

A CRITICAL APPRAISAL OF THE PAROL EVIDENCE RULE IN CONTRACT LAW

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Abstract

Under the common law the 'hallowed principle' in contract law is that once the parties have reduced their agreement into a written form, in the event of a dispute between them as to the written terms of the contract, they are prohibited from adducing extrinsic evidence to add to, subtract from, vary or contradict the written terms. The strict application of the rule was found to have caused hardship and worked unfairly to the parties. To mitigate the rigour of the rule, the judiciary created exception to the rule, whereby extrinsic evidence was allowed to be admitted. In time, the exceptions became so numerous as to virtually emasculate the 'hallowed' rule. To allay this uncertain state of affairs, law commission were set up in the United Kingdom, Canada, India and Singapore to reconsider the status of the rule. Some suggested a slight modification of the rule while the Law Commission in Ontario suggested a total abolition of the rule. This paper proposes to look at the nature of the 'parol evidence rule', numerous exceptions to it, the merits and demerits of the proposals for reform especially in the mother of common law England, Canada, India, Singapore and Malaysia.

Keywords: Parol Evidence Rule, Contract Law, Critical Appraisal.

1. INTRODUCTION

In the interpretation of a contract, the contractual intent of the parties is to be determined by reference to the words they used in drafting the document. Evidence of one party's subjective intention at the time of drafting was inadmissible by virtue of the parol evidence rule. In other words, the extrinsic evidence in the making of a contract has no independent place in this determination when the document was clear and unambiguous on its face (see *Eli Lilly and Co v Novapham Ltd* [1998] 2 SCR 129). In *Shogun Finance Ltd v Hudson* [2004] 1 AC 919 HL, Lord Hobson described the parol evidence rule as fundamental to the mercantile law of [England], the bargain is the document, the certainty of the contract depends on it. It is one of the greatest strengths of [English] commercial law. The parol evidence rule is a substantive common law rule in contract law that prevents a party to a written contract from presenting extrinsic evidence that adds to, subtract from, vary or contradict the written terms of the concluded contract (see Wigmore, 1904, pp. 338-355). It has been said that the parol evidence rule in truth deals not with a rule of evidence, but with the nature of legal acts (see Thayer, 1898, p. 10; Greenleaf, 1853, p. 305.). A fascinating ancient case that illustrate the working of the rule is the *Countess of Rutland's Case* [1604] 5 Co Rep 25. It thus expressly assumes that the written document is the final and full expression of the parties' agreement (see *Tractors Malaysia Bhd v Kumpulan Pembinaan Malaysia Sdn Bhd* [1978] 1 LNS 220; [1979] 1 MLJ 129; *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1983] CLJ 186 (Rep); [1983] 2 CLJ 187; [1984] 1 MLJ 243; *Datuk Yap Peng Leong v Sababumi* [1997] 1 CLJ 23; [1997] 1 MLJ 587). This general rule was expressed way back in 1787 in *Davis v Symonds* [1787] 1 Cox Eq Cas 402 at 404-405, and in 1826, in *Williams v Jones* [1826] 5 B & C 108. In *Bank of Australia v Palmer* [1897] AC 540, 545, Lord Morris held: "Parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract or the terms in which the parties have deliberately agreed to record any part of their contract". The rule can be regarded as an

expression of the objective theory of contract. Under this theory the court is concerned not with the parties' actual intention but their manifest intention.

Consistent with the objective test of the agreement, the parol evidence rule seeks to promote certainty in the law by holding parties who have reduced a contract to writing should be bound by the writing and their writing alone (see Treitel, 2003, p. 192). The parol evidence rule applies only to prove the terms of a contract and not to the existence of the fact of a contract (see *P'ng Hun Sun v Dato Yip Yee Foo* [2013] 1 LNS 320). This has been interpreted to mean that even if the written contract can be an incomplete or an inaccurate record of what the parties agreed, the parties are stuck with what is written: extrinsic evidence of terms which were agreed but which were, by accident or design, omitted from the written agreement, could not as a general rule be given (see *Evans v Roe et al* [1872] LRCP 138; English Law Commission, Law of Contract – The Parol Evidence Rule. Working Paper No. 70. [London: 1986], p. 6 *et seq*).

