Singapore Management University

Institutional Knowledge at Singapore Management University

Research Collection Yong Pung How School Of Law

Yong Pung How School of Law

9-2021

Proper characterisation of the parol evidence rule and its applicability in international arbitration

Darius CHAN
Singapore Management University, dariuschan@smu.edu.sg

Yi Hang Louis LAU

Follow this and additional works at: https://ink.library.smu.edu.sg/sol_research

Part of the Dispute Resolution and Arbitration Commons

Citation

1

This Journal Article is brought to you for free and open access by the Yong Pung How School of Law at Institutional Knowledge at Singapore Management University. It has been accepted for inclusion in Research Collection Yong Pung How School Of Law by an authorized administrator of Institutional Knowledge at Singapore Management University. For more information, please email cherylds@smu.edu.sg.

Arbitration International, 2021, 00, 1–29
doi: 10.1093/arbint/aiab029
Article

OXFORD

Proper characterisation of the parol evidence rule and its applicability in international arbitration

Darius Chan * and Louis Lau Yi Hang†

ABSTRACT

Most arbitral statutes and institutional rules give great latitude to tribunals on the admissibility of evidence, and do not mandate application of domestic rules of evidence. In common law jurisdictions where the parol evidence rule applies, the issue that arises is whether the parol evidence rule is necessarily a procedural rule of evidence which tribunals are not bound to apply, especially in jurisdictions which have codified the rule under domestic evidence legislation. Notwithstanding any codification, this article argues that the parol evidence rule at common law is a substantive rule of contractual interpretation that should be applied as part of the *lex contractus* in international arbitration proceedings. Faithful application of the parol evidence rule as a substantive rule of contractual interpretation ensures that adjudicators arrive at the same interpretation on the same set of facts, thereby promoting uniformity, predictability, and consistency, regardless of the mode of dispute resolution.

1. BACKGROUND

Outcomes in most arbitrations are highly dependent on the admissibility of evidence, which allows the tribunal to make factual determinations.[1] In this connection, issues of contractual interpretation are central to disputes arising out of commercial

* Darius Chan, Associate Professor of Law (Practice), Yong Pung How School of Law, Singapore Management University, Singapore; Arbitrator and Advocate, Fountain Court Chambers, Singapore. Email: dariuschan@smu.edu.sg. The author acknowledges and is grateful for the support of the Singapore International Dispute Resolution Academy.

† Louis Lau Yi Hang, LLB (*summa cum laude*), Yong Pung How School of Law, Singapore Management University, Singapore. Email: yihang.lau.2017@law.smu.edu.sg

1 N Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 375–76. The authors observed that perhaps 60–70 per cent of cases turn on facts rather than the application of principles of law, and in the vast majority of other cases, the outcome is based on a combination of factual and legal issues; See also J Waincymer, 'Part II: The Process of an Arbitration, Chapter 10: Approaches to Evidence and Fact Finding' in J Waincymer (ed), *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) 743, 743; W Park, 'Arbitrators and Accuracy' (2010) 1(1) Journal of International Dispute Settlement 25, 26–27.

© The Author(s) 2021. Published by Oxford University Press on behalf of the London Court of International Arbitration.
For permissions, please email: journals.permissions@oup.com

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

contracts,[2] and this is no more apparent than in international arbitration where most disputes are typically founded upon a written contract.[3]

Contractual interpretation involves ascertaining the meaning of the express term of a written contract based on the language used to deduce the allocation of the respective rights and obligations of the contracting parties.[4] The civil law tradition generally adopts a 'subjective' approach focused on admitting all extrinsic evidence in interpreting the contract according to the parties common intentions.[5] On the other hand, under the common law approach, the focus is generally on ascertaining the objective common intention of the contracting parties based on what the reasonable man in the position of the parties and having all available background knowledge of the transaction available to the parties at the time of the contract would understand the provision to mean.[6] This approach has largely been accepted across various common law jurisdictions[7] and is underpinned by the idea of legal certainty for the parties.[8]

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

2 VK Rajah, 'Redrawing the Boundaries of Contractual Interpretation – From Text to Context to Pre-Text and Beyond' (2010) 22 Singapore Academy of Law Journal 513, 513.

3 JJ Spigelman, 'The Centrality of Contractual Interpretation: A Comparative Perspective' (2015) 81(3) The International Journal of Arbitration, Mediation and Dispute Management 234, 234–35; A Rau and E Sherman, 'Tradition and Innovation in International Arbitration Procedure' (1995) 30 Texas International Law Journal 89, 101; R Calnan, 'Construction of Commercial Contracts: A Practitioner's Perspective' in A Burrows and E Peel (eds), *Contract Terms* (OUP 2007); P Ostendorf, 'The Exclusionary Rule of English Law and Its Proper Characterisation in the Conflict of Laws – Is It a Rule of Evidence or Contract Interpretation?' (2015) 11(1) Journal of Private International Law 163, 164.

4 E McKendrick, 'Chapter 13: Express Terms' in HG Beale and others (eds), *Chitty on Contracts, Volume 1: General Principles* (32nd edn, Sweet & Maxwell 2018) paras 13-048–13-049; E Peel, 'Chapter 6: The Contents of a Contract' in E Peel (ed), *Treitel: The Law of Contract* (15th edn, Sweet & Maxwell 2020) para 6-041; E McKendrick, 'Chapter IV - The Law of Obligations: Contract: In General, Contents' in A Burrows (ed), *English Private Law* (3rd edn, OUP 2013) para 8.83; P Koh and A Phang, 'Terms of the Contract: Express and Implied Terms' in Andrew Phang Boon Leong (ed), *The Law of Contract in Singapore* (Academy Publishing 2012) paras 06.0410–6.042.

5 I Schwenzer, P Hachem and C Kee, *Global Sales and Contract Law* (OUP 2012) 26–38; S Vogenauer, 'Interpretation of Contracts: Concluding Comparative Observations' in A Burrows and E Peel (eds), *Contract Terms* (OUP 2007) 123 and 125; B Ling, *Contract Law in China* (Sweet & Maxwell Asia 2002) para 5.007; K Zweigert and H Kötz, *Introduction to Comparative Law* (Tony Weir ed, 3rd edn, Clarendon 1998) 400–409. See also M Panhard, 'Admission of Extrinsic Evidence for Contract Interpretation: The International Arbitration Culture in Light of the Traditional Divisions' (2018) 18(2) International and Comparative Law Review 100, 106–07; J Karton, 'The Arbitral Role in Contractual Interpretation' (2015) 6(1) Journal of International Dispute Settlement 4, 8.

6 Chitty (n 4) para 13-048; Treitel (n 4) para 6-042; Burrows (n 4) para 8.83; D Nicholls, 'My Kingdom for a Horse: The Meaning of Words' (2005) 121 Law Quarterly Review 577, 579–80; For the common law approach to contractual interpretation, see *Prenn v Simmonds* [1971] 1 WLR 1381 (HL) 1384–85; *Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1)* [1998] 1 WLR 896 (HL) 913; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 (HL) paras 28–47; *Arnold v Britton* [2015] AC 1619 (UKSC) para 15.

7 Spigelman (n 3) 247–50. See also YH Goh, 'From Context to Text in Contractual Interpretation: Is There Really a Problem with the Plain Meaning Rule?' (2016) 45(4) Common Law World Review 298, 309–10; J Perillo, 'The Origins of the Objective theory of Contract Formation and Interpretation' (2000) 69(2) Fordham Law Review 427.

8 See generally Perillo (n 7).

Consistent with the common law's emphasis on objectivity and certainty is the development of the parol evidence rule,[9] a related principle that is the subject of this article. The rule is invoked when the parties' agreement relating to a transaction has been entirely reduced to writing, and operates to bar the admission of evidence, verbal or otherwise, that would add to, vary or contradict that written agreement.[10] Crucially, there exists no functionally equivalent rule within the civil legal tradition's rules of contractual interpretation.[11] The case of *Evans v Roe and Others*[12] provides a simple example of how the rule operates. In that case, the plaintiff, Mr Evans, was employed by the defendants, JT Roe & Co, to be a foreman. A term of the memorandum of employment read as follows: 'I hereby agree to accept the situation as foreman of the works of Messrs. J. T. Roe & Co., flock and shoddy manufacturers, &c., and to do all that lays in my power to serve them faithfully, and promote the welfare of the said firm, on my receiving a salary of two pounds per week and house to live in from the 19th of April, 1871.' Prior to signing the agreement, the plaintiff asked the defendants if the engagement was to be for a year. The defendants answered orally in the affirmative. Shortly after employment, the defendants paid the plaintiff a week's wages and dismissed him. The defendants argued that, upon the true construction of the memorandum, the employment was on a weekly basis and could be determined by a week's notice or payment of a week's wages. The issue was thus whether parol evidence regarding the defendant's confirmation that the plaintiff was to be employed for a year could be adduced. At trial, the jury allowed for the oral evidence to be admitted and found for the plaintiff. This outcome was overturned on appeal, however, with the appellate court holding that the plaintiff's oral evidence was inadmissible given that the parties had reduced their agreement into writing.

Evidently, the parol evidence rule operates strictly. Yet the rule yields many exceptions, including where the contract is not intended to express the entire agreement between the parties[13] or where the provision is ambiguous.[14] Nonetheless, its application narrows the scope of admissible evidence, thus affecting the arbitrator's fact-finding process in ascertaining the parties' contractual rights and obligations embodied in the contract. Moreover, in relation to contractual interpretation, the parol

9 Burrows (n 4) para 8.85; Koh and Phang (n 4) para 06.026; As noted in *AIB Group plc v Martin* [2002] 1 WLR 94 (HL) para 4, the purpose of the parol evidence rule is to promote commercial certainty by holding the parties bound by the writing alone. See also *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 (SGHC) paras 24 and 26.

10 Chitty (n 4) para 13-109; Treitel (n 4) para 6-021.

11 AE Farnsworth, *Contracts* (4th edn, Aspen Publishers 2004) 415; AL Zuppi, 'The Parol Evidence Rule: A Comparative Study of the Common Law, the Civil Law Tradition, and *Lex Mercatoria*' (2007) 35(2) Georgia Journal of International and Comparative Law 233, 259–62; C Valcke, 'Contractual Interpretation at Common Law and Civil Law: An Exercise in Comparative Legal Rhetoric' in JW Neyers, R Bronaugh and SGA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 89–91; Spigelman (n 3) 249–51; Karton (n 5) 9; Panhard (n 5) 103.

12 (1872) LR 7 CP 138.

13 Chitty (n 4) para 13-110; Treitel (n 4) para 6-022; Koh and Phang (n 4) para 06.027.

14 Chitty (n 4) para 13-135; Koh and Phang (n 4) para 06.046; *J Evans & Son (Portsmouth Ltd v Andrea Merzario Ltd* [1976] 1 WLR 1078 (UKCA) 1083.

