

# **ANALYZING THE JURISDICTIONAL ARBITRAGE POTENCY OF INDIAN CONTRACT LAW: WITH THE DISTINCT APPLICATION OF THE PAROL EVIDENCE RULE OF CONTRACT INTERPRETATION**

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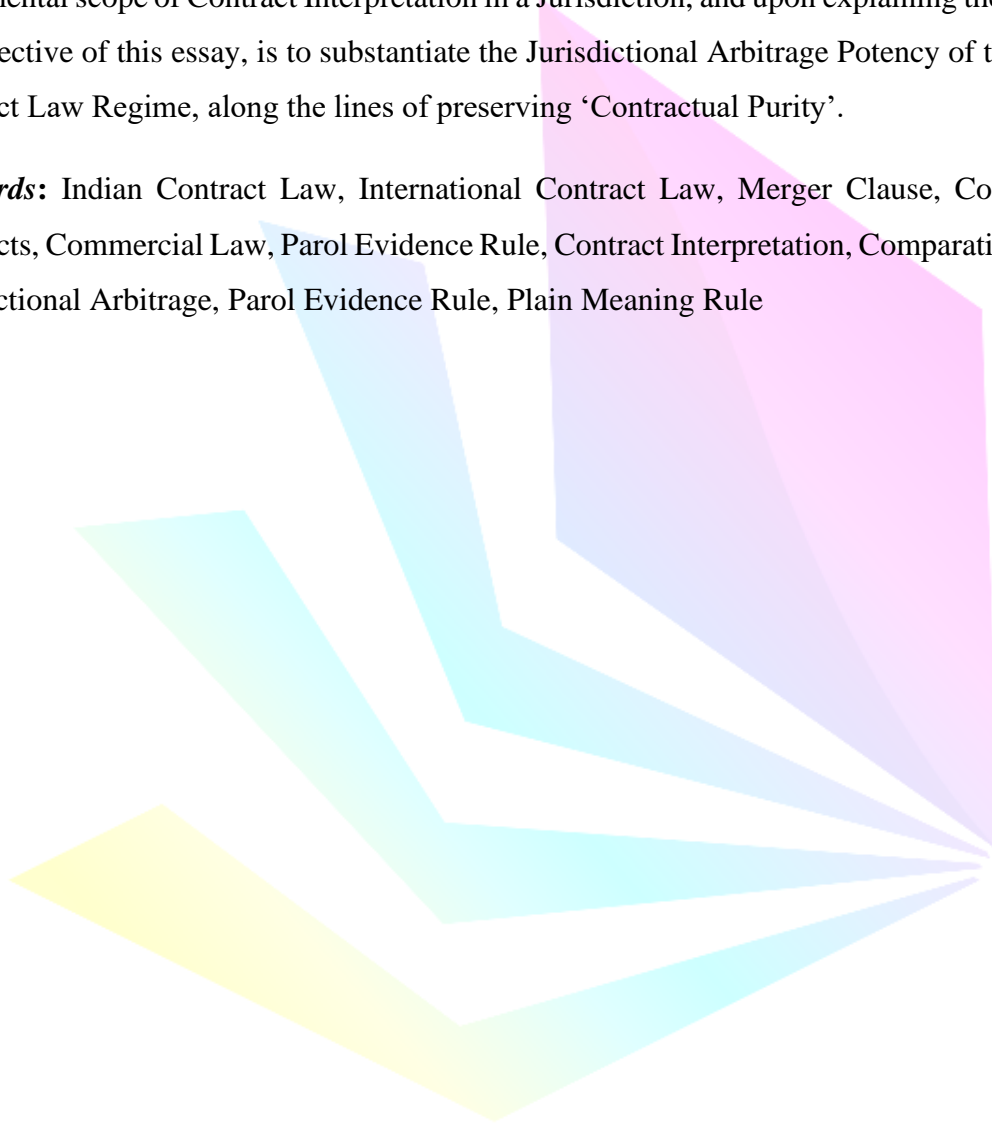
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## **ABSTRACT**

The Common Law Parol Evidence Rule, is a principle of restraint in contract interpretation derived from common law courts<sup>i</sup> (specifically inclusive of the jury system, i.e., the United States of America- U.S.A, since 1630)- excluding the consideration of preceding, contemporaneous (oral- specifically exempting written stature), and successive (subject to jurisdiction: i.e., allowed in the U.S.A, but barred in the United Kingdom- U.K) statements, agreements, and conduct (oral, written and behavioural- subject to jurisdictional requisite) deemed ‘extrinsic/Parol evidence’, in the contrary/alternative interpretation of contracts, in the presence of attributed ‘written stature’ (expressly representative of the intentions of the parties). The objective of the rule is to sanctify the ‘written stature’ of contracts, with the attribution of inherent finality and determinative impetus. Post initial conception by common law courts as a tool, to direct the attention of juries, towards the specific written provisions of contracts subject to litigation, inhibiting bias upon the consideration of irrelevant prior evidence, being agreement/statement/conduct (not mutually exclusive)<sup>ii</sup>, capable of impeding the textual interpretation of contracts; the Evidence Parol Rule, has been subject to manifestation/rejection (wholly/partially), across several legal systemic-integration efforts, bearing legislative impetus- i.e., the United Nations Convention on Contracts for the International Sale of Goods (CISG), the International Institute for Unification of Private Law (UNIDROIT PICC) Principles of International Commercial Contracts, Principles of European Contract Law