Not surprisingly, the English courts found quickly that a strict adherence to the rule could lead to unjust results. So gradually, the general common law rule came to be diluted by numerous exceptions and made the parol evidence rule's ambit unclear (see more English Law Commission, Law of Contract – The Parol Evidence Rule. Working Paper No. 70. [London: 1986], p. 4). The exceptions where extrinsic evidence may be admitted includes to prove defects in the formation of the contract such as mistake, fraud or illegality; to disprove the validity of the contract; to show intention of the parties over the ambiguous terms in the contract; to identify the parties or subject matter of the contract; and to prove a condition precedent, among others. These exceptions have narrowed the rule considerably in favour of admitting proof of the true intentions of the parties as far as possible. Chitty stated that "[T]he scope of the parol evidence rule is much narrower than at first sight appears. It has no application until it is first determinate that the terms of the parties' agreement are wholly contained in the written document" (Chitty, 1977, para 674).

2. EXCEPTION TO THE COMMON LAW RULE

In *Quality Concrete Holdings Bhd v Classic Gypsum Manufacturing Sdn Bhd & Ors* [2012] 5 CLJ 33, Abdul Malik Ishak JCA noted, *inter alia*, the exceptions to the common law rule where extrinsic evidence may be admissible, namely:

- (i) where there is an allegation that the signature is void under the *non est factum* rule (see *Foster v Mackinnon* [1869] LR 4 CP 704);
- (ii) where the written agreement is subject to a condition precedent (see *John Pym v Robert James Roy Campbell, James Thompson Mackenzie And Richard Pastor Pritchard* [1856] 6 EL & BL 370);
- (iii) where the written agreement is not intended to give rise to a contractual relationship (see *Orion Insurance Co plc v Sphere Drake Insurance plc* [1992] 1 Lloyd's Rep 239, CA);
- (iv) where the written agreement does not correspond with the prior oral agreement between the parties (see *Joscelyne v Nissen and another* [1970] 2 QB 86, [1970] 1 All ER 1213, CA);
- (v) where the application is made in order to show that an apparently valid contract has been invalidated by duress (see *Henry Williams And Others v James Bayley* [1866] LR 1 HL 200), fraud (see *Pickering And Others v Dowson And Others* [1813] 4 Taunt 779 and *Dobell v Stevens* [1825] 3 B&C 623), illegality (see *Madell v Thomas & Co* [1891] 1 QB 230, CA), misrepresentation (see *Curtis v Chemical Cleaning and Dyeing Co.* [1951] 1 KB 805, [1951] 1 All ER 631, CA), mistake (see *Clowes v Higginson* (1813) 1 Ves & B 524; *Wilson v Wilson* [1854] V H.L.C. 40) and frustration.

The above list of exceptions is by no means exhaustive. In fact, the Law Commission shrewdly stated that the exceptions to the parol evidence rule were so numerous and extensive that it may be wondered whether the rule itself had not been largely destroyed.

The categories of exceptions to the common law rule that existed today is summarised below:

- (i) Vitiating factors: These are facts that vitiate or invalidate a contract. They relate to the validity of the contract rather than the contents of the contract. Thus, extrinsic evidence can be used to establish the presence or absence of consideration or of contractual intention, or some invalidating cause such as lack of capacity, fraud, misrepresentation, illegality, mistake or *non est factum*. For example, in *Quality Concrete Holdings Bhd v Classic Gypsum Manufacturing Sdn Bhd & Ors* [2012] 5 CLJ 33, it was stated that parol evidence can be adduced to show that the written agreement is not a valid contract because there was never any agreement between the parties.

