

**MCC-Marble Ceramic Center, Inc. v.  
Ceramica Nuova D'Agostino, S.P.A.**

UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT  
144 F.3d 1384 (1998), *cert. denied*, 526 U.S. 1087 (1999)

**Author's Note:** Plaintiff buyer MCC is a US corporate tile seller. Defendant seller D'Agostino is an Italian corporation that manufactures tiles. MCC's president, Juan Carlos Monzon, met representatives of D'Agostino at a trade fair in Bologna, Italy. He negotiated an agreement in 1990 to purchase ceramic tiles from D'Agostino, based on samples he examined at the Bologna trade fair. Monzon, who did not speak Italian, communicated with Gianni Silingardi (D'Agostino's commercial director) through a translator, Gianfranco Copelli. Copelli was an agent of the D'Agostino company.

The parties apparently arrived at an oral agreement on the crucial terms of price, quality, quantity, delivery, and payment. They then recorded these terms on one of D'Agostino's standard pre-printed order forms. Monzon signed the contract on MCC's behalf. According to MCC, the parties also entered into a related but separate "requirements" contract in February 1991. D'Agostino thereby agreed to supply MCC with high-grade ceramic tile at specific discounts so long as MCC continued to purchase sufficient quantities of tile. MCC completed a number of additional order forms which thus requested tile deliveries pursuant to the discount agreement.

Then this commercial dispute erupted. MCC brought suit against D'Agostino in a US federal court, claiming that the defendant manufacturer breached the 1991 requirements discount contract by failing to fill orders that MCC placed in April, May, and August 1991.

Most footnotes and citations to authority have been omitted.

***Court's Opinion:***

This case requires us to determine whether a court must consider parol [oral] evidence in a contract dispute governed by the United Nations Convention on Contracts for the International Sale of Goods ("CISG"). . . .

BACKGROUND

. . .

In addition to other defenses, D'Agostino responded that it was under no obligation to fill MCC's orders because MCC had defaulted on payment for previous shipments. In support of its position, D'Agostino relied on the pre-printed terms of the contracts that MCC had executed. The executed forms were printed in Italian and contained terms and conditions on both the front and reverse. According to an English translation of the October 1990 contract, the front of the order form contained the following language directly beneath Monzon's signature:

[T]he buyer hereby states that he is aware of the sales conditions stated on the reverse and that he expressly approves of them with special reference to those numbered 1-2-3-4-5-6-7-8. Clause 6(b), printed on the back of the form states:

[D]efault or delay in payment within the time agreed upon gives D'Agostino the right to . . . suspend or cancel the contract itself and to cancel possible other

pending contracts and the buyer does not have the right to indemnification or damages. . . .

MCC . . . argued that the parties never intended the terms and conditions printed on the reverse of the order form to apply to their agreements. As evidence for this assertion, MCC submitted Monzon's affidavit, which claims that MCC had no subjective intent to be bound by those terms and that D'Agostino was aware of this intent. MCC also filed affidavits from Silingardi and Copelli, D'Agostino's representatives at the trade fair, which support Monzon's claim that the parties subjectively intended not to be bound by the terms on the reverse of the order form. The magistrate judge [in the Florida federal trial court] held that the affidavits, even if true, did not raise an issue [which a jury could resolve] . . . regarding the interpretation or applicability of the terms of the written contracts and the district court accepted his recommendation to award . . . judgment in D'Agostino's favor. MCC then filed this timely appeal.

## DISCUSSION

The parties to this case agree that the CISG governs their dispute because the United States, where MCC has its place of business, and Italy, where D'Agostino has its place of business, are both States Party to the Convention. Article 8 of the CISG governs the interpretation of international contracts for the sale of goods and forms the basis of MCC's appeal from the district court's grant of summary judgment in D'Agostino's favor.<sup>7</sup> MCC argues that the magistrate judge and the district court improperly ignored evidence that MCC submitted regarding the parties' subjective intent when they memorialized the terms of their agreement on D'Agostino's pre-printed form contract, and that the magistrate judge erred by applying the parol evidence rule in derogation of the CISG.

