The Parol Evidence Rule, Electronic Commerce and the Relevant Law

Emmanuel T Laryea*

Introduction

It cannot be doubted that we are in the age of information[1] in which our mode of business communications is shifting from paper-based medium to electronic systems. The shift to Electronic Data Interchange (EDI)[2] raises numerous legal issues. Traditional legal rules and concepts are challenged by the electronic systems.[3] Evidential rules and concepts are particularly challenged.[4] While there have been various attempts to meet these

* LL.B, LL.M. Presently, Research Student at Bond University. My sincere thanks go to Dr Ross P Buckley, Associate Professor of Law, of Bond University, for his encouragement and help. All opinions and responsibility are mine.

1 *See* S Saxby, *The Age of Information*, London: Macmillan Press, 1990, 1-34; W P Dizard, Jr., *The Coming Information Age*, 2nd ed, New York: Longman, 1985, 1-19.

2 In this article, EDI is used synonymously with electronic commerce. Technically, EDI is only a part of Electronic Commerce which is the broader terminology for electronic messaging technologies. EDI is the movement of electronic business messages from computer to computer. Electronic commerce includes fax, e-mail, telegraph and telex, EFT, videotex, and, of course, EDI. The categories are, in many respects, indistinct because the technologies blend. Computers can (within limits) convert messages from one technology to another. For example, a message may start as electronic mail, but an intermediary service provider may reformat it and deliver it to a telex terminal, a fax machine, or as paper in the postal mail. For detailed discussion of Electronic Commerce, *see* B Wright and J K Winn, *The Law of Electronic Commerce*, 3rd ed, New York: Aspen Law & Business, 1998.

3 I Walden, "EDI and the Law: An Introduction", (1989) 6 *Computer Law and Practice* 34.

4 For example, computer generated information (electronic data) generally falls within the classification of hearsay evidence and is, by virtue of the rule against hearsay, generally inadmissible at common law. However, significant exceptions have been introduced by statutes to accommodate electronic data, if they meet certain conditions. See, in Australia, ss 95 and 93 of the *Evidence Act*, 1977 (Qld); s 55 of the *Evidence Act* 1958 (Vic); Part VIA and s 45a of the *Evidence Act* 1929 (SA); s 69 of the *Evidence Act* 1995 (Cth); s 69 of the *Evidence Act* 1995 (NSW); Pt III, Div 2B of the *Evidence Act* 1910 (Tas); the whole of the Northern Territory *Evidence (Business Records) Interim Arrangements Act* 1984.

challenges at both national and international levels, complete success is yet to be achieved.[5] Meanwhile parties in international trade are fast adopting EDI as their medium of effecting and recording transactions.[6] When, in the event of a dispute, courts are called upon to ascertain and enforce the terms of a contract set out in writing, the courts apply the parol evidence rule to confine the terms of the contract to what has been set in writing.

This article examines whether, how, and by which law the parol evidence rule applies to international contracts concluded by EDI. In doing this three main issues are discussed. First, do EDI contracts constitute contracts in writing[7] (or recorded contracts)? This arises because, in principle, the parol evidence rule applies to contracts constituted in writing. Second, in a conflict of laws situation which law determines whether the parol evidence rule is applicable: is it the law of the forum or the proper law of the contract? Third, again relating to conflict of laws, which law determines whether an EDI contract constitutes a contract in writing? This third issue is important because whereas EDI messages constitute writing or documents in some jurisdictions, it may not qualify as such in others.

The article argues that the rule will be applicable to contracts concluded by EDI in most jurisdictions. It reveals that in some jurisdictions, the applicability of the rule will be determined by the *lex fori* while in other jurisdictions it will be determined by the proper law of the contract. Similarly, it will be demonstrated that the issue of whether or not EDI constitutes writing will be determined according to the *lex fori* in some jurisdictions while the proper law of the contract determines it in other jurisdictions. The article concludes that the lack of uniformity in the approach to determining the applicability of the parol evidence rule and the writing component of transactions can pose difficulties for trade partners. A concerted international effort is needed to achieve uniformity.

---

5 Apart from legislative provisions in domestic laws, provisions are also made in bilateral and multilateral EDI Agreements. *See*, for example, *Model Electronic Data Interchange Agreement and Commentary*, prepared by the Legal Sub-Committee advising the EDI Council of Australia (version 1, October 1990); *EDICA Model EDI Trading Agreement (Short Form)*, prepared by a Subcommittee of the Legal and Audit Committee of the EDI Council of Australia; *EDI Association Standard Electronic Data Interchange Agreement*, prepared by the EDI Association of the United Kingdom (2nd ed, August 1990); *CMI Rules for Electronic Bills of Lading*, adopted by the Comite Maritime International (International Maritime Committee or CMI) in June, 1990; UNCITRAL Model Law on Electronic Commerce A/CN.9/XXIX/CRP.1/Add.13, 12 June 1996 (Hereinafter "UNCITRAL Model Law on Electronic Commerce").

6 It is estimated that the electronic commerce market will grow to become a US$400 billion industry by 2002, see a study report by a US firm, International Data Corp., at http://www.idcresearch.com/; *see* also D K Taft, "EDI Technology Eases Data Translation Process", (2 July 1988) *Government Computer News*, 51 (forecasting that almost 70% of all companies will use electronic transmission for commercial transactions by the year 2000).

7 "Writing" in this context does not necessarily mean text on paper. Paper and ink have for centuries been the media for writing. As a result, most legal rules and concepts relating to 'writing' or 'documents' are predicated on text on paper. For the legal status of computer generated writings in the context of evidence, *see* above n 4.

These issues for discussion will be considered in order, but, before then, the rule and its development will be outlined in brief.