- (ii) Rectification: Evidence may be admitted to rectify a written document executed by the parties under a common mistake. Where a document is meant to record a previous oral agreement but fails to do so accurately, the document may be rectified to correct the mistakes and bring it in line with the oral agreement. In such a case, evidence of the previous oral agreement must inevitably be admitted. In most cases in which the parol evidence rule is invoked, the parties make no mistake: they know perfectly well that the extrinsic term is not incorporated in the document, and so rectification is not available.
- (iii) Independent oral agreement (including collateral agreement): Even where extrinsic evidence cannot be used to vary, add to or contradict the terms of a written document, it may be possible to show that the parties made two related contracts, one written and the other oral (see *Malpas v L & SW Ry Co* [1866] LR 1 CP 336 HL; *Cauchman v Hill* [1947] KB 554; *Turner V Forward* [1951] 1 All ER 746). Evidence is admissible if it proves an “independent agreement”. It is often hard to say whether the evidence has this effect or whether it varies, or adds to, the terms of the main contract. The test, according to Treitel, seems to be whether the evidence relates to a term which would go to the essence of the whole transaction: if so, it cannot be regarded as evidence of a collateral contract and will be inadmissible (see Treitel, 2003, p. 192). Evidence of a collateral contract is inadmissible if it varies or contradicts a term actually set out in the written contract. The same would apply to express oral warranties given at the time of contract (see, however, *City and Westminster Properties [1934] Ltd v Mudd* [1959] Ch 129). Where apparently there was a contradiction between the oral assurances to allow tenant to stay on the premises – in the teeth of written covenant prohibiting the tenant to stay. Yet evidence of oral assurance was admitted on the collateral contract principle (see *Evans (J) & Son (Portsmouth) Ltd v Andrea Herzario Ltd* [1976] 2 All ER 930).
- (iv) Condition precedent: On its face a document may purport to record a valid and immediately enforceable contract, but extrinsic evidence may be admitted to show that it had been previously agreed to suspend the operation of the contract until the happening of a certain event, such as the approval of a third party, and that this event had not yet taken place. The happening of the event in question is a condition precedent to the contract's existence, and evidence of such an agreement may be given (see *Pym v Campbell* [1856] 6 E & B 370).
- (v) Subsequent oral agreement: Extrinsic evidence can be used to show that the contract has been varied or rescinded by subsequent oral agreement.
- (vi) Custom and implied terms: Evidence of custom can be used to add to, but not to contradict, the written contract. Evidence of custom is admissible to show the meaning of particular words in the contract, even where it differs from the ordinary meaning of those words. In *Smith v Wilson* [1832] 3 B & Ad 728, the extrinsic evidence was admitted to show by the local custom that the phrase ‘1000 rabbits’ used in the written contract was to be taken as meaning 1,200 rabbits (see also *Hutton v Warren* [1836] 150 ER 517, 521). Similarly, extrinsic evidence may be admissible where it relates to terms that are implied. The common law rule only prevents a party from relying on extrinsic evidence as to *express* terms of a contract.

3. STATUTORY RULE UNDER THE EVIDENCE ACT

The admissibility of extrinsic evidence is prima facie governed by sections 91 to 99 of the Malaysian Evidence Act 1950 and sections 93 to 102 of the Singapore Evidence Act (Chapter 97 of the 1997 [Revised Edition]). The Malaysian and Singapore Evidence Acts are largely modelled on the Indian Evidence Act 1872. Sections 91 and 92 of the Malaysian Evidence Act would prevent any parol evidence from being admitted to add to, vary, contradict or subtract from the contents of a written document unless the evidence comes within one of the exceptions or illustrations contained in section 92. Sections 91 and 92 of the Evidence Act 1950 are also applicable to criminal cases (see *Ah Mee v PP* [1967] 1 LNS 3; [1967] 1 MLJ 220; *Inspector General of Police & Anor v Alan Noor bin Kamat* [1987] 1 LNS 101; [1988] 1 MLJ 260; *PP v Krishnan a/l Letchumanan & Anor* [1995] 2 MLJ 690 and *PP v Sulaiman bin Mohamad Noor* [1995] 1 LNS 325; [1996] 1 MLJ 196). Section 91 relates to the exclusiveness of documentary evidence, an aspect of the ‘best evidence’ rule (see sections 64 and 65 of the Evidence Act; Yung, 1988, pp. 224 -226; Monir, 1989, p. 937; Sarkar, 1999, p 1265; Paul, 2010). The above section provides: “When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of the contract, grant or other disposition of property or of the

matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act”.