(PECL), the Restatement (Second) of Contracts and the Uniform Commercial Code (UCC) [in the context of the U.S.A] and jurisdictions (including the U.S.A, the U.K, India- being a partial integration jurisdiction according to precedent and statute such as the Indian Evidence Act 1872 and the Indian Contracts Act 1872, and civil law frameworks such as Japan, France and Germany). The whole/part acceptance/rejection of the Evidence Parol Rule, determines the fundamental scope of Contract Interpretation in a Jurisdiction, and upon explaining the process, the objective of this essay, is to substantiate the Jurisdictional Arbitrage Potency of the Indian Contract Law Regime, along the lines of preserving ‘Contractual Purity’.

**Keywords:** Indian Contract Law, International Contract Law, Merger Clause, Commercial Contracts, Commercial Law, Parol Evidence Rule, Contract Interpretation, Comparative Study, Jurisdictional Arbitrage, Parol Evidence Rule, Plain Meaning Rule



While the Parol Evidence Rule was conventionally applied- restricting the consideration of extrinsic evidence by the court, to prevent the contradiction/supplementary-replacement of the terms of a contract; extrinsic evidence was considerable for the interpretation of contracts- in furtherance of the intention of the parties, across multiple jurisdictions, including the U.S.A. The result, of such an exception, was the conception of the 'Plain Meaning Rule' of contractual interpretation<sup>iii</sup>, restricting the consideration of the court to the express provisions of the contract (devoid of ambiguity), for the interpretation of the contract, in furtherance of the intention of the parties.

The 'Plain Meaning Rule' prohibits the reference to extrinsic evidence, for the interpretation of contracts, in the case of reasonable clarity attributable to the express provisions of the contract. This rule however, is not restrictive of extrinsic evidence representative of the intention of parties contradictory/supplementary to the express provisions of the contract. The applicability of both the 'Common Law Parol Evidence Rule' and the 'Plain Meaning Rule', is contingent upon the nature of the contract, specifically the degree to which extrinsic evidence may be referred to, for the resolution of ambiguity and the furtherance of the actual intention of the parties to contract (subject to presumed representation via the provisions of the contract). The degree to which extrinsic evidence is capable of being referenced, may be ascertained upon the consideration of the degree of which, all the provisions of the agreement, definitive of the contract, are subject to express written representation, in the contract- defined as the degree of 'integration'.<sup>iv</sup>

'Complete Integration' refers to the state of a contract, inclusive of all the facets of the derivative agreement and the facts, in written form, with clarity and the absolute representation of the intention of the parties to contract, devoid of ambiguity. Completely integrated contracts are subject to finality, and the applicability of the Parol Evidence Rule via the addition of 'Integration/Merger Clauses', excluding any extrinsic evidence, from legal consideration in the interpretation of contracts; placing complete reliance upon express provisions. 'Partial Integration' on the contrary, refers to the state of a contract, inclusive of only partial aspects of the derivative agreement and the facts (fully definitive of the contract), in written form, placing reliance upon extrinsic evidence (preceding/contemporaneous/successive- subject to jurisdiction), for the clarification of the actual intention of the parties, which may be supplementary/explanatory or alternative in nature to the provisions of the litigated contract.

The Parol Evidence Rule may not apply to partially integrated contracts with the absence of an ‘Integration/Merger Clause’, and the express reference to extrinsic evidence in the provisions of the contract, furthering the actual intention of the parties. While the ‘Plain Meaning Rule’ may be reasonably applied to completely integrated contracts in adoptive common law jurisdictions, it may not be applied to partially integrated contracts in the light of the evident reliance of such contracts upon extrinsic statements/agreements/conduct, for accurate interpretation. India as a jurisdiction, permits the partial integration of contracts, according to the provisos of section 92 of the Indian Evidence Act 1872<sup>v</sup>, permitting the admission of extrinsic evidence, in the case all the facets of the derivative agreement, subject to contractual representation, have not been included in the contract. In comparison to the rigid positions assumed by adoptive common law jurisdictions over the ‘Parol Evidence Rule’ and also the legal frameworks and jurisdictions subject to the rejection of the rule, I found the jurisdiction of India to be of greater relative flexibility, despite the statutory codification of the ‘Parol Evidence Rule’, via the Indian Contract Act, and the Evidence Act, further re-enforced by the precedent of the Supreme Court.