The Parol Evidence Rule

In simple terms the parol evidence rule declares that a written memorial of a transaction is not disputable by the parties as to the terms of the transaction.[8] The rule excludes the admissibility of extrinsic (extraneous) evidence[9] that is intended to add to, vary or contradict the terms of a judicial record, a transaction required by law to be in writing, or a document constituting a valid and effective contract or other transaction.[10] Although the parol evidence rule applies to written documents of varying nature, this article focuses on its application to contractual documents.

A statement of the rule concerning contracts,[11] which has perhaps attained the character of a *locus classicus*, is that of Lord Morris in *Bank of Australasia v. Palmer*[12] where he stated:

> [P]arol 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.[13]

Lord Denman had previously noted in *Gross v. Lord Nugent*[14] that:

> [I]f there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time it was in a state of preparation, so as to add to or subtract from, or in any manner vary or qualify the written contract.[15]

When parties have integrated their contract into writing, they are presumed to have intended the written document to be their final and conclusive embodiment of the contract.[16] The rule thus has the effect of reducing the uncertainties that often attend agreements which are made up of conversations, exchanges of correspondence and related inferences.[17]

---

8 J H Wigmore, "A Brief History of the Parol Evidence Rule", (1904) 4 *Columbia Law Review* 338.
9 Extrinsic evidence, in this context, is any prior oral or written agreement showing that the terms were different from those in the integrated writing or recording.
10 J D Heydon, *Cross on Evidence*, 5th Australian ed, Sydney: Butterworths, 1996, 1161.
11 In fact most judicial statements of the rule are concerned with its application to contracts. Ibid.
12 (1897) AC 540.
13 See n12 at 545.
14 (1833) 110 ER 713.
15 See n14 at p716.
16 Heydon, above n 10 at 1163.
17 See n10

Development of the Parol Evidence Rule

The parol evidence rule emerged towards the end of the middle ages, but gained complete recognition only in fairly modern times.[18] Written agreements begun to gain evidentiary weight with the rise of the seal in the eleventh century.[19] The spread of printing in the fifteenth century and the enactment of statutes, in the sixteenth and seventeenth centuries, requiring certain transactions to be in writing gave written agreements further efficacy.[20] By the end of the seventeenth century there had been three of such statutes.[21] These were the Statute of Enrolments,[22] which required a transfer by bargain and sale to be made in writing, the Statute of Wills, Wards and Primer Seisins,[23] which permitted freedom of devise of land by last will and testament in writing, and the Statute of Frauds 1677, which required certain types of contracts to be evidenced by writing before they could be enforced by legal action.[24]

The Statute of Frauds was particularly influential in the development of the parol evidence rule for two reasons. First, it abolished the practice of creating estates of freehold by oral livery of seisin only and, secondly, it permitted the required document (for leases) to be in writing without seal.[25] By the former, the statute emphasised the constitutive nature of the document. That is, the right or interest under the transaction was created by the written document: the document was not a mere proof of the

---

[18] For a detail account of the historical development of the parol evidence rule, see Wigmore, above n8.

[19] Although written transactions by notarial documents were in use among the Romanised peoples (in Italy at least) by the 900s, a document in those days had an efficacy independent of its written tenor. If the truth of statements in a document were disputed, the terms of the transaction were proved by calling the witnesses to the document regardless of any contradiction in the writing. The seal, when it emerged, not only provided a means of authenticating the genuineness of documents; it rendered them conclusive as to the terms of the transaction and thus dispensed with the summoning of witnesses. See Wigmore, above n 8.

[20] J H Wigmore, *Wigmore on Evidence*, vol 9, Boston: Little Brown & Company, 1981, 86.

[21] See n20 at p90.

[22] 27 Hen. VIII c. 16 (1535).

[23] 32 Hen. VIII c. 1 (1540).

[24] S. 4 of the Statute of Frauds, 1677 (England). The Statute of Frauds was adopted in most common law countries including Australia. *See* the Imperial Statutes of Australia. Similar provisions can be found in s 141 of the U.S. *Restatement of the Law of Contract*. In Australia, the section is no longer applicable in the Capital Territory, New South Wales, Queensland and South Australia. See *Imperial Acts (Substituted Provisions) Act* 1986 (ACT), s 3(1) Schedule 1; *Imperial Acts Application Act* 1969 (NSW) s 8(1); *Statute of Frauds* 1972 (QLD) s 3 (which has also been repealed by the *Property Law Act* 1974); *Statutes Amendment (Enforcement of Contracts) Act* 1982 (SA) s 3. The statute has been replaced in Tasmania, Victoria and Western Australia: see, for instance, the *Law Reform (Statute of Frauds) Act* 1962 (WA) s 2. It must be noted that although the Statute of Frauds has either been repealed or replaced in these jurisdictions, transactions involving the sale of land or transfer of interest in land are, by virtue of some specific statutes, required to be in or evidenced by writing. *See*, for example: s 59 of the *Property Law Act* 1974 (QLD); ss 52-54 of the *Property Law Act* 1958 (Vic); and ss 33-35 of the *Property Law Act* 1969 (WA).