The clause "any matter is required by law to be reduced to the form of a document" refers to bilateral instruments and dispositive documents only (see *PP v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180). As from the above, when a contract, grant or other disposition of property has been reduced into a document, that document must be produced. The document could be the best evidence expressing the intent of the parties. Secondary agreement may be admissible only in very limited circumstances (see Section 65 of the Indian and Malaysian Evidence Act). It is noted that unlike the common law rule which applies to all written instruments, section 91 above is limited only to the types of documents specified, namely, 'contract, grant or other disposition of property, and any matter required by law to be reduced to the form of a document.' Further, the above section applies as between persons who are parties or even persons who are non-parties to the document. This is unlike section 92 which applies only in respect of parties to the document. It may added that the principal rule in section 91 is subject to two exceptions namely, (i) when a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved; and (ii) wills admitted to probate in Malaysia may be proved by the probate.

Meanwhile, section 92 provides: "When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms". Section 92 is closely related with section 91, and deals with conclusiveness of documentary evidence. It is based on the same principle, that documentary evidence is superior to oral evidence. When any document has been proved under section 91 (by the production of the document or by admissible secondary evidence), no oral evidence is admissible for the purpose of 'contradicting, varying, adding to, or subtracting' from its terms.

Section 92 makes reference to section 91 and deals with exactly the same type of documents specified in section 91. Section 92 is operative only if the written document has been admitted under section 91. It does not operate independently of section 91. It has been said that section 91 deals with the proof of matters specified in it, and section 92 deals with what may be regarded as disproof of such matters. The restrictions in section 92 apply to the admission of evidence 'as between the parties' only and it is thus narrower in application than section 91. The Federal Court had, in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, considered the scope of section 92 and section 99 of the Evidence Act 1950 in detail.

In relation to the above two sections, it is also useful to refer to the speech of Augustine Paul JC, (as he then was) in *Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors* [1997] 3 CLJ 421, at pp. 433-434, where he said that: "The best evidence about the contents of a document is the document itself and it is the production of the document that is required by s. 91 in proof of its contents. In a sense, the rule enunciated by s. 91 can be said to be an exclusive rule in as much as it excludes the admission of oral evidence for proving the contents of the document except in cases where secondary evidence is allowed to be led under the relevant provisions of the Evidence Act 1950. Section 92 applies to cases where the terms of contracts, grants or other dispositions of property have been proved by the production of the relevant documents themselves under s. 91. In other words, it is after the document has been produced to prove its terms under s. 91 that the provisions of s. 92 come into operation to exclude evidence of any oral agreement or statement for the purpose of contradicting, varying, adding to or subtracting from its terms. Sections 91 and 92, in effect, supplement each other. Section 91 would be frustrated without the aid of s. 92 and s. 92 would be inoperative without the aid of s. 91. Since s. 92 excludes the admission of oral evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of the document properly proved under s. 91, it may be said that it makes the proof of the document conclusive of its contents. Like s. 91, s. 92 can also be said to be based on the best evidence rule" (see *Bai Hira Devi v Official Assignee* AIR [1958] SC 448).

In other words, the purported contract must have been proved first under s. 91 of the Evidence Act 1950 in order to render it applicable under s. 92 of the same Act. Having said the above, it is noted that the principal rule in section 92 is subject to six provisos as follows (see Paul, 2010; Salim, 1994, pp. 372-397):

- (a) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration (Oral

evidence of failure of consideration in contract is admissible. See *Tang Siew Hee v Hii Sii Ung* [1964] MLJ 385; *Guthrie Waugh Bhd v Malaippan Muthucumar* [1972] 1 MLJ 35, 37; *Lim Ah Moy v Lee Cheng Hor* [1970] 2 MLJ 99; or mistake in fact or law (When mistake is common to all parties, evidence would be admissible to found a claim for rectification of the document. See *Janardan v Venkatesh* [1939] AIR Bom 151. Where either mutual mistake or fraud is alleged, oral evidence will be received: *Rickhiram v Ghasiram* [1978] AIR MP 189, a case considered in the Law Commission of India 185th Report);