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

evidence rule *prima facie* precludes the admissibility of extrinsic evidence[15] to assist in interpreting a provision that is clear and unambiguous.[16]

That contractual interpretation is characterized as a matter of substantive law governed by the proper law of the contract (ie *lex contractus*) is largely uncontroversial.[17] However, characterizing the parol evidence rule as a substantive rule under the *lex contractus* presupposes that the rule is a manifestation of the rules of contractual interpretation.[18] On the other hand, if one were to characterize the parol evidence rule as procedural, arbitrators would thus be free to depart from it, and to instead admit evidence on a discretionary basis.[19]

Notwithstanding the close relationship between the parol evidence rule and the principles of contractual interpretation, prevailing debates on the characterization of the rule remains divergent. Moreover, inconsistencies in the application of the parol evidence rule are observed in arbitration practice. The resulting complexity and unpredictability have generated difficulties and uncertainties for counsel in anticipating the tribunal's approach towards admission of evidence and interpretation of contracts, thereby hindering their ability to effectively advise their clients and collect evidence during discovery.[20]

For instance, in a Singapore High Court decision of *BQP v BQQ*,[21] it was observed by the court that arbitrators applying Singapore law as the *lex causae* were not bound to apply the parol evidence rule. This observation, however, sits uncomfortably with another observation by the Singapore High Court in *HSBC Trustee*

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

15 As regards the English position, the categories of extrinsic evidence that are excluded in contractual interpretation includes pre-contractual or prior negotiations of parties, declarations of subjective intent, and evidence of the parties' subsequent conduct: see Treitel (n 4) paras 6-030 and 06-034; Burrows (n 4) para 8.93; *ICS* (n 6) 912–13; *Chartbrook* (n 6) paras 34–36 and 38; *James Miller & Partners Ltd v Whitworth Street Estates (Manchesters) Ltd* [1970] AC 683 (UKCA) 603 and 606. The position is not homogenous amongst all common law jurisdictions. For example, the Singapore jurisdiction leaves it as an open question whether extrinsic evidence in the form of the parties' pre-contractual negotiations or subsequent conduct is admissible: see eg *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 (SGCA) para 132(d); *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 (SGCA) para 75; *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 (SGCA) paras 62–69. The New Zealand jurisdiction has accepted that pre-contractual negotiations and subsequent conduct may be admissible to aid in contractual interpretation: see *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2008] 1 NZLR 277 (NZSC) and *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 (NZSC).

16 Chitty (n 4) para 13-113; Treitel (n 4) para 6-029; Burrows (n 4) para 8.85; Koh and Phang (n 4) para 06.046; UK Law Commission Report 154 (Cmnd 9700, 1986) para 27; Nicholls (n 6) 581; E Posner, 'Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation' (1997) 146 *University of Pennsylvania Law Review* 533, 534–35.

17 Spigelman (n 3) 235; D Bentolila, 'Chapter 3: Arbitrators' Freedom in Arbitral Decision-Making' in Dolores Bentolila (ed), *Arbitrators as Lawmakers* (Kluwer Law International 2017) 142; Waincymer (n 1) 786. See also Council Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6. The Rome I-Regulation classifies questions of interpretation as falling within the ambit of the governing law of the contract.

18 Waincymer (n 1) 749–50.

19 G Born, *International Commercial Arbitration* (2nd edn, Kluwer Arbitration 2014) 2307.

20 L Greenwood, 'Principles of Interpretation of Contracts under English Law and Their Application in International Arbitration' (2019) 35 Arbitration International 21, 21–22.

21 [2018] SGHC 55.

(Singapore) Ltd v Lucky Realty Co Pte Ltd[22] that 'a dispute over how a contract is to be construed must yield the same final judicial determination whether the contract is construed at trial . . . or even in arbitration'.

When a dispute arises, parties must be able to predict, with a reasonable degree of confidence, how tribunals or courts will apply the rules of contractual interpretation. This is especially important in international arbitration, where determinations of an arbitration agreement's applicable law,[23] the scope of an arbitration agreement,[24] and the seat of arbitration,[25] to name a few, frequently arise in jurisdictional challenges or challenges to awards. For instance, the UK Supreme Court in *Enka v Chubb* observed that it would be 'illogical' if the governing law of an arbitration agreement differed depending on the stage of arbitral proceedings simply because each adjudicator chose to apply different interpretative rules.[26] *Mutatis mutandis*, it would be equally awkward if curial courts, and not arbitral tribunals, are required to apply the parol evidence rule, since this could yield diverging interpretation of the same contractual provisions despite purporting to applying the same *lex causae*.

This article therefore seeks to examine the proper characterization of the parol evidence rule in international arbitration. The thesis of this article is that, under the common law the parol evidence rule is a substantive rule of contract law that arbitrators must apply under the relevant *lex contractus*. Faithful application of the parol evidence rule as a substantive rule of contractual interpretation ensures that adjudicators arrive at the same interpretation using the same set of facts, thereby promoting uniformity, predictability, and consistency, whether in litigation or arbitration.

Part 2 of this article undertakes a review of the current perception of arbitrators towards contractual interpretation and their consistency when applying the parol evidence rule. In doing so, we review judicial observations by the Hong Kong, Indian, and Singapore courts. Part 3 examines the underlying principles of contractual interpretation and its relationship with the parol evidence rule, and demonstrates that the parol evidence rule is a substantive rule of law. Finally, Part 4 sets out some practical guidance for arbitrators on how the parol evidence rule should be applied as part of the *lex causae* in international arbitration proceedings.

22 [2015] 3 SLR 885.

23 See eg *Sulamerica Cia Nacional de Seguros SA v Ensa Engenharia SA* [2013] 1 WLR 102 (EWCA) para 51; *Enka Insaat ve Sanayi AS v OOO 'Insurance Company Chubb'* [2020] UKSC 38 para 35. For a more in-depth discussion of interpretation of the governing law of an arbitration agreement, see D Chan and JM Teo, 'Ascertaining the Proper Law of an Arbitration Agreement: The Artificiality of Inferring Intention When There Is None' (2020) 37(5) Journal of International Arbitration 635.

24 See eg *Aggeliki Charis Compania Maritima SA v Pagnan SpA, The Angelic Grace* [1995] Lloyd's Rep 87 (EWCA); *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951 (HL) para 13. See also Redfern and Hunter (n 1) paras 2.65–2.70.

25 See eg *PT Tri-MG Intra Asia Airlines v Norse Air Charter Limited* [2009] SGHC 13; *BNA v BNB* [2020] 1 SLR 456 (SGCA) paras 83–88. See also J Hill, 'Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements' (2014) 63(3) The International and Comparative Law Quarterly 517. For an in-depth discussion on how ambiguities may feature in the parties' choice of arbitral seat, see M Hwang and D Chan, 'Determining the Parties' True Choice of the Seat of Arbitration and *lex arbitri*' in K Hobér, A Magnusson and M Öhrström (eds), *Between East and West: Essays in Honour of Ulf Franke* (Juris Publishing 2010).

26 *Enka* (n 23) para 136.

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

2. INCONSISTENT UNDERSTANDING OF THE PAROL EVIDENCE RULE

2.1 Current approaches to contractual interpretation and admissibility of extrinsic evidence in international arbitration

As Derains observed, contractual interpretation 'is one of the areas in which international commercial arbitrators are most inclined to disengage from national laws in order to resort to general principles of law'.[27] Indeed, with international arbitration being perceived as unshackled from national legal systems, or 'lawless',[28] arbitrators are also thought to confer upon themselves greater flexibility than national courts when engaging in contractual interpretation.[29] For instance, Böckstiegel notes that the 'usual way' for arbitrators to decide cases is based 'exclusively on the interpretation of contracts and the relevance of trade usages' and 'very little depends on the question of the applicable law'.[30]

The decision-making process of arbitrators thus focuses on reaching the most commercially reasonable or sensible outcome.[31] Consequently, little regard may be given to the *lex contractus*, which lays down the applicable rules in construing a contract.[32] Indeed, when reviewing 73 published awards by the International Chamber of Commerce,[33] Karton observed that the practice of interpreting contracts without reference to the governing law's rules of interpretation is widespread. The general indication was that most arbitrators interpret contracts in a manner consistent with the *lex contractus*,[34] although they often do not expressly articulate the interpretative principles to be adopted according to the governing law, or at the very least explain the adopted principles.[35] Focusing on awards involving a common law system as the *lex contractus*, however, inconsistencies were observed. While the majority of the

27 ICC Case No 2291 of 1975 [1976] JDI 989.

28 P McConnaughay, 'The Risks and Virtues of Lawlessness: A 'Second Look' at International Commercial Arbitration' (1999) 93 Northwestern University Law Review 453.

29 Karton (n 5) 5; Bentolila (n 17) 142.

30 KH Böckstiegel, *Arbitration and State Enterprises: A Survey of the National and International State of Law and Practice* (Kluwer 1984) 27.

31 Karton (n 5) 5, 16–17; R Reuben, 'Personal Autonomy and Vacatur after Hall Street' (2009) 113(4) Penn State Law Review 1103, 1129. See also The Right Hon. The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, 'Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration' (The Bailii Lecture 2016, UK, 9 March 2016) para 19 <https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf> (accessed 9 April 2021). Lord Thomas cited *BTP Tioxide Ltd v Pioneer Shipping, The Nema* [1980] QB 547 (CA) 564–65, where Lord Denning observed that a commercial arbitrator was more likely to be better placed to interpret the contract in a commercial sense than a judge and in a one-off case probably more likely to be right than a judge.

32 Bentolila (n 17) 142.

33 Karton (n 5) 8.

34 ibid 15.

35 ibid 10–12 and 15–16. Karton notes that where the applicable law was either a civil law system or an international contract law instrument, the tribunals correctly applied the interpretative method mandated under the respective law and had considered evidence of the parties' subjective intentions, or had at the very least not excluded any extrinsic evidence. However, Karton caveated that it may not mean that arbitrators actually apply the correct substantive rules of interpretation, as opposed to simply having a general preference for a subjective approach to interpretation supported by liberal admission of extrinsic evidence.

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

decisions correctly applied the objective approach mandated under the applicable *lex contractus* by discounting extrinsic evidence, four of the awards departed from the objective approach by admitting extrinsic evidence in the form of the parties subjective intentions to ascertain the parties 'true intent'.[36] Karton thus concludes that there might exist a preference amongst international arbitrators to adopt a subjective interpretive approach, even if this is inconsistent with the governing law (ie common law system).[37]

This article does not go so far as to affirm that arbitrators prefer a subjective interpretative approach at the expense of the governing law. Given the relatively small sample size of awards reviewed by Karton, little meaningful or accurate generalizations can be made regarding the attitude of arbitrators in adhering to the *lex contractus*. Moreover, since the written awards reviewed were mostly published in summary or redacted form, it is unclear whether the tribunal had in fact dealt with the issue of the applicable law.[38]

Bearing in mind that the parol evidence rule exists only within the common law legal tradition,[39] Karton's empirical analysis of the arbitral awards where the *lex contractus* is a common law system evinces the inconsistent practice of arbitrators in determining the admissibility of extrinsic evidence. Specifically, evidence which would have been denied by common law courts in several of the published awards was nevertheless admitted by certain tribunals. The next section analyses the source of this problem.