[25] Wigmore, above n 8 at p352.

transaction. By the latter, the statute extended the concept of constitutive documents to include all writings so that the indisputability of the terms of documents was no longer based on the seal.[26]

Even though only selected transactions were required to be evidenced by writing under the Statute of Frauds, a great mass of transactions which were not affected by it were nonetheless put into writing by parties.[27] The scope and concept underlying the statute (that transactions are constituted by the documents) begun to influence all questions of parol evidence, by setting an example and typifying a general principle.[28] The conclusive nature of terms of contracts contained in written documents had become firmly established by the end of the seventeenth century.[29]

In the early stages of its development, the parol evidence rule had the effect of conceiving legal transactions which had been reduced to writing "as constituted, not merely indisputably proved, by the writing".[30] This was the case whether the writing was required by law or merely voluntary act of the parties and whether the document was sealed or unsealed.[31] In its modern form, the rule is only a rebuttable presumption.[32] It is, therefore, open to either party to allege that there was, along with what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to have effect in addition to the express written agreement.[33] As such, there have been many cases, says Denning L.J., "where the courts have found an oral warranty collateral to a written contract".[34] Indeed, where there are merely "writings out of which with other things a contract is to be made";[35] where the parties intended a previous informal agreement to survive a deed;[36] where a charterparty[37] or a bill of lading[38] represented only part of the whole agreement; where on a sale of a house the written contract did not contain an oral warranty previously given by the vendor builder;[39] where, according to the written terms of carriage, goods were to be carried to a certain station but the parties had orally agreed upon carriage to a more distant

[26] It must be noted that to date, a seal may still make a difference to an ordinary written document. For example, at common law, a contract under seal is enforceable whether or not the contract is supported by consideration, but a contract not under seal needs generally to be supported by consideration.

[27] Wigmore, above, n 20 at 86.

[28] Wigmore, above n 8 at 352.

[29] As above at n8.

[30] As above at n8.

[31] As above at n8.

[32] K W Wedderburn, "Collateral Contracts", (1959) *CLJ* 58 at 62.

[33] *See* Lord Russell of Killowen C.J's judgement in *Gillespie Bros v Chency, Eggar & Co.* (1896) 2 Q B 59 at 62.

[34] *Oscar Chess Ltd. v Williams* (1957) 1 W.L.R. 370 at 376.

[35] Per Alderson B. in *Lockett v Nicklin* (1848) 2 Ex. 93, 100; *see* also *Allen v Pink* (1838) 4 M. & W. 120; *Buckett v Nurse* (1948) 1 K. B. 535.

[36] *Palmer v Johnson* (1884) 13 QBD 351, see especially the judgment of Bowen L.J. at 357.

[37] *Hassan v Runciman & Co.* (1905) 91 L.T 808.

[38] *Ardenes SS (Cargo Owners) v Ardenes SS (Owners)* (1951) 1 K.B. 51.

[39] *Otto v Buolton* (1936) 2 K.B. 46, 50-51; *Miller Cannon Hill Estates Ltd* (1931) 2 K.B. 113.

destination,[40] parol evidence has been admitted. In view of the numerous exceptions to the parol evidence rule and the attendant complications, reforms have been considered in many jurisdictions.[41] Despite its weakened nature, the parol evidence rule continues to be applied to written contracts in almost all common law jurisdictions. Since the rule is still applied and the central issue in its application is writing, we now turn to consider whether EDI constitutes writing.

Does EDI Constitute Writing?

EDI contracts qualify as 'contracts in writing', 'recorded contracts', or 'documented contracts' in most jurisdictions today. In Australia, the term "writing" is defined in various statutes widely enough to cover inscriptions in an electronic medium.[42] Essentially, the statutes define "writing" to include words and symbols in visible form. Judicially, writing has been construed to include "any form of printing or other means of reproducing words in a visible form".[43] Importantly, the medium of the writing is not important. So writing on a computer screen or plastic or wood satisfies the definitions.

Similarly, the term 'document' has been defined in s 25 of the *Acts Interpretation Act* 1901 (Cth) to include "any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them" or "any article or material

---

[40] *Malpas v L. & S. W. Rly* (1866) L. R. 1 C.P 336.

[41] In 1977, the California Law Revision Commission recommended that the exceptions to the parol evidence rule be codified, *see* California Law Revision Commission, Tentative Recommendation Relating to the Parol Evidence Rule, (No. 79, 1977). In 1976 the English Law Commission recommended that the parol evidence rule be abolished, *see* The Law Commission, Law of Contract - Parol Evidence Rule, (Working Paper No. 70, 1976). The Ontario Law Reform Commission recommended that the rule be abolished in respect of contracts for the sale of goods, *see* Ontario Law Reform Commission, Report on the Sale of Goods, vol 1 at 115. In 1979 the Law Reform Commission of British Columbia recommended the abrogation of the rule, *see* Law Reform Commission of British Columbia, Report on Parol Evidence Rule 1979 at 20-21. Despite the various proposals and recommendations, the rule remains applicable in these jurisdictions.

[42] See the definition of "writing" in s 25 of the *Acts Interpretation Act* (Cth); s 32 of the *Acts Interpretation Act* 1954-1977 (QLD); s 38 of the *Interpretation of Legislation Act* 1984 (No 10096) (Vic); s 17 of the *Interpretation Ordinance* (ACT); s 21(1) of the *Interpretation Act* 1987 (NSW); s 26 of the *Interpretation Act* 1980 (NT); s 24 of the *Acts Interpretation Act* 1931 (Tas); s 4 of the *Acts Interpretation Act* 1915 (SA); and s 5 of the *Interpretation Act* (1884) (WA).

[43] Per Cohen J in *NM Superannuation Pty Ltd v Baker and Others*, (1992) 7 ACSR 105 at 113. It was held that notice sent and received by facsimile transmission was notice in writing (the notice was not required to be signed) and had the same effect as one sent by other means. The case is not directly on point because it involved the determination whether a facsimile transmission constituted notice in writing. However, the broad definition of the term 'writing' as stated in the case indicates that writing is not necessarily paper and ink but includes other means of reproducing words in a visible form. These may include an embedded micro-chip on which information is stored and recalled onto a computer screen or printed.

from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device".[44] Section 9 of the *Corporations Law* goes further to define 'document' to include (a) any paper or other material on which there is writing or printing or on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; (b) a disc, tape or other article from which sounds, images, or messages are capable of being reproduced; and (c) disc, tape or other article, or any material, from which sounds, images, writings or messages are capable of being reproduced with or without the aid of any other article or device. These definitions accord with Cohen J's "other means of reproducing words in a visible form".[45]

In the United States, the *Federal Rules of Evidence* 1996, define 'writings' and 'recordings' to "consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, photographing, magnetic impulse, mechanical or electronic recording, or other forms of data compilation".[46] There is no doubt that this definition includes EDI messages. Recorded EDI messages fall within the scope of "letters, words, or numbers, or their equivalent" set down by magnetic impulse, mechanical or electronic recording. The term 'equivalent' of letters, words or numbers will accommodate coded EDI messages.