- (b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document (It has been held that proviso (b) is limited only to a separate agreement. In *Syarikat Bunga Raya Timor Jauh Sdn Bhd v Tractors Malaysia Berhad* [1980] 2 MLJ, a letter to prove a separate agreement was held not admissible. With regard to separate oral agreement McElwaine CJ said in *Gek Lam Choon Theatrical Company v Hu Kiang Yan* [1937] MLJ 25 that 'the proviso sets out what I understand to be the English law as laid down in *Lindley v Lacey* 17 CB (NS) 578. See also *Angell v Duke* 10 QB 17. In *Eushu Properties Sdn Bhd v MBF Finance* [1992] 2 MLJ 137, the Supreme Court said that the law on collateral oral agreement is clearly spelt out in section 92(b). The leading Malaysian cases where the doctrine of collateral contract was applied are *Tan Swee Hoe v Ali Hussain Bros* [1980] 2 MLJ 16 – oral promise by landlord to tenant that upon payment of tea money, he could stay as long he wanted provided he paid the rentals due, was held to be admissible as a collateral contract to the written tenancy agreement. Oral evidence was also allowed to be given despite the fact the agreement was in writing, *Tan Chong Motot Co Sdn Bhd v Alan McKnight* [1983] 1 MLJ 220. It appeared oral evidence was allowed to be given on the basis that it was collateral to the written agreement even if the oral agreement contradicted the written terms. But recent Malaysian cases, following the approach of Singapore courts, have begun to interpret the collateral contract doctrine embodied in proviso (b) of section 92 strictly. These cases are: *Singapore Lemon Complex Pte Ltd v Peranakan Place Complex Pte Ltd* [2004] 4 SLR 693. For Malaysian cases, see *Seven Seans Industries Sdn Bhd v Philips Electronic Supplies* [2008] 5 MLJ 164; *Rira Bina Sdn Bhd v GBC Construction Sdn Bhd* [2011] 2 MLJ 378, and *Samaworld Asia Sdn Bhd v RHB Bank Bhd* [2008] 6 CLJ 44);
- (c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;
- (d) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents (However, when the terms of the instrument are required by law to be reduced into writing, no evidence of any oral agreement can be admitted. See *Teo Siew Peng v Guok Sing Ong* [1982-1983] SLR; *Voo Min En & Ors v Leong Chung Fatt* [1982] 2 MLJ 241, FC);
- (e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of any such incident would not be repugnant to or inconsistent with the express terms of the contract (Oral evidence is admissible to establish trade usage if such usage is consistent with the terms and tenor of the written contract. See *Cheng Keng Hong v Government of the Federation of Malaysia* [1966] 2 MLJ 33);
- (f) any fact may be proved which shows in what manner the language of a document is related to existing facts. This proviso is more closely related with sections 93 to 98, which deal with matters of construction, than provisos (a) to (e) of section 92. The Law Commission of India in their 69th and 185th Report divided their discussion into "(a) the first two provisos and (b) the six proviso".

It is evident from the case law on sections 91 and 92 that there are significant differences between the common law rules on parole evidence and the sections 91 and 92 above. Whereas the common law rule has been judicially relaxed to favour permitting proof of the true intention as far as possible, the statutory rule has remained unchanged since its enactment in 1872 and has not been amended to keep up with subsequent developments in the English common law. The statutory provisions resemble but are not an exact mirror of the English common law.

4. THE POSITION OF THE RULE IN OTHER COMMON LAW JURISDICTION

In the last 40 years, the parol evidence rule has come under review in a number of common law jurisdictions. The following are the reviews done in United Kingdom, Canada, USA, India and Singapore.

4.1. United Kingdom

The Law Commission of England and Wales recommended, in 1976, that the parol evidence rule be abolished (see UK Law Commission of England and Wales, *Law of Contract: The Parol Evidence Rule*. Working Paper No. 70. [1976], Paras 4 and 5). After surveying the rule under the English common law, their conclusions were as follows:

- (a) The scope of the rule had been so greatly reduced by exceptions as to lead to uncertainty in the existing law;
- (b) The advantages that the rule may once have had of achieving certainty and finality had largely gone;
- (c) The disadvantage of the rule, that it prevents the parties from proving the terms of their agreement, might still have existed in some cases:
- (d) Where there is a written agreement, the rejection of evidence to add to, vary, contradict or subtract from its terms should be justified not by the parol evidence rule but by the fact that the parties have agreed upon the writing as a record of all they wish to be bound by;
- (e) The abolition of the rule would produce the same result in many cases, but in some cases it might lead to a different and more just result.