2.2 Observations on the inconsistent application of the parol evidence rule

Due process concerns aside,[40] the reluctance on the tribunal's part to limit or exclude extrinsic evidence in interpreting contracts might be explained on two grounds. The

36 Karton (n 5) 12 and 14. In ICC Case No 5946, the sole arbitrator found that New York law was the applicable law. He held that the plain meaning of the disputed term was both clear and decisive, but then considered extrinsic evidence of the parties' negotiations without explaining why it was admissible. The arbitrator found that the extrinsic evidence did not change the result, but a New York court is not likely to have admitted it. In ICC Case No 4555, the arbitrator acknowledged that he would 'place substantial weight on the objective, commonly understood meaning of the contract language actually employed, and to give less weight to unarticulated and undocumented understandings' and recognized that the interpretation of the term 'could be overridden by persuasive evidence of standard commercial usage or the clear intent of the parties'. Notwithstanding this, the arbitrator then proceeded to admit the claimant's testimony which amounts to an expression of his subjective intention as to the meaning of the disputed term. In ICC Case No 12172, notwithstanding that English law was the applicable law, the arbitrator admitted an extrinsic evidence including pre-contractual negotiations and a witness' subjective understanding of the agreement between the parties.

37 Karton (n 5) 15–16.

38 ibid 7–8. Karton caveats that given the confidential nature of most arbitral awards, the published awards which he had reviewed are relatively small and may not be a good representative sample of the overall approach, and thus it may not be appropriate to make robust generalizations of the approach to contractual interpretation as adopted by arbitrators. This is further complicated by the fact that tribunals often do not specify which interpretive method they are applying. In addition, since most of the awards are published in summary or redacted form, it is possible that relevant discussions were excluded from the published extract.

39 See above at Part I.

40 G Mehren and C Salomon, 'Submitting Evidence in an International Arbitration: The Common Lawyer's Guide' (2003) 20(3) Journal of International Arbitration 285, 290. While it is acknowledged that

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

first involves the diverging approaches to contractual interpretation in different legal systems which may have contributed to the confusion. The second turns on the potential misunderstanding of the function of the parol evidence rule in guiding the admissibility of evidence, instead of governing contractual interpretation. While they are neither causative nor conclusive in explaining the inconsistencies observed by the various tribunals', they are worth exploring so as to preface the subsequent discussion on the characterization of the parol evidence rule.

2.2.1 Diverging approaches to contractual interpretation and admissibility of extrinsic evidence

While the difference between the common law and civil law approach to contractual interpretation is arguably more apparent than real,[41] the divergent underlying approaches between each legal system remain unavoidable in a transnational adjudicatory context. In international arbitration, a tribunal may comprise arbitrators from a mix of legal systems, each of whom may approach contractual interpretation differently. This may be exacerbated by the fact that some arbitrators may be chosen for their experience in the relevant industry and not so much their familiarity with the substantive law of the dispute.[42]

Additionally, arbitrators untrained in a common law jurisdiction may find the application of the parol evidence rule, alongside its numerous exceptions,[43] unduly technical and difficult to apply.[44] They are thus generally reluctant to apply the common law exclusionary rules of evidence, choosing instead to admit relevant extrinsic evidence to establish the facts necessary for the determination of the issues between the parties[45] and giving the evidence its due weight.[46]

2.2.2 Conflation between general exclusionary rules of evidence and the parol evidence rule

The starting point is to appreciate the flexibility of the arbitral process, which is recognized as one of the paramount considerations in international commercial arbitration[47] and a selling point.[48] Arbitrators expect, and are expected, to have autonomy

exclusionary decisions have impacts on a party's right to be heard, the right to a full opportunity to present a case and to adversarial proceedings does not presumptively override a tribunal's power to determine admissibility or weight of evidence, and more must be shown before an award is set aside for a breach of the parties' due process rights.

41 See eg J Rosengren, 'Contract Interpretation in International Arbitration' (2013) 30(1) Journal of International Arbitration 1, 2–3; Redfern and Hunter (n 1) para 6.80.

42 Greenwood (n 20) 27.

43 Rosengren (n 41) 6; Karton (n 5) 2.

44 Rosengren (n 41) 8.

45 Redfern and Hunter (n 1) paras 6.81–6.83.

46 Greenwood (n 20) 26.

47 See eg Judgment of 18 November 1960, Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (*Honduras v Nicaragua*), [1960] ICJ Reports, paras 215–216. The International Court of Justice considered that an arbitral tribunal generally has a broad discretion as to the way to approach the evaluation of evidence, such as the 'appraisal of the probative value of documents and evidence'.

48 Greenwood (n 20) 22.

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

in managing the arbitral process as 'master[s] of [their] own procedure',[49] including when determining the admissibility of evidence.[50] Indeed, the emphasis on granting parties more flexibility with respect to evidentiary matters was a historical impetus for the development of arbitration.[51]

The tribunal's autonomy to admit evidence is recognized by both international and domestic arbitration laws and procedural rules.[52] These include theUnited Nations Commission on International Trade Law's Model Law on International Commercial Arbitration (1985) ("UNCITRAL Model Law") (and implicitly the national arbitration legislations incorporating the Model Law),[53] arbitral legislations of certain non-model law countries,[54] the rules of various international arbitral institutions,[55] and soft law instruments such as the IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules).[56]

Notably, none of them lay out specific guidelines or rules regarding the admissibility or exclusion of evidence. As Greenwood aptly observed in the context of major international arbitration institutes, 'institutional rules are not lengthy tomes, but slim pamphlets' and as a result, 'the tribunal [must] actively exercise its discretion to fill in the blanks'.[57] On the other hand, the IBA Rules, a popular source of guidelines often referred to by arbitrators when dealing with evidentiary matters,[58] stipulates under Article 9(1) that the tribunal has discretion in determining the admissibility of evidence. While Article 9(2) lays down instances where evidence is excluded, none of them comes close to resembling the parol evidence rule.

49 L Reed, 'Ab(use) of Due Process: Sword vs Shield' (2017) 33(3) Arbitration International 361, 372.

50 Born (n 19) 2310; Waincymer (n 1) 750 and 792. See also D Caron and L Caplan, *The UNCTTRAL Arbitration Rules: A Commentary* (2nd edn, OUP 2013) 572. It has been noted that a tribunal is free to apply evidentiary rules applicable in national courts.

51 VV Veeder, 'Evidential Rules in International Commercial Arbitration: From the Tower of London to the New 1999 IBA Rules' (1999) 65(4) Arbitration 291, 292–93. See also J Lew, L Mistelis and S Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 560.

52 Lew, Mistelis and Kröll (n 51) 558.

53 UNCITRAL Model Law on International Commercial Arbitration art 19(2). art 19(2) of the UNCITRAL Model Law provides that '[t]he power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence'. See also UNCITRAL, Report of the Secretary-General on the Preliminary Draft Set of Arbitration Rules for Optional Use in Ad Hoc Arbitration Relating to International Trade, Eighth Session (1975) UN Doc A/CN.9/97, 163, 176. The Model Law's drafting history also supports the arbitrators' broad discretion in determining the admissibility of evidence.

54 See eg Brazil Law No 9.307 art 21; Arbitration Law of the People's Republic of China arts 43–47; English Arbitration Act 1996 ss 33–34; French Code of Civil Procedure art 1467; Code of Civil Procedure of the Netherlands arts 1036 and 1039; Switzerland Private International Law Act arts 182 and 184.

55 UNCITRAL Arbitration Rules 2010 art 27(4); Hong Kong International Arbitration Centre Rules 2018 art 22.2; Singapore International Arbitration Centre Rules 2016 rule 19.2; London Court of International Arbitration Rules 2020 art 22.1(vi); Swiss Chambers' Arbitration Institution, Arbitration Rules and Laws 2012 art 24.2; Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration Rules 2017 art 31; International Chamber of Commerce, Arbitration Rules 2012 (amended in 2017) art 25(1).

56 International Bar Association Rules on the Taking of Evidence in International Arbitration 2010 art 9 <https://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC> (accessed 9 April 2021).

57 Greenwood (n 20) 22.

58 IBA Arbitration Guidelines and Rules Subcommittee, 'Report on the Reception of the IBA Arbitration Soft Law products' (September 2016) paras 19–21.

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

Taking the broad discretion afforded to arbitrators together with their preference to admit all relevant evidence which would aid them in understanding the background leading up to the dispute in order to reach a commercial sensible outcome,[59] application of the parol evidence rule may be counterintuitive.[60] For instance, in relation to section 34 of the English Arbitration Act 1996 which provides that the tribunal shall decide all procedural and evidential matters,[61] it has been observed that 'there is no reason why the arbitrator should not admit...extrinsic evidence to explain or interpret a contract even if this would be inadmissible under the parol evidence rule' and that arbitrators can simply assign less weight to such evidence.[62]

Furthermore, it does not help that the treatment of parol evidence is 'in the grey zone between substance and procedure',[63] with no clear consensus regarding its characterization as a substantive[64] or procedural[65] rule. Given however the parol evidence rule's effect of denying the admissibility of extrinsic evidence, it could be viewed as a procedural rule that excludes evidence.[66] Consequently, international arbitrators (especially those unfamiliar with the common law rules of evidence) may (mis)understand the rule as simply a procedural rule of evidence that can be disregarded in arbitral proceedings.

2.3 Characterization of the parol evidence rule by common law judicial authorities

While many common law courts have affirmed the tribunal's broad discretion in dealing with evidentiary issues, including the admissibility of evidence,[67] few have ventured to discuss the characterization and application of the parol evidence rule when dealing with the admissibility of extrinsic evidence in international arbitration proceedings. Even then, the observations of these courts are neither entirely clear nor consistent. A survey of the common law authorities shows that only the Hong Kong, Indian and Singapore national courts have explored this issue to varying degrees.

59 Lew, Mistelis and Kröll(n 51) 561–62; Redfern and Hunter (n 1) para 6.81.

60 E Marild, 'Oral Presentation of Evidence and the Application of the Parol Evidence Rule in International Arbitration' (2013) 24(2) The American Review of International Arbitration 325, 331; R Goode, 'Chapter 6: The Adaptation of English Law to International Commercial Arbitration' in J Lew and L Mistelis (eds), *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration* (Kluwer Law International 2007) 103–04.

61 Arbitration Act 1996, s 34.

62 E McKendrick and R Goode, *Goode and McKendrick on Commercial Law* (6th edn, LexisNexis Butterworths 2020) para 39.67.

63 Lew, Mistelis and Kröll (n 51) 559.

64 Panhard (n 5) 107; Karton (n 5) 32; Marild (n 60) 332; Rosengren (n 41) 7; Rajah (n 2) 520.

65 Ostendorf (n 3); See also *DIC of Delaware, Inc & Underhill of Delaware, Inc v Tehran Redevelopment Corp & the Government of the Islamic Republic of Iran*, in Albert Jan van den Berg (ed), *Yearbook of Commercial Arbitration Volume XI* (Kluwer Law International 1986) 336. The arbitral tribunal commented that notwithstanding a governing law of the contract, 'it is arguable that the type of evidence admissible to establish a contract is a procedural or evidentiary matter.'

66 Marild (n 60) 330–31.

67 See eg *Jivraj v Hashwani* [2011] UKSC 40 (UKSC) para 61; *Arbitration Application No 3 of 2011* [2011] CSOH 164 (Scotland Outer House, Court of Session, 5 October 2011) para 29; *Int'l Chem Workers Union v Columbian Chem Co*, 331 F3d 491, 497 (5th Cir 2003).