Upon, defining the Parol Evidence Rule, and its scope of applicability, the objective of this article is to prove the hypothesized benefit of jurisdictional arbitrage, that may be availed by parties selecting India as their choice of jurisdiction for contractual interpretation, via comparative analysis of the specified relative legal frameworks.

The UN CISG, is the first relative legal framework, subject to comparative analysis. The CISG was an integration effort, creating a multi-jurisdictional legal framework, applicable to contracts, only subject to exclusion upon express specification in the jurisdiction clause. The Common Law Parol Evidence Rule and the Plain Meaning Rule are not applicable to the jurisdictions subject to the CISG; which assumes independent discretion in the ascertainment of value of express contractual specification, and the consideration of extrinsic evidence (either preceding, contemporary or successive).<sup>vi</sup> The relevant articles of the CISG, inhibiting the applicability of the Parol Evidence Rule, include articles 8, 9 and 11; while articles 6 and 12 detail the scope of derogation from the CISG, and the manner of exclusion. Article 8 of the CISG, sanctifies the actual intention [specifically article 8 (1)]<sup>vii</sup> of the parties and authorizes the consideration of all the relevant extrinsic/intrinsic evidence (within the provisions of the contract) for the ascertainment of intention, in the process of contractual interpretation. Article

8 (2) upholds the ‘reasonable person test’ for the ascertainment of the intention of the parties via the interpretation of actions and statements from the perspective of reasonability<sup>viii</sup>, in the case, the actual intention of the parties was not identified according to article 8 (1). Article 8 (3) directly excludes the applicability of the Common Law Parol Evidence Rule, via the consideration of every relevant aspect of the contract including facts, usages, actions and preceding/contemporary/successive agreement<sup>ix</sup>; in the application of the upheld ‘reasonable person’ perspective. Article 11, of the CISG empowers the court with the ability to consider witness testimony in the interpretation of contracts, specifically pertinent to sales.<sup>x</sup> Merger/Integration Clauses, providing inherent finality to the provisions of a contract, thereby diminishing the relevance of extrinsic evidence, fall within the ambit of derogation from the principles of the CISG, explicated in Article 6.<sup>xi</sup>

The CISG however, has no explicit provision fostering inherent finality of contract. There is always scope for litigation on the basis of limitless evidentiary consideration. The landmark case of MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D’Agostino<sup>xii</sup>, upheld the non-applicability of the Parol Evidence Rule, in cases of contract litigation where the CISG is the governing legal authority (either by active/tacit-without express exclusion, acquiescence).

The territorial jurisdiction of the court and the implications of the local legal framework (potentially inclusive of the application of the Parol Evidence Rule), may be deemed immaterial, in the cases of contract litigation, subject to the ambit of the CISG. The UNIDROIT PICC, are emblematic of the provisions of the CISG, excluding the applicability of the ‘Parol Evidence Rule’ and the ‘Plain Meaning Rule’, authorizing the consideration of preceding agreements, facts and statements, for the interpretation of a contract, irrespective of the presence of a Merger Clause.<sup>xiii</sup> Contrary to the CISG, the UNIDROIT PICC, do not permit derogation in the form of the ‘Merger/Integration’ Clause. The position of the Principles of European Contract Law is dualistic in nature with the accommodation of exceptions devoid of rigidity. According to Article 2:105 of the PECL<sup>xiv</sup>, the applicability of the ‘Parol Evidence Rule’ is contingent upon the integration of a ‘Merger Clause’, further subject to variation, as either a ‘Merger Clause’ arising from individual negotiation, or a ‘Merger Clause’ not subject to individual negotiation. In the case a ‘Merger Clause’ is subject to individual negotiation, preceding extrinsic evidence devoid of contractual integration via writing are excluded from consideration, in furtherance of contractual interpretation, in alignment with the Parol Evidence

Rule. The inherent finality of the contract is attributed to the perceived intention of the parties, upon individually negotiating the ‘Merger Clause’. In the case the ‘Merger Clause’ is devoid of conception upon individual negotiation, there is a rebuttable presumption, that the parties to the contact intended to exclude extrinsic evidence, which may however be disproved.