The Law Commission subsequently issued its report in 1986 (UK Law Commission of England and Wales, *The Law of Contract: The Parol Evidence Rule*. Report No. 154. [1986]). They commented that the parol evidence rule was a proposition of law that was no more than a circular statement: when it is proved or admitted that the parties to a contract intended that all the express terms of their agreement should be recorded in a particular document, evidence will be inadmissible (because irrelevant) if it is tendered only for the purpose of adding to, varying, subtracting from or contradicting the express terms of that contract. The Law Commission had considerable doubts whether such a proposition should properly be characterised as a 'rule' at all, or whether such a rule continued to exist in English law: "[T]he parol evidence rule, in so far as any such rule of law can be said to have an independent existence, does not have the effect of excluding evidence which ought to be admitted if justice is to be done between the parties. ... Evidence will only be excluded when its reception would be inconsistent with the intention of the parties. While a wider parol evidence rule seems to have existed at one time, no such wider rule could, in our view, properly be said to exist in English law today" (UK Law Commission of England and Wales, *The Law of Contract: The Parol Evidence Rule*. Report No. 154. [1986], paras 2.7 and 2.45).

Accordingly, it was not necessary for the Law Commission to recommend abolishing the rule. It had in their view, ceased to exist.

4.2. Canada

In British Columbia, the Law Reform Commission, in a 1979 report (Canada, Law Reform Commission of British Columbia, *Report on Parol Evidence Rule*. Report No. 44. [1979]), was also in favour of abrogating the parol evidence rule. They observed that the rule had become 'riddled with exceptions' and its scope and application were uncertain. When the rule did apply, it could yield unfair results. The Commission felt that most of the difficulty and injustice created by the parol evidence rule could be met, by a straightforward provision that addresses the rule primarily as one of evidence as opposed to substance. Written evidence of an agreement was not invariably to be preferred to oral evidence, and ultimately it was a question of weight of evidence. Accordingly, it was recommended that British Columbia's Evidence Act be amended by adding a provision comparable to the following: "If an agreement or provision thereof is disputed, neither the parol evidence rule, nor any agreement or provision thereof, shall result in the exclusion of evidence which would otherwise be admissible, and if such evidence is admitted, it shall be accorded such weight, if any, as is appropriate in the circumstances.

The Commission also noted that parol evidence is not excluded and admissible in consumer dispute cases. For the purpose of preventing consumer protection legislation from being subverted by the operation of the parol evidence rule, it was provided in British Columbia's Trade Practices Act, at section 27, that: "In a

proceeding in respect of a consumer transaction, no rule of law respecting parol or extrinsic evidence, nor any term or provision in a consumer transaction, shall operate to exclude or limit the admissibility of evidence relating to the understanding of the parties as to the consumer transaction or a particular term or provision of the consumer transaction”.

The Ontario Law Reform Commission also advocated the abolition of the parol evidence rule (Canada, Ontario Law Reform Commission, Report on Amendment of the Law of Contract. Report No. 85. [1987]). It recommended a provision similar to s 17 of the Canadian Uniform Sale of Goods Act, but which was applicable to all types of contracts. Section 17 reads: “No rule of law or equity respecting parol or extrinsic evidence and no provision in a writing prevents or limits the admissibility of evidence to prove the true terms of the agreement, including evidence of any collateral agreement or representation or evidence as to the true identity of the parties”.

4.3. USA

In the United State of America too, proposals for the reform of the parol evidence rule have been advanced (see Sweet, 1967, p. 1036; Palmer, 1967, p. 833; Notes, 1969, p. 972). Commentators have criticised the rule stating that it ‘confuses attorneys in counselling clients about contracts that the rule may affect if the case goes to court’ and that “[t]he danger of incorrect verdicts because of the absence of the parol evidence rule would be no greater than the danger of incorrect verdicts with the rule”. In 1977, the California Law Revision Commission made tentative recommendations to codify the exceptions to the parol evidence rule. However, it is not clear whether the recommendations were implemented (USA, California Law Revision Commission, Tentative Recommendation Relating to the Parol Evidence Rule. Study No. 79. [1977]).