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

2.3.1 Hong Kong

The case of *AIG v X* concerned a setting-aside challenge before the Hong Kong Court of First instance on, *inter alia*, the basis that the arbitral procedure was not in accordance with the parties' agreement.[68] The applicant tendered expert evidence for the proposition that, since New York law was the *lex contractus*, the arbitral tribunal had erroneously relied upon extrinsic evidence when interpreting the express terms of the contract.[69] Nonetheless, the court did not elaborate further on this issue as the admissibility of extrinsic evidence for the purposes of interpreting the contract dealt with an issue on a point of law, which was inappropriate in a setting aside action under Article 34 of the Model Law.[70]

The court's reluctance to deal with this issue suggests that it may have viewed the admissibility of extrinsic evidence for the purpose of contractual interpretation as a matter of substantive law that is not within the remit of the seat court. Had the court viewed this matter as a procedural issue, it could have addressed the issue as part of the alleged procedural defects in the arbitral process.[71] Nonetheless, the court's position on the proper characterization of the parol evidence rule remains unclear.

2.3.2 India

In the Delhi High Court decision of *Glencore International v Indian Potash*, the respondent sought to resist enforcement of an award by arguing, *inter alia*, that the arbitrator had applied an incorrect institutional rule.[72] The salient facts were that the contract (including the arbitration agreement) was governed by Singapore law.[73] The arbitration clause was problematic because it provided that the parties would settle any dispute via arbitration according to 'the Rules of Singapore International Arbitration of the Chambers of Commerce in Singapore'.[74] The named arbitral institute is non-existent in Singapore. In light of this ambiguity, the tribunal referred to extrinsic evidence to ascertain the parties' intended arbitral institution.[75]

Crucially, the Delhi court approved the tribunal's interpretative approach as consonant with 'the law as prevailing in Singapore',[76] suggesting that the application of the parol evidence rule and its exception was viewed as a matter of substantive law. However, no further guidance was provided on why the rule should be seen as a facet of contractual interpretation (and hence a substantive rule), instead of an evidential exclusionary rule (and hence procedural in nature).

68 *American International Group Inc & Anor v X Co* [2016] HKCU 2166 (HKCFI) para 1.

69 ibid para 14.

70 ibid para 15.

71 Redfern and Hunter (n 1) paras 10.36, 10.41, and 10.75. However, one can also argue that given the broad procedural powers of arbitrators, courts would hesitate to critically examine how the tribunal conducted the admissibility of evidence.

72 *Glencore International AG v Indian Potash Limited* [2019] DEL 2383 (Delhi High Court) para 15(ii).

73 ibid para 16.1.

74 ibid para 22.

75 ibid para 25.2.

76 ibid para 24.

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

2.3.3 *Singapore*

Unlike most common law jurisdictions, Singapore belongs to the subset of common law jurisdictions which adopted the Indian Evidence Act 1872 (IEA) compiled by Sir James Stephens.[77] Accordingly, Singapore's rules of evidence are codified in its Evidence Act (EA), of which there are three pertinent things to note:

- The parol evidence rule finds statutory expression under sections 93–101 EA .[78]
- Section 2(1) EA provides that the EA does not apply to arbitrations.[79]
- Section 2(2) EA provides that all common law rules of evidence that are not codified within the EA and which are inconsistent with it are repealed.[80] Insofar as the common law parol evidence rule is consistent with sections 93–101 EA, therefore, they shall remain in existence.[81]

Section 2(1) EA thus renders the *statutorily embedded* parol evidence rule non-applicable in arbitral proceedings. Nonetheless, given that the *common law* parol evidence rule remains in existence to the extent that it is consistent with the EA per section 2(2) EA, the question remains whether arbitrators hearing a dispute governed by Singapore law must apply the parol evidence rule. This in turn is determined by the characterization of the common law parol evidence rule. While these issues will be addressed below,[82] we first turn to consider the treatment of the rule under Singapore case law.

Our analysis begins with the Singapore High Court's (SGHC) decision in *Digital Dispatch (ITL) v Citycab* (*Digital Dispatch*).[83] The case concerned a domestic arbitration proceeding involving an appeal on a point of law pursuant to section 28(2) of Singapore's Arbitration Act.[84]

The court found that the arbitrator erred in law by admitting extrinsic evidence to interpret certain terms of a contract where the term was clear and unambiguous,[85] in contravention of the parol evidence rule. Recalling that section 2(1) EA does not oblige arbitrators to apply the parol evidence rule under the EA,[86] this decision

77 The IEA 1872 has been adopted by, and remains in force, in the Republic of India (other than Jammu and Kashmir), Pakistan, Bangladesh, Sri Lanka, Burma, Malaysia, and Singapore, as well as a number of nations in Africa and the West Indies.

78 LS Chan, 'Resolving Ambiguity Through Extrinsic Evidence' (2005) 17(1) The Singapore Academy of Law Journal 277, 284; YL Tan, 'Construction of Commercial Contracts and Parol Evidence' (2009) Singapore Journal of Legal Studies 301, 311.

79 Singapore Evidence Act, s 2(1).

80 ibid, s 2(2).

81 *China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd* [2005] SGHC 40 (SGHC) para 41.

82 See Part 3.

83 *Digital Dispatch (ITL) Pte Ltd v Citycab Pte Ltd* [2003] SGHC 6 (SGHC).

84 Singapore Arbitration Act, s 28(2). The provision states that provided that either all other parties to the reference have consented, or leave of the court has been granted, an appeal shall lie to the court on any question of law arising out of an award made on an arbitration agreement.

85 *Digital Dispatch* (n 83) para 17.

86 Although s 2(1) of the Singapore Evidence Act does not state whether the term 'proceedings before an arbitrator' refers to a domestic arbitration or international arbitration proceeding, existing jurisprudence

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

suggests that the parol evidence rule, in its common law form, remains applicable, and that it is a substantive rule of contractual interpretation.

That the parol evidence rule was viewed as a substantive rule of contractual interpretation was also observed in *Healthcare Supply Chain v Roche Diagnostics Asia Pacific*.[87] That case dealt with an appeal on a point of law from a domestic arbitration, specifically on the tribunal's application of contractual interpretation principles. Notwithstanding section 2(1) EA which did not mandate application of the statutory parol evidence rule, the arbitrators nonetheless applied the rule, differing only in terms of the manner of application. The SGHC (per Choo Han Teck J) discussed in detail the application of the statutory parol evidence rule in controlling the admissibility of extrinsic evidence within the framework of contractual interpretation, before concluding that the appeal ought to be dismissed because it concerned an appeal on the application of the law, and not an error of law.[88] That Choo J discussed the statutory parol evidence rule in tandem with the principles of contractual interpretation, as opposed to simply dismissing the case on the basis that the admissibility of evidence was at the sole discretion of the arbitrators, hints at the court's view regarding the substantive nature of the rule itself.

Subsequent decisions, however, are less clear. *JVL Agro Industries v Agritrade International* (*JVL Agro*)[89] concerned an annulment action premised on a breach of natural justice before the SGHC. In the arbitration, the plaintiff sought to adduce evidence of the parties' entire agreement. The tribunal found the evidence to be extrinsic in nature given that the purported main contract was reduced to writing, and requested the parties to deal with the parol evidence rule and the possible exceptions invoked to admit the evidence.[90] The tribunal did not justify the invocation of the parol evidence rule as a procedural or substantive rule. However, the tribunal wanted the parties to deal with a common law exception to the parol evidence rule.[91] This suggests that the tribunal acknowledged the substantive nature of the parol evidence rule, but ultimately the issue was not pursued by the parties.[92]

The *lex causae* in *JVL Agro* was Singapore law.[93] Importantly, the court in *JVL Agro* (per Coomaraswamy J) observed that, 'although the parol evidence rule is a single doctrine, it comes in two guises'. In its guise as a rule of evidence embodied in the EA, it has no application to arbitration because of section 2(1) of that Act. But in its guise as a 'doctrine which forms a part of Singapore's substantive law of contract, the parol evidence rule applies to every contractual dispute which is resolved in accordance with Singapore law, whatever mode of dispute resolution is used'.[94]

In contrast, in *BQP v BQQ* (*BQP*), which involved a jurisdictional challenge under section 10 IAA, the SGHC affirmed the *procedural* nature of the parol evidence

regarding the wide ambit of both domestic, and international arbitrators suggests that the EA is not applicable in both arbitration contexts.

87 *Healthcare Supply Chain (Pte) Ltd v Roche Diagnostics Asia Pacific Pte Ltd* [2011] SGHC 63.

88 ibid para 8.

89 *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 (SGHC).

90 ibid paras 52–53 and 80.

91 ibid para 116.

92 ibid para 40.

93 ibid para 23.

94 ibid para 39.

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

rule.[95] Citing statements to that effect by the Singapore Court of Appeal (SGCA) in *Sembcorp Marine Ltd v PPL Holdings Ltd* [2013] 4 SLR 193, the SGHC (per Quentin Loh J) held that codification of the parol evidence rule under section 94 EA affirms its characterization as procedural law, since 'the rules of evidence under the EA may affect the application of specific rules of contractual interpretation; but they do not prescribe how a contract should be interpreted and construed'.[96] In any case, the EA's application in arbitration proceedings is disengaged by virtue of section 2(1) EA.[97]

Additionally, according to the court, '[p]arties resort to arbitration. . .precisely because they wish to. . .preclude the application of laws and procedures which may be alien to them',[98] including the parol evidence rule. This is especially so when parties had contracted out of the EA by choosing to incorporate institutional rules. In that case, the parties had chosen to adopt the Singapore International Arbitration Centre Rules. SIAC Rule 16.2 provides that tribunals are empowered with the discretion to determine issues of admissibility.[99]

The reasoning in *BQP* has been doubted. As Foxton observed, *BQP* creates a potential mismatch between the approach which a court would follow when interpreting a contract to determine whether the arbitrators had jurisdiction (where the court would have to apply the parol evidence rule embodied in the EA), versus that which a tribunal would be entitled to follow (where, on *BQP's* view, the parol evidence rule would not apply).[100] Furthermore, simply because the parol evidence rule affects the admissibility of evidence does not automatically make it an evidential (and hence procedural) rule, given that various other substantive legal principles contains concepts or terminologies associated with rules of evidence. Foxton raised the examples of rectification requiring a higher standard of proof under English law, and consequential loss of profit following a breach of contract requiring a higher standard of proof under New York law.[101]

Shortly after *BQP*, the Singapore courts had yet another opportunity to clarify the parol evidence rule's characterization. *BNA v BNB*[102] saw a jurisdictional challenge mounted based on an allegedly invalid arbitration agreement according to its proper law. As no express proper law of the arbitration agreement was provided, the inquiry turned on the implied proper law. An ancillary issue involved interpreting the phrase 'arbitration in Shanghai' in the arbitration agreement to determine whether the parties' intended Shanghai as the seat.

The SGHC (per Coomaraswamy J) first observed that the parol evidence rule finds expression in *three* forms: (i) as a substantive contractual principle under

95 *BQP v BQQ* [2018] 4 SLR 1364.
96 ibid para 122; citing *Sembcorp Marine* (n 15) paras 40 and 43.
97 *BQP* (n 95) paras 124 and 125.
98 ibid para 126.
99 ibid para 127.
100 See eg D Foxton, 'Arbitration Without Parol? *BQP v BQQ* [2018] SGHC 55' (2018) LMCLQ 309, 314.
101 ibid 315.
102 *BNA v BNB* [2019] SGHC 142 (SGHC); *BNA v BNB* [2020] 1 SLR 456 (SGCA).

