documents was linked to taking delivery of goods.

Common law does not in all circumstances rely solely on the objective theory. In *Taylor v. Johnson*,[51] the court at least discussed the 'subjective theory.'

> The 'subjective theory' ... is that the true consent of the parties is essential to a valid contract. The contrary view, ... is that the law is concerned, not with the real intentions of the parties, but with the outward manifestations of those intentions.[52]

The majority in *Taylor v. Johnson* argued that 'in practice, as between the contracting parties, there is little difference in the result of the application of the two competing theories.'[53] Their view was based on the opinion that the doctrine of estoppel would preclude conduct, which would mislead the other party regarding what the real intention was. The operation of estoppel was summarized by J. A. Priestley when he noted:

> 'For equitable estoppel to operate there must be the creation or encouragement by the defendant in the plaintiff of an assumption that a contract will come into existence or a promise be performed or an interest granted to the plaintiff by

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[49] *M. Caiato Roger v. La Société française de factoring international factor France "S.S.F." (SA)*, *Cour d'appel de Grenoble*, 93/4126, at <http://cisgw3.law.pace.edu/cases/950913f1.html>, last updated on 24 October 2000.
[50] (1856) 5 HLC 673; 10 ER 1065.
[51] (1983) 151 CLR 422.
[52] Ibid. p. 428.
[53] *Taylor v. Johnson* at p. 428.

> the defendant, and reliance on that by the plaintiff, in circumstances where departure from the assumption by the defendant would be unconscionable.'[54]

Arguably, estoppel breaches the gap between common law and Article 8, but to argue that estoppel achieves the same result as Article 8 is incorrect. The doctrine only works to create a contract when technically none exists. It is doubtful whether a court would use estoppel to alter or add a term to a contract. Furthermore, an act of unconscionability must be present in order to invoke estoppel. Such narrowness is not envisaged by Article 8.

The common law courts are faced with the problem that here is matter of a difference in legal techniques when applying the subjective or objective theory of mistake. The important distinction is that according to the subjective theory the contract is void *ab initio,* whereas the objective theory regards a contract as voidable only.[55] Such terminology is unknown in the CISG, where a contract can only be avoided under the principles of fundamental breach or '*Nachfrist*.'

Article 8 of the CISG simply determines whether the contract exhibits mutual intent of the parties. Either such intent is expressed subjectively or the court 'constructs' the contract objectively. Common law, on the other hand, attempts to merge the evidentiary as well as the interpretative function into one. As a result, the aversion of the courts to use the subjective theory has left the 'objective theory in command of the field.'[56] Arguably, the difference between common law and the CISG is that the former views a contract as seen through the eyes of a third party, whereas the CISG attempts to look at the contract as the parties intended to view it in the first place. The subjective intent should always take precedent over the objective one, as it truly reflects the purpose of the agreement between the two parties.

4. Conclusion

The application of the CISG is exhaustive; it governs the entire contract including the formation of the contract and the rights and obligations of the parties.[57] Article 8 therefore has wide application. The CISG recognizes that in international trade an effective contract must express the true intent of the parties and not an intent measured by the views of informed bystanders.

Interestingly enough, in the initial stages there is no real difference between common law and Article 8. Both the CISG and common law, where necessary,

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[54] *Austotel Pty Ltd v. Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582, at p. 610.
[55] Ibid. p. 429.
[56] Ibid. p. 429.
[57] Switzerland, 15 September 2000, *Bundesgericht* [4C.105/2000]. <http://cisgw3.law.pace.edu/cases/000915s.html>, last updated on 26 June 2002.

construct the contract. However, Article 8 takes into consideration subjective as well as objective intent within the framework of Article 7. As such, contacts are constructed without recourse to technical language. Article 8 will not allow the objective construction to be the influential factor in determining the intent of parties.

The methodology of the need to interpret the intent (*auslegungsbedürftigkeit*) is the important difference between common law and the CISG. The CISG looks at the 'true intent' of the parties and is not, unlike common law, constrained by evidentiary rules. Considering the intent of the parties as expressed in the contractual document is very narrow. The fact that subjective intent can be taken into consideration but only according to the principle of rectification indicates that contracts cannot be interpreted without considering the subjective intent of parties. Common law had to abandon the parol evidence rule to elicit the subjective intent, which demonstrates that the subjective intent of parties is an integral part of any agreement.

Arguably, the CISG is superior in constructing a contract when the intent of the parties needs to be examined. Furthermore, the '*auslegungsbedürftigkeit*'' of the CISG is closer to civil law in suggesting that a statutory overhaul of the common law principle of mistake is warranted specifically in view of the increased internationalization of trade.