In the United Kingdom, it has been held that a written instrument or any other object carrying information such as photograph, tape recording or computer disc is a document for the purposes of s 33 (1) & (2) of the English *Supreme Court Act*, 1981.[47] In *Guardian Ocean v Banco do Brasil*,[48] the English Court of Appeal was prepared to apply the parol evidence rule to written telexes if the telex exchanges constituted a conclusive embodiment of the parties' intentions.[49]

Although some of these statutory definitions (and judicial constructions[50]) are contextual, they have the general effect of bringing computer stored information, of which EDI is part, within the meaning of 'writing', 'recording', or 'document'. It may be argued that the definition contained in s 9 of the *Corporations Law* relates to the corporations law only and is not applicable to contracts in general. Similarly, it may be argued that Hoffmann J's construction is for the purposes of the English *Supreme Court*

---

[44] *See* also the definition of "document" in the *Evidence Act* 1995 (Cth); *Evidence Act* 1995 (NSW) and the *Interpretation Act* 1987 (NSW); s 5 (1) of the *Evidence Act* (Qld); s 3 (1) of the *Evidence Act* 1958 (Vic); s 4 of the *Evidence Act* (NT); sections 34g (1) and 45b (6) of the *Evidence Act* 1926 (SA).

[45] *NM Superannuation Pty Ltd v Baker and Others* (1992) 7 ACSR 105 at 113.

[46] Rule 1001 (1) of the United States *Federal Rules of Evidence*, 1996.

[47] *Huddleston & Anor v Control Risks Information Services Ltd* (1987) 2 All ER 1035. *See* Hoffmann J's judgement at 1037.

[48] (1994) 2 Lloyd's Rep. 152.

[49] It was found as a fact that the telex exchanges in this case were not conclusive enough to invoke the parol evidence rule. Ibid.

[50] *See* Cohen J's view in *NM Superannuation Pty Ltd v Baker and Others*, (1992) 7 ACSR 105 at 113; Hoffmann J in *Huddleston & Anor v Control Risks Information Services Ltd.* (1987) 2 All ER 1035 at 1037.

Act only. However, the provisions in the Australian *Acts Interpretation Act*, the *Evidence Act* of the various states and the United States' *Federal Rules of Evidence* have wide application with the general effect of bringing computer and electronic generated information within the meaning of a writing, recording or document for legal purposes.

Indeed, the United States' Electronic Messaging Service Task Force has long maintained that EDI messages, however stored, constitute objective corroborating evidence that serves the evidentiary purpose of the writing requirement.[51] The Task Force adopted this position when it considered EDI and the statutes of frauds before the current definition of writing and recording in the *Federal Rules of Evidence* 1996 was effected.[52] Further, all bilateral and multilateral EDI agreements contain provisions to the effect that EDI messaging meets writing requirements.[53] Textbook writers have also argued that an electronically communicated message is inherently just as capable of being an integrated writing as a paper document.[54] It is therefore submitted that EDI messages constitute writing or recording for the purposes of the parol evidence rule.

However, the writer is conscious of the fact that EDI messages may not constitute writing or recording in some jurisdictions. In jurisdictions where electronic communication and documentation are not well developed, statutory definition of the terms may connote only paper documents. It is hoped that in those jurisdictions the courts will be influenced by multilateral EDI agreements, such as the UNCITRAL Model Law on Electronic Commerce, as well as judicial pronouncements in other countries. In appropriate circumstances they should borrow from these sources to construe EDI messages as satisfying the requirement of writing.

Having submitted that EDI messages constitute writing for the purposes of the parol evidence rule, we now consider which law determines whether the parol evidence rule applies to a particular contract concluded by EDI.

---

[51] A.B.A. Electronic Data Messaging Task Force, "The Commercial Use of Electronic Data Interchange - Report and Model Trading Agreement", (1990) 45 *Business Law* 1645 [hereinafter ABA Report and Model Trading Partner Agreement] at 1649.

[52] Despite the ABA Report, some scholars doubted that the courts will recognise EDI as satisfying the requirement of writing. *See*, for example: Sharon F DiPaolo, "The Application of the Uniform Commercial Code Section 2-201 Statute of Frauds to Electronic Commerce", (1993) 13 *Journal of Law and Computers* 143 at 146; Marc E Szafran, "A Neo-Institutional Paradigm for Contracts Formed in Cyberspace: Judgment Day for the Statute of Frauds", (1996) 14 *Cardozo Arts & Entertainment* 492. It is supposed that the re- definition contained in the *Federal Rules of Evidence* 1996 has eliminated such doubts.

[53] *See* A H. Boss, "Electronic Data Interchange Agreements: Private Contracting Towards a Global Environment", (1992) 13 *Northwestern Journal of International Law & Business* 31. *See* also the various EDI agreements cited in n 4; UNCITRAL Model Law on Electronic Commerce.

[54] Wright and Winn, above n 2 section 15.06.

Which law determines whether the Parol Evidence Rule applies?