### *I. Subjective Intent Under the CISG*

Contrary to what is familiar practice in United States courts, the CISG appears to permit a substantial inquiry into the parties' subjective intent, even if the parties did not engage in any objectively ascertainable means of registering this intent.<sup>8</sup> Article 8(1) of the CISG instructs courts to interpret the "statements . . . and other conduct of a party . . . according to his intent" as

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<sup>7</sup> Article 8 provides:

(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 [thus allowing oral evidence which might be contrary to the terms in a written contract]. . . .

<sup>8</sup> In the United States, the legislatures, courts, and the legal academy have voiced a preference for relying on objective manifestations of the parties' intentions. For example, Article Two of the Uniform Commercial Code, which most states have enacted in some form or another to govern contracts for the sale of goods, is replete with references to standards of commercial reasonableness. See e.g., U.C.C. §2-206 (referring to reasonable means of accepting an offer); . . . Justice Holmes expressed the philosophy behind this focus on the objective in forceful terms: "The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and [the law will] judge parties by their conduct." Oliver W. Holmes, "The Common Law" 242 (Howe ed.1963) quoted in John O. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* §107 at 164 (2d ed.1991)(hereinafter Hannold, Uniform Law.)

long as the other party “knew or could not have been unaware” of that intent. The plain language of the Convention, therefore, requires an inquiry into a party’s subjective intent as long as the other party to the contract was aware [or should have been aware] of that intent.

In this case, MCC has submitted three affidavits that discuss the purported subjective intent of the parties to the initial agreement concluded between MCC and D’Agostino in October 1990. All three affidavits discuss the preliminary negotiations and report that the parties arrived at an oral agreement for D’Agostino to supply quantities of a specific grade of ceramic tile to MCC at an agreed upon price. The affidavits state that the “oral agreement established the essential terms of quality, quantity, description of goods, delivery, price and payment.” The affidavits also note that the parties memorialized the terms of their oral agreement on a standard D’Agostino order form, but all three affiants contend that the parties subjectively intended not to be bound by the terms on the reverse of that form despite a provision directly below the signature line that expressly and specifically incorporated those terms.

The terms on the reverse of the contract give D’Agostino the right to suspend or cancel all contracts in the event of a buyer’s non-payment and require a buyer to make a written report of all defects within ten days. As the magistrate judge’s report and recommendation makes clear, if these terms applied to the agreements between MCC and D’Agostino, summary judgment [on the law, which precludes the plaintiff’s case from going to trial for the resolution of factual issues] would be appropriate because MCC failed to make any written complaints about the quality of tile it received and D’Agostino has established MCC’s non-payment of a number of invoices amounting to \$108,389.40 and 102,053,846.00 Italian lira.

Article 8(1) of the CISG requires a court to consider this evidence of the parties’ subjective intent. Contrary to the magistrate judge’s report, which the district court endorsed and adopted, article 8(1) does not focus on interpreting the parties’ statements alone. Although we agree with the magistrate judge’s conclusion that no “interpretation” of the contract’s terms could support MCC’s position, article 8(1) also requires a court to consider subjective intent while interpreting the conduct of the parties. The CISG’s language, therefore, requires courts to consider evidence of a party’s subjective intent when signing a contract if the other party to the contract was aware of that intent at the time. This is precisely the type of evidence that MCC has provided through the Silingardi, Copelli, and Monzon affidavits, which discuss not only Monzon’s intent as MCC’s representative but also discuss the intent of D’Agostino’s representatives and their knowledge that Monzon did not intend to agree to the terms on the reverse of the form contract. [The defendant described them as disgruntled employees.] This acknowledgment that D’Agostino’s representatives were aware of Monzon’s subjective intent puts this case squarely within article 8(1) of the CISG, and therefore requires the court to consider MCC’s evidence as it interprets the parties’ conduct.