The purpose behind the parol evidence rule is to ‘prevent deception and to protect against convenient memories’. Simply put, the rule states that “[I]f parties have reduced their entire agreement to writing, they are not allowed to introduce testimony of prior oral, understandings that are at variance with the written agreement” (Hunter, 1999, §7:6.). An unambiguous written document may not be contradicted, added to or explained by evidence of a prior agreement or contemporaneous oral agreement, absent fraud or mistake. The written document must purport to be complete, unambiguous and unconditional. Section 2-202 of the UCC (Uniform Commercial Code) provides a codified version of the rule, states that although parol evidence may not be used to contradict an integrated agreement, evidence of the course of dealing, usage of trade, or course of performance is admissible to explain or supplement the written agreement.

4.4. India

The Law Commission of India completed, in 2003, a review of the Indian Evidence Act, 1872 (see Law Commission of India 185th Report). It is one of the Commission's most comprehensive reports on the Act. In relation to sections 91 to 100 of the Act, the Law Commission recommended amendments to two provisions. Sections 91 - 100 of the Indian Evidence Act 1872 which relate to the parol evidence rule are *in pari materia* with sections 93 - 102 of the Singapore Evidence Act and sections 92 to 99 of the Malaysian Evidence Act 1950.

4.5. Singapore

In its Report of the Law Reform Committee on Review of the Parol Evidence Rule (2006), considered four options to reform the rule: Option One: maintain the *status quo* with no legislative amendments; Option Two: Abolish the rule by statute; Option Three: Abolish the parol evidence rule and rely on the common law; It was the Fourth Option that found favour with the Law Commission. This was to retain and improve the statutory rule.

5. CONCLUSION

From this brief survey it is clear that the development of the parol evidence rule was driven by consideration which has long ceased to be relevant. If the rule were purely a creature of common law, this would be a case of *cessante razione legis, cessat ipse lex* – ‘when the rationale of the law ceases, the law also ceases’. Certainly there has been a considerable relaxation of the rule in modern times. It has been suggested that the nineteenth century cases exhibited a more permissive attitude towards the admission of extrinsic evidence than is commonly thought. All the law commissions recognised that the rule needs some modification without bringing down the entire structure. The rule is already hedged with numerous exceptions. Let that remain without being labelled as radical reformers.

REFERENCE LIST

- Chitty, J., & Guest, G. A. (1977). *Chitty on Contracts: General Principles* (24th edn). Sweet & Maxwell.
- Greenleaf, S. (1853). *A Treatise of the Law of Evidence*. Boston: Little, Brown, and Company.
- Hunter, H. O. (1999). *Modern Law of Contracts* (2nd rev. edn.). West Group.
- Monir, M. (1989). *Principles and Digest of the Law of Evidence* (7th edn.). State Mutual Book & Periodical Service, Limited.
- Notes. (1969). Parol Evidence Rule: Is It Necessary?. *N.Y.U. L. Rev.*, vol. 44.
- Palmer, G. E. (1967). Reformation and the Parol Evidence Rule. *Michigan L. Rev.*, vol. 65 (5).
- Paul, A. (2010). *Evidence: Practice and Procedure* (4th edn.). LexisNexis.
- Salim, R. (1994). *Evidence in Malaysia and Singapore: Cases, Materials and Commentary* (2nd edn.). Butterworths Asia.
- Sarkar, M. C. *et al.* (1999). *Sarkar's Law of Evidence in India, Pakistan, Bangladesh, Burma & Ceylon* (15th edn.). Wadhwa and Company Law Publishers.
- Sweet, J. (1967). Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule. *Cornell L. Rev.*, vol. 53. <http://scholarship.law.berkeley.edu/facpubs/1168>
- Thayer, J. B. (1898). *A Preliminary Treatise on Evidence at the Common Law*. Boston: Little, Brown, and Company.
- Treitel, G. H. (2003). *Treitel on the Law of Contract* (11th edn.). Sweet and Maxwell.
- Wigmore, J. H. (1904). A Brief History of the Parol Evidence Rule. *Columbia Law Review*, vol. 4 (5).
- Yung, C. T. (1988). *Evidence*. Butterworths.