To answer this question, one has first to ask whether the parol evidence rule is a rule of evidence or a rule of substantive law. Depending on the classification to which it belongs, the rule would be governed by either the *lex fori* or the proper law of the contract.

It is generally accepted that evidence is governed by the *lex fori*.[55] Matters as to whether a witness is competent or not; whether a certain matter requires to be proved by writing or not; and whether certain evidence proves a certain fact or not; are determined by the law of the country where the question arises, where the remedy is sought to be enforced and where courts sit to enforce it.[56] This general principle is however limited to "only provisions of a technical or procedural character",[57] and does not extend to rules as to admissibility of hearsay evidence or what must be noticed judicially. These are matters for the substantive law.[58]

In the United States, the parol evidence rule is classified as a rule of substantive law and not of evidence.[59] According to Wigmore,[60] it is a rule of substantive law because it deals with the question where, and in what sources and materials, the contract can be found. This view is shared by Jaeger who argues that the parol evidence rule is a rule of substantive law which "defines the limits of a contract; it fixes the subject-matter for interpretation, though not itself a rule of interpretation".[61] In support of his view, Wigmore cites *Dollar v International Banking Co*[62] where it was held that whether a contract in writing may be varied by parol evidence is a question of substantive law, while the admission or rejection of secondary evidence is governed by the rules of evidence.[63]

It follows that in a conflict of laws situation, U.S. courts will defer to the proper law of the contract to determine whether the rule applies. This

---

55 E H Ailes, "Substance and Procedure in the Conflict of Laws" (1941) 39 *Michigan Law Review* 392. *See* also A V Dicey and J H C Morris, *The Conflict of Laws*, vol 1, 12th ed, London: Sweet & Maxwell, 1993, 169; P M North and J J Fawcett, *Cheshire and North's Private International Law*, 11th ed, London: Butterworths, 1987, 74; E I Sykes and M C Pryles, *Australian Private International Law*, 3rd ed, Sydney: The Law Book Company, 1991, 260-261; J-G Castel, *Canadian Conflict of Laws*, 2nd ed, Toronto: Butterworths, 1986, 120.

56 *Bain v. Whitehaven and Furness Junction Rly.* (1850) 3 H.L.C. 1.

57 *Mahadervan v Mahadervan* (1964) P. 233, 234.

58 See n57.

59 W H E Jaeger, *Williston on Contracts*, vol 4, 3rd ed, Rochester, N.Y: Lawyers Cooperative Publishing, 1961, 955.

60 Wigmore, above n 20 at 78.

61 *See* Jaeger, above n 59 at 955. This assessment is consistent with the plain meaning rule of the interpretation of contracts, that is, an objective appraisal of the parties' intention is derived from the written words of the document itself. *See* D W McLauchlan, "Admissibility of Parol Evidence to Interpret Written Contracts", (1974) 6 *N.Z.U.L.R.* 122.

62 13 Cal. App. 331, 343, 109 P. 449, 504 (1910).

63 Wigmore, above n 20 at 78.

position is endorsed in s 140 of the *Restatement of the Conflict of Laws.*[64] Thus if parties to a contract concluded by EDI chose as the proper law of their contract a system of law which does not recognise the parol evidence rule, U.S. courts may admit parol evidence which would add to, or vary the terms of the written contract even though such evidence would have been excluded under U.S. law.

The position appears to be different in the United Kingdom and most current or former member countries of the British Commonwealth that follow the common law. It has been suggested that English law classifies the parol evidence rule as one of evidence or procedure.[65] This view derives basically from a statement of Denning L.J in *Korner v Witkowitzer.*[66] Denning L.J, referring to three cases,[67] held:

> The rule of our law which says that documents are exclusive evidence of the transaction which they embody is a rule of evidence, and, as such, it is to be applied by our courts even when they deal with foreign contracts; because, by private international law, the court of trial applies its own rules of evidence just as it applies its own mode of trial.[68]

In *Korner v Witkowitzer*[69] the plaintiff sued to recover arrears of pension under a written contract[70] concluded in Czechoslovakia and governed by Czech law. To obtain leave to serve notice of the writ out of the jurisdiction, the plaintiff had to establish that the contract had been broken in England. One of the means by which he sought to prove this was to rely on an oral agreement to the effect that he was entitled to receive his pension in the country in which he might be living when it accrued (this being Britain). In his dissenting judgment, Denning LJ rejected the oral agreement though it would have been admissible under Czech law.

Of the two other judges, Singleton L.J. disagreed with Denning while Bucknill L.J. did not discuss the issue. Concerning the oral agreement, Singleton L.J stated:

> It is essential to make up one's mind whether one accepts the statement of the plaintiff. If one does – as I do – effect must be given to it. The only real criticism

---

[64] American Law Institute, *Restatement of the Law: Conflict of Laws*, 2nd ed, St. Paul Minn: American Law Institute Publishers, 1971, 390-391. The section provides: "whether a contract is integrated in a writing and, if so, the effects of integration are determined by the local law of the state selected by application of the rules of ss 187-188". Sections 187-188 lays down rules for ascertaining the proper law of a contract. It means that the issue whether a contract is integrated in a writing is determined according to the proper law of the contract.

[65] Dicey and Morris, above n 55 at 176.

[66] (1950) 2 KB 128 .

[67] *Yates v Thompson* (1835) 3 Cl. & F. 544; *Bain v Whithaven and Furness Junction Railway Co* (1850) 3 H.L. C. 15; and *Leroux v Brown* (1852) 12 C.B. 801.

[68] *Korner v. Witkowitzer* (1950) 2 K.B. 128 at 162-163.

[69] (1950) 2 K.B. 128 .

[70] The contract in this case was deciphered from letters received by the plaintiff from the defendants advising plaintiff of his pension entitlement.