## *II. Parol Evidence and the CISG*

Given our determination that the magistrate judge and the district court should have considered MCC’s affidavits regarding the parties’ subjective intentions, we must address a question of first impression in this circuit: [W]hether the parol evidence rule, which bars evidence of an earlier oral contract that contradicts or varies the terms of a subsequent or contemporaneous written contract,<sup>12</sup> plays any role in cases involving the CISG. . . .

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<sup>12</sup> The Uniform Commercial Code includes a version of the parol evidence rule applicable to contracts for the sale of goods in most states. . . .U.C.C. §2-202.

The CISG itself contains no express statement on the role of parol evidence. It is clear, however, that the drafters of the CISG were comfortable with the concept of permitting parties to rely on oral contracts because they eschewed any statutes of fraud provision and expressly provided for the enforcement of oral contracts. Compare CISG, art. 11 (a contract of sale need not be concluded or evidenced in writing) with U.C.C. §2-201 (precluding the enforcement of oral contracts for the sale of goods involving more than \$500). Moreover, article 8(3) of the CISG expressly directs courts to give “due consideration . . . to all relevant circumstances of the case including the negotiations . . .” to determine the intent of the parties. Given article 8(1)’s directive to use the intent of the parties to interpret their statements and conduct, article 8(3) is a clear instruction to admit and consider parol evidence regarding the negotiations to the extent they reveal the parties’ subjective intent.

Despite the CISG’s broad scope, surprisingly few cases have applied the Convention in the United States, see *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1027-28 (2d Cir.1995) (observing that “there is virtually no case law under the Convention”), and only two reported decisions touch upon the parol evidence rule, both in dicta. . . .

Our reading of article 8(3) as a rejection of the parol evidence rule [which prohibits proof of an oral agreement which varies a term in the parties’ written contract] . . . is in accordance with the great weight of academic commentary on the issue. As one scholar has explained:

[T]he language of Article 8(3) that “due consideration is to be given to all relevant circumstances of the case” seems adequate to override any domestic rule that would bar a tribunal from considering the relevance of other agreements. . . . Article 8(3) relieves tribunals from domestic rules that might bar them from “considering” any evidence between the parties that is relevant. This added flexibility for interpretation is consistent with a growing body of opinion that the “parol evidence rule” has been an embarrassment for the administration of modern transactions. Honnold, *Uniform Law* §110 at 170-71. . . .

[A]lthough jurisdictions in the United States have found the parol evidence rule helpful to promote good faith and uniformity in contract, as well as an appropriate answer to the question of how much consideration to give parol evidence, a wide number of other [foreign] States Party to the CISG have rejected the rule in their domestic jurisdictions. One of the primary factors motivating the negotiation and adoption of the CISG was to provide parties to international contracts for the sale of goods with some degree of certainty as to the principles of law that would govern potential disputes and remove the previous doubt regarding which party’s legal system might otherwise apply. See Letter of Transmittal from Ronald Reagan, President of the United States, to the United States Senate, reprinted at 15 USC app. 70, 71 (1997). Courts applying the CISG cannot, therefore, [unwittingly] upset the parties’ reliance on the Convention by substituting familiar principles of domestic law when the Convention requires a different result. We may only achieve the directives of good faith and uniformity in contracts under the CISG by interpreting and applying the plain language of article 8(3) as written and obeying its directive to consider this type of parol evidence.

This is not to say that parties to an international contract for the sale of goods cannot depend on written contracts or that parol evidence regarding subjective contractual intent need always prevent a party relying on a written agreement from securing summary judgment. To the

contrary, most cases will not present a situation (as exists in this case) in which both parties to the contract acknowledge a subjective intent not to be bound by the terms of a pre-printed writing. In most cases, therefore, article 8(2) of the CISG will apply, and objective evidence will provide the basis for the court's decision. Consequently, a party to a contract governed by the CISG will not be able to avoid the terms of a contract . . . simply by submitting an affidavit which states that he or she did not have the subjective intent to be bound by the contract's terms. . . . Moreover, 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.