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

Singapore contract law; (ii) as a statutory procedural rule under the EA; and (iii) as a part of Singapore's common law of evidence.[103] *BQP* was distinguished on the basis that the parties in *BNA* had included an entire agreement clause, which, according to Coomaraswamy J, precluded any admission of extrinsic evidence to aid in interpreting the arbitration agreement. In Coomaraswamy J's view, the parties had 'contracted out of the parol evidence rule as a rule of Singapore's evidence law when they incorporated by reference the SIAC Rules into their arbitration agreement. . .[but] reintroduced a contractual analogue of the parol evidence rule by incorporating an entire agreement clause.'[104]

The SGHC's reasoning in *BNA* is not free from doubt. An entire agreement clause generally precludes reference to extrinsic evidence in construing the contractual terms written within the four corners of the contract.[105] However, it 'will usually not prevent a court from justifiably adopting a contextual approach in contract interpretation', especially where 'textual or interpretative controversies as to the meaning of particular words or terms in contracts' are concerned.[106] Furthermore, to the extent that parties had, according to the SGHC, 'contracted out' of the parol evidence rule by incorporating the institutional procedural rules, those institutional rules apply only to the arbitration proceedings, and not arbitration-related court proceedings. Rather, section 2(1) EA[107] mandates that the Singapore courts must apply, *inter alia*, the statutory parol evidence rule within the EA.

On appeal, the SGCA affirmed the position that the Singapore courts are bound to apply the statutory parol evidence rule under the EA by virtue of section 2(1) EA.[108] Moreover, *BQP* was distinguished on a different ground: that extrinsic evidence which was already admitted by the tribunal can be considered by the Singapore courts.[109] The court, however, did not address the critical issue on the proper characterization of the parol evidence rule.

In sum, the present position in Singapore is unsettled on the proper characterization of the parol evidence rule. Similarly, other common law jurisdictions have also not provided clear guidance on why the rule should be characterized as a substantive rule. The next section examines the principles undergirding the parol evidence rule, which affects our understanding of its characterization.

3. THE PAROL EVIDENCE RULE AS A SUBSTANTIVE RULE OF CONTRACT LAW

In arbitration proceedings, the doctrine of party autonomy mandates that the tribunal gives effect to the parties' agreement.[110] This includes the contract's governing

103 *BNA* SGHC (n 102) para 33.

104 ibid para 43.

105 *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 (SGCA) paras 25–26 and 36; see also *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] 2 WLR 1603 (UKSC) para 14.

106 *Lee Chee Wei* (n 105) para 41; affirmed in *Sunray Woodcraft Construction Pte Ltd v Like Building Materials (S) Pte Ltd* [2019] 3 SLR 285 (SGCA) para 45.

107 Singapore (n 79).

108 *BNA* SGCA (n 102) paras 78–79.

109 ibid para 80.

110 Redfern and Hunter (n 1) paras 3.97–3.99.

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

law and all relevant substantive rules and doctrines affecting the legal rights *and* obligations of the parties associated with the applicable *lex causae*.[111]

After the arbitrators determine the applicable *lex causae*, the question turns on identifying the applicable substantive rules mandated under that law. To determine whether the parol evidence rule is a substantive rule of contractual interpretation, the primary inquiry involves determining its *function* in relation to the common law's approach to contractual interpretation. As Ostendorf noted, the substantive characterization of the parol evidence rule is justifiable 'if its function is more closely intertwined with principles of contractual interpretation'.[112] We turn next to consider this issue.

3.1 The function of the parol evidence rule within the common law's approach to contractual interpretation

3.1.1 The modern approach to contractual interpretation

Contractual interpretation involves ascertaining the parties' intended meaning, effect, and application of the words used in the provision.[113] Under the common law objectivity is the key underlying principle,[114] with the focus on ascertaining the meaning of the contract's language from a reasonable man's perspective[115] and disregarding evidence tainted with subjectivity.[116] The primary rationale behind the objective approach is to promote commercial certainty, since adjudicators have 'no direct access to [the parties'] subjective mental states'.[117] Moreover, given that disputes usually arise years after the time of contracting, the availability or reliability of oral evidence as to the parties understanding of the meaning of the terms would have eroded with time.[118]

111 D Jones, 'Choosing the Law or Rules of Law to Govern the Substantive Rights of the Parties' (2014) 26 Singapore Academy of Law Journal 911, 912.

112 Ostendorf (n 3) 175.

113 See, eg *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429 (UKCA) para 17; *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 (HL); *Equitable Life Assurance Society v Hyman* [2000] 3 All ER 961, 969. See also J Carter, *Construction of Commercial Contracts* (Hart Publishing 2013) paras 104–07.

114 See, eg *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 (HCA); *Benjamin Developments Ltd v Robt Jones (Pacific) Ltd* [1994] 3 NZLR 189 (NZCA); *Dumbrell v The Regional Group of Companies Inc* (2007) 279 DLR (4th) 201 (Ontario, CA).

115 *Prenn* (n 6) 1385; *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 (HL) 767, 775 and 782; *ICS* (n 6) 912–13; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 para 14; Chitty, 2018 (n 4) para 14-048; Treitel (n 4) para 6-042; M Furmston, *Butterworths Common Law Series The Law of Contract* (6th edn, LexisNexis 2017) 712; R Havelock, 'Return to Tradition in Contractual Interpretation' (2016) 27(2) King's Law Journal 188, 189. See also H Collins, 'Objectivity and Committed Contextualism in Interpretation' in Sarah Worthington (ed), *Commercial Law and Commercial Practice* (Hart Publishing 2003); G Leggatt, 'Making Sense of Contracts: The Rational Choice Theory' (2015) 131 Law Quarterly Review 454; K Lewinson, *The Interpretation of Contracts* (6th edn, Sweet & Maxwell 2015) 10 and 34–41.

116 *Prenn* (n 6) 1385; *Bank of Credit and Commerce International v Ali* [2002] 1 AC 251 para 8.

117 L Hoffmann, 'The Intolerable Wrestle with Words and Meanings' (1997) 114 South African Law Journal 656, 661. See also R Stevens, 'Contract Interpretation: What It Says on the Tin' *Inner Temple Reading* (London, 6 October 2014) <https://d17g388r7gqnd8.cloudfront.net/2017/08/lecture_stevens_2014.pdf>.

118 S Menon, 'The Interpretation of Documents: Saying What They Mean or Meaning What They Say' (Speech Given at the 25th Singapore Law Review Annual Lecture, Singapore, 23 September 2013) para 5.

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

Traditionally, the common law's approach to interpretation starts from the 'natural and ordinary' or 'plain' meaning of contractual words.[119] Extrinsic evidence is inadmissible to prove what the parties meant, unless there is latent ambiguity.[120] Recent developments have, however, seen a shift towards a broader, 'modern'[121] contextual approach where the meaning of words can only be understood when seen within the context in which they operate.[122] Specifically, the adjudicator must ascertain the objective meaning of the words through the lens of a reasonable person having recourse to the contextual evidence reasonably available to both parties at the time of the contract, to aid in contractual interpretation.[123]

This development is not novel.[124] The impetus for adopting a more liberal contextual approach to interpretation was brought about by Lord Wilberforce,[125] who held that the factual matrix comprising, *inter alia*, the genesis and aim or commercial purpose of the transaction must be considered in interpreting contracts. The emphasis in adopting a contextual approach peaked following Lord Hoffmann's restatement of the approach to contractual interpretation in *Investors Compensation Scheme v West Bromwich Building Society* ('*ICS*'): that contractual interpretation involves '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 the contract'.[126] Beyond English jurisprudence,[127] the modern contextual approach to interpretation has been

119 See, eg *Shore v Wilson* (1842) 9 Cl & Fin 355 (English High Court), 565; *Bank of New Zealand v Simpson* [1900] AC 182 (HL) 188; *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd* [1989] 2 Lloyd's Rep 570 (English High Court) 591.

120 Latent ambiguity refers to ambiguity which arises extrinsically in the application of an instrument of clear and definite intrinsic meaning to doubtful subject-matter: T Starkie, *A Practical Treatise on the Law of Evidence, and Digest of Proofs in Civil and Criminal Proceedings* (3rd edn, Stevens & Norton 1842) 755 and 768. For illustrations on how this works, see, eg *Sweeting v Fowler* (1815) 1 Stark 106; *Stebbing v Spicer* (1849) 8 CB 827.

121 P Davies, 'Construing Commercial Contracts: No Need for Violence' in M Freeman and F Smith (eds), *Law and Language* (OUP 2013) 448.

122 See, eg *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 (HL) 391.

123 *Mannai* (n 115) 770; *Prenn* (n 6) 1383–84.

124 In *Chartbrook* (n 6) para 37; Lord Hoffmann, quoting Lord Bingham, said that there was 'little' in that restatement which could not be found in earlier decisions. Even then, the contextual approach to contractual interpretation was advocated as early as in *Ford v Beech* (1848) 11 QB 852, 866, where Baron Parke held that 'greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent'.

125 See *Prenn* (n 6) 1385; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 (HL) 987.

126 *ICS* (n 6) 912.

127 This approach has been subsequently affirmed in numerous English cases: *Bank of Credit* (n 116) paras 8 and 39; *Chartbrook* (n 6) paras 21–26; *Rainy Sky* (n 115) paras 14 and 21; *Amlin Corporate Member Ltd v Oriental Assurance Corp (The Princess of the Stars)* [2014] EWCA Civ 1135; *Wood v Capita Insurance Services Ltd* [2017] AC 1173 (UKSC) paras 8–14. In *Rainy Sky*, the court termed the approach as a 'unitary exercise' which calls for the simultaneous consideration of the contractual term's wording and the context in which it was used from the outset. Moreover, a 'business common sense' is applied in resolving two or more possible interpretations of the provision. In *Wood*, the UK Supreme Court described the process of interpretation as one 'by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated'. See also Furmston (n 115) 715–16; Lewinson (n 115) 25; L Grabiner 'The Iterative Process of Contractual Interpretation' (2012) 128 Law Quarterly Review 41; L Hoffmann, 'Language and Lawyers' (2018) 134(4) Law Quarterly Review 553, 568–71; cf J Sumption, 'A Question of Taste: The Supreme Court and the

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

acknowledged in many common law jurisdictions including New Zealand,[128] Hong Kong,[129] Singapore,[130] and Malaysia.[131]

Recently, however, enthusiasm towards the modern approach to contractual interpretation has waned. In particular, commentators surveying recent English decisions noted a shift in emphasis from the commercial context of the transaction to the text of the contract as the starting point.[132] While admissibility of extrinsic evidence forming part of the commercial context is still permitted, these decisions have focused on giving effect to the meaning of the terms where unambiguous language is used.[133] Crucially, in *Arnold v Britton*,[134] Lord Neuberger held that 'reliance. . .surrounding circumstances. . .should not be invoked to undervalue the importance of the language of the provision which is to be construed' and that 'the less clear [the contractual provisions] are. . .the more ready the court can properly be to depart from their natural meaning'.[135] Insofar as the current English position is concerned, a restrained admission of contextual evidence constrained by the requirement of ambiguity seems to be preferred.