> which I venture to make of the judgement of Slade J., arises from his rejection of ... that part of the plaintiff's second affidavit which refers to the conversation and oral agreement said to have been made with Dr. Sonnenschein, and in his failure to apply that along with the written documents in accordance with the article 914 of the Czechoslovak Code.[71]

Singleton L.J. accepted the oral agreement and applied it together with the written agreement.[72] This indicates his rejection of the applicability of the parol evidence rule in this case. Since Bucknill L.J. did not consider the issue the only judge who applied the parol evidence rule was Denning L.J. who happened to be dissenting. The court granted the application, having found that the plaintiff had a prima facie case and did not need to rely on the oral agreement. This view was endorsed by the House of Lords.[73]

Since the opinions of Denning L.J. and Singleton L.J. were in sharp contrast and the third judge, Bucknill L.J., did not consider the issue, how did the case become authority for the proposition that English law applies the parol evidence rule to contracts the proper law of which is foreign?

Despite the conflicting views expressed in the case, most writers are of the opinion that the *lex fori* determines the issue in common law jurisdictions and cite *Korner v Witkowitzer* as authority.[74] For example, Sykes and Pryles[75] state:

> [T]he English rule that in the case of a written contract no oral evidence can be given to add to, subtract from, or vary such a contract has been applied even to a contract the proper law of which was Czechoslovakian.

Although the authors went on to suggest that this is an over-stretch of the principle,[76] the English position seems to be that applicable in Australia.[77] The same position is adopted in many other common law countries like Canada.[78] In the opinion of this writer, this supposed common law position is not supported by a sound legal foundation.

Yates v Thompson,[79] which Denning cited in support of his view, does not seem to support his conclusion, since it involved the interpretation of a testator's written declaration. In this case Jacob Yates, born in Scotland but domiciled in England, bought an estate in Scotland. He paid part of the price and gave a bond in respect of the remainder. He subsequently

---

71 *See* Singleton LJ's judgment at 157.
72 See n71.
73 See *sub nom. Vitkovice v Korner* (1951) A.C 869.
74 Among them, Dicey and Morris, above n 55 at 174-181; North and Fawcett, above n 55 at 83-84; Sykes and Pryles, above n 55 at 614; Castel, above n 55 at 120-121.
75 Sykes and Pryles, above n55 at 261.
76 Above n55.
77 Above n55 at p614.
78 *See* Castel, above n 55 at 121.
79 (1835) 3 Cl. & F. 544.

deposited the money under the bond in the Bank of Scotland. Later, he executed in England several instruments (wills and trust deeds) in writing. In one will Yates gave his goods and chattels, wherever situated, to his nephew, and appointed his nephew sole executor and residual legatee. The executor obtained probate of the will and claimed the bank deposit in a suit instituted in Scotland. The court had to ascertain the intention of the testator by interpreting the will. It was held that following the principle that *lex loci domicilii* governs the distribution of personal estate, the Scottish and foreign courts were bound, in interpreting the will to ascertain the testator's intention, to adopt principles of construction applicable to such instruments by the law of the testator's domicile, which was England.[80]

There are two reasons why the case does not support Denning's conclusion. The first reason is that the case involved the construction of a will and disposition of personal property. The general rule is that a will is to be interpreted in accordance with the law intended by the testator and, in the absence of indications to the contrary, this is presumed to be the law of his domicile at the time when the will was made.[81] By applying English law, the Scottish court simply followed the general rule relating to the construction of wills.[82] The second reason is that even for contractual documents, interpretation of terms is governed by the proper law of the

[80] Conflict of laws arose in this case because although Britain is politically a unitary state, it is legally plural. The Treaty of Union of 1707, which incorporated the England and Scottish kingdoms into one polity, guaranteed the maintenance of distinct English and Scottish legal systems. The Treaty did not, however, fully protect the integrity or the autonomy of the Scottish judicial system. It preserved Scottish private law, but it did not declare it to be inviolable. Quite to the contrary, the Treaty allowed Scottish private law to be altered for evident utility of the subjects within Scotland. It also preserved Scotland's judicatures, but did nothing to prevent appeals to the English-dominated House of Lords. The House of Lords established its appellate authority in Scottish civil cases soon after the Treaty was ratified. Thus we find appeals from Scottish courts to the House of Lords. Legal pluralism is not the only pillar of national identity preserved by the Union Treaty of 1707: the separation of the national churches, the Church of England and the Church of Scotland, was guaranteed. The ecclesiastical pluralism was more complete, unconditional, and unequivocal than the legal pluralism that the Treaty recognised. For whereas the British parliament reserved the right to alter Scottish law when 'evident utility' for Scottish subjects could be demonstrated, it possessed no corresponding power to encroach upon the integrity and established constitution of the Scottish Church. *See*, generally, Brian P. Levack, *The Formation of the British State*, Oxford: Clarendon Press, 1987.

[81] A V Dicey and J H C Morris, *The Conflict of Laws*, vol 2, 12th ed, London: Sweet & Maxwell, 1993, 1038; *See* also *Ewing v Orr-Ewing* (1883) 9 App. Cas. 34 at 43; *Re Ferguson's Will* [1902] 1 Ch. 483; *Re Cunnington* [1924] 1 Ch. 68; *Philipson-Stow v I.R.C.* [1961] A.C. 727 at 761. Questions of construction should not be confused with material or essential validity which are governed by the law of the testator's domicile at the time of his death (in the case of movables) or by the *lex situs* (in the case of immovables), and not by the law which the testator intended to govern.