Considering MCC's affidavits in this case, however, we conclude that the magistrate judge and the district court improperly granted summary judgment in favor of D'Agostino. Although the affidavits are, as D'Agostino observes, relatively conclusory and unsupported by facts that would objectively establish MCC's intent not to be bound by the conditions on the reverse of the form, article 8(1) requires a court to consider evidence of a party's subjective intent when the other party was aware of it, and the Silingardi and Copelli affidavits provide that evidence. This is not to say that the affidavits are conclusive proof of what the parties intended. A reasonable finder of fact, for example [at trial], could disregard testimony that purportedly sophisticated international merchants signed a contract without intending to be bound as simply too incredible to believe and hold MCC to the conditions printed on the reverse of the contract.<sup>20</sup> Nevertheless, the affidavits raise an issue of material fact regarding the parties' [arguable] intent to incorporate the provisions on the reverse of the form contract. . . .

#### CONCLUSION

MCC asks us to reverse the district court's grant of summary judgment in favor of D'Agostino [so that this case can go to trial]. The district court's decision rests on pre-printed contractual terms and conditions incorporated on the reverse of a standard order form that MCC's president signed on the company's behalf. Nevertheless, we conclude that the CISG, which governs international contracts for the sale of goods, precludes summary judgment in this case because MCC has raised an issue of material fact concerning the parties' subjective intent to be bound by the terms on the reverse of the pre-printed contract. The CISG also precludes the application of the parol evidence rule, which would otherwise bar the consideration of evidence concerning a prior or contemporaneously negotiated oral agreement. Accordingly, we REVERSE the district court's grant of summary judgment and REMAND this case for further proceedings consistent with this opinion.

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#### *, Notes & Questions*

1. How would the result in MCC be different under domestic US (nontreaty) law? Why?
2. The MCC opinion says that "Courts applying the CISG cannot, therefore, upset the parties' reliance on the Convention by substituting familiar principles of domestic law when the

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<sup>20</sup> D'Agostino attempts to explain and undermine the affidavit of its representatives during the transaction, by calling Silingardi a "disgruntled" former employee. Appellee's Br. at 11, 39. Silingardi's alleged feelings towards his former employer may indeed be relevant to undermine the credibility of his assertions, but that is a matter for the finder of fact, not for this court on summary judgment. . . .

Convention requires a different result." Is it likely that the parties even knew about the CISG when the plaintiff's representative signed the defendant's contract in Italy? Does this apparent presumption on the part of the court actually matter?

3. The plaintiff's representative traveled from Florida to the trade fair in Bologna, but could not speak Italian. He negotiated a contract written in Italian. Plaintiff MCC basically appealed to secure the right to get this case to trial to introduce oral evidence, varying the terms of the written contract. Those terms, on the back of the written form contract, were expressly incorporated into the contract—appearing immediately under the plaintiff representative's signature. The three affidavits were, as argued by the defendant, "relatively conclusory and unsupported by facts that would objectively establish MCC's supposed intent *not* to be bound by the conditions on the reverse of the form." Without affidavits from the two representatives of the defendant, and thus only an affidavit from the plaintiff's representative, would the appellate court likely allow this case to survive dismissal so that it could go to trial?

4. The Dallas Area Rapid Transit Authority (DART) provides a good example of a company advising its vendors that it has opted out of a treaty that would otherwise their contractual relationship—per its notice at <<http://www.dartstore.org/registration.html>>:

Disclaimer DART Store's Standard Terms of Sale and Use of Web Site: All sales and/or transactions are subject to the following terms and conditions:

3. Governing Law This Agreement will be governed by the laws in force in the State of Texas. This Agreement will *not* be governed by the *United Nations Convention on Contracts for the International Sale of Goods*, the application of which is expressly excluded. Customer hereby agrees that applying Texas Law to this agreement is appropriate and that the DART Store's agreement to sell and deliver products to the Customer is dependent on this provision.