Beyond the English position, other common law jurisdictions which once readily adopted Lord Hoffmann's approach in *ICS* have displayed similar reservations. In *Firm v Zurich Australian Insurance*, the New Zealand Supreme Court held that the wording of the contract 'remains centrally important' in the interpretative process, and where a provision 'has an ordinary and natural meaning', that meaning is a 'powerful' indicator of what the parties presumably meant.[136] Embedded within the presumption is, perhaps, a requirement that ambiguity must first be shown before the plain meaning can be departed from. Likewise, in *YES F&B Group v Soup Restaurant*

Interpretation of Contracts' (2017) 17(2) Oxford University Commonwealth Law Journal 301, 308–09 and 313.

128 See eg *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (NZCA) 81–82; *Finn PI I Ltd v Zurich Australian Insurance and Body Corporate 398983* [2015] 1 NZLR 147 (NZSC) para 60.

129 See eg *Jumbo King Ltd v Faithful Properties Ltd* (1999) 4 HKC 707 (HKCFA) 726–27; *River Trade Terminal Co Ltd v Secretary for Justice* [2005] HKCFA 29 paras 21–22.

130 *Sandar Aung v Parkway Hospitals Singapore Pte Ltd* [2007] 2 SLR 891 (SGCA) paras 35 and 37; *Zurich Insurance* (n 15) para 81.

131 See eg *Berjaya Times Square Sdn Bhd v M Concept Sdn Bhd* [2010] 1 MLJ 597 (Federal Court of Malaya) paras 42–43.

132 P Davies, 'Interpreting Commercial Contracts: A Case of Ambiguity?' (2012) 1 Lloyd's Maritime and Commercial Law Quarterly 26, 27; D McLauchlan, 'The Lingering Confusion and Uncertainty in the Law of Contract Interpretation' (2015) 33(3) Lloyd's Maritime and Commercial Law Quarterly 406, 408–09, 415, and 420. See generally A Eoi, 'Is the Plain Meaning Approach to Construction of 'Unambiguous Words' in Contracts Still Alive in the English Courts?' 24(2) European Business Law Review 537; Havelock, 2016 (n 115).

133 See eg *Multi-Link Leisure Developments Ltd v North Lanarkshire Council* [2011] 1 All ER 175 (UKSC) para 11; *Rainy Sky* (n 115) para 23. In *Multi-Link Leisure*, Lord Hope emphasized that the first port of call in interpreting the contract should be the ordinary meaning of the words, and reference to the 'contractual context' should only be adopted where an ambiguity is found. Similarly, Lord Clarke in *Rainy Sky*, while affirming the Lord Hoffmann's restatement in *ICS*, also noted that '[w]here parties have used unambiguous language, the court must apply it'. See also L Neuberger, 'The Impact of Pre- and Post-Contractual Conduct on Commercial Interpretation' (Speech to Banking Services and Finance Law Association Conference, Queenstown, 11 August 2014) para 3.

134 [2015] 2 WLR 1593.

135 *Arnold* (n 6) paras 16–23.

136 [2014] NZSC 147.

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

Singapore ('*YES F&B*'), the SGCA also referred to the wording of the contractual provisions as 'the first port of call', especially when it 'might be plain and unambiguous'.[137]

Other jurisdictions, such as Australia and Canada, while acknowledging the development following *ICS*, remained steadfast in advocating the plain wording of the contract as the first port of call when undertaking interpretation. In *Mount Bruce Mining v Wright Prospecting*, the High Court of Australia held that contractual interpretation is 'possible by reference to the contract alone' and that extrinsic evidence of the surrounding circumstances is inadmissible where the provision is 'unambiguous or susceptible of only one meaning'.[138] Similarly, although the Canadian Supreme Court in *Sattva Capital v Creston Moly* ('*Sattva*') observed that 'words alone do not have an immutable or absolute meaning' and the contract's wordings must be 'consistent with the surrounding circumstances',[139] they nevertheless emphasized that contextual evidence 'must never be allowed to overwhelm the words of that agreement. . .such that the court effectively creates a new agreement'.[140] Rather, the interpretative process 'must always be grounded in the text and read in light of the entire contract'.[141]

As it stands, the current approach under common law is that extrinsic evidence is admissible to determine the nature of the contractual term, namely, whether it is plainly clear or ambiguous. Where the former is concerned, no further extrinsic evidence is admissible to allow the court to depart from the plain meaning of the words. Only in the latter case where latent ambiguity is present would additional extrinsic evidence be admissible to 'cure' the ambiguity. Additionally, although the modern approach to contractual interpretation permits a more generous admission of categories of extrinsic evidence, any evidence sought to be admitted must still conform with the core principle of objectivity in contractual interpretation. Hence, only evidence that was known or reasonably available to the contracting parties is admissible,[142] given that they form part of the objective backdrop of the transaction.[143] Corresponding to this requirement, three categories of extrinsic evidence are generally treated as inadmissible (with minor variations between jurisdictions). The first relates to the parties' subjective declarations and understandings of the contractual provisions.[144] The second category of inadmissible evidence relates to pre-

137 *YES F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd* [2015] 5 SLR 1187 (SGCA) paras 31–32. See also *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 (SGCA) para 44.

138 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37 paras 48–49. See also *Codelfa Construction Pty Ltd v State Rail Authority* (NSW) (1982) 149 CLR 337 (HCA) 352; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 (HCA) para 40; *Electricity Generation Corp v Woodside Energy Ltd* [2014] HCA 7. See also D McLauchlan, 'Plain Meaning and Commercial Construction: Has Australia Adopted the ICS Principles?' (2009) 25 Journal of Contract Law 7, 23–24.

139 *Sattva Capital Corp v Creston Moly Corp* [2014] SCC 53 para 47.

140 ibid para 57.

141 ibid.

142 *Arnold* (n 6) para 15. In that case, Lord Neuberger held that the admissibility of evidence must disregard 'subjective evidence of any party's intentions'.

143 *Mannai* (n 115) 778; *Sattva* (n 139) para 58; Lewinson (n 115) 10–11. See also J Steyn, 'Written Contracts: To What Extent May Evidence Control Language' (1998) 41(1) Current Legal Problems 23.

144 *Young v Brooks* [2008] 3 EGLR 27 (UKCA); *Mannai* (n 115) 778. See also Spigelman (n 3) 249.

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

contractual negotiations and communications between the parties at the stage.[145] The final category of inadmissible evidence pertains to the post-contractual conduct of the parties.[146]

We turn next to examine how the parol evidence rule operates within the framework described above.

3.1.2 Parol evidence rule as a rule of contractual interpretation

Preliminarily, trenchant criticisms have been levied against the parol evidence rule. Historically, the rule was conceived to avoid the unreliability of oral evidence that may unduly affect the conduct of a jury trial.[147] This justification is no longer relevant in some jurisdictions given their abolishment of jury trials.[148] This is so in arbitration where the concept of a jury is entirely irrelevant. From a theoretical perspective, the UK Law Commission noted that its exceptions 'are so numerous and so extensive that it may be wondered whether the rule itself has not been largely destroyed'.[149] In a later report, the Law Commission pointed out that the rule is 'no more than a circular statement' and expressed doubts as to whether it 'should properly be characterized as a "rule" at all'.[150] However, given repeated affirmation of the common law parol evidence rule across every common law jurisdictions[151] (such as its continued existence within Singapore's EA), any doubt as to its continued relevance may be moot.

Broadly speaking, the parol evidence rule facilitates the objective theory of contract. It does so by providing an objective approach in identifying the relevant terms of the contract. Also known as the 'best evidence rule',[152] the parol evidence rule stipulates that provisions reduced into writing must be proved only by production of that written document.[153] All other forms of extrinsic evidence are inadmissible to

145 *Prenn* (n 6) 1384–85; *Chartbrook* (n 6) para 24; *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2011] 1 Lloyd's Rep 96 (UKSC) para 46. Examples of such evidence may include drafts or preliminary documents related to the contract.

146 See eg *Union Insurance Society of Canton Ltd v George Wills & Co* [1916] 1 AC 281 (UKPC) 288. See also Stevens (n 117) 6.

147 *Countess of Rutland's Case* (1604) 5 Co Rep 25b, 26a; JH Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, vol IX (3rd edn, Little Brown and Company 1940) 86; JB Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Rothman Reprints, Inc 1969 Reprint) 429; The Law Commission, 'Law of Contract: The Parol Evidence Rule' (1976) Working Paper No 70, s 23, 15.

148 Rajah (n 2) 515–17.

149 The Law Commission (n 147) s 21, 13.

150 Law Commission, *Law of Contract: The Parol Evidence Rule* (Cmnd 9700, 1986) para 2.7.

151 See, eg *Chartbrook* (n 6); *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2004] HCA 55; *Quality Concrete Holdings Berhad v Classic Gypsum Manufacturing Sdn Bhd* [2011] MYCA 147; *Yap Son On* (n 137).

152 See however UK Law Commission Report (n 16) para 2.7. The 'best evidence' rule has been criticised for being circular. Specifically, the UK Law Commission noted that to prove a written document as embodying all the terms of the parties' agreement, reference to extrinsic evidence is inevitable, but yet the parol evidence rule precludes the admissibility of the very thing that is necessary for its operation in the first place. It has thus been suggested, and accepted, that the parol evidence rule should not apply unless it has been determined that the terms of the parties' agreement are wholly contained in the written document, and extrinsic evidence is admissible for this purpose.

153 Koh and Phang (n 4) para 06.023.

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

prove the terms.[154] This function renders the rule a manifestation of the objective theory of contract,[155] and emphasizes the need to give certainty to contracting parties.[156] Indeed, this position was affirmed in the recent SGCA's decision in *Toh Eng Tiah v Jian Angelina* where the court observed that the rationale for the parol evidence rule is 'grounded on the objective theory of contract'.[157] It is also precisely this function that saw commentators distinguishing the rule from the rules governing contractual interpretation. As Kniffin argued, interpretation seeks to 'assign meaning to terms already contained within the contract' while the parol evidence rule 'determines whether a term can be added to [or deleted or displaced in] a contract'.[158]

However, this arguably misconstrues the functions of the parol evidence rule. It is suggested that the parol evidence rule also plays a crucial part in influencing the framework of contractual interpretation under the common law in two ways[159]: first, it gives effect to the objective contextual approach to contractual interpretation, prescribing that the interpretation of the contract starts from its plain wording and constraining the admissibility of extrinsic evidence only to instances of ambiguity.[160] Secondly, it gives effect to the objective manifestation of the parties' agreement found within the written document by excluding evidence that would vary or contradict the written terms of the contract.[161]

Turning to the first function, where the wording of the contractual provisions are clear and unambiguous, the parol evidence rule operates to render extrinsic evidence inadmissible in interpreting the terms.[162] Extrinsic evidence is, however, admissible where latent ambiguities are concerned (ie where the provision is clear and unambiguous on its face, but is ambiguous when in the transaction's context).[163] The concept of ambiguity thus regulates the admissibility of extrinsic evidence for contractual interpretation, and forms the cornerstone from which the modern contextual approach towards interpretation was developed, viz from one that permits a generous admission of extrinsic evidence to one that permits admissibility contingent upon ambiguity.[164]

As for the second function, the parol evidence rule arguably gives effect to the categories of excluded evidence under the common law rules of contractual

154 Lewinson (n 115) 133.

155 See generally D McLauchlan, *The Parol Evidence Rule* (Professional Publications Ltd 1976).

156 *AIB Group* (n 9) 4 and 7; *Shogun Finance Ltd v Hudson* [2004] 1 AC 919 (HL) 944.