I also find the European Principles to be relatively more beneficial to the parties to a contract in comparison to rigid common law jurisdictions, applying the Parol Evidence and Plain Meaning Rule; with the denial of the enforcement of ‘Merger Clauses’, upon proof by either party to the contract, of their entry into agreement, upon being induced by preceding extrinsic evidence (inclusive of factual representation). The perpetration of fraud is thereby prevented. The U.S Restatement (Second) of Contracts, specifies the applicability of the Parol Evidence Rule upon completely integrated contracts, while excluding partially integrated contracts from the ambit of the same. The Uniform Commercial Code bars the admission of ‘evidence of prior agreement’ according to § 2-202.<sup>xv</sup>

The conclusive issue of the outright absence of the Parol Evidence Rule, and the consideration of any possible evidence for the contrary/supplementary/auxiliary interpretation of contracts, is the absence of respect for the finality of contract, attained upon documentation. While the civil law argument of the requisite consideration of every evidence, may persist, I believe the intention of the parties to formalize their agreement, via contracting, and documenting their contract, is significant. Parties may be empowered to arbitrarily renege upon their contractual obligations, with the admission of preceding evidence of contrary intention (subject to change in actuality prior to entering into the documented final contract), furthering wrongful interpretation, potentially contrary to their intention at the time of entering into contract. While the parol evidence rule, should generally apply, in cases of clarity and assurance, the exceptions provided for in Section 92 of the Indian Evidence Act 1872, facilitate equitable admission of extrinsic evidence, devoid of scope to exploit the lacuna of the CISG and UNIDROIT.

The Indian Evidence Act, entails 10 relevant statutory implications preserving the Parol Evidence Rule, with the ideal circumstance of exception.<sup>xvi</sup> Section 91, excludes the admission of extrinsic evidence, aside from the contract itself, in the case of such provision of contract (allowing for Merger Clauses). The section further entails exceptional circumstances, where additional extrinsic evidence may be considered. The 6 provisos of section 92, and section 93 are of the utmost significance. The position of the Indian Jurisdiction is ideally represented by

the Supreme Court in the case of Mangala Waman Karandikar vs. Prakash Damodar Ranade, where in the court upheld that the only circumstances where the Parol Evidence Rule would not apply are, cases of contractual ambiguity and express exceptional allowance by statute- the Indian Evidence Act, or the Indian Contract Act. The sanctity of contractual documentation was thereby preserved in the Indian Jurisdiction, devoid of causing prejudice to the rights of the parties involved. Sections 91-100 of the Evidence Act, assure equitable interpretation, devoid of the scope of exploiting lacunae (as observed in the provisions of the CISG and UNIDROIT).



## ENDNOTES

<sup>i</sup> CISG-AC Opinion no 3, *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG*, 23 October 2004. Rapporteur: Professor Richard Hyland, Rutgers Law School, Camden, NJ, USA. Open-access at: <https://digitalcommons.pace.edu/pilr/vol17/iss1/3/>.

<sup>ii</sup> Charles McCormick, *Handbook of the Law of Evidence* §§ 210-11 (1954).

<sup>iii</sup> CISG-AC Opinion no 3, *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG*, 23 October 2004. Rapporteur: Professor Richard Hyland, Rutgers Law School, Camden, NJ, USA. Open-access at: <https://digitalcommons.pace.edu/pilr/vol17/iss1/3/>.

<sup>iv</sup> CORNELL LAW, Partial integration | Wex | US Law | LII / Legal Information Institute (cornell.edu) (last visited Dec. 2, 2022).

<sup>v</sup> Indian Evidence Act, 1872, §92.

<sup>vi</sup> CISG-AC Opinion no 3, *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG*, 23 October 2004. Rapporteur: Professor Richard Hyland, Rutgers Law School, Camden, NJ, USA. Open-access at: <https://digitalcommons.pace.edu/pilr/vol17/iss1/3/>.

<sup>vii</sup> United Nations Convention on Contracts for the International Sale of Goods, 1980, Art. 8 (1).

<sup>viii</sup> United Nations Convention on Contracts for the International Sale of Goods, 1980, Art. 8 (2).

<sup>ix</sup> United Nations Convention on Contracts for the International Sale of Goods, 1980, Art. 8 (3).

<sup>x</sup> United Nations Convention on Contracts for the International Sale of Goods, 1980, Art. 11.

<sup>xi</sup> United Nations Convention on Contracts for the International Sale of Goods, 1980, Art. 6.

<sup>xii</sup> *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.*, 114 F.3d 1384, 1388-89 (11th Cir. 1998).

<sup>xiii</sup> See Unidroit Principles of International Commercial Contracts Article 2.1.17.

<sup>xiv</sup> See Article 2:105.

<sup>xv</sup> Uniform Commercial Code, 2021-2022 ed., § 2-202.

<sup>xvi</sup> GOH, Yihan. Contractual Interpretation in Indian Evidence Act Jurisdictions: Compatibility with Modern Contextual Approach. (2013). Oxford University Commonwealth Law Journal. 13, (1), 17-48. Research Collection School Of Law. Available at: [https://ink.library.smu.edu.sg/sol\\_research/1386](https://ink.library.smu.edu.sg/sol_research/1386).