[82] The general rule that wills should be construed according to the law of the testator's domicile is merely a rebuttable presumption. If there is any reason, from the nature of the will or otherwise, which suggests that the testator wrote the will with reference to the law of some other country, the rule may be ignored. *See*, for example, *Bradford v Young* (1885) 29 Ch.D. 617; *Re Price* [1900] 1 Ch. 442, 452; *Re D'Este's Settlement* [1903] 1 Ch. 898; *Re Bonnefoi* [1912] P. 233; *cf. Re Cliff's Trust* [1892] 2 Ch. 229.

contract.[83] Thus even if the will were to be a contractual document and was construed according to English law, the case could still not be authority for the proposition that the *lex fori* determines whether the parol evidence is applicable to foreign contracts.

The case may have been confused because it was stated that the Scottish Court of Session was not bound to adopt foreign rules of evidence, every court having its own technical rules of procedure.[84] That a court is not bound to adopt foreign rules of evidence is not in doubt.[85] But two questions arise here: First, is the parol evidence rule a rule of evidence, or a rule of substantive law? As has been noted earlier, English law, arguably, classifies the rule as one of evidence. Considering that the conflict of laws rule which states that the *lex fori* governs evidence is limited to provisions of a technical or procedural character,[86] the next question is whether the parol evidence rule is one of such a character. In the opinion of this writer, the answer to both questions is no. On the first question the writer shares the view of Wigmore that the parol evidence rule, in truth deals not with a rule of evidence, but with the nature of legal acts.[87] On the second question the writer argues that the issue is not technical or procedural but one that affects substantive rights and obligations of parties. Incorrect application of the parol evidence rule can completely alter the expectations of parties under a contract.

In the next case relied upon by Denning L.J., *Bain v Whitehaven and Furness Junction Railway Co*,[88] the Scottish Court of Session had wrongly admitted foreign law to which the appellant objected on the grounds of surprise. On appeal, it was held that surprise was not sufficient ground for objection. The objection should have been that the evidence itself was inadmissible and not merely that it would surprise the appellant. The case did not discuss the parol evidence rule *per se*, though it was mentioned that the law of the forum determines evidence. The case simply states the general principle relating to evidence and procedure.[89]

The third case, *Leroux v Brown*,[90] did not determine the applicability of the parol evidence rule. The issue there was whether an oral contract, valid and enforceable under its proper law, was unenforceable in England for not having met the requirements of the Statute of Frauds. In this case an action was brought in England on a contract the proper law of which, in modern parlance, would have been the law of France.[91] It was

---

[83] Dicey and Morris, above n 81 at 1259-1260.
[84] *Yates v Thompson*, above at 545.
[85] Ailes, above n 55 at 392.
[86] *Mahadervan v Mahadervan* (1964) P. 233, 234
[87] Wigmore, above n 8 at 338.
[88] (1850) 3 H.L. C. 15.
[89] For the general rules relating to evidence and procedure in private international law, see discussion above. *See* also Ailes, above n 55; Dicey and Morris, above n 55; North and Fawcett, above n 55.
[90] (1852) 12 C.B. 801.
[91] Sykes and Pryles, above n 55 at 257.

held that the action must fail because it was an oral contract, but should have been in writing under the *Statute of Frauds*.[92] The contract could have been sued upon in France.[93]

None of the above cases support Denning's position. It is therefore not surprising that in asserting the position under English law, text writers cite *Korner v Witkowitzer* and not the earlier cases cited by Denning L.J.

Which law determines whether EDI constitutes writing?

The issue here is which law, in a conflict of laws situation, determines the status of EDI communication? In other words, under which law does it constitute writing: is it the law of the forum or the proper law of the contract (which might be different from that of the forum) or the law of the place of contract (which may likewise be different from that of the forum)? This writer is not aware of any case directly on the issue, but it would appear that under U.S. law the issue falls to be determined by the proper law of the contract while under English law, and that of commonwealth countries like Australia, the domestic law will govern. Having classified the application of the rule itself as one of evidence and thus falling for determination by the *lex fori*, the common law courts would most probably determine the issue according to law of the forum.

English courts tend to apply English law in cases where the applicable law or rule is in doubt. They have applied English law where they think legal vacuums exist.[94] They have applied English statutory requirement of writing for certain types of contracts (under the Statute of Frauds) to foreign contracts. Thus in *Leroux v Brown*[95] the court declined to enforce an oral contract of apprenticeship which, under English law, was required to be in writing in order to be enforceable, but which was valid and enforceable under its proper law. With this tendency, it would not be surprising if English courts apply English law to determine whether EDI constitutes writing.

Under U.S. law, issues relating to the *Statute of Frauds* are determined by the proper law of the contract or, if it is found that the contract never came into existence, the putative proper law of the contract.[96] In the opinion of this writer, the U.S. position is to be preferred. If the proper law is applied the legitimate expectations of the parties will not be defeated simply because they find themselves litigating in a jurisdiction which does not recognise what they consider to be their final written agreement

[92] As far as it relates to formal validity of contracts the decision in *Leroux v Brown* has been severely criticised. Sykes and Pryles castigate it as "clearly a bad law", as above.
[93] As above.
[94] *Amin Rasheed Shipping Corporation v Kuwait Insurance Co.* (1984) AC 50.
[95] (1852) 12 C.B. 801.
[96] American Law Institute, *Restatement of the Law: Conflict of Laws*, above n 64, s 141.

and which is recognised as such by the proper law with which the parties are familiar.