157

158 M Kniffin, 'Conflating and Confusing Contract Interpretation and the Parol Evidence Rule: Is the Emperor Wearing Someone Else's Clothes?' (2009) 62 Rutgers Law Review 75, 78. See also C Moustaka, 'The Admissibility and Use of Evidence of Prior Negotiations in Modern Contract Interpretation' (2016) 41(1) The University of Western Australia Law Review 203, 243–44.

159 Chan (n 78) 283; Singapore Academy of Law, Report of the Law Reform Committee on the Review of the Parol Evidence Rule (2006) para 13.

160 Menon (n 118) para 21; JJ Spigelman, 'Contractual Interpretation: A Comparative Perspective' (2011) 85 *Australian Law Journal* 412, 414; Rajah (n 2) 515;

161 Chan (n 78) 283.

162 *Bank of New Zealand v Simpson* [1900] AC 182 (UKPC) 189; R Stevens, 'Objectivity, Mistake and the Parol Evidence Rule' in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (OUP 2007) 108, 109; Rajah (n 2) 514.

163 Chitty (n 4) paras 13-077 and 13-134.

164 See Part 2.1.1.

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

interpretation,[165] thereby preventing any undue modification or contradiction of the parties' originally agreed-upon terms.[166] It has been argued that these exclusionary rules are primarily engaged for the purpose of contractual interpretation and does not directly affect the identification of terms outside of the written contract.[167] However, this fails to consider that the use of such extrinsic evidence may result in a variation or contradiction of the disputed term's meaning different from its ordinary meaning. As Corbin succinctly puts it, '[c]ontradiction, deletion, substitution: these are not interpretation'.[168] Especially given the modern contextual approach's extensive consideration of the commercial transaction's factual background, opportunistic parties may abuse this as a 'Trojan horse'[169] to subvert the parol evidence rule under the guise of interpretation. As the SGCA observed in *Zurich Insurance v B-Gold Interior Design* (*Zurich Insurance*), extrinsic evidence cannot be used 'as a pretext to contradict or vary [the contract]'.[170] Hence in *Yap Son On v Ding Pei Zhen*, the SGCA denied the admissibility of extrinsic evidence in the form of a party's declaration of subjective intentions to show that the number of shares to be distributed between the parties in the share allotment agreement was an amount other than the stipulated amount, especially since the provision was plainly clear and unambiguous. To do so would, according to the Court of Appeal, 'not simply be a case of expansive interpretation but something which amounted to a re-writing of the contract'.[171] Moreover, if there is to be a meaningful distinction between contractual interpretation and other contractual doctrines, such as implication and rectification,[172] it is important to limit the admissibility of these categories of extrinsic evidence.

165 G McMeel, *McMeel on The Construction of Contracts: Interpretation, Implication, and Rectification* (2nd edn, OUP 2011) para 5.30. See also *Codelfa* (n 138) 352. The High Court of Australia accepts that the function of the parol evidence rule is to exclude evidence of prior negotiations in the interpretation of contracts.

166 *Arnold* (n 6) para 20; *ING Bank NV v Ros Roca SA* [2012] 1 WLR 472 (UKCA) para 110; Sumption (n 127) 304.

167 Ostendorf (n 3) 169.

168 A Corbin, 'The Interpretation of Words and the Parol Evidence Rule' (1965) 50 Cornell Law Quarterly 161, 171.

169 *Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd* [2008] All ER (D) 114 (EWHC) para 13.

170 *Zurich Insurance* (n 15) paras 122 and 134. At first instance, the trial judge relied on extrinsic evidence in interpreting an exclusion clause and concluded that it should be denied efficacy in light of the surrounding context of the insurance policy. On appeal, however, the SGCA overturned the trial judge's decision. The court held that the trial judge should not have considered the context of the policy, since it was in contravention of the statutory parol evidence rule. More importantly, the court held that the trial judge's reliance of the extrinsic evidence in concluding that the exclusion clause was inoperable had strayed from interpretation into that of varying the terms.

171 *Yap Son On* (n 137) paras 30–44.

172 Sumption (n 127) 311. See also Menon (n 118) paras 57–58. Chief Justice Sundaresh Menon pointed out the critical need to clearly demarked the limit between interpreting a contract and re-writing the parties bargain, and provides an example of how such a limit may be crossed when, in seeking to determine the meaning of the written text, the court goes further by filling a gap within the contract based on its own assessment of what is fair, just, or reasonable.

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

3.2 Determining the substantive rules prescribed by the contract's governing law

Having established the function of the parol evidence rule as giving effect to the principle of objectivity underlying contractual interpretation, the analysis turns towards the characterization of the rule. To start, it is necessary to distinguish between substantive and procedural matters under private international law rules, since only substantive rules are governed by the *lex causae*.[173] Admittedly, this undertaking is far from settled, with several different approaches developed. The first relates to the distinction between procedural matters which affect relief and enforcement matters in the proceeding, and substantive matters which affect the existence or abrogation of rights.[174] The second, termed the 'outcome determinative test', states that substantive matters are those affecting the existence and extent of the parties' rights and duties.[175] The final approach discards the distinction between substance and procedure; instead, matters concerning the decision on the merits (ie directed at the dispute itself), rather than simply affecting it, will be governed by the *lex causae*.[176]

Regardless of the applicable approach, at the crux of the characterization process is the need to appreciate rule's *function*, *viz* whether it affects the existence of the rights or merits of the dispute, or simply their enforcement. To say that the parol evidence rule is both a procedural *and* substantive rule would arguably misapply the characterization test[177] as the core concepts of the procedural–substantive classification are intended to be antithetical.[178]

Turning to the issue of characterization proper, it is well-accepted that rules governing contractual interpretation are substantive in nature.[179] This can be explained on the basis that they constrain the adjudicator's approach in determining the existence and content of the contractual rights and obligations of the parties. This in turn inevitably affects the existence and extent of the contractual claim and hence the

173 G Panagopoulos, 'Substance and Procedure in Private International Law' (205) Journal of Private International Law 69.

174 R Garnett, *Substance and Procedure in Private International Law* (OUP 2012) para 2.04.

175 ibid para 2.25, citing *John Pfeiffer Ply Ltd v Rogerson* (2000) 203 CLR 503 (HCA) para 99. See also *First Laser Ltd v Fujian Enterprises (Holdings) Co Ltd* [2012] HKCFA 52 para 52; M Davies, A Bell and P Brereton, *Nygh's Conflict of Laws in Australia* (8th edn, LexisNexis Butterworths 2010) para 16.5.

176 M Illmer, 'Neutrality Matters – Some Thoughts about the Rome Regulations and the So-Called Dichotomy of Substance and Procedure in European Private International Law' (2009) 28 Civil Justice Quarterly 237, 246.

177 *JVL Argo* (n 89) para 39; *BNA* SGHC (n 102) para 33.

178 *Cf Three Rivers District Council and others v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 (HL) at para 26. In that case, the UK House of Lords held that another rule of evidence, that of legal advice privilege, is both a procedural and substantive rule. The court explained that the rule 'may be used in legal proceedings to justify the refusal to answer certain questions or to produce for inspection certain documents. Its characterisation as procedural or substantive neither adds to nor detracts from its features'. Despite this, most jurisdictions appear view privilege as a substantive rule: DLA Piper, *Legal Professional Privilege Global Guide* (2019) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwizgcfdjLTtAhXu9nMBHcGYAJIQFjACegQIAxAC&url=https%3A%2F%2Fwww.dlapiperintelligence.com%2Flegalprivilege%2Finsight%2Fhandbook.pdf&usg=AOvVaw07PmxrVfdMPESDOzZCet3j> (accessed 9 April 2021).

179 L Collins (ed) *Dicey, Morris and Collinson the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) para 32-143. See also *Compagnie Tunisienne de Navigation SA v Compagnie d'Armament Maritime SA* [1971] AC 572 (HL) 603; Rome I Regulation art 12(1)(a).

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

merits of the decision. Critically, *Dicey, Morris and Collins* points out that while certain interpretative rules may affect the admissibility of evidence, they are not to be treated as being subsumed under the law of evidence.[180] The distinction lies in differentiating between rules which prescribe how facts are to be proved (ie by which means of evidence), which is governed by the *lex fori*, versus rules which determine what facts should be allowed to throw light on the intention of the parties, which is governed by the *lex causae*.[181] The parol evidence rule falls within the latter category, given that it prescribes the admissibility of extrinsic evidence contingent on whether they are relevant in providing an objective understanding of the commercial context underlying the transaction. Moreover, the admission of extrinsic evidence which are relevant in ascertaining the objective contractual intention of the parties invariably affects the existence and/or extent of the parties' contractual rights and obligations.[182]

Accordingly, neither the exclusionary effect of the parol evidence rule, nor the fact that it may be codified in legislation, *ipso facto* justifies a procedural characterization of the rule. Rather, as a manifestation of the objective approach to interpretation, and by giving effect to the exclusion of subjectively laden extrinsic evidence, the rule is necessarily substantive. Insofar as the governing law of the contract recognizes the rule, arbitrators are thus mandated to apply it as part of the *lex causae*.

4. PRACTICAL APPLICATION OF THE PAROL EVIDENCE RULE

In practice, most arbitrators are inclined towards understanding the commercial relationship and balancing the parties' competing interests.[183] As Hermann notes: 'It is fundamental to arbitration that it should solve disputes according to commercial practice and common sense, arriving at a result considered fair in a particular business community.'[184] Moreover, modern arbitration institutional rules and soft law instruments such as the IBA Rules governing arbitral procedures confer great latitude to arbitrators in determining the admissibility of evidence. These reasons explain why many international arbitrators prefer to admit all evidence that is *prima facie* relevant.[185] The management of each evidence is then dealt with as a matter of weight.

Yet as explained in the sections above, the substantive nature of the parol evidence rule means that arbitrators are obliged by the governing law of the dispute to apply them. The applicable procedural law, whether incorporated by the parties in their arbitration agreement, or determined at the outset of the proceedings, does not affect the rule's application. Rather, the parol evidence rule and its exceptions will apply as part of the *lex causae* whenever arbitrators perform the task of interpreting contractual provisions. As Karton aptly observed: 'Procedural discretion does not extend to substantive rules, even ones that deal with evidence.'[186]

180 Collins (n 176) para 32-144.
181 Ostendorf (n 3) 173.
182 Garnett (n 174) para 2.24; Collins (n 179) paras 32-144 and 32-145.
183 Greenwood (n 20) 27.
184 AH Hermann, *Judges, Law and Businessmen* (Kluwer 1983) 2221
185 Redfern and Hunter (n 1) para 6.81; Greenwood (n 20) 26. See also Panhard (n 5) 101.
186 Karton (n 5) 32.

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

Despite the substantive nature of the parol evidence rule, its apparent complexity is a key reason why arbitrators, especially those who not educated or trained in the common law jurisdiction, may be reluctant to apply the rule.[187] Clear guidance on the application of the parol evidence rule within the broader framework of contractual interpretation and on managing the admission of extrinsic evidence would encourage arbitrators to give effect to the rule. This section attempts to set out some guidance for tribunals on how the rule may be applied.

4.1 When and how is the parol evidence rule applied

4.1.1 Identification of terms

Where the parties' agreement has been recorded in a written document, extrinsic evidence cannot be admitted to add to, subtract from, vary or contradict that document.[188] There is thus a rebuttable presumption that a written contract that appears *reasonably* to be complete contains all of the parties agreement, and no further evidence purportedly recording the parties' intentions will be admitted.[189] This presumption applies with even greater force where standard form contracts and commercially circulated documents such as negotiable instruments are concerned.[190]

However, where the purpose of admitting parol evidence is not directed towards affecting the terms of the contract, the evidence is generally admissible. The following are the commonly invoked exceptions to the parol evidence rule:

1. When establishing a collateral contract, extrinsic evidence is generally admissible.[191] However, extrinsic evidence supporting a term that goes to the essence of the whole transaction is inadmissible as it would vary, add to, subtract or contradict the terms of the main contract.[192]
2. When determining the formation or validity of the contract, extrinsic evidence is admissible to demonstrate the presence or absence of consideration[193] or intention to create legal relations,[194] or vitiating circumstances, such as mistake, misrepresentation, incapacity, or illegality.[195]
3. When identifying the contracting parties[196] and the capacity in which they contracted.[197]

187 Rosengren (n 41) 8; Marild (n 60) 332.

188 Chan (n 78) 283.

189 *Forefront Medical Technology* (n 9) paras 24 and 26; *Zurich Insurance* (n 15) para 40; Treitel (n 4) para 6-023; Koh and Phang (n 4) para 06.023; K Wedderburn, 'Collateral Contracts' (1959) 17(1) Cambridge Law Journal 58, 62.

190 *Zurich Insurance* (n 15) para 110.

191 *Mann v Munn* (1874) 30 LT 526, 527.

192 *Angell v Duke* (1875) 32 LT 320; *Henderson v Arthur* [1907] 1 KB 10.

193 Chitty (n 4) para 13-121.

194 ibid para 13-119.

195 ibid para 13-0125.

196 *Aspen Underwriting Ltd v Credit Europe Bank NV* [2019] 1 Lloyd's Rep 221 para 49.

197 *Internaut Shipping GmbH v Fercometal SARL* [2003] EWCA Civ 812 para 56. See also Chitty (n 4) para 13-127. For example, where a person contracts ostensibly as a principal, evidence can be admitted to prove that he was in fact an agent of another party. This allows for the proper defendant to be identified.

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

4. When rectifying terms that were mistakenly incorporated within the contract.[198]

Of course, where an 'entire agreement' clause is incorporated within the contract, this effectively bars the admission of extrinsic evidence in supplementing or qualifying the contract,[199] but importantly, not for the purposes of contractual interpretation.[200]

4.1.2 Interpretation of terms

Once the arbitrators are satisfied that the written contract reflects the parties' full and final agreement, the next stage is to interpret the disputed terms. Generally speaking, the modern contextual approach to contractual interpretation permits arbitrators to admit extrinsic evidence to aid in their understanding of the background context of the transaction. This reflects the 'longstanding principle. . .that a commercial document must be read in a business-like manner',[201] and accords with the preference of many international arbitrators in seeking to understand the commercial context underlying the dispute.

That being said, the prevailing approach to contractual interpretation in most common law jurisdictions mandate that any interpretation of contractual provision should start with the plain wording. The parol evidence rule would then control the admissibility of extrinsic evidence in the following manner[202]:

- First, in determining the presence or absence of ambiguity, arbitrators can admit extrinsic evidence documenting the context of the commercial transaction. However, such evidence must be relevant and reasonably available to the parties.[203] This is premised on the need for objectivity in identifying the parties' intentions. Consistent with this, subject to specific variations between common law jurisdictions, arbitrators should generally be wary of admitting extrinsic evidence falling under the following three categories, given that they generally do not serve to provide an objective understanding of the parties' agreement[204]:

a. Evidence of either party's unexpressed subjective intentions, including their personal uncommunicated views on what the term means.

198 *Saga Group Ltd v Paul* [2017] 4 WLR 12 para 43.

199 *Lee Chee Wei* (n 105) para 25; *Inntrepreneur Pub Co (GL) v East Crown Ltd* [2000] 2 Lloyd's Rep 611 paras 7–8.

200 *Lee Chee Wei* (n 105) para 41; *Sunray Woodcraft* (n 106) para 45.

201 Spigelman (n 3) 247.

202 See also YH Goh, *The Interpretation of Contracts in Singapore* (Sweet & Maxwell 2018) paras 2.004–2.036. Professor Goh has adopted a similar framework, albeit in the context of interpretation of contracts where litigation before the Singapore courts is concerned. However, Professor Goh advocated for a slightly different approach as he argues that admission does not depend on the type of evidence, but rather on the presence of ambiguity. Nonetheless, this view is contingent on the Singapore Evidence Act being applicable, which is not the case for international arbitral proceedings.

203 See Part 2.1.1.

204 ibid.

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

b. Evidence of the parties' pre-contractual negotiations, including prior drafts of the contract.
c. Evidence of the parties' statements and conduct following the conclusion of the contract.
d. Secondly, depending on whether the term is clear or ambiguous, the parol evidence rule may permit the admission of further extrinsic evidence:
e. Where the text is clear and unambiguous seen in light of the context, extrinsic evidence is inadmissible since there is no reason to depart from the plain meaning.
f. Where the text is patently ambiguous,[205] extrinsic evidence is not admissible. Rather, the term would likely be unenforceable for lack of certainty and completeness.[206]
g. Where the text is latently ambiguous,[207] the parol evidence rule permits arbitrators to direct the further admission of extrinsic evidence targeted at resolving this latent ambiguity.

This approach generally accords with the overall shift in the sentiments of common law jurisdictions away from the unrestrained admission of extrinsic evidence to one that accords primacy to the language chosen by the parties.[208] Any deficiency in drafting of the contract would be remedied by admitting extrinsic evidence referring to the wider context, and possibly considerations of commercial sense.[209]

4.2 Managing the admission of extrinsic evidence

The expanded gateway for admitting evidence of the transaction's commercial context may 'create greater uncertainty of outcome. . .and add to the cost [and time] of advice'.[210] This concern applies equally in international arbitration, where disputes often involve heavy reliance on documentary evidence[211] and where time and cost are real concerns.[212]

205 Patent ambiguity refers to when the wording of the provision is obviously uncertain or extremely defective so as to be meaningless.

206 Goh (n 202) para 2.024.

207 Latent ambiguity refers to situations where the wording of the provision is clear in itself, but is meaningless when seen in the broad context of the commercial transaction, where the provision may apply to more than one subject-matter, or where the provision could potentially apply to two sets of existing facts but not entirely to either one.

208 See Part 2.1.1.

209 See eg *Rainy Sky* (n 115). In that case, the UK Supreme Court had to grapple with the interpretation of a bank guarantee which provided for a refund to the claimant in the event of an 'insolvency event' pursuant to the main contract. The drafting of the bank guarantee was defective as one provision provided for a refund to be provided according to the terms provided under the main contract, but another provision provided for a refund only in the event of termination. The court referred to the wider context of the transaction and considerations of commercial sense in concluding that the defendant bank had to fulfill its refund obligations in an 'insolvency event' and not merely in the event of termination.

210 *Chartbrook* (n 6) para 36. See also *Sembcorp Marine* (n 15) para 72; *Yap Son On* (n 137) para 3; Spigelman (n 158) 431.

211 Born (n 19) 2255–56.

212 L Levy and L Reed, 'Managing Fact Evidence in International Arbitration' in A van den Berg (ed), *International Arbitration 2006: Back to Basics?* (ICCA Congress Series No 13 2006) 633 and 636

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

Possible directions that tribunals can lay down from the outset can be gleaned from the pleading requirements espoused by the SGCA in *Sembcorp Marine* to manage the volume of extrinsic evidence in court proceedings[213]:

1. Parties who contend that the factual matrix is relevant to the construction of the contract must plead with specificity each fact of the factual matrix that they wish to rely on in support of their construction of the contract.
2. The factual circumstances in which each relevant fact of the factual matrix relied upon were known to both or all the relevant parties must also be pleaded with sufficient particularity.
3. Parties should in their pleadings specify the effect which such facts will have on their contended construction.
4. The obligation of the parties to disclose evidence would be limited by the extent to which the evidence is relevant to the facts pleaded above.

These requirements were developed in accordance with Singapore's civil procedure rules.[214] Nevertheless, they constitute practical responses to opportunistic parties seeking to take advantage of the modern contextual approach by admitting 'all manner of evidence. . .without any governing rules of engagement'.[215] By requiring parties to specifically declare all evidence relied upon in support of their construction of the disputed term, the tribunal's attention can be directed towards the specific aspects and purpose for admitting the evidence. This mitigates any consequent uncertainty, needless prolonging of proceedings, and undue costs incurred.[216] On the flipside, advocates seeking specific discovery of extrinsic evidence in arbitration proceedings may find their task of persuading the tribunal easier if they address the *Sembcorp Marine* guidelines in their submissions.

Another potential issue pointed out by Greenwood is termed the 'anchoring' effect.[217] Since parol evidence must still be received by arbitrators to determine its admissibility, there is a risk that any undue exposure the contents of such evidence would influence (consciously or not) their thought processes and hinder their abilities to disregard the evidence.[218] To mitigate this, arbitrators can consider adopting a procedure similar to that under Article 3(8) of the IBA Rules. That provision permits the tribunal to appoint a neutral expert in certain 'exceptional circumstances' to review objectionable documents prior to its production and give a recommendation to the panel as to whether production is required.[219] Similarly, the tribunal may consider engaging an expert to review the documents and determine its suitability for admission if in doubt.

213 *Sembcorp Marine* (n 15) para 73. Affirmed in *Yap Son On* (n 137) para 46.
214 See the Singapore Supreme Court Practice Directions, pt III, para 35A <https://epd.supremecourt.gov.sg/PART-03-Originating-Processes-And-Documents.html#35a-pleadings>.
215 *Sembcorp Marine* (n 15) para 72.
216 *Yap Son On* (n 137) para 46; Menon (n 118) para 45.
217 Greenwood (n 20) 26.
218 ibid 27.
219 IBA Rules art 3(8).

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021

5. CONCLUSION

In conclusion, under the common law the parol evidence rule is a substantive rule of contract law that should be applied as part of the *lex causae* in international arbitration proceedings. While the rule has evidentiary *implications*, its primary functions within the framework of contractual interpretation under the common law are:

- giving effect to the manner in which contractual interpretation is adopted (ie to start from the plain wording of the contract, and allowing the admission of extrinsic evidence where there is ambiguity) and
- providing the basis justifying the exclusion of pre-contractual negotiations, post-contractual conduct, and subjective declarations of intent.

Faithful application of the parol evidence rule as a substantive rule of contractual interpretation under the common law will ensure that adjudicators arrive at the same interpretation using the same set of facts, thereby promoting uniformity, predictability, and consistency, whether in litigation or arbitration .

Downloaded from https://academic.oup.com/arbitration/advance-article/doi/10.1093/arbint/aiab029/6377239 by guest on 29 September 2021