Like other aspects of private international law, the uncertainties surrounding the application of the parol evidence rule can pose difficulties for parties to international contracts, courts and legal scholars. It is desirable to have a uniform approach and, in this writer's opinion, the U.S. position is better. Various reasons can be given in support of this view. First, the parol evidence rule raises only a strong presumption that the parties intend to be bound solely by the terms of the written contract.[97] If, as was the case in *Korner v Witkowitzer,*[98] the governing law would allow the displacement of the presumption by admitting parol evidence, no injustice will be done in admitting parol evidence. Moreover, since presumptions on which rights are based are generally governed by the law which governs substantive rights, i.e. the proper law of the contract, it is legitimate to demand that application of the parol evidence rule which, when applied, affect the rights of the parties should be governed by the proper law of the contract.[99]

Secondly, it is reasonable to think that in concluding contracts parties consider their rights in relation to the governing law of the contract (especially where they have expressly chosen one) rather than the procedural rules of the forum in which they may find themselves litigating.[100] Why should procedural rules of the forum be used to exclude facts which, under its proper law, would form part of the terms of the contract?

The distinction at English law between the meanings of the terms of the contract and what the actual terms are is rather technical. In *Korner v Witkowitzer*[101] Denning L.J endorsed the rule that the terms of the contract are interpreted according to the proper law, distinguished between the meaning of the terms (that being a matter of construction) and what the terms are.[102] At a glance this distinction appears convincing because in principle they are different issues. But the terms need to be ascertained before meaning can be assigned to them.[103] If vital terms are excluded as a result of procedural rules the rights accruing to the parties may be substantially different from what they may have contemplated at the time of the contract and what would have been their rights by the proper law of the contract.

Thirdly, the common law position of determining writing requirement by the *lex fori* is clearly a bad law.[104] This is because it is a rule of general

---

97 Heydon, above n 10 at 1163; *see* the effect of the modern parol evidence rule discussed above.

98 (1950) 2 K.B. 128 at162-263.

99 Sykes and Pryles, above n 55 at 261.

100 At the time of contracting, the parties may not even know the forum before which later disputes will come.

101 (1950) 2 K.B. 163.

102 As above.

103 Jaeger, above n 59 at 955.

104 Sykes and Pryles, above n 55 at 257.

application that formal validity of a contract is governed by the *lex contractus* or alternatively the proper law of the contract.[105] What purpose does it serve to refuse to enforce a contract which is valid and enforceable under its proper law, and whose enforcement would not be contrary to public policy? This was what happened in *Leroux v Brown.*[106]

Given, as has been argued, that EDI messages meet the writing requirement and that the parol evidence rule may apply, it needs to be indicated that the rule will not apply automatically. There must be in existence an "integrated" contract, presumably adopted by the parties.[107] A mere note or memorandum kept by one party is insufficient.[108] To this end, it is important to mention that it is possible to view and transmit an EDI message without keeping a record of it.[109] Obviously if no record is kept there will be nothing in writing that will require application of the rule. But even where records are kept of the various exchanges but integration cannot be proved the rule will not apply.[110]

The parol evidence rule comes into effect only when the contract has been reduced to integrated writing. What constitutes "integrated writing" is a question of fact about what the parties intended to be final.[111] It need not be a single formal document so that a series of letters and telegrams which mutually modify and complement each other could constitute integrated writing.[112] Once a comprehensive recording or documentation of definite terms is ascertainable the parties will be presumed to have intended it to be final and the rule applicable.

It is submitted that a recorded integrated EDI contract capable of being reproduced either by print or on a computer screen satisfies the writing requirement for the purposes of the parol evidence rule. As such, the rule should apply when necessary.

Conclusion

Contracts concluded by EDI constitute contracts in writing in most jurisdictions for the purposes of the parol evidence rule. Depending on the forum deciding the issue, the applicability of the rule may be determined by the *lex fori* or the proper law of the contract. Classifying the rule as one

---

105 Dicey and Morris, above n 81 at 1255; Sykes and Pryles, above n 55 at 615; Castel, above n 55 at 549.

106 (1852) 12 CB 801.

107 Wigmore, above n 20 at 75.

108 J M Perillo, *Corbin on Contracts: Formation of Contracts*, Minn: West Publishing Co., 1993, 114-115.

109 Wright and Winn, above n 2 section 15.06. It must be noted, however, that in practice records are most often kept of business communications.

110 As above at n2.

111 As above at n2.

112 Wigmore, above n 20 at 75.

of evidence, English courts and those of other countries of the Commonwealth such as Australia, Canada and Ghana will determine the issue according to their domestic rules. U.S. courts on the other hand will defer to the proper law of the contract (which may be U.S. law) in deciding whether the rule is applicable. If the proper law of the contract recognises the rule U.S. courts will apply it; if not, the rule will be ignored.

In deciding whether or not EDI messages satisfy the requirements of writing for the purposes of the parol evidence rule, English courts and those of the Commonwealth will most probably resort to their domestic law. U.S. courts on the other hand, are likely to look at the proper law of the contract to decide the issue.

Like many areas of private international law, the lack of uniformity in the law relating to the applicability of the parol evidence rule and the determination of the writing component may pose difficulties. If uniform rules are to be adopted the U.S. position is preferable. The position at English law, and those of other Commonwealth countries—including Australia, does not seem to have a sound legal foundation.

But the development of the law rarely proceeds by way of abrupt change.[113] It is rare, says Schmitthoff, "that a particular principle of law is suddenly abandoned and another one substituted for it".[114] With this in mind, it will probably be futile to expect English courts to abandon their well-established position in favour of the U.S. position. Accordingly, statutory changes and a concerted international effort to formulate uniform rules are recommended. We should bear in mind that statutes have become the most important source of English conflict of laws.[115] Perhaps that is the way other common law countries should follow.

[113] C M Schmitthoff, "The Application of Foreign Law in Private International Law", in Chia-Jui Cheng (ed), *Clive M. Schmitthoff's Select Essays on International Trade Law*, Dordrecht: Martinus Nijhoff Publishers, 1988, 547 at 556.

[114] As above.

[115] *See* Dicey and Morris, above n 55 at 7-8